

305054

ENTERED
Office of Proceedings
July 26, 2022
Part of
Public Record

July 26, 2022

BY E-FILING

Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20423-0001

Re: *Application of the National Railroad Passenger Corporation Under 49 U.S.C. § 24308(a)—
Canadian National Railway Company* (Finance Docket No. 35743)

Dear Ms. Brown:

Attached for filing in the above-referenced docket are (1) a Highly Confidential version of the Post-Interim Decision Reply Submission of Illinois Central Railroad Company and Grand Trunk Western Railroad Company; (2) a Confidential (i.e., partially redacted) version of the Reply Submission; and (3) a public version of the Reply Submission, to be placed on the public record.

The Highly Confidential and Confidential versions of the Reply Submission are designated as such under the protective order in this proceeding, and are therefore being filed under seal.

Sincerely,

/s/ David A. Hirsh

David A. Hirsh

*Counsel for Illinois Central Railroad Company
and Grand Trunk Western Railroad Company*

Enclosures

cc: All Parties of Record

PUBLIC VERSION – REDACTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 35743

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

**POST-INTERIM DECISION REPLY SUBMISSION OF
ILLINOIS CENTRAL RAILROAD COMPANY
AND GRAND TRUNK WESTERN RAILROAD**

Kathryn J. Gainey
CN
Suite 500 North Building
601 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 347-7840

David A. Hirsh
James M. Guinivan
Vineeta Kamath
Kelsey N. Weyhing
DENTONS US LLP
1900 K Street, N.W.
Washington, DC 20006
(202) 496-7500
david.hirsh@dentons.com

Tobias S. Loss-Eaton
SIDLEY AUSTIN LP
1501 K Street, N.W.
Washington, DC 20006
(202) 736-8000

July 26, 2022

TABLE OF CONTENTS

	Page
INTRODUCTION AND SUMMARY	2
ARGUMENT	7
I. AMTRAK’S PROPOSAL IS INCONSISTENT WITH THE BOARD’S INTERIM DECISION, THE STATUTORY FRAMEWORK, AND FRA’S METRICS AND STANDARDS RULE.	7
A. Amtrak’s New Incentives and Penalties Proposal Is Based on HRD, so It Has the Same Fundamental Flaws that Led the Board to Decline to Adopt Its Prior HRD-Based Proposal.	7
B. The FRA’s Metrics and Standards Support Adoption of CN’s Proposed Incentive/Penalty Provision, Not Amtrak’s.	15
C. Amtrak’s “Reopener” Proposal Is Inconsistent with PRIIA and the RPSA.	20
D. Amtrak’s Goals Do Not Bind the Board or Hosts, and Cannot Override Specific RPSA Provisions.	22
II. AMTRAK’S HRD-BASED INCENTIVES/PENALTIES PROPOSAL PENALIZES CN BASED ON MATTERS UNRELATED TO CN’S CONTRIBUTION TO AMTRAK’S ON-TIME PERFORMANCE, AND IS CALCULATED TO ENSURE THAT CN IS COMPELLED TO SUBSIDIZE AMTRAK	25
A. An Incentives and Penalties Scheme Based on HRD Is Inherently Flawed Because HRD Does Not Reflect On-Time Performance and Does Not Fairly and Accurately Reflect Host Performance.	26
1. HRD Does Not Reflect On-Time Performance	26
2. HRD Does Not Fairly and Accurately Reflect Host Performance	27
B. Amtrak’s One-Size-Fits-All HRD Standard Is Unsupported and Would Unreasonably Penalize CN for Delays It Cannot Reasonably Prevent.	31
1. Mr. Weiss’s Vague Assertion of an “Association” between HRD and COTP Provides No Basis for Amtrak’s 924 HRD Standard.	32
2. Amtrak’s proposal fails to measure the quality of CN’s service	38
3. Amtrak’s Chosen Standard – 924/925 HRD – Is Unreasonable, and Would Result in Most Host Railroads Paying Amtrak Penalties on Most Amtrak Trains.	42
4. Amtrak’s Asymmetrical Incentives/Penalties Table Is Unsupported and Exacerbates Its Scheme’s Unreasonable Tendency to Produce Net Penalties	45
C. Amtrak’s COTP and Passenger-Miles Add-ons Weaken the Relationship of its Proposal to CN’s Performance and Produce Irrational Results.	47
1. COTP	48
2. Passenger-Miles	50

D.	Amtrak’s Scheme Is Calculated to Generate Facially Unreasonable Results, Including Huge Penalties, for CN and Other Host Railroads.	52
E.	Amtrak’s Proposal Would Eviscerate the Lookback Provision and Leave CN with Little or No Prospect of Earning Net Incentives Over the Life of the Operating Agreement.	54
III.	AMTRAK’S UNPRECEDENTED “REOPENER” IS UNLAWFUL, UNREASONABLE, AND UNSOUND	59
A.	Amtrak’s Punitive Proposal Disregards the Board’s Instructions About an Effective Reopener Provision.	59
B.	None of Amtrak’s Three Proposed Tiers Is A “Reasonable” Commercial Contract Term “For Using” CN’s Facilities.	62
C.	Amtrak’s Proposal Conflicts With the Statutory Structure.....	75
D.	The Board’s Prior Decisions On Dispatching Responsibility Confirm That Amtrak’s Proposal Is Improper.....	83
E.	Amtrak’s Punitive Dispatching Takeover Proposal Would Violate the Takings Clause.....	85
IV.	AMTRAK’S APPROACH TO SCHEDULES UNDERSCORES THE IMPORTANCE OF CLARIFYING THAT SCHEDULES ARE SUBJECT TO ARBITRATION UNDER THE OPERATING AGREEMENT.....	89
A.	Contrary To Amtrak’s Suggestion, Schedules For 6 Trains, And Amtrak’s “Proposed Schedules” Are Not In Effect and Do Not Resolve All Schedule Issues.....	89
B.	Although Amtrak Concedes That Additional PRT Is Required For Illini/Saluki Schedules, It Refuses To Lengthen Those Schedules, Underscoring The Need For Arbitration Under The Operating Agreement.....	92
V.	OTHER AREAS OF AGREEMENT OR DISAGREEMENT BETWEEN THE PARTIES.	96
A.	The Parties At Least Partially Agree On Retroactivity.....	96
B.	Section 8.8 (Term) Should Be Revised to Provide a Seven-Year Contract Term, as Suggested by the Interim Decision and Proposed by Both Parties.	98
C.	The Letters Regarding PTC Costs and Incremental Safety Appliance Costs Must Be Properly Integrated into the Operating Agreement, as Agreed by the Parties.....	100
D.	The Parties Are Close to Agreement On Confidentiality.	102
E.	Some of Amtrak’s Proposed Revisions to the Operating Agreement Are Acceptable to CN, but Other Unsupported Amtrak Proposals Should Be Rejected.....	104
1.	Certain of Amtrak’s proposed changes are acceptable to CN, which has incorporated them, verbatim or with minor changes, into its own markup of the Operating Agreement.....	105

2. The Board should reject other substantive changes that Amtrak has proposed without, or with minimal, supporting argument or evidence.	107
CONCLUSION.....	108

APPENDIX – UNSUPPORTED AMTRAK CHANGES THAT SHOULD BE REJECTED

Tab A – Reply Verified Statement (Post-Interim Decision) of Dr. Steven Peterson

Tab B – Reply Verified Statement (Post-Interim Decision) of Derek Taylor

Tab C – Joint Reply Verified Statement (Post-Interim Decision) of Michael Matteucci and Scott Kuxmann

Tab D – Reply Verified Statement (Post-Interim Decision) of Thomas M. Sullivan

Tab E – Operating Agreement

Exhibit 1 – CN Redline Revisions to 2011 Operating Agreement (complete redline with new changes in **blue**)

Exhibit 2 – CN Clean Revised Operating Agreement

ACRONYMS

ADA	Passenger Related (Amtrak delay code)
ASOTP	All-Stations On Time Performance
BNSF	BNSF Railway Company
CAR	Car Failure (Amtrak delay code)
CCR	Cab Car Failure (Amtrak delay code)
CN	Illinois Central Railroad Company and Grand Trunk Western Railroad, indirect wholly-owned subsidiaries of Canadian National Railway Company
COTP	Customer On-Time Performance
CON	Hold for Connection (Amtrak delay codes)
CSX	CSX Transportation, Inc.
CTC	Centralized Traffic Control
CTI	Commuter Train Interference (Amtrak delay code)
CUI	Customs (Amtrak delay code)
DBS	Debris (Amtrak delay code)
DCS	Signal Delays (Amtrak delay code)
DMW	Maintenance of Way (Amtrak delay code)
DNC	Do Not Count
DSR	Slow Order Delays (Amtrak delay code)
DTR	Detour (Amtrak delay code)
DW	Data Warehouse
ENG	Locomotive Failure (Amtrak delay code)

FRA	Federal Railroad Administration
FTI	Freight Train Interference (Amtrak delay code) (except when referring to FTI Consulting)
GPS	Global Positioning System
GTW	Grand Trunk Western Railroad Company
HLD	Passenger-Related (Amtrak delay code)
HPH	Horsepower hour
HPT	Horsepower per ton
HRD	Host Responsible Delay
IC	Illinois Central Railroad Company
ICC	Interstate Commerce Commission
INJ	Injury Delay (Amtrak delay code)
ITI	Initial Terminal Delay (Amtrak delay code)
MBO	Drawbridge Opening (Amtrak delay code)
Metra	Commuter Rail Division of the Regional Transportation Authority d/b/a Metra (a commuter agency in and near Chicago)
MiDOT	Michigan Department of Transportation
MP	mile marker post
MW	Maintenance of Way
NOD	Unused Recovery Time (Amtrak delay code)
NRPC	National Railroad Passenger Corporation (Amtrak)
NS	Norfolk Southern Railway Company
OTH	Miscellaneous Delays (Amtrak delay code)
OTP	On-Time Performance

POL	Police-related (Amtrak delay code)
PRIIA	Passenger Rail Investment and Improvement Act of 2008
PRT	Pure Run Time
PTC	Positive Train Control
PTI	Passenger Train Interference (Amtrak delay code)
RCPA	Rail Customer and Public Assistance
RPSA	Rail Passenger Service Act of 1970
RTB	Recovery Time Base
RTC	Rail Traffic Controller
RTE	Routing (Amtrak delay code)
SRS	Service Reliability Strategy
SVS	Servicing (Amtrak delay code)
SYS	Crew & System (Amtrak delay code)
TJS	Train Journal Schedule
TPC	Train Performance Calculator
TRS	Trespasser Incidents (Amtrak delay code)
TSP	Train Service Plan
UP	Union Pacific Railroad Company
WCL	Wisconsin Central Limited
Wi-PU	Wireless Processing Unit
WTR	Weather-Related (Amtrak delay code)

Notes regarding record cites:

Verified statements filed by either party before the Board’s Interim Decision¹ are identified by “VS [Last Name]” if filed with the party’s opening evidence; by “RVS [Last Name]” if filed with the party’s rebuttal evidence; and by “SRVS [Last Name]” if filed with the party’s surrebuttal evidence.

Verified statements filed with this Post-Interim Decision Opening Submission are identified by “[S][R]VS (PID) [Last Name]”.

¹ Decision served Aug, 9, 2019.

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 35743

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

**POST-INTERIM DECISION REPLY SUBMISSION OF
ILLINOIS CENTRAL RAILROAD COMPANY
AND GRAND TRUNK WESTERN RAILROAD**

In accordance with the Board’s order served March 3, 2022, as modified by its stamp order served May 18, 2022, Illinois Central Railroad Company and Grand Trunk Western Railroad Company (together, “CN”) hereby submit their Post-Interim Decision¹ Reply Submission, concerning the terms and compensation under 49 U.S.C. § 24308(a) for the use of CN’s tracks and other facilities by National Railroad Passenger Corporation (“Amtrak”).

An important test for any proposal for governmental action (such as a Board order) is what impact it would have, in normal circumstances, if applied generally. Abnormal circumstances have prevailed in the railroad industry for most of the last two and a half years – including generally decreased traffic due to the Covid pandemic. So calendar year 2019 will serve well as representing the last normal year. *If applied to the national freight rail network as of January 1, 2020, Amtrak’s proposal would mean that on most of the freight railroad segments on which Amtrak trains run, including key freight corridors owned by BNSF, CN, CSX, NS and UP, Amtrak would be in control of dispatching both its trains and freight trains,*

¹ As used in this Submission, “Interim Decision” means the decision served in this proceeding on August 9, 2019, providing the Board’s interim findings and guidance.

*it would have veto power over routine maintenance, and it would be collecting penalties from, or paying zero incentives to, the hosts.*²

Such outcomes could only conceivably be justified if Amtrak owned the freight railroads – it doesn’t – or if freight railroads nationwide had been found, after adjudicatory processes providing them due process, to have been guilty of illegal conduct on a massive scale – they haven’t. As detailed below, Amtrak’s proposal is an outrageously self-serving recipe for *de facto* mass expropriation of the freight rail industry, which would cause profound harm to freight railroads, freight customers, American consumers, and the broader economy. The Board should reject it out of hand.

INTRODUCTION AND SUMMARY

Two key purposes of an operating agreement are (1) to provide for Amtrak’s payment of incremental costs to its freight carrier host so Amtrak internalizes the costs it is imposing, and (2) incentivize the freight carrier host to help Amtrak achieve strong Customer On-Time Performance (“COTP”). The Board’s Interim Decision and CN’s proposal will bring the Operating Agreement closer to requiring Amtrak to pay the incremental costs it imposes, but it will not provide for CN’s full recovery of incremental costs, as some of those costs, while substantial, cannot at this time, as a practical matter, be verifiably quantified. This makes it all the more crucial that the Operating Agreement provide a reasonable opportunity for CN to earn incentives, in order to reduce or eliminate its subsidy to Amtrak.

The basic structure of the existing Operating Agreement provides such an opportunity by closely tailoring incentives and penalties to CN’s contribution to on-time performance for each train, each month. It does so by accounting for when trains arrive at checkpoints within their

² See RVS (PID) Peterson ¶¶ 79-80.

agreed run times on CN's lines, and when they fail to do so due to delays agreed to be within CN's reasonable control. As discussed in CN's Post-Interim Decision Opening Submission, CN has tailored its new proposal in accordance with the direction provided by the Board in its Interim Decision. That decision declined to accept Amtrak's alternative incentive/penalty approach based on "Host-Responsible Delay" ("HRD"), and addressed the parties' competing proposals within the basic incentives/penalty structure of the existing Operating Agreement.

In its Post-Interim Decision Opening Submission, Amtrak took a different track. Rather than follow the Board's direction in the Interim Decision, Amtrak has recycled a version of its HRD-based proposal that the Board declined to adopt. Amtrak's new HRD-based proposal (its third proposal in this proceeding) is even more flawed than its initial one. It uses an HRD standard that is not tailored to the services CN hosts, it randomly adjusts incentives and penalties based on COTP data and changes in ridership that are not measures of CN's performance, and it is calibrated to generate net penalties. Given the Board's direction that the Operating Agreement should continue to include a lookback provision, CN would not be required to pay net penalties over the life of the contract, but it would have no realistic opportunity to earn net incentives. Thus, CN would be left with no financial incentive to provide strong hosting services. Moreover, given that CN would not be fully compensated for its incremental costs, it would be compelled to subsidize Amtrak.

Amtrak's revised incentive/penalty proposal appears to work in accordance with the following formula:

Quarterly Incentive or Penalty =

A “baseline” historic level of incentives earned for a service
(based on 25% of 2019 (or for Illini/Saluki 2020-2021 average) net annual incentives
earned, indexed for inflation & reduced or increased beginning in 2024
by the % change in Amtrak passenger miles from 2019)

X

A Customer OTP % adjustment
(Customer OTP % average for the service for the quarter (based on full train routes,
including all hosts) divided by 80%)

X

A % “Delay Adjustment Factor” by which Amtrak assigns
a positive percentage for incentives when Amtrak’s measure of “Host Responsible
Delay” per 10,000 train-miles for a service is below 924 (on a scale from 10-120%) and assigns a
negative percentage for penalties when it exceeds 924 (on a scale from -20% to -250%)³

The proposal not only suffers from the same flaws as Amtrak’s prior proposed HRD-
based incentive/penalty provision that the Board previously declined to adopt, it has added
deficiencies:

- Its most basic flaw is its reliance on HRD, contrary to the Interim Decision, which recognized that delays are a concern only for late trains. Unlike the existing OA and CN’s proposed revisions, Amtrak’s proposal would penalize CN for “delay” to trains that arrive early and on-time.
- HRD, the principal metric relied upon by Amtrak, is vastly over-broad as a measure of delays within a host’s reasonable control and it is unreliably measured by Amtrak.
- The critical 924 HRD minutes per 10,000 train-miles (“924 HRD”) standard proposed by Amtrak to determine whether incentives or penalties will apply is unsupported, unrealistic and not based on the Amtrak trains run on CN’s lines. Amtrak does not address whether it is feasible in normal conditions, what would be required to achieve it, or how it relates to Amtrak’s schedules (which include varying amounts of recovery time primarily because varying amounts of HRD are expected). It cites in support nothing more than a vague “association” between HRD and COTP levels based on observations of Amtrak services nationwide

³ VS Blair ¶¶ 36-52.

during a period that will not plausibly be representative of future performance, given that it involved reduced traffic during the Covid pandemic and preceded recent Amtrak schedule adjustments designed to increase COTP.

- Amtrak’s scheme is clearly designed to produce large penalties, including for performance that currently (and historically) earns substantial incentives. It thus fails to fulfill one of the most basic requirements of an Amtrak-Host Operating Agreement.
 - The 924 HRD standard is well below historical and current measures for most Amtrak services.⁴
 - In June 2022, 9 of 10 UP-hosted services, 11 of 11 BNSF-hosted services, and 10 of 13 NS-hosted services exceeded that proposed standard.⁵
 - In fact, Amtrak badly fails to meet its own HRD standard. The combined Amtrak/Chicago Terminal HRD for the portion of the Illini/Saluki service between Chicago Union Station and CN’s line regularly exceeds 15,000 HRD minutes per 10,000 train-miles,⁶ and Amtrak’s own HRD for other services regularly far exceeds 1,000 minutes per 10,000 train-miles.⁷
- In addition to HRD, Amtrak’s scheme irrationally makes incentives/penalties depend on factors (full-route COTP & ridership/passenger miles) that are not designed to measure CN’s performance and do not do so meaningfully.
 - HRD, COTP and ridership are jumbled together and multiplied with no theory as to why one should multiply them. The results are irrational. For example, when HRD per 10,000 train-miles exceeds 924 minutes, the better the COTP and/or the more the ridership, the more CN is penalized.⁸

Worse yet, under the guise of a “reopener,” Amtrak has proposed extreme and punitive intrusions into CN’s network dispatching that are baseless, inconsistent with PRIIA’s structure, operation, and evidentiary requirements, usurp the Board’s PRIIA authority, and have no place in

⁴ See RVS (PID) Peterson ¶ 79; RVS (PID) Matteucci/Kuxmann ¶ 53.

⁵ See Amtrak Host Railroad Report at 7-8 (June 2022); RVS (PID) Matteucci/Kuxmann ¶ 53.

⁶ See RVS (PID) Matteucci/Kuxmann ¶ 55.

⁷ See RVS (PID) Peterson ¶¶ 46-47.

⁸ See RVS (PID) Peterson ¶¶ 55-56; RVS (PID) Matteucci/Kuxmann ¶ 64.

a service contract. Its proposal is a breathtaking overreach that would run roughshod over shipper and host freight railroad interests by authorizing Amtrak to interfere in CN dispatching and maintenance processes that are critical to its freight operations, and even authorizing Amtrak to completely take over CN's dispatching. And all of that could occur even if Amtrak's trains are achieving 80% COTP, without any proof of a failure to provide preference – CN vehemently denies that it fails to provide Amtrak preference – and with no STB investigation. Amtrak's proposal treats CN's network as if it were Amtrak's property, and would likely result in a material lessening of the quality of freight service on CN's network, and, more broadly, the nation's inter-dependent freight network.

Adoption of Amtrak's proposal would be disastrous not only for CN, but for freight railroads, their customers, and the end-consumers they serve nationwide. Amtrak's proposal of a uniform HRD standard, ostensibly based on a nationwide HRD/COTP "association," is clearly intended to set a nationwide precedent for replacing negotiated contractual standards with a one-size-fits-all regulation masquerading as a contractual term. That HRD-based regulation would be inconsistent with both the Board's guidance in this case and the underlying statutes. It would suit Amtrak well in the short-term, by saving it the trouble of negotiating and implementing customized standards for different hosting situations, by compelling freight railroads to subsidize it, and by allowing it to take over dispatching and treat freight rail lines as its own. But the short-term benefit to Amtrak would be far outweighed by the harm to the national economy caused by forcing freight railroads to subsidize Amtrak, raising freight service costs, and impairing freight service quality, all while eliminating financial incentives for freight railroads to help Amtrak get its passengers to their destinations on time and impairing the ability and incentives of freight

railroads to re-invest in their networks. In the longer term, all railroad users – shippers and passengers alike – would be harmed.

In Part I, below, we explain that, Amtrak’s misleading claims notwithstanding, its proposal is inconsistent with the Interim Decision, FRA’s Metrics and Standards, and the overall statutory scheme governing Amtrak. In Part II we examine the many serious flaws with Amtrak’s proposed HRD-based incentive/penalty provision that make it far inferior to CN’s proposal as an incentive mechanism. In Part III, we focus on Amtrak’s misnamed “reopener,” addressing its inconsistency with PRIIA, its lack of justification, and the harm it would cause to CN’s operations and, ultimately, the broader rail network. In Part IV, we discuss the parties’ unresolved schedule issues, which underscore the importance of clarifying that schedules are subject to arbitration under the Operating Agreement. Finally, in Section V, we cover various miscellaneous issues and changes to the Operating Agreement proposed by Amtrak.

ARGUMENT

I. AMTRAK’S PROPOSAL IS INCONSISTENT WITH THE BOARD’S INTERIM DECISION, THE STATUTORY FRAMEWORK, AND FRA’S METRICS AND STANDARDS RULE.

A. Amtrak’s New Incentives and Penalties Proposal Is Based on HRD, so It Has the Same Fundamental Flaws that Led the Board to Decline to Adopt Its Prior HRD-Based Proposal.

Amtrak’s new HRD-based incentives and penalties proposal is fundamentally at odds with the Interim Decision, a fact Amtrak attempts to disguise through its selective and misleading discussion of that decision and by emphasizing COTP and “Ridership Factor” additions that function essentially as window-dressing for its proposal.

When the Board issued the Interim Decision, three competing proposals were before it:

- (1) CN’s proposal, based on the traditional checkpoint-based “contract on-time performance” system, which focuses on whether a train arrives is within

tolerance of its scheduled run-time on the host's segment of its route, after taking into account "relief items" agreed on by the parties that represent delays the host could not reasonably be expected to prevent;

- (2) Amtrak's initial proposal, based purely on its HRD metric; and
- (3) Amtrak's alternative proposal, based on an all-stations, no-tailored-relief-items version of the traditional checkpoint-based system.

The Board did not tell the parties precisely what to do. However, it expressly declined to adopt Amtrak's HRD-based proposal, highlighting flaws that are fundamental to any HRD-based incentives and penalties system:

[T]he 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.⁹

The remainder of the Board's discussion of incentives and penalties clearly indicates that the Board favored a system that addresses directly, rather than indirectly and unreliably attempting to infer from HRD, the "readily observable occurrence" of "whether, and to what degree, a train is late." And it strongly points towards a checkpoint-based system combining the best elements of each of the two checkpoint-based systems that were before it. The Board endorsed an "80% OTP standard to receive incentive payments" – an OTP (on-time performance) standard, not an HRD standard.¹⁰

Amtrak spends pages attempting to frame the Board's Interim Decision as a broad victory for Amtrak on incentives and penalties that justifies Amtrak's new proposal.¹¹ But what the

⁹ Interim Decision at 14; *see also id.* at 11 n.26 (stating that, for the quoted reasons, "the Board will not adopt [Amtrak's HRD-based system] at this time.").

¹⁰ *Id.* at 14.

¹¹ *See generally* Amtrak Opening Br. (PID) at 2-3, 6-10, 14-16, 42-53; VS Blair ¶¶ 35, 54-87.

Board actually did is adopt some of Amtrak's points, and some of CN's points, within the context of the parties' competing checkpoint-based proposals. In Amtrak's favor, the Board found that "the OTP metric would ideally include *checkpoints* at all stations along a route,"¹² suggested "a degree-of-*lateness* multiplier,"¹³ and recommended "elimination of the neutral zone."¹⁴ In CN's favor, the Board encouraged the parties to review more closely together which delays should be given relief item treatment (building on the traditional tailored relief items model), rather than (as Amtrak proposed) relying simplistically and uncritically on Amtrak's unilaterally defined and implemented HRD delay codes:

[T]he 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 [Amtrak] 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.¹⁵

The Board also provided substantial guidance on the subject of "*recovery time* base" ("RTB"), finding in CN's favor that Recovery Time should be allocated between the parties based on "the real-world operating conditions," and that it is not "objectionable that CN can utilize unused portions of Amtrak's RTB, provided that an Amtrak train otherwise arrives on

¹² *Id.* at 11 (emphasis added). The 2011 Operating Agreement generally uses only the train's final destination as a checkpoint; CN had suggested a compromise solution treating major, but not all, stations as checkpoints. CN's new proposal includes weighted checkpoints at every Amtrak station (and endpoints on CN's lines, when not a station), in accordance with the Board's guidance.

¹³ *Id.* at 14 (emphasis added). The 2011 Operating Agreement and CN's old proposal made OTP a binary, yes/no, proposition. CN's new proposal includes a degree of lateness multiplier, in accordance with the Board's guidance.

¹⁴ *Id.* at 15 n.29. The 2011 Operating Agreement and CN's old proposal included a "neutral zone," with no incentives or penalties, between 70% and 80%. CN's new proposal provides for penalties whenever CN achieves less than 80% performance, in accordance with the Board's guidance.

¹⁵ *Id.* at 24.

time.”¹⁶ RTB does not even exist as a concept in an HRD-based system, since HRD is measured against theoretical Pure Run Time (“PRT”), not the whole train schedule, which includes Recovery Time in addition to PRT.¹⁷ RTB is solely concerned with what portion of Recovery Time is counted in CN’s favor in determining whether a train is considered on-time (or how late it is considered) under a checkpoint-based system.¹⁸

The Board’s Interim Decision, including its extensive discussion of concepts that derive their meaning from their role in the traditional checkpoint-based system – checkpoints, lateness, the neutral zone, and RTB – cannot rationally be read as an invitation for another HRD-based proposal. And, while it should always be subject to adjustment and improvement, as directed by the Board’s guidance, the tried-and-tested checkpoint-based system is simply far superior to an HRD-based system. As Dr. Peterson explains, the goal of an incentives and penalties provision should be to align payments as closely as possible with the performance sought to be incentivized, *i.e.*, to pay CN based on the extent to which it does what it reasonably can to help Amtrak achieve high levels of COTP.¹⁹ That is what CN’s new checkpoint-based proposal, informed by the Board’s guidance, does.²⁰

Amtrak’s new proposal, in contrast, is another fatally-flawed HRD-based scheme. Notwithstanding the Board’s guidance, Amtrak’s proposal has no “checkpoints,” it measures

¹⁶ *Id.* at 25; *see generally id.* at 24-26.

¹⁷ Amtrak concedes that its proposal has no place for RTB as a concept. Amtrak Opening Br. (PID) at 45 n.34.

¹⁸ Counting “delay” against a PRT baseline entails ignoring Amtrak’s own decision to include varying amounts of Recovery Time in its schedules to account for the reality that, to extents that vary by train and location, deviations from PRT are normal and inevitable. *See generally* RVS (PID) Matteucci/Kuxmann ¶¶ 38-45.

¹⁹ *See* RVS Peterson (PID) ¶¶ 4, 11, 14.

²⁰ *See id.* ¶¶ 22-29.

“delay” against theoretical PRT rather than “lateness” against schedule,²¹ and it allocates zero Recovery Time to CN. By relying on HRD, Amtrak attaches a uniform financial penalty (be it an additional penalty or a loss of incentives) to every minute of “delay” versus PRT Amtrak’s HRD metric attributes to CN, without regard to whether the train is within its scheduled run-time on CN’s lines, and without regard to whether that “delay” affects many passengers, a few, or none. Notwithstanding Mr. Blair’s claim that that is what the Board intended,²² it flies in the face of the Board’s guidance 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.*”²³ In addition, far from taking a close and critical look together with CN at actual avoidability of and responsibility for delays, as the Board instructed,²⁴ Amtrak proposes to simply eliminate all the relief items the parties have previously agreed on – and even relief items to which Amtrak previously agreed in this proceeding – and rely exclusively on its simplistic, self-serving HRD metric.

²¹ Amtrak claims that its scheme incorporates “degree of lateness” by counting all delays. Amtrak Opening Br. (PID) at 34-35. That defies the plain-language meaning of the Board’s guidance. A train that arrives on time is not “late.” A delay to a train that nonetheless arrives on time (which, under Amtrak’s scheme, would cause CN to accrue less incentives or more penalties) does not increase its “degree of lateness,” because an on-time train has no “lateness.”

²² VS Blair ¶ 82.

²³ Interim Decision at 14 (emphasis added). PRIIA likewise focuses only on delays that are directly associated with a failure to achieve the Customer OTP standard. Under PRIIA, the Board is authorized to investigate delays only for trains that are operating at less than 80% Customer OTP. See 49 U.S.C. § 24308(f)(1); 49 C.F.R. § 273.5(a).

²⁴ See Interim Decision at 24.

Knowing that its previous HRD-based proposal failed to garner the Board's approval, Amtrak discusses the COTP and "Ridership Factor" elements in its new proposal at length²⁵ before addressing its HRD-based "Delay Adjustment Factor."²⁶ The Board should not be fooled.

Under Amtrak's new proposal, just like its original proposal, ***HRD would be both the sole determinant of whether CN accrues penalties and incentives, and the principal determinant of their magnitude.***²⁷ Entirely without regard to COTP and the Ridership Factor, CN would earn incentives if CN HRD were 924 minutes per 10,000 miles or lower, and penalties if it were 925 minutes per 10,000 miles or higher.²⁸ Moreover, whereas COTP and the Ridership Factor would each affect the magnitude of the incentive or penalty proportionately (e.g., a 20% improvement entails a 20% increase), variations in HRD would affect its magnitude much more dramatically. For example, from Amtrak's chosen neutral point of 924/925 HRD, a 20%

²⁵ See, e.g., Amtrak Opening Br. (PID) at 42-47; VS Blair ¶¶ 32-34.

²⁶ See Amtrak Opening Br. (PID) at 47-53; VS Blair ¶¶ 45-52.

²⁷ Amtrak Opening Br. (PID), Addendum #1 ("Amtrak OA Redline"), Appendix V, § 1.1 provides that CN's "Quality Payment" is to be determined by the formula "COTP x Ridership Factor x Delay Adjustment Factor." See also VS Blair ¶ 45 (same). COTP (a percentage, see, e.g., *id.* ¶ 53(a)) and Ridership Factor (a dollar amount, see, e.g., *id.*) are, by definition, positive values. So whether the "Delay Adjustment Factor" (which is determined solely by CN HRD minutes per 10,000 miles, see *id.* ¶ 52; Amtrak OA Redline, Appendix V, table 2) is positive or negative is the sole determinant of whether Amtrak pays CN incentive payments or CN pays Amtrak penalties. As elaborated below, Amtrak's use of simple multiplication also means that if CN HRD exceeds 924, CN will be penalized more if Amtrak's COTP is higher or if its ridership is greater – a facially irrational outcome. See generally RVS (PID) Peterson ¶¶ 36, 55-56; RVS (PID) Matteucci/Kuxmann ¶¶ 7, 64.

²⁸ See VS Blair ¶¶ 48-52; Amtrak OA Redline, Appendix V, § 1.1 & table 2. Mr. Blair states that "[t]he better the COTP on the route, the more likely CN is to earn incentives, and avoid penalties." VS Blair ¶ 35(b). As demonstrated in footnote 27, that is a plain mischaracterization of the proposal he sponsors, since under it, HRD is the sole determinant of whether CN accrues incentives or penalties.

increase in HRD (to 1,110) would lead to penalties at a 110% level; a 20% decrease in HRD (to 740) would lead to incentives at a 105% level.²⁹

Moreover, as elaborated in Section II.C below, neither COTP nor Amtrak's Ridership Factor would bear a reasonable relationship to the Board's guidance even if they had a significant impact on incentives and penalties under its scheme. Amtrak suggests that its use of COTP is justified because the Board encouraged the parties to work together to develop "an OTP metric" that "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."³⁰ But the Board did so in the context of discussing the parties' competing checkpoint-based proposals, while endorsing the use of concepts, such as relief items and RTB, that are specific to the checkpoint-based model. The Board never suggested that CN's compensation be determined based on a measure that is heavily – for four of the six Amtrak services CN hosts, primarily – determined by events that transpire off CN's lines, on other hosts. Instead, the Board's guidance suggested a incorporating the COTP approach (insofar as it appropriately weights timeliness based on its importance to larger or smaller numbers of passengers) into a checkpoint-based system (which appropriately focused on host performance). CN's proposal does so; Amtrak's proposal just randomly tosses in a whole-train COTP metric that is largely unrelated to CN's performance.

Likewise, there is no merit to Amtrak's argument that its "Ridership Factor" implements the Board's guidance. Amtrak relies on the Board's guidance that the experience, in terms of punctuality, of each and every passenger should count.³¹ Again, CN's proposal appropriately

²⁹ See VS Blair ¶ 52; Amtrak OA Redline, Appendix V, table 2.

³⁰ Interim Decision at 11 n.25; see Amtrak Opening Br. (PID) at 44.

³¹ Interim Decision at 10; see Amtrak Opening Br. (PID) at 43.

implements that guidance by measuring performance at all stations and weighting it by passenger counts, and accounting for CN delays, thus measuring whether CN did a good job of helping Amtrak to deliver each and every passenger to their destination within the scheduled run time for their trip on CN's lines.³² Amtrak's "Ridership Factor," by contrast, has nothing to do with passenger experience or punctuality; it simply counts the total passenger miles traveled on a train in the preceding two years.³³

Several additional points confirm that COTP and Ridership Factor play nothing more than window-dressing roles in Amtrak's proposal. First, Ridership Factor would not even apply as a variable until 2024.³⁴ Second, and quite irrationally, increases in COTP and Ridership Factor – desirable outcomes for Amtrak – would *reduce* CN's net compensation, by increasing penalties imposed on it, if HRD exceeded 924.³⁵ And third, Amtrak would trigger the most dramatic and objectionable aspect of its scheme to incentivize CN – its punitive so-called "reopener" scheme – based solely on HRD. As elaborated in Section III below, Amtrak proposes that the Board authorize it to take over CN's dispatching and control CN's maintenance based solely on HRD levels, and without regard to whether Amtrak has excellent COTP and increasing ridership.

In sum, Amtrak has ignored the Board's guidance. The Board highlighted the inherent flaws in an HRD-based scheme and guided the parties to work together to blend the best aspects of their competing checkpoint-based proposals. However, Amtrak has returned with a thinly disguised HRD-based scheme (and one which has additional flaws, as detailed in Section II

³² See RVS (PID) Peterson ¶¶ 25-27.

³³ See, e.g., VS Blair ¶¶ 41-43.

³⁴ See *id.* ¶ 41.

³⁵ See *supra*, n. 27.

below). The Board also called on the parties to include a reopener provision.³⁶ However, Amtrak admits that it has not done so, and its HRD-based so-called “reopener” (discussed in detail in Section III below) is nothing of the sort.³⁷ Amtrak’s claim that it has implemented the Board’s guidance is baseless.

B. The FRA’s Metrics and Standards Support Adoption of CN’s Proposed Incentive/Penalty Provision, Not Amtrak’s.

Section 207 of the Passenger Rail Investment and Improvement Act of 2008 (“PRIIA”)³⁸ (1) authorized FRA and Amtrak to jointly promulgate metrics and standards for Amtrak trains,³⁹ and (2) instructed that those metrics and standards be incorporated into Amtrak-host operating agreements “[t]o the extent practicable.”⁴⁰ The “to the extent practicable” caveat in that instruction is important. Congress did not repeal or amend section 402(a) of the Rail Passenger Service Act of 1970 (“RPSA”), under which this proceeding arises.⁴¹ The RPSA calls for a bilateral commercial “agreement” on “reasonable” terms between Amtrak and an individual host regarding the hosting of individual Amtrak trains;⁴² PRIIA did not replace that with a uniform regulatory scheme co-drafted by FRA and Amtrak. A one-size-fits-all regulatory approach is not apt to meet the needs of widely varying mixed-use (freight and passenger) arrangements (involving, *e.g.*, different schedules, different freight-passenger mixes, different levels of private

³⁶ Interim Decision at 17.

³⁷ *See* Amtrak Opening Br. (PID) at 67 n.48.

³⁸ Pub. L. No. 110-432, div. B, § 207, 122 Stat. 4848, 4916, *codified at* 49 U.S.C. § 24101 note.

³⁹ PRIIA § 207(a).

⁴⁰ PRIIA § 207(c).

⁴¹ Pub. L. No. 91-518, § 402(a), 84 Stat. 1327, 1335, *codified at* 49 U.S.C. § 24308(a).

⁴² *See id.*

and (in some cases) public investment, different levels of network traffic, and different infrastructure) nationwide. Nor would it be “practicable” to try to incorporate all of the FRA Metrics and Standards promulgated under PRIIA⁴³ in an operating agreement, or to do so without customizing and adapting them. For example, Metrics and Standards designed to be applied to a whole train need to be adapted to apply meaningfully to an individual host, especially for trains that have many hosts. And it would make no sense to try to incorporate all seven distinct delay Metrics included in the FRA Metrics and Standards,⁴⁴ or other metrics largely unrelated to individual hosts, into an agreement between Amtrak and an individual host.⁴⁵

That said, harmony between the RPSA and PRIIA should be pursued “to the extent practicable.” Accordingly, CN’s incentives and penalties proposal incorporates key elements of three Metrics and Standards. First, as CN explained in its Opening Submission (in Section I.A), CN proposes to measure OTP at all stations, with stations weighted by the number of detraining passengers, and with a 15-minute tolerance, to be consistent with the sole standard FRA adopted: its 80% COTP performance standard for an Amtrak train.⁴⁶ Consistent with the COTP standard and the Board’s Interim Decision,⁴⁷ CN’s proposal treats performance as satisfactory, and thus

⁴³ FRA, *Metrics and Minimum Standards for Intercity Passenger Rail Service*, 85 Fed. Reg. 72,972 (Nov. 16, 2020) (“FRA Metrics and Standards”), *codified at* 49 C.F.R. pt. 273.

⁴⁴ *See* 49 C.F.R. § 273.5(d)

⁴⁵ As discussed below, Amtrak cherry-picks certain Metrics and Standards and incorporates them into its proposal without any effort to customize them to the context of an individual host agreement, and with no reasonable basis for how it incorporates them. Mr. Blair suggests that doing so is compelled by the existing Operating Agreement. *See Blair VS (PID)* ¶ 63. Not so: the Operating Agreement merely recites and incorporates the language of Section 207(c), including the “to the extent practicable” caveat. Operating Agreement § 3.4(D).

⁴⁶ 49 C.F.R. § 273.5(a).

⁴⁷ *See* Interim Decision at 14-15 (endorsing an checkpoint-based “80% OTP” standard as “reasonable”).

worthy of incentive payments, when OTP defined thus is at 80% or above. Recognizing, however, that FRA defined COTP for a whole Amtrak train – without isolating host segments or host performance – in incorporating COTP, CN adapted it to assess host performance by focusing on the CN-hosted segment and (via relief items) on CN’s performance.

Second, CN’s proposal appropriately reflects another important OTP Metric, FRA’s “Host Running Time” metric.⁴⁸ Host Running Time focuses on whether the Amtrak train is meeting its scheduled run-time within the host’s segment (thus avoiding crediting or blaming the host for what occurs off its lines), measuring host performance against the actual anticipated arrival times of Amtrak’s public schedules (thus focusing on whether passenger expectations are being met, not on whether there are “delays” versus theoretical PRT baselines that are meaningless to passengers). In adopting Host Running Time, FRA explained:

As delays may or may not cause a train to be late on its schedule, it is important to measure the performance of host railroads against the scheduled operation. The host running time metric shows the performance of a host railroad against the time allowed for in the schedule and provides more insight into a host railroad’s operating impact on OTP. This metric is an indication of which host railroads may be responsible for chronic performance below standard and which ones are not.⁴⁹

Consistent with FRA’s rationale, CN’s proposal measures the “host railroad’s operating impact” against the actual public schedule, isolated to the host’s segment.

Third, CN’s proposal appropriately reflects FRA’s delay Metrics, including HRD and disputed HRD.⁵⁰ CN’s proposal utilizes HRD as an initial screen for delays potentially attributable to CN, and provides a fair and effective process to resolve disputes regarding delay

⁴⁸ 49 C.F.R. § 273.5(g).

⁴⁹ FRA Metrics and Standards, 85 Fed. Reg. at 72,983.

⁵⁰ See 49 C.F.R. § 273.5(d).

attribution. In doing so, CN, like FRA, uses HRD as a metric, but does not adopt an HRD standard.⁵¹ CN's proposal also retains the additional route-specific relief items worked out by the parties over time that weed out specific additional delays that should not be attributed to CN.⁵² Doing so is consistent with the Interim Decision.⁵³

CN's incentive/penalty proposal is a rational and effective means of incorporating the FRA Metrics and Standards into the Operating Agreement "[t]o the extent practicable," as prescribed by Section 207(c) of PRIIA. Amtrak's is not.

As discussed above, Amtrak's proposal is, in practice, all about just one Metric: HRD. And unlike the FRA, Amtrak proposes to elevate that Metric, which Amtrak unilaterally defined, into the critical standard. In doing so, Amtrak entirely neglects the other key host-specific Metric FRA created: Host Running Time. FRA highlighted exactly the same problem with HRD the Board highlighted: it does not address "whether, and to what degree, a train is late."⁵⁴ As FRA explained, a Metric like FRA which is measured against theoretical PRT, and not against the actual schedule, counts indiscriminately "delays [that] may or may not cause a train to be late on its schedule."⁵⁵ By focusing exclusively on HRD to determine whether CN accrues

⁵¹ 80% COTP is the sole standard related to OTP or delays established by FRA. *See* 49 C.F.R. § 273.5(a). FRA expressly considered and rejected the idea of establishing other standards. *See* 85 Fed. Reg. at 72,975. HRD minutes per 10,000 miles is one of many metrics FRA adopted related to train delays. *See* 49 C.F.R. § 273.5(d)-(e); 85 Fed. Reg. at 72,981-82.

⁵² For example, the existing Operating Agreement does not hold CN responsible for delays at the many interlockings it does not control and that are particularly prevalent in the largely urban Chicago area through which CN hosts most of Amtrak's trains. *See* 2011 Operating Agreement, Appx. V, § A.1.g; *id.*, App. VI, § D.10.

⁵³ *See* Interim Decision at 24.

⁵⁴ Interim Decision at 14.

⁵⁵ FRA Metrics and Standards, 85 Fed. Reg. at 72,983.

incentives or penalties, Amtrak fails to “measure the performance of host railroads against the scheduled operation.”⁵⁶

Amtrak does include an OTP Metric in its proposal: COTP. But unlike CN, it does not adapt it to make it suitable for an individual host agreement.⁵⁷ FRA was charged with developing an OTP standard for potential investigation of a “train,” which would trigger a potential investigation, under section 213 of PRIIA, to determine what caused that train to have low OTP.⁵⁸ Given its task, it developed an OTP standard, 80% COTP, for the full “train” route, covering all hosts and describing an outcome – low OTP – without addressing causes – who is responsible. In doing so, it emphasized the importance of matching the OTP standard with the statutory basis for investigation,⁵⁹ while also making clear that it understood its full-train OTP metric would not be an appropriate measure of individual freight carrier host performance.⁶⁰ It was not FRA’s job to set terms for bilateral Amtrak-host operating agreements, and FRA did not purport to do so.

⁵⁶ *Id.*

⁵⁷ Nor does Amtrak incorporate COTP in a way that makes any sense, as detailed in Section II.C.1 below.

⁵⁸ *See* 49 U.S.C. § 24308(f)(1) (STB investigation is based on “the on-time performance of any intercity passenger *train*”).

⁵⁹ 85 Fed. Reg. at 72,975 (citing PRIIA §213, 49 U.S.C. § 24308(f)(1)).

⁶⁰ *See, e.g.*, 85 Fed. Reg. at 72,975-76 (unlike COTP, “the final rule’s train delays metric and host running time metric speak to the individual host railroad’s performance”); *id.* at 72,984 (recognizing concerns regarding metrics, such as COTP, that do “not distinguish between host railroads of multi-host railroad routes,” and explaining that “the host running time metric specifically addresses this concern by showing train performance over a host railroad as compared to the train’s scheduled running time, thereby distinguishing host railroads on multi-host railroad routes”). Given its specific statutory assignment, FRA rightly rejected the suggestion made by some commenters (not CN) that it set a host-specific COTP standard instead of a whole-train standard. *See id.* at 72,975-76. However, FRA’s final rule and its reasoning are entirely consistent with the traditional use of a host-specific conception of OTP checkpoints in a host-specific contract.

Amtrak acknowledges that COTP is not a good measure of individual host performance for multi-host routes,⁶¹ but it nonetheless irrationally utilizes full-route COTP as a multiplier in its incentive/penalty scheme. Moreover, as detailed in Section II.C.1 below, it does so in a way that serves no rational economic function.

Amtrak devotes much of its argument to claiming that its proposal is justified or even compelled by the FRA Metrics and Standards. But the reality is that it has cherry-picked the Metrics it prefers, emphasized one – HRD – above all others, and failed to adapt them to the context of a bilateral agreement or combine them rationally. The result is a proposal that neglects FRA’s as well as the Board’s guidance, disassociates the Metrics and Standards from their purpose, and fails entirely to integrate OTP meaningfully with the actual contribution of hosts to the performance of its trains.

C. Amtrak’s “Reopener” Proposal Is Inconsistent with PRIIA and the RPSA.

Amtrak makes a huge leap in logic from noting its statutory right to preference (which it casually claims, with no evidence, is “historically disregarded by the freight railroad industry through, *inter alia*, abuses in its dispatching practices”)⁶² to an unprecedented and hugely intrusive proposal that would allow Amtrak to oversee and ultimately take over dispatching of the nation’s freight railroads. Amtrak’s so-called “reopener” is objectionable on many legal, policy, and practical grounds, as discussed at length in Section III, below. But one of the most immediate and obvious bases for rejecting Amtrak’s proposal is that it is blatantly inconsistent with the statutory preference provisions (in both the RPSA and the PRIIA) themselves.

⁶¹ See, e.g., Amtrak Opening Br. (PID) at 53.

⁶² *Id.* at 31.

Amtrak has never had a right to enforce host preference obligations by private action or self-help. To the contrary, the RPSA has long provided for enforcement by the Attorney General,⁶³ and Section 213 of PRIIA has more recently committed primary enforcement of preference issues to the Board.⁶⁴ Amtrak's request that the Board give it a new right to engage in self-help under the guise of a compelled "agreement" with CN would be inconsistent with the statutory scheme even if the Board's proposed self-help right required an actual failure to provide preference to trigger it – which, under Amtrak's proposal, it would not. By bypassing statutory enforcement mechanisms and the due process and neutral decisionmakers they entail, Amtrak presumably intends to impose on CN Amtrak's distorted notion of preference as compelling a host railroad to accord "Presidential motorcade" treatment to Amtrak – a notion that no authority has ever adopted and no reasonable decisionmaker ever would adopt.⁶⁵

Further, Amtrak's proposal would bypass every safeguard provided by PRIIA, and bypass the Board, which is charged with protecting both passenger rail and freight rail customers. Amtrak's so-called "reopener" would allow it to intrude on carriers and require specific performance based solely on HRD minutes per 10,000 train-miles exceeding 924,

⁶³ 49 U.S.C. § 24103(a)(1)(C).

⁶⁴ See 49 U.S.C. § 24308(f).

⁶⁵ Amtrak has not offered a definition of preference in this proceeding. But it has previously taken the position that preference means it should have an absolute "right to run trains unimpeded on host railroads' tracks." Office of the Inspector Gen., U.S. Dep't of Transp., Report No. CR-2008-076, *Root Causes of Amtrak Train Delays* (Sept. 8, 2008), available at https://www.oig.dot.gov/sites/default/files/Amtrak_Root_Causes_Final_Report_9_8_08_with_508_charts.pdf. Notably, Amtrak's proposal includes no proposed standards for how it would manage either freight carrier dispatching and maintenance of way with no governing standards, leaving it free to bar freight trains from their owners' freight railroads for miles and hours on end, and otherwise to treat the private assets of the nation's freight railroad hosts as its own assets. Nothing could be more violative of the balanced relationship established between hosts and Amtrak contemplated by the RPSA.

without any of the prerequisites for specific performance under Section 213 – including COTP under 80%; Board investigation looking behind bare metrics to find real causes; a finding of a failure to provide preference causing excessive delays; and Board remedial discretion.⁶⁶

D. Amtrak’s Goals Do Not Bind the Board or Hosts, and Cannot Override Specific RPSA Provisions.

In an effort to support its extreme proposal, Amtrak misstates the Board’s task.⁶⁷ Neither the Board nor CN is charged with doing whatever Amtrak deems necessary to accomplish Amtrak’s aspirational goals. The specific provisions of the RPSA govern this proceeding, and they require that (1) at a minimum, Amtrak’s net compensation payment to hosts fully cover the hosts’ incremental costs, with added net incentives as appropriate,⁶⁸ and (2) the terms the Board prescribes for an operating agreement be “reasonable.”⁶⁹ Amtrak and hosts through their negotiated agreements, and the Board through its many decisions, have developed terms of operating agreements over the past 50 years that directly bear on what may be regarded as “reasonable.”⁷⁰

Amtrak ignores that history and the requirement that terms be “reasonable” in the context of an “agreement” between railroads that Congress intended to work cooperatively together.

⁶⁶ See 49 U.S.C. § 24308(f).

⁶⁷ Amtrak Opening Br. (PID) at 31 (“The Board’s imposition of terms must be consistent with Amtrak’s mission to “carry out” its Congressionally-mandated goals”).

⁶⁸ See 49 U.S.C. § 24308(a)(2)(B); Interim Decision at 16, 22-23.

⁶⁹ 49 U.S.C. § 24308(a)(2)(A)(ii), (B).

⁷⁰ See, e.g., *Baker—Comp. for Passenger Serv.*, 342 I.C.C. 820, 831 (1973) (task of agency under predecessor of 49 U.S.C. § 24308(a)(2)(A)(ii) is to “create a compensation formula which imposes no inequities on the parties involved, permits the supplier of the services to operate on a viable financial basis provided that the operation is carried out with a reasonable degree of efficiency and regard for consumer preferences, and provides some incentive for efficiency and quality of service”).

Instead, Amtrak takes a one-sided view, focusing solely on (1) Amtrak’s statutory right to preference, and (2) what measures would further Amtrak’s own statutory goals.⁷¹ There are three fundamental flaws with Amtrak’s approach.

First, this proceeding arises in the context of a specific statutory provision, providing specific authorization for the Board to resolve disputes when the parties fail to reach the voluntary commercial “agreement” Congress hoped they would reach.⁷² Amtrak fails to address what is appropriate, and what has previously been found – by Amtrak, hosts, the Board, and, before it, the ICC – under that provision.

Second, Congress prescribed two clearly separate mechanisms to achieve good host performance for Amtrak – (1) preference and (2) incentives and penalties under operating agreements. This proceeding concerns the latter mechanism, not the former. And Amtrak cannot justify its proposal in this case as a remedy for failures to provide preference without proving such failures – which it has not attempted to do and cannot do.⁷³

Third, Amtrak’s statutory goals⁷⁴ are Amtrak’s goals, not CN’s, or even the Board’s. To be sure, as Amtrak’s host, CN has preference and contractual responsibilities that involve

⁷¹ See Amtrak Opening Br. (PID) at 28-33.

⁷² 49 U.S.C. § 24308(a).

⁷³ Amtrak’s characterization of the “public bargain” surrounding Amtrak’s creation (*see* Amtrak Opening Br. (PID) at 25-26) is selective and misleading, as CN has previously explained. *See* CN Reply Br. at 26-34 (filed Mar. 2, 2018). In particular, host railroads paid to be relieved of prior passenger common carrier obligations by providing Amtrak initial funding; the “bargain” did not entail ongoing financial subsidies to Amtrak, and in providing for incremental cost compensation as a floor for host compensation, the RPSA clearly precludes that. *See id.* That said, CN fully recognizes Amtrak’s right to preference. But since Amtrak has neither attempted to demonstrate preference violation nor invoked the statutory processes Congress prescribed for doing so, Amtrak’s right to preference cannot support its proposals in this case.

⁷⁴ 49 U.S.C. § 24101.

helping Amtrak achieve its goals, and CN works diligently and cooperatively to do so. The Board should consider Amtrak's rights and goals, and its passengers' interests, in this proceeding. But the Board should also consider CN's rights and goals, and its freight customers' interests. CN's goals include, crucially, fulfilling its common carrier obligations and providing efficient, high-quality freight service to thousands of freight customers and the millions of consumers they serve – goals that are important not just to CN but to the Board's mission and Congress's Rail Transportation Policy, which calls for policies to “promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board,” and to “foster sound economic conditions in transportation.”⁷⁵ Amtrak does not share in those other goals – as its myopic focus on its OTP to the exclusion of all else reflects. Hence the need for the Board to resolve disputes between two parties who have legitimate different goals and interests, bearing in mind both passenger and freight interests. Congress was originally motivated to create Amtrak by its finding that “modern, efficient, intercity railroad passenger service is a necessary part of a *balanced* transportation system.”⁷⁶ Amtrak's proposal and arguments entirely ignore the need for “balance” to accommodate the interests not just of Amtrak and its passengers but of freight railroads and the millions of Americans who depend on freight rail service.

⁷⁵ 49 U.S.C. § 10101(3), (5), (9).

⁷⁶ RPSA § 101 (emphasis added).

II. AMTRAK’S HRD-BASED INCENTIVES/PENALTIES PROPOSAL PENALIZES CN BASED ON MATTERS UNRELATED TO CN’S CONTRIBUTION TO AMTRAK’S ON-TIME PERFORMANCE, AND IS CALCULATED TO ENSURE THAT CN IS COMPELLED TO SUBSIDIZE AMTRAK

As detailed above, failing to heed the Board’s direction, Amtrak has again proposed to depart radically from the traditional incentives and penalties model that has prevailed throughout at least most of the industry for close to half a century. That traditional model looks to whether the host has done its part in getting Amtrak trains to checkpoints (generally Amtrak stations) on time. It appropriately focuses on the goal – not to avoid “delays” in some abstract sense, but to deliver a train on time – and on the host’s contribution to that goal – which it isolates using relief items so that the host is not penalized for delays beyond its reasonable control. And, through the lookback provision, it appropriately ensures that the host is not compelled to subsidize Amtrak by hosting it and paying net penalties for more than a year.

In contrast, as detailed in this Section, Amtrak’s proposal is calculated to ensure that CN has no reasonable opportunity to earn net incentives. It uses an HRD metric that penalizes CN for delays that it cannot prevent and delays that do not make Amtrak passengers late; it sets an unreasonably low HRD threshold (925) for penalties, and an even lower HRD threshold (799) for normal historical levels of incentive compensation; and it uses a skewed, asymmetrical matrix geared to produce larger penalties than incentives. And in case CN somehow does earn incentives, Amtrak’s proposed changes to the lookback provision maximize the scope of services and the length of time over which they can be wiped out. Amtrak’s proposal as a whole is calculated to deny CN any financial “carrot.” Instead, as described in Section III below, a key element of Amtrak’s proposal is an unprecedented and unreasonable “stick.”

A. An Incentives and Penalties Scheme Based on HRD Is Inherently Flawed Because HRD Does Not Reflect On-Time Performance and Does Not Fairly and Accurately Reflect Host Performance

Basing incentives and penalties on HRD is not merely contrary to the Board's guidance; it is contrary to sound economic principles and railroading realities. As Dr. Peterson explains, a rational and economically efficient incentives and penalties scheme relates compensation as closely as possible to both the goal to be achieved – here, high COTP – and the performance of the subject whose contribution to the achievement of that goal is to be incentivized – here, the host, CN.⁷⁷ Because of its reliance on HRD, Amtrak's scheme fails on both counts.

1. HRD Does Not Reflect On-Time Performance

First, as the Board emphasized, the appropriate goal in the present context is to minimize lateness against the public schedule – what matters is “whether, and to what degree, a train is late.”⁷⁸ As the Board further emphasized, HRD does not measure that.⁷⁹ Under Amtrak's HRD-based scheme, CN would be penalized (either by accruing less in incentives or by accruing more in penalties) whenever an Amtrak train incurs a minute of what Amtrak deems HRD, regardless of whether that train arrives on-time or late to the next station. In other words, CN could be penalized for a train trip – or even a whole quarter – in which its hosting efforts result in Amtrak achieving the COTP goal – an outcome that makes no economic (or other) sense.⁸⁰

That mismatch between Amtrak's incentives and penalties proposal and its ostensible COTP goal would likely occur frequently, given how Amtrak's schedules are constructed and how Amtrak defines HRD. As Mr. Matteucci and Mr. Kuxmann explain, Amtrak's public

⁷⁷ See RVS (PID) Peterson ¶¶ 4, 11, 14.

⁷⁸ Interim Decision at 14.

⁷⁹ *Id.*

⁸⁰ See RVS (PID) Peterson ¶¶ 44, 48.

schedules, like other passenger schedules (such as airline schedules), reflect the reality that on complex transportation networks, a “perfect” run is rare. To provide passengers with accurate information about the trip and anticipated arrival times, Amtrak schedules nationwide include “Recovery Time,” and in some cases “Miscellaneous Time,” over and above the “Pure Run Time” (“PRT”) that is estimated to reflect a perfect, delay-free run.⁸¹ Whereas COTP (like other OTP measures) is measured against the public schedules, with 15 minutes tolerance added,⁸² Amtrak measures HRD against a baseline of PRT.⁸³ Thus, the 80% COTP standard on which both parties agree assumes that some delay (most of which Amtrak broadly categorizes as HRD) is normal and acceptable, and not a cause for concern or penalties. Indeed, there will be many cases in which HRD has no or negligible negative impact on passengers: if a train is running ahead of schedule (because it has not yet had delays that “use” its Recovery Time), Amtrak will necessarily delay it at the next station to await its scheduled departure time.

2. HRD Does Not Fairly and Accurately Reflect Host Performance

Second, Amtrak’s calling a delay “host-responsible” does not make it so. Amtrak witness Yoel Weiss emphasizes that on average, across Amtrak services nationwide, about two-

⁸¹ See RVS (PID) Matteucci/Kuxmann ¶¶ 38-39.

⁸² 49 C.F.R. § 273.5(a)(1).

⁸³ The FRA/Amtrak regulations define HRD as “delays recorded by Amtrak, in accordance with Amtrak procedures, as host-responsible delays, including freight train interference, slow orders, signals, routing, maintenance of way, commuter train interference, passenger train interference, catenary or wayside power system failure, and detours.” 49 C.F.R. § 273.3. Notably, the FRA referred to Amtrak’s recording and procedures rather than setting out the appropriate baseline or otherwise fully specifying in the regulation what HRD means. HRD remains Amtrak’s unilaterally defined and implemented metric, which the FRA said should be published as a metric, but which the FRA did not bless for any purpose beyond publication for information.

thirds of delay is HRD.⁸⁴ That may be so,⁸⁵ but that does not mean that most delays are reasonably preventable by hosts; it simply means that Amtrak, which unilaterally defined, and records delays as, HRD, defined HRD to encompass most delays.

As defined by Amtrak, CN HRD includes such delays on CN's lines as those occasioned:

- when a slow order is in place for *safety* purposes, even if it is required as a result of Amtrak's choice of equipment;
- when there is a delay due to necessary *maintenance* CN is performing for the benefit of all line users, including Amtrak;
- when two *Amtrak* trains meet ("PTI");
- when an Amtrak train meets a *commuter* train ("CTI");
- when an Amtrak train is delayed (e.g., for a *non-CN* freight train) at an interlocking controlled by a non-CN railroad (a "foreign interlocking") or activated automatically; and
- when a train meet does not work efficiently, as scheduled, because of a prior delay caused by *Amtrak or a non-CN freight host* earlier on the Amtrak train's trip.⁸⁶

As Mr. Matteucci and Mr. Kuxmann explain, many of these and other delays Amtrak defines and records as HRD are not reasonably preventable by CN.⁸⁷ Even where it is theoretically possible for CN to prevent them – for example, by delaying important maintenance, by banning commuter trains from its lines, by paying a fee to a foreign railroad to operate interlockings it controls to let Amtrak go through unimpeded, or by excluding freight trains from its freight railroad both when an Amtrak train is scheduled to pass through and when it might pass through after a delay elsewhere – it is not reasonable to expect CN to subsidize Amtrak in

⁸⁴ VS Weiss ¶ 81.

⁸⁵ Amtrak has provided no workpapers or other data to support Mr. Weiss's discussion of HRD and COTP.

⁸⁶ See generally RVS (PID) Matteucci/Kuxmann ¶¶ 15-30.

⁸⁷ See generally *id.*

those ways, or to penalize it for not doing so. It is arbitrary and self-serving, for example, for Amtrak to hold CN, and not itself, responsible for failing to pay the operator of a foreign interlocking to let Amtrak through with priority. A “reasonable” incentives and penalties scheme should incentivize CN to prevent delays that CN should prevent, not delays that should be tolerated because the costs or safety risks associated with efforts to prevent the delay would be disproportionate, or should better be borne by Amtrak.⁸⁸

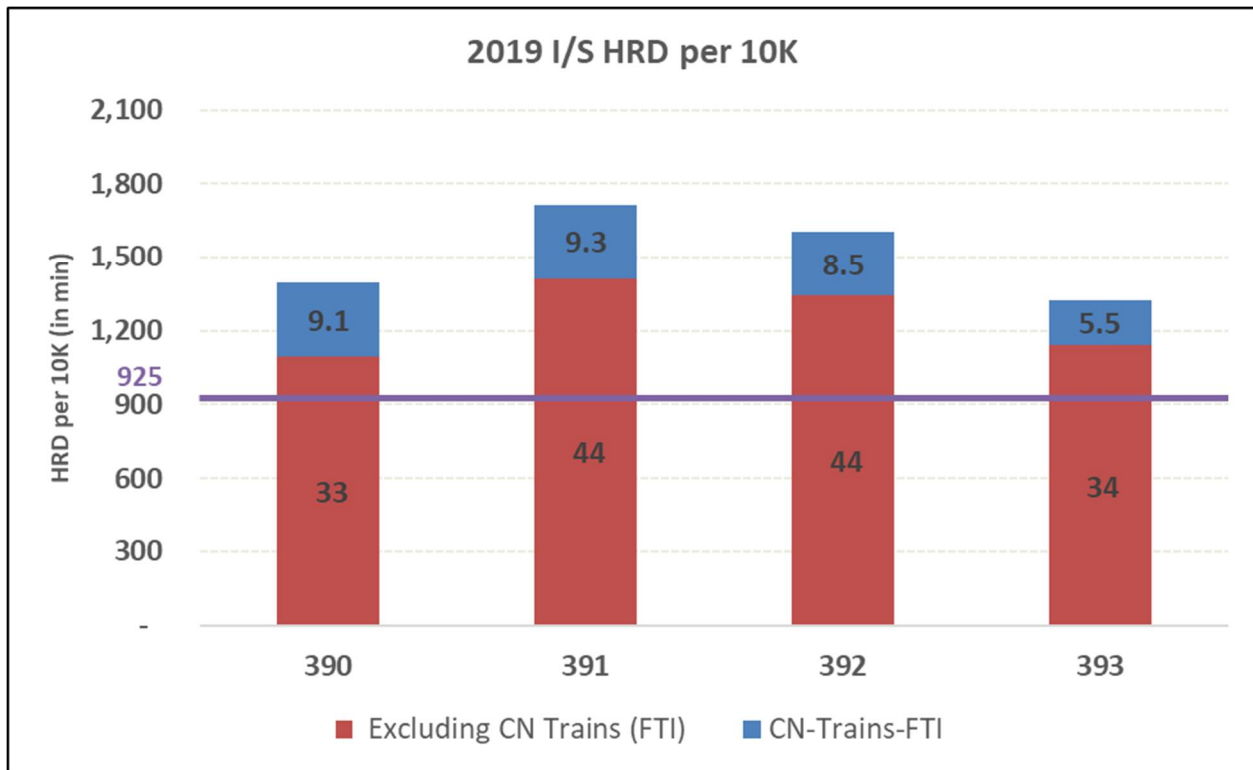
The instances in which HRD is over-broad in ascribing responsibilities to hosts are not insignificant. For several trains and services, they represent a major proportion of the delay as recorded by Amtrak. For example, for the Texas Eagle and Lincoln services, a large percentage of HRD recorded by Amtrak – and almost all the FTI it attributes to CN – is for cross-traffic delays at foreign-controlled interlockings over which CN has no control⁸⁹ – and those foreign-controlled delays alone regularly exceed Amtrak’s 924 HRD standard.⁹⁰ Likewise, for the Illini/Saluki service in 2019, HRD delays not involving CN freight trains (non-FTI delays plus foreign-controlled interlocking delays) consistently exceeded 924 minutes per 10,000 miles, while FTI delays involving CN freight trains were consistently less than 10 minutes per Amtrak train trip:⁹¹

⁸⁸ See RVS (PID) Peterson ¶ 17.

⁸⁹ See RVS (PID) Matteucci/Kuxmann ¶ 26.

⁹⁰ See *id.* ¶ 27.

⁹¹ See *id.* ¶ 31.



Amtrak itself has previously recognized that hosts should not be penalized for many delays it codes as HRD. For example, Amtrak agreed in the existing Operating Agreement that CN should not be held responsible for interlocking delays.⁹² Indeed, even in its alternative checkpoint-based proposal it recognized that exceptions should be made to its HRD coding.⁹³ In

⁹² 2011 Operating Agreement, App. V, § A.1.g; App. VI, § D.10.

⁹³ See, e.g., RVS Vilter/Maga, Ex. 28 (proposed App. V, § B(1), (3), (4), (6)).

SRVS Ladue at 10 (filed Oct. 30, 2017); see also VS Hirsh (filed Sept. 4, 2015), Ex. 1 (BNSF OA), App. V, § A.1; *id.*, Ex. 3 (CSXT OA), App. V, § A.1; *id.*, Ex. 4 (UP OA), App. V, § A.1; SRVS Ladue (filed Oct. 30, 2017), Ex. 1 (Buckingham Branch Railroad OA), Ex. 2, § A.1; *id.*, Ex. 2 (Conrail OA), App. V, § A.1; *id.*, Ex. 3 (Florida DOT OA), App. V, §§ A.2-3; *id.*, Ex. 4 (Springfield Terminal, *et al.*, OA), App. V, § A.1; *id.*, Ex. 5 (Metra OA), App. V, § F; *id.*, Ex. 6 (Metro-North OA (New Haven Line)), App. V, § A.1; *id.*, Ex. 7 (Metro-North OA (Hudson Line)), App. V, § A.1; *id.*, Ex. 11 (Southern California Regional Rail Authority, *et al.*, OA), App. 5, § 2; *id.*, Ex. 12 (Vermont Railway OA), App. V, § A.1.

doing so, Amtrak has recognized that particular trains running in particular territories are subject to particular delays that are not the host's fault, so a one-size-fits-all approach to host responsibility is unfair. But in proposing a contractual incentives and penalties scheme based on its own, uniform HRD metric, Amtrak is now abandoning that tailored, negotiated approach.

It is, no doubt, convenient for Amtrak to have a uniform national rule it has written rather than individually negotiated contracts, and financially beneficial to Amtrak to penalize hosts for delays they cannot reasonably prevent. However, Amtrak's HRD-based proposal is not fair to hosts, not reflective of railroading realities, not consistent with the Board's decision,⁹⁴ and fundamentally inconsistent with the "reasonable" commercial "agreement" that Congress called for in the RPSA.⁹⁵

B. Amtrak's One-Size-Fits-All HRD Standard Is Unsupported and Would Unreasonably Penalize CN for Delays It Cannot Reasonably Prevent.

Amtrak's proposed HRD standard is arbitrary and unreasonable, and its defense of it falls far short in two main respects.

 *Id.*, Ex. 8, App. V, § D.

Id., Ex. 8, App. V, § D.

⁹⁴ *See generally* Section I.A, above.

⁹⁵ 49 U.S.C. § 24308(a). Nor, as explained in Section I.B, above, do FRA's Metrics and Standards provide any basis for a contractual standard that focuses narrowly on HRD to the exclusion of other pertinent metrics such as Host Running Time.

1. Mr. Weiss's Vague Assertion of an "Association" between HRD and COTP Provides No Basis for Amtrak's 924 HRD Standard.

Amtrak supported its original HRD-based proposal in this case with a statistical theory, based on an assumed linear relationship, as to what level of CN HRD minutes per 10,000 miles on a given Amtrak service "correlates" with 80% on-time performance for that service. Based on that theory, Amtrak proposed to impose penalties when CN HRD on that service was above that level, and to provide incentives when it was below that level.⁹⁶ In response, CN pointed out that Amtrak's theory was profoundly flawed. Among other things, it:

- assumed a linear relationship that does not exist;
- ignored the interdependence of different types of delay;
- treated all delays as equally important to OTP, which is self-evidently wrong, and significantly distorts analysis, given that delays earlier in a trip affect timeliness at more stations than delays later in a route;
- treated schedules and non-HRD delays as a given, ignoring that adopting more realistic schedules and reducing other forms of delay might be a better and more cost-effective way to improve OTP;⁹⁷ and
- improperly inferred causation from a relatively weak showing of correlation.⁹⁸

These problems are inherent in any effort to construct an incentives and penalties scheme based on a purported match between a given level of HRD with a given level of OTP. HRD does not have a simple, linear effect on OTP, and even if it did, that would not justify imposing financial penalties on a host if the host is doing all that is necessary to help Amtrak trains reach

⁹⁶ See generally VS Sacks.

⁹⁷ The Board agreed, at least in part, with CN's argument that in seeking to improve OTP, the parties should address poorly designed schedules first. See Interim Decision at 11.

⁹⁸ See generally VS (PID) Dubin ; RVS (PID) Peterson ¶ 96.

their destination on time, or if poor OTP is being driven by delays or other (*e.g.*, unrealistic schedule) factors a host cannot reasonably control.

These fundamental problems cannot be evaded by applying the same flawed theory on a different scale. But that is precisely what Amtrak's new proposal does. It still proposes to set the threshold for penalties at approximately the level of HRD minutes per 10,000 miles that it says is "associat[ed]"⁹⁹ with 80% OTP (now, COTP). And it still appears to base that "association" on a simplistic assumption of a linear relationship between HRD and OTP. It therefore wrongly continues to treat all delays as the same, regardless of where and when they occur, and it fails to distinguish delays to late and on time trains.

Two things about Amtrak's new HRD penalty threshold are new, and neither of them is an improvement. First, having supported its prior proposal with a flawed statistical demonstration, Amtrak decided not to support its new proposal with any statistical demonstration at all. Whereas Amtrak's prior proposal was supported by a statistics expert, its new proposal is supported by an Amtrak employee, Mr. Weiss, whose three years of railroad experience appear to have focused on negotiating with host railroads and preparing FRA reports.¹⁰⁰ Whereas Amtrak previously asserted a "correlation" between HRD and OTP, Mr. Weiss asserts a mere "association."¹⁰¹ Whereas Amtrak previously proffered a linear regression analysis and detailed workpapers, Amtrak now proffers a single, indistinct graph unsupported by any workpapers.¹⁰²

Second, Amtrak has now (without acknowledgment or explanation) abandoned the effort to discern a "correlation" or "association" between HRD and COTP for specific routes or trains.

⁹⁹ See VS Weiss ¶ 85.

¹⁰⁰ See *id.* ¶¶ 8-11.

¹⁰¹ *Id.* ¶ 85.

¹⁰² *Id.* ¶ 83.

Instead, Mr. Weiss lumps together HRD and COTP data for what he says are “8,361 Amtrak trains”¹⁰³ nationwide. The vast majority of these trains are not hosted by CN and, thus, not implicated in the subject matter of this proceeding – the Operating Agreement between CN and Amtrak. Then, based on nationwide average data, Mr. Weiss purports to determine a level of HRD that is “associat[ed],” on a nationwide average basis, with 80% COTP: “approximately 900 minutes of HRD per 10,000 trains-miles.”¹⁰⁴

That may or may not be a roughly accurate mean or median for the dataset Mr. Weiss used. (Since Amtrak provided no workpapers, it is unclear whether it is.) If it is roughly accurate for that dataset, it is probably significantly too low – a higher level of HRD would, on average, be compatible with 80% COTP – going forward. As Mr. Weiss elsewhere recognizes, the period from which he drew his HRD/COTP “association” dataset – April 2019 through March 2022 – is anomalous insofar as the Covid pandemic led to unusually low levels of both freight and passenger traffic. Low traffic levels mean fewer train meets and therefore, typically fewer delays, so Mr. Weiss selected a period characterized by anomalously low HRD and anomalously high COTP.¹⁰⁵ Moreover, consistent with the FRA’s direction,¹⁰⁶ and the approach recommended by the Board,¹⁰⁷ many Amtrak schedules, including some for CN-hosted services, have recently been revised to better reflect the FRA’s COTP standard – *i.e.*, to increase COTP.¹⁰⁸ If Amtrak and its hosts have done what they set out to do with those schedule revisions (and

¹⁰³ *Id.* ¶ 82.

¹⁰⁴ *Id.* ¶ 85.

¹⁰⁵ *See generally* RVS (PID) Matteucci/Kuxmann at 54.

¹⁰⁶ FRA Metrics and Standards, 85 Fed. Reg. at 72,975, 72,978-79; *see also* 49 C.F.R. § 273.5(c) (creating a regulatory mechanism for such schedule revision).

¹⁰⁷ *See* Interim Decision at 11.

¹⁰⁸ *See* RVS (PID) Matteucci/Kuxmann at 55.

what Mr. Weiss claims such schedule revisions can do¹⁰⁹), the HRD levels “associat[ed]” with a given level of COTP should be substantially higher, going forward, than they were during the period from which Mr. Weiss takes his data.

That suggests that insofar as there is an HRD level that will be associated with 80% COTP in the future, it may be substantially above 900. But the more fundamental problem with Mr. Weiss’s analysis is that (as Amtrak recognized when it proffered its original service-specific HRD-based proposal¹¹⁰) there is no basis for taking a “mean” or “median” from 8,000+ observations concerning trains that do not run on CN’s lines and applying it to the specific trains that do run on CN’s lines.¹¹¹

That much is obvious from Mr. Weiss’s graph. To be sure, it tends to support the unremarkable conclusion that on average, higher levels of delay are “associat[ed]” with lower levels of COTP. But it also shows that the COTP/HRD relationship is immensely variable. The graph shows many instances of trains with HRD levels substantially above 1,000 – some over 3,000 – with COTP above 80%, and, conversely, many instances of trains with HRD levels substantially below 800 – some at zero – with COTP below 80%.¹¹² That variability is also borne out by historical data on the specific Amtrak services that CN hosts. For example, according to Amtrak’s June 2022 Host Railroad Report, over the preceding 12 months, the City of New Orleans incurred HRD of 890 minutes per 10,000 train-miles and COTP of 69.7%, while the Illini/Saluki had lower HRD – 848 minutes per 10,000 train-miles – but also lower COTP –

¹⁰⁹ See VS Weiss ¶¶ 46, 50 (claiming that for Amtrak train 391, Amtrak’s proposed reallocation of Recovery Time to better align with the COTP metric would change 40% COTP to 81% COTP without a change in HRD).

¹¹⁰ See generally VS Sacks.

¹¹¹ See RVS (PID) Peterson ¶ 44.

¹¹² See VS Weiss ¶ 83.

59.5%.¹¹³ Notably, for both services, HRD was below the level Mr. Weiss claims is “associated” with 80% COTP but COTP was below 80%, and the service with lower HRD had lower COTP – precisely contrary to what Mr. Weiss’s analysis would predict.

The main reason why the HRD/COTP relationship is so variable is obvious and well-known to Amtrak, although Amtrak never acknowledges it. COTP is measured against Amtrak’s public schedules, including Recovery Time; HRD is measured against PRT, excluding Recovery Time. Subject to other, complicating factors (for example, a train with more HRD earlier in its trip will tend to have lower COTP than a train with more HRD later in its trip;¹¹⁴ a train with more variable HRD may have lower COTP than a train with the same average level of HRD distributed more consistently among trips), the more Recovery Time is included in a schedule, the higher the level of HRD that will be compatible with high COTP. Amtrak’s schedules include varying levels of Recovery Time and, naturally, trains with more Recovery Time per 10,000 miles tend to achieve higher COTP at a given level of HRD (or delay generally).¹¹⁵

Amtrak has, in effect, taken two incompatible positions. On the one hand, in setting schedules in consultation with hosts, it has taken the position that Recovery Time should be customized to the realities of a particular train. While Amtrak’s implementation of that position is problematic in some cases,¹¹⁶ that basic approach, on which Amtrak and hosts have agreed for decades, makes sense. Different Amtrak trains traversing different routes face different obstacles that prevent them, to varying extents, from approximating PRT. An Amtrak train running on a

¹¹³ See Amtrak, *Host Railroad Report: Amtrak Performance on Host Railroads* 7, 11 (June 2022); RVS (PID) Matteucci/Kuxmann ¶ 53.

¹¹⁴ See VS Dubin at 16-18.

¹¹⁵ See RVS (PID) Matteucci/Kuxmann at 42.

¹¹⁶ See Section IV, below.

route with double-track or lots of sidings, no foreign interlockings, no other (*e.g.*, commuter) passenger traffic and minimal freight traffic will tend to have very little delay, including HRD. Little Recovery Time needs to be included in such a train's schedule, just as Google Maps or Waze would predict little trip time in excess of the optimal trip time traveling at the speed limit for a road trip along a deserted rural highway. In contrast, an Amtrak train – like those CN hosts – traveling on an almost entirely single-track railroad, crossing foreign interlockings, encountering other Amtrak and commuter trains, and inevitably meeting with many freight trains will inevitably experience delays. Such a train requires a substantial level of Recovery Time for its schedule to be realistic, just as the predicted trip time for a cross-town drive in Manhattan on a busy work day far exceeds the theoretical optimal time for such a trip.¹¹⁷

On the other hand, in advancing its new incentives and penalties proposal, Amtrak now proposes to treat every Amtrak train the same, as if the expected level of “delay” versus PRT on every train were the same. The result is about as reasonable as tipping a cab driver who drives a fare along an empty rural highway generously because he avoided “delay,” but refusing to pay a cab driver who drives a fare across Manhattan because she “failed” to avoid “delay.”

In its schedules, Amtrak has, in effect, agreed that a certain level of delay – most of which, as Mr. Weiss notes, is typically HRD,¹¹⁸ given Amtrak's broad definition of HRD – is acceptable, if not inevitable, given the specific challenges associated with the specific train at issue. And that level of delay properly varies by train. Applying a uniform 924/925 national HRD standard to such different, and differently-scheduled, trains to determine what is good or bad performance by a host, and what should be presumed to be consistent with 80% COTP,

¹¹⁷ See RVS (PID) Matteucci/Kuxmann ¶¶ 39-40.

¹¹⁸ VS Weiss ¶ 81.

makes no sense.¹¹⁹ What does make sense is using the individual train's actual schedule, including Recovery Time included to reflect reasonable and expected levels of HRD, as the baseline for evaluating host performance – as prior CN-Amtrak Operating Agreements have done and as CN's proposal does by means of the checkpoint-based contract-OTP metric.

2. *Amtrak's proposal fails to measure the quality of CN's service*

A related, and fundamental, problem with Amtrak's proposal is that its analysis addresses the wrong question. To be sure, the goal of 80% COTP is an important consideration in determining what host performance should accrue incentives and what host performance should accrue penalties. But it is not the only consideration. A rational incentives and penalties scheme also considers what hosts reasonably can and should do to advance that goal, bearing in mind that, as the Board emphasized, hosts have "obligations, not only to Amtrak, but also to [their] freight customers,"¹²⁰ and that reducing HRD is just one of multiple ways – including revising schedules, reducing Amtrak-Responsible Delay, and reducing Third-Party Delay – to improve COTP.¹²¹ In setting (in conjunction with the FRA regulation), a goal for Amtrak of 80% COTP,

¹¹⁹ The argument here does not support an incentives and penalties scheme based on tailored HRD levels, such as Amtrak's initial scheme. The point is merely that if one accepts for the sake of argument Amtrak's premise that HRD is a good proxy for COTP, a tailored scheme would be far more rational than Amtrak's new proposed one-size-fits-all national regulation in the guise of an "agreement" provision. In fact, however, as explained above and in CN's original Reply Submission (particularly by Professor Dubin), Amtrak's premise is wrong.

¹²⁰ Interim Decision at 16.

¹²¹ *See generally* Interim Decision at 11 (encouraging schedule revision to improve COTP). Amtrak seeks to brush away the issue of schedule revision by assuring the Board that the parties have reached agreement on "most" of the schedules at issue. Amtrak Opening Br. at 3. That is true, but the six outstanding schedules on which the parties have not agreed are those for the six trains that represent most of the train-miles, passenger-miles and compensation at issue: the City of New Orleans and Illini/Saluki trains. *See id.* at 24 n.17; *see generally* Section IV, below.

Congress did not instruct that hosts be subjected to financial (or other) compulsion to do whatever it takes to ensure that Amtrak achieves that goal. Rather, with respect to hosts, Congress instructed that they be required to give Amtrak preference subject to exceptions for emergencies and instances in which providing preference “materially will lessen the quality of freight transportation provided to shippers,”¹²² and that they enter into “agreement[s]” on commercially “reasonable” terms that would incentivize them to provide quality service.¹²³ Focusing solely on the 80% COTP goal, and not on the “reasonable” role Congress assigned to hosts working alongside Amtrak to achieve that goal, is an economic and legal¹²⁴ error.

Amtrak certainly cannot prevail on the argument (which seems to be its position) that “high” HRD indicates a failure to provide preference, so HRD above a certain level should be deemed poor service and penalized. Amtrak makes a conclusory *claim* that host railroads generally fail to honor Amtrak’s statutory right to preference, implying that if they did not do so, HRD would generally be lower.¹²⁵ But Amtrak offers no *evidence* that CN fails to honor Amtrak’s right to preference; neither this Board nor any other adjudicator has ever found that CN fails to honor Amtrak’s right to preference; Amtrak has not invoked either mechanism prescribed

¹²² 49 U.S.C. § 24308(c).

¹²³ 49 U.S.C. § 24308(a).

¹²⁴ See, e.g., *Dir., Off. of Workers’ Comp. Programs, Dep’t of Lab. v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 136 (1995) (“Every statute proposes, not only to achieve certain ends, but also to achieve them by particular means.”).

¹²⁵ Amtrak Opening Br. (PID) at 27-28; see also VS Blair ¶ 20.

by Congress for determining, with due process, whether a host has failed to honor preference;¹²⁶ and CN strongly denies that it has failed to provide preference to Amtrak.¹²⁷

Amtrak's argument also fails because any connection between HRD levels and potential failures to provide preference is, at best, highly attenuated. As Mr. Blair implicitly concedes, preference concerns only how dispatchers handle meets between Amtrak trains and freight trains.¹²⁸ That means that at most, preference issues might be raised by a subset of FTI delays – and by no means by all of them, since Amtrak codes as FTI delays such as delays at foreign and automatically controlled interlockings, which have nothing at all to do with how CN dispatchers handle Amtrak/CN freight train meets.¹²⁹ But the portion of FTI that represents conflicts between CN's and Amtrak's trains is typically a small subset of all delays, and often a small subset even of HRD.¹³⁰

Mr. Weiss's suggestion that most delays are HRD and therefore incentivizing CN to reduce HRD¹³¹ should be the primary means of improving COTP must be viewed in that light. Amtrak would like the Board to believe that HRD is the main problem causing low COTP and HRD is mainly the result of (unproven) failures to provide preference, which host railroads should be penalized for failing to cure. Not so. Even apart from schedule issues, most delay incurred by the Amtrak trains CN hosts is not even (as broadly coded by Amtrak) FTI – much

¹²⁶ See 49 U.S.C. §§ 24103(a)(1)(C) (authorizing the Attorney General to sue to enforce, *inter alia*, preference), 24308(f) (providing for this Board to investigate allegations of preference violation, along with other delay and schedule issues, in the context of specific trains that fail to achieve 80% COTP).

¹²⁷ See RVS (PID) Taylor ¶¶ 8, 17-25.

¹²⁸ See VS Blair ¶ 20.

¹²⁹ See RVS (PID) Matteucci/Kuxmann 24.

¹³⁰ See *id.* at 33.

¹³¹ See VS Weiss ¶ 81.

less, in any way related to an (unproven) failure to provide preference. So an incentives and penalty scheme designed to put the entire burden of achieving 80% COTP on CN is not justified.

That is evident even without review of the facts relating to CN's dispatching in the subset of FTI instances that involve CN's freight trains. And, since the applicable rule is not "guilty until proven innocent," CN should not be required to disprove vague assertions of failure to provide preference that (although they are essential to any attempt to justify its entire approach) Amtrak has entirely failed to support. But in fact (while CN reserves the right to defend itself further if and when Amtrak proffers any purported evidence of failures to provide preference), the evidence shows a clear pattern and practice of CN diligently providing preference to Amtrak.¹³²

In addition to making unreasonable and unsupported demands on host railroads, Amtrak's myopic and self-serving focus on HRD makes it neglect other measures that should be taken to better serve its passengers and that could lead to the achievement of 80% COTP without demanding drastic measures of host railroads that would entail huge incremental costs and lead to material impairment of freight service.¹³³

¹³² See generally RVS (PID) Taylor ¶¶ 17-19.

¹³³ Amtrak delays to southbound Illini/Saluki trains provide an instructive example. Trains 391 and 393 regularly experience some of the lowest levels of COTP of any of the trains hosted by CN – consistently lower than other trains on the IC spine dispatched by the same CN dispatchers. One reason why is obvious, and it has nothing to do with preference, and little if anything to do with HRD. These trains regularly experience significant delays before they reach CN, on the 2.5 miles hosted by Amtrak and Chicago Terminal coming out of Amtrak's Chicago Union Station. Converted to Amtrak's preferred metric of HRD per 10,000 miles, those delays are astronomical – averaging approximately 16,000 in 2019. Further, because they occur at the start of the trip for Trains 391 and 393, they have a disproportionate effect on COTP (both because they can make the train late at subsequent stations, and because they ensure that the train does not arrive at scheduled meets on time, which makes it more difficult for Amtrak to prevent FTI and PTI delays down the line). See RVS (PID) Matteucci/Kuxmann ¶¶ 58, 65.

3. *Amtrak's Chosen Standard – 924/925 HRD – Is Unreasonable, and Would Result in Most Host Railroads Paying Amtrak Penalties on Most Amtrak Trains.*

The analytical flaws identified above lead Mr. Weiss to a conclusion – that 924/925 HRD is an appropriate standard – that is both indefensible in principle and remarkably financially favorable to his employer in practice. Amtrak pointedly fails to address the most obvious conclusion from Mr. Weiss's graph: if Amtrak's 925 HRD threshold for penalties were applied nationwide (as Amtrak presumably intends, since it derived it from nationwide rather than CN-specific data), ***most hosts would be accruing liability to Amtrak for penalties on most services most of the time***, since 925 is a relatively low HRD level according to the historical, real-world data.

While that is evident even from Mr. Weiss's graph, this problem is even worse than Mr. Weiss's graph suggests. Mr. Weiss's graph shows data from April 2019 through March 2022 – a period during most of which both freight and especially passenger rail traffic levels were abnormally due to the Covid pandemic. Amtrak is well aware how abnormal this period was: beginning in March 2020, Amtrak suspended ten, and reduced the frequency of four, of its 26 trains running on CN for more than a year; some of those services remain suspended or reduced.¹³⁴ Again, reduced traffic inevitably entails fewer train meets, which, in turn, entails lower HRD (which Amtrak defines to include delays related to meets with both freight trains (FTI) and other Amtrak trains (PTI)). Amtrak's train cancellations meant that the trains it continued to run were delayed less by meetings with other Amtrak trains, which reduced the remaining trains' level of PTI. For example, as Mr. Matteucci and Mr. Kuxmann show, the level

¹³⁴ See RVS (PID) Matteucci/Kuxmann ¶ 54.

of PTI incurred by Train No. 390, one of the remaining Illini/Saluki trains, declined precipitously when Amtrak cut other trains on the IC spine.¹³⁵

Thus, Mr. Weiss's graph displays data from a period of abnormally low HRD.

More representative data can be gathered from the two years immediately preceding the Covid pandemic – calendar years 2018 and 2019 – and the current calendar year, during which normal traffic levels have largely been restored. Taking those periods, and deferring for the sake of analysis to Amtrak's preference to organize data by quarter, Dr. Peterson shows that the vast majority of Amtrak services hosted by freight railroads nationwide exceeded 924 HRD most of the time:¹³⁶

¹³⁵ *See id.* ¶ 17.

¹³⁶ *See* RVS (PID) Peterson ¶ 80.

Class I Railroads Subject to Amtrak Supervision and Control Based on Performance 2018-2019

Minutes of HRO per 10,000 Train Miles										Tier 1 Intervention Trigger	Tier 2 Intervention Trigger	Tier 3 Intervention Trigger
Host Grouped	Route	2018Q1	2018Q2	2018Q3	2018Q4	2019Q1	2019Q2	2019Q3	2019Q4			
BNSF	California Zephyr	801	1,170	1,317	1,149	1,850	1,820	1,620	1,156	Yes	Yes	Yes
BNSF	Cascades	1,406	1,333	1,329	1,348	1,472	1,109	1,010	914	Yes	Yes	Yes
BNSF	Coast Starlight	798	902	738	653	698	558	498	474	No	No	No
BNSF	Empire Builder	894	1,131	1,326	788	1,103	952	862	658	Yes	Yes	No
BNSF	Heartland Flyer	1,718	2,334	2,414	2,057	1,288	2,250	2,023	1,614	Yes	Yes	Yes
BNSF	Illinois	515	695	560	667	559	753	833	710	No	No	No
BNSF	Pacific Surfliner	1,011	1,039	1,531	1,329	1,261	1,260	968	1,526	Yes	Yes	Yes
BNSF	San Joaquins	1,156	856	1,020	1,051	930	1,067	1,192	1,145	Yes	Yes	Yes
BNSF	Southwest Chief	543	750	814	752	683	805	842	784	No	No	No
BNSF	Sunset Ltd	1,647	1,263	1,192	2,301	2,806	3,003	2,116	1,981	Yes	Yes	Yes
BNSF	Texas Eagle	1,445	1,105	2,559	2,366	1,822	2,634	1,441	1,724	Yes	Yes	Yes
CN	Adirondack	3,650	2,586	3,263	3,276	3,488	4,040	4,402	4,194	Yes	Yes	Yes
CN	Blue Water	1,083	943	685	700	1,180	993	1,089	800	Yes	Yes	No
CN	City of New Orleans	1,691	1,314	1,044	1,080	1,162	1,212	958	730	Yes	Yes	Yes
CN	Illini/Saluki	2,094	1,846	1,668	1,581	1,547	1,809	1,514	1,309	Yes	Yes	Yes
CN	Lincoln Service	1,850	1,494	1,405	1,886	3,018	3,117	2,221	2,029	Yes	Yes	Yes
CN	Sunset Ltd	15,670	14,394	15,326	30,245	16,832	23,342	15,455	20,364	Yes	Yes	Yes
CN	Texas Eagle	2,784	3,049	1,907	2,949	4,612	5,460	3,957	2,902	Yes	Yes	Yes
CN	Wolverine	1,381	1,998	1,989	2,025	2,712	2,633	2,702	2,800	Yes	Yes	Yes
CP	Adirondack	613	832	817	718	652	871	889	652	No	No	No
CP	Empire	641	696	694	638	536	919	605	642	No	No	No
CP	Empire Builder	547	664	1,062	428	830	594	520	475	Yes	No	No
CP	Hiawatha	224	255	312	300	254	318	361	265	No	No	No
CSX	Auto Train	1,335	1,440	1,185	1,139	1,268	1,264	1,255	1,160	Yes	Yes	Yes
CSX	Capitol Ltd	1,010	1,618	1,169	1,023	810	955	987	728	Yes	Yes	Yes
CSX	Cardinal	1,252	1,010	885	915	818	731	792	733	Yes	Yes	No
CSX	Carolinnian	1,860	1,897	1,760	1,396	1,324	1,406	1,312	1,222	Yes	Yes	Yes
CSX	Crescent	2,326	2,553	4,329	1,916	2,750	3,074	4,513	2,387	Yes	Yes	Yes
CSX	Empire	1,470	1,328	1,100	901	1,047	1,066	1,177	1,138	Yes	Yes	Yes
CSX	Hoodier	1,620	525	615	862	496	430			Yes	No	No
CSX	Lake Shore Ltd	1,285	967	1,048	859	673	876	909	750	Yes	Yes	No
CSX	Michigan	552	432	415	464	350	473	500	439	No	No	No
CSX	Northeast Regional	1,789	2,118	1,966	1,340	1,297	1,183	1,132	888	Yes	Yes	Yes
CSX	Palmetto	1,167	1,251	1,175	899	899	947	945	811	Yes	Yes	No
CSX	Silver Meteor	983	1,073	834	668	717	828	810	679	Yes	Yes	No
CSX	Silver Star	1,450	1,238	1,081	994	1,040	885	1,008	826	Yes	Yes	Yes
CSX	Sunset Ltd									No	No	No
NS	Blue Water	2,409	2,787	3,899	3,637	4,946	3,502	4,190	3,046	Yes	Yes	Yes
NS	Capitol Ltd	2,302	2,494	2,783	3,138	2,226	2,220	2,155	2,147	Yes	Yes	Yes
NS	Cardinal	1,213	1,632	1,248	2,007	1,802	1,857	1,633	1,364	Yes	Yes	Yes
NS	Carolinnian	662	1,002	1,056	1,398	839	872	679	613	Yes	Yes	No
NS	Crescent	1,901	2,297	1,936	1,739	1,540	1,362	1,301	1,367	Yes	Yes	Yes
NS	Hoodier	3,582	2,689	5,515	4,212	11,107	5,917			Yes	Yes	Yes
NS	Lake Shore Ltd	2,616	2,957	3,116	3,445	2,017	2,228	2,200	2,205	Yes	Yes	Yes
NS	Michigan	1,834	2,377	2,977	2,763	3,374	3,235	3,236	3,032	Yes	Yes	Yes
NS	Northeast Regional	489	667	657	876	647	769	875	765	No	No	No
NS	Pennsylvanian	975	1,530	1,562	1,426	1,204	1,793	1,386	1,046	Yes	Yes	Yes
NS	Piedmont	902	1,536	1,220	1,218	675	814	586	478	Yes	Yes	No
NS	Silver Star	920	762	766	1,520	852	1,151	516	369	Yes	No	No
NS	Sunset Ltd									No	No	No
NS	Wolverine	2,476	2,718	3,767	3,894	4,614	3,737	4,438	3,325	Yes	Yes	Yes
UP	California Zephyr	728	793	726	626	772	753	883	655	No	No	No
UP	Capitol Corridor	621	741	385	550	563	594	532	575	No	No	No
UP	Cardinal	5,979	7,277	8,462	6,064	6,462	5,174	4,100	5,429	Yes	Yes	Yes
UP	Cascades	1,143	1,146	1,266	1,223	1,817	1,782	1,225	1,377	Yes	Yes	Yes
UP	Coast Starlight	1,245	1,170	1,380	1,150	1,480	1,360	1,236	1,262	Yes	Yes	Yes
UP	Heartland Flyer									No	No	No
UP	Hoodier	7,658	3,455	4,929	4,805	8,844	8,099			Yes	Yes	Yes
UP	Lincoln Service	1,028	1,662	947	1,003	1,019	885	793	702	Yes	Yes	Yes
UP	Missouri	633	710	957	709	1,198	994	1,965	1,012	Yes	Yes	Yes
UP	Pacific Surfliner	1,376	1,144	1,254	1,681	1,473	1,496	1,443	1,559	Yes	Yes	Yes
UP	San Joaquins	1,092	1,615	941	1,076	1,092	1,086	1,039	1,096	Yes	Yes	Yes
UP	Sunset Ltd	1,561	1,548	2,071	1,803	1,987	1,818	1,926	1,635	Yes	Yes	Yes
UP	Texas Eagle	1,541	1,789	2,181	1,833	1,738	1,846	1,878	1,605	Yes	Yes	Yes
Total Class I Host Routes										64	64	64
Host Routes Affected by Amtrak's Proposal										51	48	40
% of Total Class I Routes										80%	75%	63%

It is, thus, obvious from Amtrak's own data that if its incentives and penalties scheme were applied nationwide, absent profound changes in how the industry as a whole operates, Amtrak would be collecting penalties from most of the hosts who serve it most of the time. Further, as elaborated in Section III below, under Amtrak's "reopener" proposal, most of its operating agreements would be "reopened" routinely, and Amtrak would be authorized to take over dispatching on vast swaths of the national freight network.

That stunning and sweeping regulatory change should not be imposed by the Board without a compelling record.¹³⁷ Yet Amtrak offers no evidence to support it. Again, for the industry as a whole, as for CN, it offers only vague, conclusory and entirely unproven assertions about failures to provide preference.¹³⁸ The Board should, therefore, reject Amtrak's proposal as both radically self-serving and entirely unsupported.

4. *Amtrak's Asymmetrical Incentives/Penalties Table Is Unsupported and Exacerbates Its Scheme's Unreasonable Tendency to Produce Net Penalties*

Once an incentives and penalties scheme has a neutral point (80% contract-OTP in CN's system, 924/925 HRD in Amtrak's system), there remains the issue of how to calibrate incentives and penalties for performance as it deviates from that neutral point. CN's proposal, like every traditional operating agreement, does so symmetrically, and (apart from eliminating the old neutral zone, in accordance with the Board's guidance¹³⁹), it largely follows the calibration the parties have agreed to in the past.

¹³⁷ To the extent Amtrak denies that its proposal is intended to have broad nationwide regulatory effect, it should be required to explain why its proposal should be applied to CN and not other railroads, thus placing CN at a major competitive disadvantage relative to the rest of the freight rail industry. Amtrak offers no such explanation.

¹³⁸ See Amtrak Opening Br. (PID) at 27-28; VS Blair ¶ 20.

¹³⁹ See Interim Decision at 14.

Not so Amtrak's system. Having chosen an arbitrary and self-serving HRD level as its starting point, Amtrak makes its proposal even more skewed towards net penalties by (without explanation) setting forth an asymmetrical matrix for determining how much CN will be incentivized or penalized.¹⁴⁰ For example, according to Amtrak's matrix, an HRD level 60 points above the 924/925 HRD neutral point (at 984/985 HRD) earns CN a 60% penalty; performance 60 points below it (at 864/865 HRD) earns CN only a 40% incentive. Performance 250 points above the neutral point (at 1174/1175 HRD) earns CN a 120% penalty; performance 250 points below the neutral point (at 674/675 HRD) earns CN only a 110% incentive. And deviations further from the neutral point yield even more asymmetrical results: even zero HRD (performance over 900 below the neutral point) yields only a 125% incentive, whereas performance 900 above the neutral point (at 1824/1825 HRD) yields a 190% penalty, and whereas the maximum incentive is 125%, the maximum penalty is 250%.

These deviations from symmetry are unsupported and potentially highly significant. As Mr. Weiss's graph makes clear, HRD levels vary widely, and results towards either extreme are not anomalous.¹⁴¹ That is particularly true when a train traverses only a short segment of a host's lines, since, viewed through the lens of HRD per 10,000 miles, the short mileage has what amounts to a magnifying effect on small amounts of delay.¹⁴²

Nor is the obvious asymmetry the only – or even the main – problem with Amtrak's proposed calibration of incentives and penalties. Mr. Blair asserts that Amtrak's proposal is designed to “ensure[] that CN earns a similar amount of inflation-adjusted incentives under the

¹⁴⁰ VS Blair ¶ 52; Amtrak OA Redline, Appendix V, Table 2.

¹⁴¹ See VS Weiss ¶ 83.

¹⁴² See VS (PID) Matteucci/Kuxmann at 49.

new OA as it earned in 2019, if the subject route performs near 80% COTP.”¹⁴³ If that was the intent, Amtrak failed. The problem with Mr. Blair’s assertion of conditional revenue-neutrality is evident on the face of the proposal he sponsors. All things being equal with respect to COTP (*i.e.*, if COTP is at 80%) and the Ridership Factor, Amtrak’s scheme generates a dollar figure at or about the level of incentives CN earned in 2019.¹⁴⁴ But it then multiplies that dollar figure by the positive or negative percentage value set forth in its “Delay Adjustment Factors” matrix.¹⁴⁵ So if Mr. Weiss is right and 80% COTP corresponds to 900 HRD, CN’s expected compensation when “the subject route performs near 80% COTP” is not what it received in 2019, but just 10% (the Delay Adjustment Factor applicable at 900 HRD) of what it received in 2019. To achieve something approximating revenue-neutrality relative to 2019, CN must not merely meet but substantially exceed Amtrak’s goals, by achieving HRD in the 750-99 range (the HRD level at which a 100% Delay Adjustment Factor applies), far below the level that Amtrak deems typically “associate[ed]” with 80% COTP, and far below levels that have historically been reached on most Amtrak services nationwide.¹⁴⁶

C. Amtrak’s COTP and Passenger-Miles Add-ons Weaken the Relationship of its Proposal to CN’s Performance and Produce Irrational Results.

As Dr. Peterson explains, the non-HRD variables in Amtrak’s proposed formula for determining incentives and penalties – COTP and Ridership Factor – serve no economically meaningful function in that context, and tend to weaken CN’s incentives by introducing

¹⁴³ VS Blair ¶ 39.

¹⁴⁴ *See id.* ¶ 40.

¹⁴⁵ *See id.* ¶¶ 48-53.

¹⁴⁶ *See* RVS (PID) Peterson ¶¶ 34, 60, 64.

somewhat random elements into calculating its compensation.¹⁴⁷ Their true function appears to be to window-dress Amtrak's proposal so it can make superficial points about how its proposal relates to the FRA Metrics and Standards and disguise its overwhelming reliance on HRD.¹⁴⁸

1. *COTP*

Amtrak's COTP-based add-on only serves to weaken the connection between Amtrak's proposal and the quality of CN's service. COTP is not specific to an individual host's performance. It is not even specific to an individual host's portion of an Amtrak route, since it encompasses the entirety of Amtrak's route, across all hosts. It is a good measure of OTP for the full route of an Amtrak train, as intended by FRA, but that is all.

An individual host can generally do nothing to improve COTP other than by reducing HRD on its own lines – CN cannot, for example, reduce Amtrak-Responsible Delay or HRD for a train with multiple hosts that occurs prior to the arrival of a train to its lines, or after a train has departed its lines. So adding a COTP factor on top of an HRD factor is, as Dr. Peterson explains, at best useless duplication and in reality much worse. Incentives should be based on factors that directly measure the subject's performance, not factors that are indirectly "associat[ed]" with that performance along with many other exogenous influences.¹⁴⁹

Amtrak's addition of a COTP factor presents a major problem for Amtrak's services on CN, because CN is a minority host for 20 out of 26 of those trains.¹⁵⁰ Indeed, for 16 trains (the

¹⁴⁷ RVS (PID) Peterson ¶¶ 7, 31-32, 51-57.

¹⁴⁸ See Section I.A, above. Insofar as COTP is below 80%, its inclusion will have the further effect – again potentially financially beneficial to Amtrak – of reducing the incentives CN can accrue.

¹⁴⁹ See CN Opening Submission (PID) at 3; RVS (PID) Peterson ¶¶ 4, 7, 54-55.

¹⁵⁰ See RVS (PID) Matteucci/Kuxmann ¶ 66. The problem is, however, by no means unique to multi-host services. Even on the Illini/Saluki and City of New Orleans services, non-HRD delays are likely to be a major cause of deviations from any typical COTP/HRD

Texas Eagle, Wolverine and Lincoln trains), CN hosts less than one-eighth (12.5%) of total route miles. COTP for those trains is barely affected by delays on CN's lines, and even less so by delays that CN can reasonably control.¹⁵¹ That means that reducing CN's compensation based on low COTP amounts to reducing CN's compensation based on events CN had nothing to do with and that did not even occur on its lines.

That makes no economic or common sense. Amtrak emphasizes that the COTP factor in its proposal does not preclude CN from sometimes earning incentives if events off CN's lines that CN has nothing to with cause Amtrak to fail to achieve 80% COTP.¹⁵² But Amtrak provides no rationale for making CN's compensation depend in any way on such events.¹⁵³ Its vague references to the Metrics and Standards notwithstanding, COTP is a metric that properly applies to an Amtrak train, not a host segment.

Amtrak's COTP factor plays an irrational role in its incentives and penalties proposal for an additional reason, which it shares with Amtrak's Ridership Factor, discussed below. Both of them are used in Amtrak's scheme as (always positive) multipliers for Amtrak's (sometimes positive, sometimes negative) HRD-based Delay Adjustment Factor.¹⁵⁴ That means that if CN has HRD above 924 and, as such, accrues penalties, it will accrue more penalties – be worse off – the more Amtrak's ostensible goal – high COTP – is being achieved. That would create, if

“association” patterns. For example, those trains regularly incur an disproportionately high level of delays on Amtrak's own line adjacent to Chicago Union Station, which particularly affects COTP for southbound trains since it is at the start of their trip. *See* RVS (PID) Matteucci/Kuxmann ¶ 58. In that case, reducing CN's compensation because the train has low COTP will amount to rewarding Amtrak financially for its own poor performance.

¹⁵¹ *See* RVS (PID) Matteucci/Kuxmann ¶ 64.

¹⁵² Amtrak Opening Br. (PID) at 35.

¹⁵³ *See* RVS (PID) Peterson ¶ 55.

¹⁵⁴ *See* Amtrak OA Redline, Appendix V, § 1.1; VS Blair ¶ 45.

anything, a perverse incentive for CN, and it lacks any economic or common sense justification.¹⁵⁵

2. *Passenger-Miles*

The third element of Amtrak's proposal, the Ridership Factor, fails Dr. Peterson's common-sense test even more clearly: it has very little to do with either measuring CN's performance or focusing on the COTP goal.¹⁵⁶ Its main effect is to further weaken Amtrak's proposal by causing CN's incentive compensation to vary based on exogenous causes that have nothing to do with CN's performance or, indeed, OTP.

OTP is just one of many factors that affect Amtrak's ridership, and it is particularly unlikely to be the most important factor for the passengers to whom Amtrak's Ridership Factor assigns the most weight, long-distance passengers. Time will not typically be a critical consideration for someone who elects to travel the scheduled 19 hours and 42 minutes from Chicago to New Orleans on Amtrak instead of flying.¹⁵⁷ Amtrak's ridership fluctuates with factors such as Amtrak ticket prices, service and on-board accommodation (which Amtrak, not CN, controls),¹⁵⁸ air fares, gasoline prices and, recently, the Covid pandemic. For example, as

¹⁵⁵ See RVS (PID) Peterson ¶ 57.

¹⁵⁶ To CN's knowledge, [REDACTED] see VS Hirsh, Exs. 1, 3-4, 6-7, 9 (filed Sept. 4, 2015); SRVS Ladue, Exs. 1-12), and Amtrak's conclusory explanation of why it included it in its proposal in this case makes no sense. As discussed in Section I.B above, Amtrak's claim that including its Ridership Factor "is consistent with the FRA's endorsement of metrics that account for the experience of each and every passenger, and its rejection of metrics that do not," Amtrak Opening Br. (PID) at 43 & n.31; VS Blair ¶ 58 & n.15, is simply wrong.

¹⁵⁷ See RVS (PID) Matteucci/Kuxmann ¶ 66.

¹⁵⁸ Since Amtrak has far more influence over its ridership than CN does, a provision that affects how much Amtrak pays CN based on ridership should be expected to affect Amtrak's incentives more significantly than CN's. CN does not suggest that Amtrak's Ridership Factor would cause Amtrak to downgrade its service in order to serve fewer passengers so that it has to

Mr. Matteucci and Mr. Kuxmann show, there was no discernible relationship between COTP and ridership on the City of New Orleans service over the past 18 months.¹⁵⁹ Making CN's incentive payments vary based on pandemics or Amtrak's ticketing decisions or gas prices makes no sense.

Amtrak suggests that the Ridership Factor will incentivize CN "to assist Amtrak in efforts to increase ridership."¹⁶⁰ But any relationship between the number of passenger miles Amtrak passengers travel and CN's efforts is even more attenuated than the relationship between passenger miles and OTP. Moreover, Amtrak pegs its Ridership Factor to ridership "during the preceding two years." The notion that CN would be efficiently incentivized by a provision that causes its opportunity to secure incentives many months in the future to be affected by current ridership, over which it has minimal influence, beggars belief. In any event, if Amtrak's point is that pegging CN's compensation to Amtrak's ridership might marginally incentivize CN to work to help Amtrak achieve higher OTP, which in turn might marginally tend to led to higher ridership, Occam's Razor should be applied: incentivizing CN to help Amtrak achieve higher OTP, as CN's proposal does, does the job more simply and efficiently.¹⁶¹

Finally, Amtrak's Ridership Factor has the same potential to create perverse incentives (insofar as it creates any discernible incentive) as its COTP factor. Like COTP, ridership factors into Amtrak's proposal solely as a multiplier – amplifying whatever incentive or penalty signal

pay CN less. But at the margins, adoption of Amtrak's Ridership Factor could perversely incentivize Amtrak to raise fares, knowing that revenue loss due to passengers being deterred by higher fares would be offset not only by revenue gains from higher fares but also from incentive payment liability reductions due to a lower Ridership Factor.

¹⁵⁹ See RVS (PID) Matteucci/Kuxmann ¶ 66.

¹⁶⁰ See, e.g., VS Blair ¶ 59.

¹⁶¹ See RVS (PID) Peterson ¶ 55.

the HRD number produces.¹⁶² So, again, insofar as CN's HRD exceeds 924, any efforts CN successfully makes to help Amtrak's achieve its goal of higher ridership¹⁶³ will lead to CN being penalized more.

D. Amtrak's Scheme Is Calculated to Generate Facially Unreasonable Results, Including Huge Penalties, for CN and Other Host Railroads.

A regulatory outcome should sometimes be judged based on its expected results, rather than on abstract theory,¹⁶⁴ and the explicit goal of the regulatory scheme in operation in this proceeding is to produce a commercially "reasonable" hosting agreement.¹⁶⁵ So, notwithstanding all the theoretical flaws in Amtrak's proposal described above, the results it would yield should also be considered.

To that end, Mr. Matteucci and Mr. Kuxmann have calculated the incentives or penalties CN would accrue under Amtrak's scheme if the CN HRD and COTP for each of the Amtrak services CN hosts were the same as in 2019, and they have compared those results to what CN actually earned, under the Operating Agreement terms CN and Amtrak agreed to in 2011, during that year. The result is not surprising given all the defects in Amtrak's proposal described above, but it is nonetheless remarkable:¹⁶⁶

¹⁶² See Amtrak OA Redline, Appendix V, § 1.1; VS Blair ¶ 45.

¹⁶³ See VS Blair ¶ 59 (embracing higher ridership as a goal).

¹⁶⁴ See, e.g., *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 602 (1944) ("Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling.").

¹⁶⁵ 49 U.S.C. § 24308(a)(ii)(A)(2).

¹⁶⁶ RVS (PID) Matteucci/Kuxmann ¶ 66.

**2019 Incentive/Penalty under Amtrak’s Proposal vs. Amounts Paid by Amtrak and
Additionally Claimed by CN**

Year	Amtrak Routes	Incentive/Penalty Under Amtrak’s Proposal	Amtrak Paid
2019	Blue Water	\$ ([REDACTED])	\$ [REDACTED]
2019	City of New Orleans	\$ ([REDACTED])	\$ [REDACTED]
2019	Illini/Saluki	\$ ([REDACTED])	\$ [REDACTED]
2019	Lincoln	\$ ([REDACTED])	\$ [REDACTED]
2019	Texas Eagle	\$ ([REDACTED])	\$ [REDACTED]
2019	Wolverine	\$ ([REDACTED])	\$ [REDACTED]
2019 Total		\$ ([REDACTED])	\$ [REDACTED]

The data are beyond dispute: far from being revenue-neutral, as Mr. Blair implies,¹⁶⁷ Amtrak’s proposal is calculated to generate a massive “penalty” subsidy to Amtrak from CN, and ultimately from its freight customers.

The same point would hold if Amtrak’s proposal – which it constructed based on nationwide averages¹⁶⁸ -- were applied to other freight hosts nationwide. As Mr. Matteucci and Mr. Kuxmann show, according to Amtrak’s own latest report on host HRD nationwide, almost every Amtrak segment hosted by every Class I freight railroad (except for CP) exceeds 924 HRD minutes for 10,000 miles.¹⁶⁹ As Dr. Peterson shows, during the last normal (pre-Covid) period of 2018-19, the vast majority of Amtrak hosts and segments nationwide regularly exceeded 924 HRD.¹⁷⁰ In other words, Amtrak’s scheme is a receipt to collect penalties from most of its hosts nationwide for historically and currently normal host performance.

¹⁶⁷ See VS Blair ¶ 39.

¹⁶⁸ See VS Weiss ¶¶ 83-85.

¹⁶⁹ See RVS (PID) Matteucci/Kuxmann ¶ 53.

¹⁷⁰ See RVS (PID) Peterson ¶ 80.

E. Amtrak's Proposal Would Eviscerate the Lookback Provision and Leave CN with Little or No Prospect of Earning Net Incentives Over the Life of the Operating Agreement.

Lookback provisions have been an essential and, to the best of CN's knowledge, universal feature of Amtrak operating agreements with hosts for decades. Almost 40 years ago, Amtrak told the Board's predecessor, the ICC, that a lookback provision limiting any penalties to offsetting prior incentive payments was an appropriate, and already a standard, term to ensure that "over time there [would be] no risk that a railroad could ever receive less than its avoidable costs in connection with the operation of Amtrak trains," and the ICC approved the provision.¹⁷¹ In other words, Amtrak historically recognized that while freight railroads are compelled to host it, they are not and should not be compelled to pay for the involuntary privilege of doing so.

No relevant facts changed in the intervening years. The Amtrak-CN Operating Agreement was appropriately designed to give CN a fair opportunity to earn net incentives by performing well for Amtrak, which CN did, so the lookback hardly ever came into play and Amtrak renewed contracts containing it without complaint.¹⁷² But in 2013, Amtrak declined to renew the Operating Agreement on the traditional terms and decided instead to seek a radical change that would convert the traditional operating agreement into a vehicle for subsidies, under the rubric of "penalties." Amtrak's agenda was nowhere more apparent than in its complete reversal of position on lookbacks. Amtrak's then- Deputy Chief – Host Railroads Paul Vilter testified that eliminating the lookback provision was the "most important[]" change Amtrak seeks."¹⁷³ That was because Amtrak had designed an HRD-based incentives and penalties

¹⁷¹ *Nat'l Rail Passenger Corp. Application under Section 402(a) of the Rail Passenger Service Act*, FD No. 30426, 1985 ICC LEXIS 318, *31 (ICC July 5, 1985).

¹⁷² See RVS (PID) Matteucci/Kuxmann at ¶ 73.

¹⁷³ VS Vilter at 2.

scheme that was so skewed towards net penalties that Amtrak's main concern was to eliminate the one thing that would prevent it from collecting those net penalties.

In its Interim Decision, the Board rejected Amtrak's new, self-serving position, expressing "concern[] 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."¹⁷⁴ Accordingly, Amtrak no longer seeks the elimination of the lookback provision. However, as demonstrated above, it is still pursuing an HRD-based scheme heavily skewed towards penalties, to which an effective lookback provision would be an obstacle. It therefore proposes to radically alter and weaken the traditional lookback provision in two respects.

First, for decades and, to the best of CN's knowledge, industry-wide, lookback provisions have taken a standard form.¹⁷⁵ The lookback is for a period of 12 months, meaning that in any month, Amtrak can only collect penalties up to the level of net incentives the host has collected in the preceding 12 months. That limits the host's financial risks by effectively ensuring that the host will not be liable for monthly net penalties – *i.e.*, have to pay Amtrak a cash subsidy – over a sustained period, and it ensures that both the host (because it is earning no incentives) and Amtrak (because it is experiencing delays and cannot continue to collect penalties) have incentives to work together to fix whatever in the operating agreement/hosting arrangement is not working.

Second, under the Amtrak-CN Operating Agreement the lookback is specific to services or groups of services on the same route, rather than treating all the Amtrak services hosted by

¹⁷⁴ Interim Decision at 16.

¹⁷⁵ See generally RVS (PID) Matteucci/Kuxmann ¶ 72.

CN as one. Thus, the lookback provision applies separately to (1) the City of New Orleans, (2) the Illini/Saluki; and (3) the Chicago-Joliet trains (the Texas Eagle and Lincoln services).¹⁷⁶ That means that if problems on one group of services (for example, short-shunt problems for which Amtrak blamed CN on the Illini/Saluki) doom CN to accrue penalties, those penalties will be payable up to the level of prior incentive payments for the same group of services, but will not wipe out incentive payments CN earns on a separate group of services. That, in turn, means that problems on one route will not deprive CN of the opportunity to earn net incentive payments on other routes, thereby preserving CN's financial incentive to perform well on those other routes.

Both of these features represent obstacles to Amtrak collecting the most penalties it can, so it proposes to eliminate them both. Under Amtrak's new proposal, the lookback term would be the (minimum eight-year, and potentially longer) length of the contract.¹⁷⁷ So if, say, CN earned substantial incentive payments over the first two years but then encountered problems that raised its HRD above 924 thereafter, it could be compelled to pay Amtrak a net penalty each year for years until incentives and penalties had zeroed out over the life of the contract. Or if, say, CN worked diligently to earn incentive payments consistently for years, but then had a disastrous month to which the skewed extreme penalties end of Amtrak's incentives and penalties matrix applied, it could find itself liable for immediate cash payment of massive

¹⁷⁶ Until now, no lookback provision was required for the Amtrak services on the GTW, because those services were subject to a different incentive regime that did not include penalties. The parties have agreed that the GTW trains should be subject to the same incentive/penalty provisions as the IC trains in the revised Operating Agreement. Therefore for purposes of its revised proposal, CN has added two additional groups for the two Amtrak services hosted by GTW – the Blue Water and Wolverine. See CN Proposed Operating Agreement, App. V, Sec. D.

¹⁷⁷ See Amtrak Opening Br. (PID) at 62-63; VS Blair ¶¶ 104, 109; Amtrak OA Redline § 5.2(A)(2). It is not clear if Amtrak has intentionally established a minimum 8-year term for the Operating Agreement, but that is the effect of its proposed term provision, which only permits service of a one-year notice of termination *after* seven years. See Amtrak OA Redline § 8.8(A).

penalties. Further, under Amtrak’s proposal, the lookback would be relationship-wide, so problems on the IC spine could prevent CN earning any net incentives despite exemplary performance on the GTW, and vice versa.¹⁷⁸

Amtrak argues that the first change – from a 12-month lookback to a life-of-the-contract lookback – is necessary to incentivize CN “during periods of sustained poor performance on CN’s system.”¹⁷⁹ Not so. CN has ample incentives to avoid sustained poor performance. Since incremental cost compensation under the Operating Agreement will not compensate CN fully for its actual incremental costs, CN needs to earn positive incentives, not just avoid penalties, to have any chance of breaking even on hosting Amtrak.¹⁸⁰ And CN is highly conscious that sustained poor Amtrak COTP on CN’s lines will lead to criticism of CN (whether deserved or not), and two quarters of COTP below 80% could lead to a Board investigation under PRIIA,¹⁸¹ which would, at a minimum, be burdensome for CN.¹⁸² Moreover, if there is truly “sustained poor performance” under Amtrak’s penalty-oriented scheme, CN will never have substantial past incentives against which to count penalties, regardless of the length of the lookback period.

In any event, perhaps the most troubling implication of Amtrak’s proposal has nothing to do with “sustained poor performance.” Given how broadly HRD is defined and how Amtrak’s proposal is asymmetrically calibrated, after sustained **good** performance CN could have a single disastrous month in which, say, an unavoidable maintenance or safety/slow order issue leads to

¹⁷⁸ See Amtrak OA Redline § 5.2(A)(2).

¹⁷⁹ Amtrak Opening Br. (PID) at 64.

¹⁸⁰ See RVS (PID) Peterson ¶ 8.

¹⁸¹ 49 U.S.C. § 24308(f)(1).

¹⁸² If adopted, Amtrak’s “reopener” provision, discussed below, would provide yet another, superfluous, incentive for CN to do what it could to avoid “sustained poor performance.”

Amtrak delays that generate massive penalties. The knowledge that any incentives earned by consistent diligent efforts could be wiped out by one bad month at any time in the next eight or more years could only impair CN's incentives to provide the performance Amtrak says it seeks.

In its Post-Interim Decision Opening Brief and (Blair and Weiss) Verified Statements, Amtrak does not disclose – much less, attempt to justify – the second fundamental change it proposes to the lookback in its OA Redline – making the lookback apply across all CN services. Both the unfairness and the negative effect on CN's incentives of the change are obvious. Just as one bad month could wipe out many months of diligent work earning incentives, under Amtrak's proposal, one bad service could prevent CN from accruing any net incentives despite stellar performance on all Amtrak's other services. From an incentives standpoint, it makes no sense to take away any financial motivation for CN to perform well on five services whenever it has a month when it knows that one service is doomed to accrue substantial penalties. Indeed, the separation of various services for application of incentives and penalties was specifically added by the parties in their last restatement of the Operating Agreement in 2011, precisely to preserve independent incentives.¹⁸³

Amtrak argues that under its new proposal, “over the life of the OA, CN is not at risk of receiving compensation that is less than its ‘incremental costs.’”¹⁸⁴ That is not true, insofar as CN's contractual incremental cost compensation is less, even under CN's proposal, and far less, under Amtrak's proposal, than its actual incremental costs. That aside, Amtrak is right that its new proposal is in this respect less bad than its old one: it includes a lookback that gives CN some long-term protection against net penalties. But a reasonable contract would give CN more

¹⁸³ See RVS (PID) Matteucci/Kuxmann ¶ 72.

¹⁸⁴ Amtrak Opening Br. (PID) at 66-67.

than just the assurance that over an eight-year (or longer) period, it will not incur net penalties. CN should not be placed at risk of being required to pay Amtrak net penalties over a year – or two years, or five years. Under Amtrak’s lookback proposal, particularly in conjunction with its skewed and asymmetrical incentives/penalty provision, that would be a very real possibility.

III. AMTRAK’S UNPRECEDENTED “REOPENER” IS UNLAWFUL, UNREASONABLE, AND UNSOUND

The Board should reject Amtrak’s unprecedented “reopener” proposal. Instead of offering a true reopener, Amtrak has proposed a punitive, hair-trigger scheme that conflicts with the statutory scheme. This three-tier proposal also fails because it is simply unworkable and unwarranted—the exact opposite of a commercially “reasonable” contractual term. And the crux of Amtrak’s proposal—inserting itself into, and then taking over, CN’s dispatching—violates both the Board’s consistent recognition that dispatching is a key part of a freight railroad’s common-carrier obligation and its emphasis that freight railroads should aim to provide reliable service to freight customers. Indeed, Amtrak’s proposal is so intrusive that parts of it would violate the Constitution.

A. Amtrak’s Punitive Proposal Disregards the Board’s Instructions About an Effective Reopener Provision.

While CN’s proposal reflects the Board’s Interim Decision, Amtrak’s does not. The Interim Decision indicated that (1) the Operating Agreement should include a lookback provision to ensure that CN is not forced to pay to host Amtrak; (2) since that provision could leave CN without incentives to address “sustained poor performance,” a “reopener” provision would be appropriate; and (3) such a provision should include “concrete action in order to resolve potential

future performance disputes.”¹⁸⁵ CN’s proposal follows this instruction: (1) it includes a lookback provision; (2) it includes a reopener provision that is triggered when the lookback provision applies, *i.e.*, when CN would be paying net penalties but for the lookback provision; and (3) the reopener provision provides for concrete action through an escalation procedure backed up by mandatory dispute resolution.

Amtrak’s proposal ignores the Board’s guidance. Under Amtrak’s proposed “reopener”:

- (1) after one quarter in which a CN-hosted train had CN HRD in excess of 924, CN’s dispatching operations would be subject to burdensome reporting requirements and intrusive continuous oversight by Amtrak and the Board;
- (2) after two such quarters, in addition to those requirements, CN would be compelled to allow Amtrak to sit in on its dispatching, and would be required to seek Amtrak approval for deploying maintenance of CN’s own lines; and
- (3) after four such quarters, in addition to those requirements, Amtrak (or its designee) could take over CN’s dispatching for a minimum of two years.¹⁸⁶

This is not a true “reopener” at all, as Amtrak admits.¹⁸⁷ In commercial practice, a reopener clause typically allows renegotiation (sometimes with a dispute resolution mechanism) when there is a substantial or sustained change in circumstances or a failure to meet the parties’ goals and expectations.¹⁸⁸ But Amtrak’s proposal includes no provision for either renegotiation or dispute resolution—it jumps straight to extreme measures giving Amtrak supervision and control of dispatching, with no chance for the parties to try reaching a mutually agreeable resolution. That is not a “reopener.”

¹⁸⁵ See Interim Decision at 16–17.

¹⁸⁶ See Amtrak Opening Br. (PID) at 66–71; VS Blair ¶¶ 123-34.

¹⁸⁷ Amtrak Opening Br. (PID) at 67 n.48 (“Amtrak is not proposing that—after a specified period of poor performance—the Parties ‘reopen’ the OA to discuss how to address it. Rather, Amtrak is now asking the Board establish specific remedial, concrete actions the Parties must undertake in the event of such poor performance.”).

¹⁸⁸ See RVS (PID) Peterson ¶ 9.

Amtrak’s proposal also has a hair-trigger without a meaningful foundation. Far from applying only if circumstances show the contract is not working, Amtrak’s proposal kicks in even if the Operating Agreement is working exactly as expected. Amtrak cannot claim to be surprised by a train exceeding 924 HRD in a quarter; for the pre-pandemic years 2018-2019, every Class I host has had more quarters where at least one service has exceeded 924 HRD than quarters in which it did not.¹⁸⁹ And Amtrak’s proposal would not wait for the lookback to apply. It would apply whenever CN has HRD above 924—*i.e.*, accrues penalties under Amtrak’s scheme—for a *single train* over a *single quarter*. The tiered penalties could thus be triggered even though:

- CN has earned net incentives over the life of the Operating Agreement, so there is no danger of the lookback applying and CN has meaningful current financial incentives under the Operating Agreement;
- CN is currently earning net incentives—*i.e.*, performing in a manner even Amtrak considered deserving of a financial reward under the prior agreement the parties negotiated at arms’ length—both overall and for the service (as opposed to the individual train) at issue; and
- CN-hosted Amtrak trains, including the train at issue, are achieving Amtrak’s ostensible goal of at least 80% COTP.

Amtrak’s entire proposal thus ignores the Board’s rationale for a reopener—addressing CN’s potential loss of incentives for good performance *if* the lookback applies.¹⁹⁰ The proposal thus bears no relation to the potential for (and the need to address) “sustained poor performance” the Board noted.¹⁹¹ In turn, it conflicts with both the Board’s guidance and the very concept of a reopener.

¹⁸⁹ See RVS (PID) Peterson ¶ 80.

¹⁹⁰ See Interim Decision 16–17.

¹⁹¹ See *id.*

B. None of Amtrak's Three Proposed Tiers Is A "Reasonable" Commercial Contract Term "For Using" CN's Facilities.

Amtrak's three-tier proposal is also inconsistent with the statute. Amtrak's application invokes § 24308(a), enacted as section 402(a) of the RPSA in 1970, which (if the parties cannot agree) empowers the Board to "(i) order that the [host carrier's] facilities be made available and the services provided to Amtrak; and (ii) prescribe reasonable terms and compensation for using the facilities and providing the services."¹⁹² But none of Amtrak's three proposed tiers is a "reasonable" commercial term "for using [CN's] facilities and providing [its] services." As this section explains in detail, each tier is unreasonable, intrusive, and unworkable. And these punitive regulatory measures are not the sort of commercially reasonable contract term that § 24308(a) contemplates. Amtrak and hosts, through their privately negotiated agreements, and the Board, through its many decisions, have for five decades developed terms that reflect what is "reasonable" in an agreement to use a host carrier's facilities.¹⁹³ Amtrak's proposal falls well outside these bounds.

The Board's power to prescribe reasonable terms under § 24308(a) is a backstop. The statute's key provision contemplates voluntary, arm's-length commercial agreements between Amtrak and hosts: "Amtrak may make an agreement with a rail carrier . . . to use facilities of, and have services provided by, the carrier . . . under terms on which the parties agree."¹⁹⁴ Only "[i]f the parties cannot agree," and the Board finds it necessary, can the Board order that the facilities be made available and "prescribe reasonable terms and compensation."¹⁹⁵

¹⁹² See 49 U.S.C. § 24308(a).

¹⁹³ Amtrak has not cited a single Amtrak-host operating agreement with any provision remotely similar to its proposal, and counsel knows of none.

¹⁹⁴ *Id.* § 24308(a)(1).

¹⁹⁵ *Id.* § 24308(a)(2)(A)(ii).

The Board's role in case of disagreement is thus to supply the commercially reasonable terms the parties ideally would have been able to agree on, including terms that will financially encourage host performance. Those terms are limited to what is appropriate "for using the [host's] facilities and providing the services." The Board's role is not to impose terms that no reasonable commercial party would ever accept. Nor is this provision a back door for operational regulations. The statute requires CN to host (and provide preference for) Amtrak trains, but it does not empower Amtrak to oversee CN's operations—much less to commandeer CN's freight railroad and serve itself.

Yet that is what Amtrak seeks here. All three of Amtrak's proposed tiers are essentially improper regulatory requirements. No reasonable agreement between a commercial service provider and a customer would empower the customer to continuously scrutinize and even take over core aspects of the provider's operations serving all its customers. Amtrak's *least* intrusive proposal, Tier 1, is unprecedented and patently unreasonable: As explained below, no arm's-length agreement would give a customer access to such commercial- and security-sensitive information, most of which is not about that customer's operations and some of which is about CN's supervisors and union-represented dispatchers. Tiers 2 and 3 simply escalate the intrusion. No business that has invested billions of dollars in facilities it mainly uses to serve its own customers would agree to allow a tenant that rents a share of those facilities to commandeer core aspects of its business. And as Mr. Taylor observes, no freight railroad hosting agreement of any kind—Amtrak-on-freight, commuter-on-freight, interchange rights, or trackage rights—has ever included anything like Amtrak's proposed intrusions into CN's dispatching and maintenance

functions.¹⁹⁶ Nor has Amtrak itself ever allowed such an arrangement for tenants on its lines on the Northeast Corridor, so far as publicly available information discloses.

That Amtrak's proposal is unprecedented is unsurprising. Amtrak's proposed measures are simply untenable. They would raise serious concerns for safety, operational efficiency, employee and labor relations, confidentiality, investment and maintenance, and service—both on CN's lines and on lines that connect with CN's as part of the national rail network.

1. Tier 1: Intrusions on Dispatching and Burdensome Reporting Requirements

At Amtrak's Tier 1, after just one quarter in which CN HRD on one train exceeded 924, CN would be required to provide Amtrak and the Board with detailed six-point reports on every instance where Amtrak has recorded a five-minute HRD delay. These reports would include "Why the delay occurred"; "How the delay could have been prevented"; "Name of dispatcher and dispatch supervisor"; "Whether the dispatcher was counseled"; "Date/time of counseling session"; and "Corrective actions taken to prevent repeat of the delay."¹⁹⁷ This requirement would last at least six months.

This requirement is burdensome, intrusive—and largely pointless. Most delays Amtrak codes as HRD cannot reasonably be prevented, so no corrective actions could avoid a repeat. For example, it would be pointless to report on delays caused by interlockings CN does not control, necessary slow orders, essential maintenance, or unavoidable train meets. And identifying to Amtrak and the Board individual CN supervisors and union-represented dispatchers and describing any "counseling" of individual dispatchers would seriously harm CN's dispatching work environment and employee relations. Amtrak's proposed requirement

¹⁹⁶ RVS (PID) Taylor ¶ 32.

¹⁹⁷ Amtrak Opening Br. (PID) at 68.

that CN should identify and counsel individual dispatchers about run-of-the-mill delays that have nothing to do with dispatching—let alone preference—would be pointless and counterproductive.

Likewise, the reporting requirement’s burden on CN would be enormous and disproportionate. That would remain true even if CN did not have to respond to follow-up from Amtrak—which seems likely—or the Board. Delays are an unavoidable part of railroading, especially on a mainly single-line network,¹⁹⁸ and a five-minute delay is generally insignificant.

Amtrak recognizes as much by including recovery time in its schedules, most of which (given the breadth of Amtrak’s definition of “HRD”) is used for HRD.¹⁹⁹ Many Amtrak trains running on CN incur multiple five-minute delays daily and still achieve high COTP. The City of New Orleans alone, which achieves high COTP and is one of Amtrak’s best-performing long-distance services nationwide, typically incurs about 200 instances of delays of five minutes or more that Amtrak codes as HRD each month, most (about three-quarters) of them being minor delays of less than 15 minutes.²⁰⁰ Writing six-point reports on every instance of delay on Amtrak trains CN hosts would be a significant burden on supervisor and dispatcher time²⁰¹—time better spent running the railroad, and time whose additional incremental cost Amtrak does not propose to compensate CN for. These burdens would be even worse because CN does not know, when a delay occurs, how many minutes of delay Amtrak will record or whether Amtrak will categorize that delay as HRD. Thus, CN would have to reconstruct a delay after-the-fact, after receiving Amtrak’s delay report, which would define CN’s reporting obligations.

¹⁹⁸ See RVS (PID) Taylor ¶¶ 9, 21, 38.

¹⁹⁹ See RVS (PID) Matteucci/Kuxmann ¶¶ 38-45.

²⁰⁰ See RVS (PID) Taylor ¶ 38.

²⁰¹ See *id.* ¶ 39.

In addition, at Tier 1, CN would have to provide Amtrak and the Board live on-line access to CN's dispatch screens, including the ability to record them. By nature, the information and data at issue could not be isolated to Amtrak's trains, and indeed Amtrak proposes that CN be required to provide data for the entire "route" along which the train at issue travels. Given the high security built into CN's dispatching IT, this would be a significant burden. That security exists for good reason: CN's dispatch screens identify train types, including the trains that carry security-sensitive freight.²⁰² CN's dispatch screens also contain highly sensitive commercial information about its operations.²⁰³ Because of these commercial and security sensitivities, no freight railroad would ever willingly share this information outside the few employees who need to use it and are trained to safeguard it—let alone share it on a live basis.²⁰⁴ Further, live-streaming CN's dispatch screens would mean that dispatchers must work knowing that someone is constantly looking over their shoulders and second-guessing their professional judgments. That, too, would seriously harm dispatching performance and employee relations and could negatively affect dispatching performance.²⁰⁵ CN should not be compelled to share dispatching information—and certainly not on a live basis—without a compelling regulatory reason, and Amtrak has provided none. Even if there were some basis to let Amtrak scrutinize all of CN's dispatching decisions after the fact, that would not justify or require access in real-time.²⁰⁶

²⁰² See RVS (PID) Taylor ¶ 14, 42; *see also* U.S. Dep't of Homeland Sec., Enhancing Rail Cybersecurity (Dec. 31, 2021), https://www.tsa.gov/sites/default/files/sd-1580-21-01_signed.pdf (emphasizing the "ongoing cybersecurity threat to surface transportation systems" and requiring countermeasures).

²⁰³ *See id.*

²⁰⁴ *See id.* ¶ 42.

²⁰⁵ *See id.* ¶ 43; RVS (PID) Sullivan ¶ 6.

²⁰⁶ *See* RVS (PID) Taylor ¶ 41. CN acknowledges that an investigation under § 24308(f) might encompass production of historical dispatching information in discovery.

2. *Tier 2: Additional Burdensome Intrusions on Dispatching and an Amtrak Veto on CN Line Maintenance*

At Amtrak's Tier 2, two quarters in which CN HRD on one train exceeded 924 would trigger another requirement: CN would have to allow an Amtrak representative and a Board representative to "sit alongside dispatchers in real time."²⁰⁷ This requirement would cause practical and legal problems, for no purpose.

To start, giving Amtrak a physical presence alongside CN's dispatchers serves no valid purpose. The only possible reasons for having people sit with CN's dispatchers would be (a) to intimidate them or (b) to directly interfere in their work. These are not proper purposes, and the counterproductive effects are obvious. Dispatchers work professionally making complex judgments, as a team, in close quarters.²⁰⁸ They make thousands of complex decisions a day that are essential for safety, network fluidity, and efficient freight and passenger service—and most of which have nothing to do with Amtrak's trains. Inserting outsiders into their work environment as they do so, literally looking over their shoulders, would seriously impair vital labor-relations, operational, and confidentiality interests.²⁰⁹

In addition, at Tier 2, CN would have to obtain Amtrak's "prior written approval" for any non-emergency repair, upgrade or maintenance-of-way work on CN's lines that "is reasonably expected to impact the on-time performance of Amtrak trains on the subject route."²¹⁰ In other words, if any one of the trains that runs on the IC spine had HRD of over 924 for two quarters, Amtrak would have a veto over any non-emergency maintenance work on the IC spine.

²⁰⁷ Amtrak Opening Br. (PID) at 69.

²⁰⁸ See RVS (PID) Taylor ¶¶ 12-13.

²⁰⁹ See *id.* ¶¶ 42-43, 46; RVS (PID) Sullivan ¶¶ 6-7.

²¹⁰ Amtrak Opening Br. (PID) at 69-70.

This proposal is again intrusive and improper. CN's railroad is CN's, not Amtrak's. CN has a right to decide how and when to maintain and improve its own railroad, consistent with safety regulations imposed by the Federal Railroad Administration. And with years of experience and a full view of all the traffic on its railroad, CN knows how best to do that.²¹¹ For example, CN knows how best to schedule maintenance as part of its annual capital planning to avoid weather problems (either extreme heat or extreme cold), to avoid peak traffic periods, to avoid maintenance work outside of the applicable collective bargaining agreements,²¹² and to ensure efficient movement of maintenance-of-way gangs and materials daily along its lines during the project. Scheduling and coordinating line maintenance work and assets is a complex process that requires both serious advance planning and significant flexibility.²¹³ Amtrak lacks the necessary experience, visibility over all of CN's traffic, employee relations, and understanding of and interest in efficiency to do the job safely. Handing veto power over CN's line maintenance work would be a fiasco.

Nor does Amtrak offer any plausible basis for this unprecedented intrusion. CN already has a greater incentive than Amtrak to ensure that line maintenance is conducted efficiently to minimize track outages—most of the traffic is CN's, so CN is more affected by potential delays from these activities. And CN already provides notice to Amtrak in advance of scheduled maintenance so that Amtrak has notice and time to temporarily adjust its schedules if needed.²¹⁴

²¹¹ See RVS (PID) Taylor ¶¶ 49-51; *cf. Norfolk S. Ry.—Pet. for Decl. Order*, No. FD 35950, 2016 WL 787579, at *3 (S.T.B. served Feb. 29, 2016) (under ICCTA, it is improper for other parties to interfere with the “actions of a rail carrier in designing, constructing, and maintaining an active rail line”).

²¹² See RVS (PID) Sullivan ¶ 10; RVS (PID) Taylor ¶ 50.

²¹³ See RVS (PID) Taylor ¶¶ 49-51.

²¹⁴ See RVS (PID) Taylor ¶ 48..

It is in everyone's interest, but especially CN's, if the lines are properly and efficiently maintained. To the extent the parties' interests could diverge at all, it would only be if Amtrak vetoed maintenance with long-term network benefits to avoid short-term passenger delays. And that, of course, would be potentially disastrous for safety and for network reliability.

What is more, CN's maintenance scheduling has nothing to do with Amtrak's supposed concern: potential failures to provide preference. Again, Amtrak itself recognizes that "whether a Host Railroad is giving Amtrak the statutory preference" is a question of "dispatching practices"²¹⁵—not maintenance. If some essential maintenance inevitably delays both freight and passenger traffic, there is no preference problem, and no justification for Amtrak to have a say over CN's operational decisions, let alone a veto. And again, this proposal would impose significant incremental costs on CN, without compensation.

3. *Tier 3: Amtrak Takeover of Dispatching*

At Tier 3, after four quarters in which a single train had over 924 CN HRD, Amtrak's proposal would add yet another unprecedented intrusion: It would (1) authorize Amtrak or its designee to take over CN's dispatching of the route at issue—not just the specific train—and (2) eliminate all incentive payments for CN on that route, for at least two years. For example, if one City of New Orleans train exceeded 924 HRD for a year, Amtrak would seize control of all dispatching on the IC main line between Chicago and New Orleans and CN would earn no incentive payments for any City of New Orleans or Illini/Saluki trains during this time.

This breath-taking proposal is improper and infeasible. First, the principle is simply wrong. Again, dispatching is key to the operation of CN's freight railroad, built by CN's investment of billions of dollars earned by CN's freight service. This is not Amtrak's railroad,

²¹⁵ Amtrak Br. (PID) at 69.

Amtrak's investment, or Amtrak's freight service. CN's dispatching center itself is a state-of-the-art facility built by CN with its own money, not Amtrak's. And CN's dispatchers and supervisors are CN's employees, not Amtrak's. No HRD level—much less an HRD level on a single train that is not so high by historical standards, may correspond with high levels of on-time performance, and show nothing about preference—can justify Amtrak's proposed expropriation of CN's control over its private property.

Second, having Amtrak (or its designee) dispatch CN's lines would be unworkable. Dispatching is a complex and important discipline requiring the judgment, skill, and knowledge of experienced railroading professionals working together as a team. Dispatching errors can have disastrous results that cascade throughout the network. And dispatching requires the exercise of complex judgment in response to ever-changing information. It cannot be applied to a single train in isolation. A dispatcher is responsible for managing a network segment, including all the trains on it and the trains that may soon enter.²¹⁶

Dispatching for CN's network in the United States is handled by a 100-person staff in Homewood. On a typical shift, twelve dispatchers are divided into three regional teams, each of which directs as many as [REDACTED] at a time. The dispatching suite is largely open plan, enabling dispatchers to work as a professional team, consulting frequently about new information, problems that arise on the line, and hand-offs from one segment (or shift) to another, and sharing feedback and best practices. Dispatchers talk often with train crews to obtain up-to-the minute information and provide directions.²¹⁷

²¹⁶ See RVS (PID) Taylor ¶ 11.

²¹⁷ See *id.* ¶ 12.

Dispatching requires both complex advance planning and on-the-fly adjustments. It begins with train service plans, set long in advance, which are designed to (among other purposes) minimize train meets that would cause delays. Then, dispatchers continuously work as a team to review data and evaluate performance, line condition, and necessary adjustments to ensure fluidity, efficiency, and safety. Last-minute adjustments are often essential. In making these professional judgments, the dispatch team must consider multiple factors, using confidential information from a mix of commercial, customized and proprietary systems.²¹⁸ This process entails considering multiple factors, making predictions under uncertainty, and professional judgment, informed by experience and local knowledge of the territory and trains operating over the territory.²¹⁹

Because local knowledge and experience is so critical, CN's dispatchers are trained for and assigned specific network line segments. A new dispatcher serves what amounts to an apprenticeship, watching and working under the direct supervision of an experienced dispatcher; dispatchers are not allowed to make independent decisions related to dispatching trains for their entire first year. In addition, dispatchers are given continuous feedback and are subject to multiple levels of supervision. Dispatcher performance is reviewed regularly, with particularly emphasis on minimizing avoidable delays to Amtrak.²²⁰

Against this backdrop, Amtrak says little about how its plan would work. How would Amtrak handle the fact that dispatchers require extensive training on specific network regions and are not allowed to make independent decisions for at least one year? Would CN dispatchers

²¹⁸ *See id.* ¶ 13.

²¹⁹ *See id.* ¶ 14.

²²⁰ *See id.* ¶ 16.

or supervisors stay on, or would they be replaced? How would the resulting complex labor issues be handled?²²¹ How would CN's and its customers' confidential information be safeguarded? How would Amtrak interface with CN's Service Delivery and Operations personnel who communicate with freight customers? How would Amtrak dispatch CN's lines? And how would Amtrak dispatch CN's trains to prevent deterioration of CN's freight service operating metrics reported weekly to the Board? Safely and efficiently dispatching CN's railroad requires dispatching experience and training, local knowledge of the territory, knowledge of CN's proprietary dispatching system, knowledge of CN's policies regarding, for example, priorities between different types of freight trains, and a holistic view of the CN network.²²² Amtrak has none of that.

What Amtrak does have is an obligation under its existing operating agreement with CN, which Amtrak does not propose to change that Amtrak “. . . will not require the performance of services hereunder by [the host] in a manner that would cause [the host] to (a) violate the terms of any then current labor agreement between that [the host] and any organization representing any of its employees”²²³ As Mr. Sullivan explains, Amtrak's proposal that would permit an employee other than a Wisconsin Central dispatcher to perform dispatching work “would inevitably cause a labor dispute and an actual or threatened strike against Wisconsin Central.”²²⁴ Thus Amtrak's Tier 3 would actually conflict with the existing operating agreement.

Worse still, Amtrak's incentives would be all wrong. Nearly all customers served and revenues generated on the IC spine and the GTW are freight customers and freight revenues.

²²¹ See generally RVS (PID) Sullivan ¶¶ 6-9.

²²² See generally RVS (PID) Taylor ¶¶ 10-16.

²²³ Operating Agreement Section 3.5.

²²⁴ RVS (PID) Sullivan ¶ 8.

Indeed, the Board has for years required weekly data from CN about its service and velocity for freight customers and recently required expanded information to be reported weekly for a six month period. Amtrak has no experience with and no interest in freight operations, and the entire point of an Amtrak takeover would presumably be to minimize delays to Amtrak trains at all costs—regardless of the effects on freight traffic. Amtrak would thus prioritize the approximately \$45 million ticket revenue plus government subsidies represented by Amtrak’s trains over the approximately \$606 million revenue represented by CN’s freight trains on the lines over which CN hosts Amtrak.²²⁵

Indeed, CN already provides Amtrak the requisite preference, incurring as much as 11 times as many freight delays as Amtrak delays when freight and Amtrak trains meet. So, Amtrak’s takeover proposal makes sense only if Amtrak intends to pursue an extreme and unsound conception of preference it has sometimes espoused: the extreme “Presidential motorcade” concept, under which Amtrak’s trains should proceed with no delays at all. In other words, Amtrak would cripple CN’s freight operations and destroy network fluidity by banning freight trains from vast swaths of CN’s largely single-line network whenever Amtrak’s trains are on the line—which, given the six trains on the IC spine, is about 20 hours per day.²²⁶ As Mr. Taylor describes, that would be disastrous for CN, the freight customers it serves, and the end-consumers they serve. It would also have harmful knock-on effects on other freight railroads who use CN’s tracks—including to interchange traffic with CN, to operate trackage rights over CN’s lines, and to cross CN’s lines at interlockings.²²⁷ And it would ultimately benefit no one.

²²⁵ See RVS (PID) Peterson ¶ 79.

²²⁶ See RVS (PID) Taylor ¶¶ 47, 61; RVS (PID) Matteucci/Kuxmann ¶ 21.

²²⁷ See RVS (PID) Taylor ¶¶ 62-63.

As Dr. Peterson explains, in the long-term, if a commercial entity like a freight railroad is prevented from operating and controlling the assets in which it has invested, it will lose both the income (since inefficient operations because of the interference will increase costs and make CN's freight service less competitive) and diminish CN's incentives to re-invest in the network.²²⁸ And a network that has lost fluidity and investment will not serve either Amtrak's or the Nation's interests.

Amtrak's Tier 3 proposal is especially disturbing because, once it is triggered, Amtrak is accountable to no one—not even the Board. As far as Amtrak's proposal discloses, Amtrak would not be accountable to CN. For example, Amtrak's proposal would inevitable impose large incremental costs on CN for which it does not propose to compensate CN.²²⁹ Nor would Amtrak have the accountability that CN has to its customers. Amtrak's proposal also includes no mechanism that would enable the Board to rein it in. Nor, for that matter, does Amtrak's proposal leave any room for CN to seek relief on the basis that “preference for intercity and commuter rail passenger transportation materially will lessen the quality of freight transportation provided to shippers.”²³⁰ And as already explained, it is unclear what Amtrak thinks would happen if its actions operating CN's rail lines led to service problems for freight customers, let alone an accident.

In fact, Amtrak's proposal identifies just one consequence that would occur if Amtrak's dispatching efforts predictably failed. If, after two years of dispatching CN's rail lines, Amtrak had failed to reduce HRD below 924, Amtrak would be *rewarded* for that failure by being

²²⁸ See RVS (PID) Peterson at ¶ 72.

²²⁹ See *id.* ¶ 78.

²³⁰ 49 U.S.C. § 24308(c).

allowed to remain in control of CN's dispatching—potentially indefinitely.²³¹ That perverse provision reflects two things. First, it reflects a recognition that one of CN's main objections to Amtrak's entire proposal is sound: for at least some trains, given freight and passenger train traffic on single lines, foreign interlockings and a host of other issues, 924 HRD is neither a reasonable nor even a feasible performance expectation. And second, Amtrak's proposal as a whole is based on the entirely improper notion that it should be treated not just as a minority tenant entitled to dispatching preference, but as the rightful owner of CN's rail lines despite the predominant use of CN's network by freight customers.

C. Amtrak's Proposal Conflicts With the Statutory Structure.

Amtrak's three-tier proposal also clashes with the statute's structure. Amtrak admits that its proposal is meant to ensure that CN is "properly dispatching trains to assure Amtrak trains have the statutory preference to which they are entitled."²³² But the statute includes a specific, detailed mechanism to identify and address any alleged "failure to provide preference to Amtrak," which includes a pre-investigation prerequisite of COTP below 80% for a train.²³³ Amtrak cannot evade that congressional scheme by invoking the Board's general power to "prescribe reasonable terms" for the CN–Amtrak operating agreement.²³⁴ Thus, none of Amtrak's three proposed tiers is appropriate under the statute.

²³¹ See VS Blair ¶ 133.

²³² Amtrak Opening Br. at 68; *see id.* at 31 (explaining that the "incentive and penalty system" is intended to serve "Amtrak's statutory preference").

²³³ 49 U.S.C. § 24308(f)(2).

²³⁴ *Id.* § 24308(a)(2)(A)(ii).

Two related interpretive canons together foreclose Amtrak’s proposal. First, it is “a commonplace of statutory construction that the specific governs the general.”²³⁵ “That is particularly true where . . . ‘Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.’”²³⁶ Thus, when “a general authorization and a more limited, specific authorization exist side-by-side,” the “terms of the specific authorization must be complied with.”²³⁷ Second, “when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.”²³⁸ That is, “[w]hen Congress has spoken so directly on the remedies to be provided for statutory violations, it is not for the courts [or agencies] to add remedies of their own.”²³⁹

These principles control here. The Board’s power to “prescribe reasonable terms” under § 24308(a) is a broad, general power having nothing to do with statutory “preference.” Indeed, this power appears in a subsection captioned “General Authority.”²⁴⁰ And Amtrak-host operating agreements typically include no definition or provision regarding “preference.” The same is true here.

By contrast, § 24308(f), which was enacted as section 213 of PRIIA in 2008, prescribes a specific procedure to address failures to reach “Passenger Train Performance and Other

²³⁵ *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012).

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Amtrak v. Nat’l Ass’n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (“a private party” could not “enforce duties and obligations” under the Amtrak Act, given the express remedial scheme allowing the Attorney General to do so); *accord Universities Rsch. Ass’n v. Coutu*, 450 U.S. 754, 773 n.24 (1981).

²³⁹ *Mullins v. Kaiser Steel Corp.*, 642 F.2d 1302, 1314 (D.C. Cir. 1980).

²⁴⁰ 49 U.S.C. § 24308(a); *see United States v. Quality Stores, Inc.*, 572 U.S. 141, 150 (2014) (a statutory caption can be “a useful aid”).

Standards.”²⁴¹ As the Interim Decision noted, this “completely separate mechanism”²⁴² specifically addresses “delays or failures to achieve minimum standards,” including those “attributable to a rail carrier’s failure to provide preference to Amtrak over freight transportation.”²⁴³ That investigative process may be triggered *only* if COTP for a train is below 80% for two consecutive quarters.²⁴⁴ It also involves an investigation conducted by the Board with due process that considers various possible causes of low COTP for a train—not a host-specific portion of a train—and subjects Amtrak’s schedules and its metrics (such as HRD) to critical review.²⁴⁵ If, after investigation, the Board finds that delays were due to a failure to provide preference, it “may award damages” and other “reasonable and appropriate” relief, considering “such factors as” “the extent to which Amtrak suffers financial loss as a result of host rail carrier delays or failure to achieve minimum standards” and “what reasonable measures would adequately deter future actions” likely to cause delays on the same route.²⁴⁶ As the Board noted, these provisions provide a specific, “separate mechanism (outside the operating agreement between Amtrak and CN) for addressing any excessive delays to Amtrak trains caused by CN.”²⁴⁷

²⁴¹ 49 U.S.C. § 24308(f).

²⁴² See Interim Decision at 17.

²⁴³ 49 U.S.C. § 24308(f)(2).

²⁴⁴ *Id.* § 24308(f)(1).

²⁴⁵ *Id.* § 24308(f)(2)–(3).

²⁴⁶ *Id.*

²⁴⁷ Interim Decision at 17. In addition, the Attorney General “may bring a civil action for equitable relief” when a rail carrier “refuses, fails, or neglects to discharge its duties and responsibilities” under the statute. See 49 U.S.C. § 24103(a).

The statutory scheme thus includes a general power to prescribe “reasonable” contract terms—which says nothing about delays or Amtrak’s preference—and a specific scheme to address delays or performance problems, including investigating and, if appropriate, prescribing damages and relief for failures to accord preference. Yet Amtrak’s proposal seeks to use the more general power to supposedly detect failures to provide preference and then automatically gain authority to supervise and control dispatching, thereby intruding in an area specifically addressed by the narrower, more specific provision—but on a different basis, with no similar procedures or investigation into the causes of the delay for the train, no trigger tied to COTP for the train, and with wholly different Amtrak rights.

Under the statute, the Board may prescribe compulsory relief against the host only if:

- a train has COTP below 80% for two consecutive quarters;
- the Board fully investigates all the causes for that failure (i.e., the host, Amtrak, and other causes);
- the Board finds that the failure resulted from a failure to provide preference; and
- the Board decides, in its discretion and after considering the factors set forth in § 24308(f)(3), that compulsory relief is appropriate.²⁴⁸

By contrast, under Amtrak’s proposal:

- only one quarter of HRD above 924, not two quarters of COTP below 80%, triggers regulatory intervention;
- there is no investigation or due process, and HRD is taken at face value as showing host fault;
- no finding or evidence of a failure to provide preference is required; and
- Amtrak intrudes on or commandeers CN’s dispatching and maintenance operations, without Board oversight or accountability.

²⁴⁸ CN does not concede that Amtrak’s “reopener” proposal would be appropriate or within the Board’s authority even under § 24308(f).

Each tier of Amtrak’s proposal thus clashes with Congress’s specific remedial scheme—they are triggered far more easily and on an entirely different basis, and they are much harsher and more intrusive. Indeed, the FRA’s Metrics and Standards rulemaking adopted no HRD-based trigger for PRIIA investigations,²⁴⁹ and the Board lacks statutory authority to impose a different trigger.²⁵⁰ And unlike Congress’s scheme, which mandates a central role for the Board and a robust procedure to investigate train performance, Amtrak’s proposal entirely excludes the Board, contemplating no investigative or fault-finding process at all. This is not an appropriate use of the Board’s authority to prescribe “reasonable” terms of the agreement governing Amtrak’s use of CN’s lines. “[W]hat is reasonable depends on the context,”²⁵¹ and the statutory context shows that § 24308(a)’s general power to supply the reasonable contract terms the parties could not agree on cannot be used to make an end-run around Congress’s prescribed regulatory regime.

Further, the Board can prescribe only terms “*for* using the facilities and providing the services.”²⁵² Each tier of Amtrak’s proposal far exceeds what is necessary or appropriate to ensure Amtrak’s use of CN’s facilities and services. Thus, Amtrak’s proposed terms are not “*for*” the purposes Congress set forth. Likewise, because Amtrak’s proposal is not necessary to carry out the statute’s stated purposes, it is not “*necessary to carry out this part.*”²⁵³ It thus exceeds the Board’s power under this provision.

²⁴⁹ See generally FRA Metrics and Standards.

²⁵⁰ *Union Pac. R.R. Co. v. STB*, 863 F.3d 816, 825 (8th Cir. 2017).

²⁵¹ *United States v. R. Enters., Inc.*, 498 U.S. 292, 299 (1991).

²⁵² 49 U.S.C. § 24308(a)(2)(A)(ii) (emphasis added).

²⁵³ *Id.* § 24308(a)(2)(A).

That Amtrak effectively seeks a new and inconsistent regulatory mechanism is confirmed by the lack of any host-specific or service-specific measures. Amtrak does not try to explain why any of its proposed tiers is appropriate for CN in particular, or to customize the proposed tiers for each of the varied services CN hosts (long-distance versus corridor; single-host versus multi-host, and so on). Likewise, Amtrak's 924 HRD trigger was developed from a general, nationwide analysis that Amtrak submitted in its opening submission.²⁵⁴ Indeed, Amtrak admits that it "does not propose that the trigger for remedial action be based upon COTP for a particular train or service," suggesting that its Operating Agreement with CN should not be host-specific because the FRA/Amtrak Metrics and Standards are not host-specific, and ignores that FRA declined to impose an HRD trigger for the Board's investigation into the on-time performance of a train.²⁵⁵ This all reflects that Amtrak is trying to leverage the Board's general power under § 24308(a) to impose a new, nationwide regulatory mechanism on all freight host railroads. That is not a proper use of an application under § 24308(a).

Congress provided that agreed-upon "terms shall include a penalty for untimely performance,"²⁵⁶ and the Board suggested that a reopener provision could provide for "concrete action in order to resolve potential future performance disputes and to prevent sustained poor performance."²⁵⁷ But Amtrak's proposal goes much further than trying to address timely performance—it seeks to self-enforce (Amtrak's mistaken view of) the statutory preference in a manner that conflicts with Congress's prescribed method for doing so.

²⁵⁴ See VS_Weiss ¶ 83.

²⁵⁵ Amtrak Opening Br. (PID) at 67.

²⁵⁶ 49 U.S.C. § 24308(a)(1).

²⁵⁷ Interim Decision at 17.

In short, Amtrak’s proposal clashes with the statute by conflating two separate mechanisms Congress adopted for very different purposes. On one hand, Congress made relief available, after a full and impartial investigation of the causes and levels of delay to a train,²⁵⁸ to enforce a preference requirement that is expressly limited to avoid undue interference with freight transportation and at the discretion of the Board.²⁵⁹ On the other hand, it created a mechanism—operating agreements—to govern terms of use and compensation, including incentives reflecting quality service. By trying to smuggle new dispatching supervision and control rights for supposed failures to provide preference into this Operating Agreement, Amtrak has disregarded Congress’s scheme. And this problem applies equally to all three of Amtrak’s proposed tiers; all are intended to address preference and on-time performance, and all are inconsistent with § 24308(f).

Amtrak’s focus on preference is also misplaced for another reason. Amtrak says its proposals “focus on CN’s dispatching practices” because “whether a Host Railroad is giving Amtrak the statutory preference to which it is entitled is directly related to a Host’s dispatching practices.”²⁶⁰ True, dispatching relates to preference. But Amtrak does not try to show that CN’s dispatching practices (or any other practices) have led to the denial of Amtrak’s preference, and its HRD trigger is primarily related to delays that have nothing to do with dispatching. HRD delays due to conflicts between freight and Amtrak trains make up a small percentage of total HRD.²⁶¹ Indeed, Amtrak does not even articulate a meaningful standard for when a host fails to

²⁵⁸ See 49 U.S.C. § 24308(f)(1).

²⁵⁹ See 49 U.S.C. § 24308(c).

²⁶⁰ Amtrak Opening Br. at 69.

²⁶¹ RVS (PID) Matteucci/Kuxmann ¶ 33.

provide preference, let alone allege that CN has failed to do so here.²⁶² And of course none of the steps required by § 24308(f) have occurred—there has been no complaint for a train that has less than 80% COTP for two consecutive quarters, no investigation, and no finding of any improper delay, much less a preference violation.

In truth, CN gives Amtrak preference, arranging its operations and delaying its own trains to do so. As Mr. Taylor explains, every CN dispatcher is trained to give every Amtrak train priority over every freight train. CN supervisors ensure compliance.²⁶³ And the data bear that out. Compare the delays Amtrak trains incur at CN–Amtrak meets with the delays CN incurs at those same meets. This can be done by comparing the FTI minutes Amtrak records on CN’s lines with the FA-coded (*i.e.*, because of Amtrak meets) delays CN dispatchers record.²⁶⁴ The results are striking. In December 2019, for example, the ratio of delays to CN versus delays to Amtrak was around 11:1.²⁶⁵

²⁶² Amtrak has taken the position that preference means it should have an absolute “right to run trains unimpeded on host railroads’ tracks.” Office of the Inspector Gen., U.S. Dep’t of Transp., Report No. CR-2008-076, *Root Causes of Amtrak Train Delays* (Sept. 8, 2008), available at https://www.oig.dot.gov/sites/default/files/Amtrak_Root_Causes_Final_Report_9_8_08_with_508_charts.pdf. Amtrak has on various occasions argued that preference precludes any exercise of judgment by freight railroad hosts and their dispatchers, while urging that FTI or weak OTP alone necessarily implies a failure to provide preference. *See, e.g., Policy Statement on Implementing Intercity Passenger Train On-Time Performance and Preference Provisions of 49 U.S.C. § 24308(c) & (f)*, STB Docket No. EP 728, Amtrak Reply Comments at 6-8 (filed April 13, 2016).

²⁶³ RVS (PID) Taylor ¶¶ 20-21.

²⁶⁴ *See id.* ¶ 24. Note that this actually overstates delays to Amtrak, since Amtrak has lower delay-recording thresholds and since FTI includes some delays (*e.g.*, at foreign interlockings) that do not involve meets with CN trains. *See id.*

²⁶⁵ *See id.* CN uses December 2019 as a sample month here, as it did in its Opening Submission, since CN has already gone through the process of checking the FA-coded data for that month and making appropriate adjustments to ensure that the amount of delay attributed to Amtrak is accurate. *See generally* VS (PID) Baranowski .

For all these reasons, Amtrak’s proposed tiers are not “reasonable terms . . . for using” CN’s lines.²⁶⁶ Indeed, Amtrak does not contend otherwise—despite requesting an unprecedented and extraordinarily intrusive set of dispatching supervision and control rights, Amtrak makes no effort to square its proposal with the statutory language, structure, or purpose. That silence is telling.

D. The Board’s Prior Decisions On Dispatching Responsibility Confirm That Amtrak’s Proposal Is Improper.

The Board’s decisions on dispatching responsibility confirm that Amtrak’s proposal conflicts with the broader regulatory regime. Dispatching is an essential rail-carrier function that almost invariably follows the common-carrier obligation that attaches to the ownership of and operation over the line. Yet Amtrak’s proposal would impede or prevent CN’s performance of its common-carrier obligation, while leaving CN responsible for any service problems that Amtrak’s interference caused. That is improper.

The Board *Rail-Term*’s decisions recognized that dispatching is an “essential railroad function.”²⁶⁷ It is both “crucial to the safe movement of trains” and “integral to the overall unity of a rail operator’s common carrier obligations.”²⁶⁸ “Historically, rail carriers have conducted the physical operation and control of their trains with their own in-house employees.”²⁶⁹ And with good reason: “the dispatching services are embraced within the interstate common carrier services held out to the public by [rail carriers], without which their common carrier services

²⁶⁶ 49 U.S.C. § 24308(a)(2)(ii).

²⁶⁷ *Rail-Term Corp.—Pet. for Decl. Order*, No. FD 35582, 2014 WL 7405858, at *2 (S.T.B. served Dec. 30, 2014) (*Rail-Term II*).

²⁶⁸ *Id.* at *3–4.

²⁶⁹ *Id.* at *2.

across their system simply could not be executed.”²⁷⁰ The Board thus held that Rail-Term—which “provides these transportation services (dispatching) under contract for the exclusive benefit of its client rail carriers”—should “be deemed a rail carrier,” because “its dispatching services are an essential component of its clients’ holding out of interstate common carrier rail transportation.”²⁷¹ “The simple act of conducting such operations over a line owned by another turns a non-carrier into a rail carrier . . . and places on that operator a common carrier obligation”²⁷²

Rail-Term shows that dispatching is a key aspect of freight carriers’ operations, and a vital part of how they discharge their common-carrier obligations. For that reason, meddling with or transferring dispatching responsibility to any third party—even voluntarily—poses significant risks of interfering with or burdening rail transportation. That is why the Board held that Rail-Term could assume dispatching responsibilities only by assuming the common-carrier responsibility too.²⁷³

Amtrak’s proposal conflicts with these principles. It would involuntarily deprive CN of its ability to discharge its common carrier obligations. As detailed above, Tiers 1 and 2 would significantly interfere with CN’s safe and efficient dispatch of its lines. They would impose unnecessary and burdensome obligations that would divert CN’s dispatching personnel from

²⁷⁰ *Rail-Term Corp.—Pet. for Decl. Order*, No. FD 35582, 2013 WL 6078414, at *9 (S.T.B. served Nov. 15, 2013) (emphasis added) (*Rail-Term I*).

²⁷¹ *Id.* at *7–9.

²⁷² *Rail-Term II*, 2014 WL 7405858, at *6.

²⁷³ The Board’s *State of Maine* doctrine is an exception to this rule, but it does not support Amtrak here. Amtrak has not acquired ownership of CN’s lines, and offers no measures at all to “protect the carrier from undue interference with the provision of common carrier freight rail service.” See *Rail-Term I*, 2013 WL 6078414, at *9; *Maine Dep’t of Transp.—Acquisition & Operation Exemption—Maine Cent. R.R.*, 8 I.C.C. 2d 835, 836–37 (1991).

their responsibilities and undermine the open communication and teamwork required in the dispatching center. They would also establish intrusive oversight procedures that would inevitably impede smooth dispatching operations and distort dispatchers' professional judgment. Each of these intrusions, standing alone, would thus be improper—they would interfere with CN's dispatching, which is “integral to the overall unity of [its] common carrier obligations.”²⁷⁴

Tier 3 would go even further, seizing control of CN's dispatching outright. If Amtrak or its designee dispatches CN's lines in CN's place, CN cannot control the discharge its common-carrier obligation. Yet Amtrak does not volunteer to, and surely does not intend to, assume the common-carrier obligation for freight traffic over the CN lines at issue, and thus to be responsible to freight-rail customers for any freight service problems. So under the proposal, Amtrak would leave CN responsible for the results of dispatching decisions despite not controlling those decisions—an untenable result that conflicts with the Board's precedents. And as already noted, Amtrak offers no protocols or standards for how it proposes to handle dispatching. This all underscores that Amtrak's proposal is unreasonable and improper.

E. Amtrak's Punitive Dispatching Takeover Proposal Would Violate the Takings Clause.

Amtrak's proposal is so audacious that it raises constitutional problems. Amtrak's Tier 2 and Tier 3 proposals would empower Amtrak personnel to physically occupy CN's dispatching facilities and take over dispatching for CN's lines, including CN's own trains. A Board order adopting these proposals would violate the Takings Clause, even under the analysis that historically has governed takings for highly regulated common carriers.

²⁷⁴ *Rail-Term II*, 2014 WL 7405858, at *3–4.

To be sure, the Interim Decision cited cases holding that a § 24308(a) proceeding generally does not raise takings problems.²⁷⁵ But those decisions address “requiring one public utility to give another operative rights over its facilities, subject to an obligation to pay reasonable reimbursement”—an issue “traditionally” evaluated in “the regulatory rather than the taking mode.”²⁷⁶ There is no equivalent history of what Amtrak proposes here: Amtrak personnel (or those of its designee) physically occupying CN’s dispatching facilities, and even displacing CN’s own employees to take direct control of CN’s rail lines, including non-Amtrak traffic. Nor is this extraordinary relief like the “reasonable health and safety inspections” courts have historically approved.²⁷⁷

A Board order adopting Amtrak’s proposal would thus create a *per se* taking. Absent a “traditional background principle” to the contrary—which does not exist here—a *per se* taking occurs “[w]henever a regulation results in a physical appropriation of property.”²⁷⁸ That is, if “the government has physically taken property for itself or someone else,” including by “a regulation” or “decree,” without just compensation, it has violated the Fifth Amendment.²⁷⁹ For example, a regulation that created a “right of access by union organizers to the premises of an agricultural employer” by allowing them “to physically enter and occupy the growers’ land for three hours per day, 120 days per year,” created a *per se* taking because it “appropriate[d] for the

²⁷⁵ Interim Decision at 23 (citing *Metro. Transp. Auth. v. ICC*, 792 F.2d 287, 296 (2d Cir. 1986); *Appl. of the Nat’l R.R. Passenger Corp. under 49 U.S.C. 24308(a)—Union Pac. R.R.*, 3 S.T.B. 143, 145 (1998)).

²⁷⁶ *Metro. Transp. Auth.*, 792 F.2d at 297.

²⁷⁷ *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2079 (2021).

²⁷⁸ *Id.* at 2072, 2080.

²⁷⁹ *Id.*

enjoyment of third parties the owners’ right to exclude,” which is “a fundamental element of the property right.”²⁸⁰

So too here. A Board mandate that CN “must allow [Amtrak employees] onto [its] property” would appropriate CN’s right to exclude and cause a physical occupation, and thus a *per se* taking.²⁸¹ It does not matter whether Amtrak would exercise this access right only intermittently: “The fact that a right to take access is exercised only from time to time does not make it any less a physical taking.”²⁸² Tier 2 would appropriate CN’s ability to exclude Amtrak physically from CN’s dispatch center, with Amtrak physically occupying the property and watching over CN’s supervisors and union-represented dispatchers. And Tier 3 would not merely appropriate CN’s right to exclude, but it would actually deprive CN of control over how its own rail network—its own property—is used, even by its own trains.²⁸³ An agency order that hands direct physical control of a private party’s valuable property to someone else effects a taking.

When Congress meant to give Amtrak the extreme power of effecting a taking from a rail carrier, it said so expressly. *See* 49 U.S.C. § 24311(c). Amtrak does not invoke § 24311(c) here, and does not try to address or satisfy that provision’s criteria for a condemnation. Indeed, Amtrak’s condemnation authority against a railroad has been used only once since Congress adopted it in 1973—an excursion that went to the highest court in the land and has continued to

²⁸⁰ *Id.* at 2069, 2072.

²⁸¹ *See id.* at 2069.

²⁸² *Id.* at 2075.

²⁸³ *Cf. Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435–36 (1982) (a “physical occupation” destroys the “power to exclude”—“one of the most treasured strands in an owner’s bundle of property rights”—including the “power to control the use of the property”).

generate litigation.²⁸⁴ Amtrak's blithe effort to invent new takings powers for itself – freed from constitutional requirements – is inconsistent with Amtrak's own governing statute.

Amtrak's proposed dispatching supervision and control rights are thus unconstitutional. Amtrak does not propose to compensate CN for these takings and the resulting intrusion and disruption, either before or after the fact. In turn, its proposal would violate the Takings Clause's just compensation mandate.

²⁸⁴ *Amtrak—Conveyance of B&M in Conn. River Line in VT & NH*, 4 I.C.C.2d 761 (1988), *rev'd sub nom. Bos. & Maine Corp. v. ICC*, 911 F.2d 743 (D.C. Cir. 1990), *reh'g denied*, 925 F.2d 427 (D.C. Cir. 1991), *rev'd*, 503 U.S. 407 (1992); *see New England Central R.R.—Trackage Rights Order—Pan Am Southern, LLC*, Docket No. FD 35842 (S.T.B. served Oct. 31, 2017).

IV. AMTRAK’S APPROACH TO SCHEDULES UNDERSCORES THE IMPORTANCE OF CLARIFYING THAT SCHEDULES ARE SUBJECT TO ARBITRATION UNDER THE OPERATING AGREEMENT.

A. Contrary To Amtrak’s Suggestion, Schedules For 6 Trains, And Amtrak’s “Proposed Schedules” Are Not In Effect and Do Not Resolve All Schedule Issues.

As noted in CN’s Opening Submission (at 68), the parties have agreed on certification of 20 of the 26 regularly scheduled daily Amtrak trains that operate over CN’s lines in the United States. The parties, however, have not yet agreed on schedules for the four Illini/Saluki trains or the two City of New Orleans trains, although they have exchanged competing proposals.²⁸⁵ There is no dispute between the parties that proper application of either of their post-Interim-Decision proposals require that “backloaded” recovery time in the schedules for those 6 trains be redistributed appropriately to promote on-time performance at all stations.²⁸⁶ However, they have for a long time disagreed over other aspects of these schedules, including CN’s claim that pure run time in various segments of these trains is too short and that they should accordingly be lengthened.

Recognizing the difficulty that the parties have had in reaching agreement that would allow them to certify these schedules, CN on March 23, 2022 proposed to Amtrak that the parties at least move forward with a redistribution of recovery time.²⁸⁷ Since that time, the parties have

²⁸⁵ These trains have the greatest mileage hosted by CN.

²⁸⁶ On time performance at each station and checkpoint on CN’s lines is integral to CN’s incentive/penalty proposal, while Amtrak proposes to use COTP (measured for full route, including all hosts) as a multiplier in calculating CN’s incentives and penalties.

²⁸⁷ See Letter from M. Matteucci to J. Blair (Mar. 23, 2022) (VS (PID) Matteucci/Kuxmann, Ex. 12).

exchanged further competing proposals,²⁸⁸ but they have not reached agreement. Amtrak tries to dismiss that fact by relying on its “proposed” schedules, which it states provide CN with a meaningful opportunity to meet its performance obligations.”²⁸⁹ But Amtrak has neither clearly proposed nor accepted any schedule for redistribution that would not entangle the parties in long-standing disputes over pure run time, schedule length, and certification.²⁹⁰ Further, there is a big difference between “proposed” schedules with redistributed recovery time and schedules that have actually been adopted for purposes of the Operating Agreement, as they must be for the proper functioning of any incentive/penalty standard that measures performance at all stations.

Mr. Matteucci’s June 28, 2022 letter to Jim Blair discusses the data driven process that CN uses to analyze schedules. That process appears to be similar to the one utilized by Amtrak. CN’s process is based on running proposed schedules against actual past performance data (using scheduled and actual arrival and departure times, actual ridership data, and the location and duration of delays). Unlike Amtrak’s analysis of the 6 uncertified schedules, however, which apparently focused solely on the period April 2021 to March 2022 (*see* VS Weiss ¶¶ 44-79), CN tested schedules against both recent and earlier pre-pandemic periods to develop a broader view that is more likely to accurately represent future performance. As discussed in the reply verified statement of Messrs. Matteucci and Kuxmann, the results were revealing. All 6 of the trains in the Illini/Saluki and City of New Orleans services would fail to meet the 80% COTP

²⁸⁸ *See* Letter from J. Blair to M. Matteucci (May 3, 2022) (VS (PID) Matteucci/Kuxmann, Ex. 13; Letter from M. Matteucci to J. Blair (June 28, 2022) (RVS (PID) Matteucci/Kuxmann, Ex. 1).

²⁸⁹ *See* Amtrak Opening Br. (PID) at 56.

²⁹⁰ *See* Letter from J. Blair to M. Matteucci (May 3, 2022) (VS (PID) Matteucci/Kuxmann, Ex. 13; Letter from M. Matteucci to J. Blair (June 28, 2022) (RVS (PID) Matteucci/Kuxmann, Ex. 1).

standard, with the Illini/Saluki trains far below that standard.²⁹¹ CN asked Amtrak to likewise test proposed revised schedules against both pre- and post-Covid periods. As Mr. Matteucci pointed out, and Amtrak itself has acknowledged,²⁹² doing so is important because recent and current operations are not representative of normal operations.²⁹³

The fact that the parties have still not reached agreement on a redistribution of recovery time for these 6 trains underscores the importance of CN's proposal to clarify the operating agreement to provide for efficient arbitration of schedule disputes under that agreement.²⁹⁴ Importantly, that proposal includes a provision for the expeditious arbitration of the Illini/Saluki and City of New Orleans schedules in the event the parties have not agreed on a redistribution of recovery time for those trains prior to the effective date of a new, revised Operating Agreement.²⁹⁵

²⁹¹ See RVS (PID) Matteucci/Kuxmann at ¶¶ 92, 97

²⁹² Amtrak Opening Br. (PID) at 42.

²⁹³ Another potential difference in approach that results in CN truly optimizing schedules at their present length for Customer OTP while Amtrak does not is that CN's analysis focuses on increasing *overall* passenger weighted OTP, whereas Amtrak states that the focus of its LASER analysis is "to better ensure on-time arrivals at the highest passenger-volume stations." Amtrak Opening Br. (PID) at 57; (Recovery Time was reallocated to protect on-time arrivals at the highest passenger volume stations). Some of the corrections and improvements proposed by CN to Amtrak's last proposed schedules would more efficiently allocate recovery time away from some heavily used stations "where Amtrak appears to have overallocated recovery time with the result that trains would regularly arrive early." Letter from M. Matteucci to J. Blair at 2 (June 28, 2022) (RVS (PID) Matteucci/Kuxmann, Ex. 1).

²⁹⁴ See CN Opening (PID) Submission at 72; CN Proposed Operating Agreement (Rev'd), Sec. 3.2.G(4).

²⁹⁵ *Id.*

B. Although Amtrak Concedes That Additional PRT Is Required For Illini/Saluki Schedules, It Refuses To Lengthen Those Schedules, Underscoring The Need For Arbitration Under The Operating Agreement.

As discussed in Mr. Matteucci's June 28, 2022 letter to Jim Blair (at 2), Amtrak's May 3, 2022 did not simply propose redistributing recovery time. Amtrak instead admitted that pure run time (PRT) is too short in a number of segments of the Illini/Saluki schedule – meaning that there is insufficient time in the schedule for even a theoretically perfect run to arrive on time – and it proposed correcting PRT by lengthening it in various segments of each train.²⁹⁶ But rather than doing so – which would have resulted, as it should, in lengthening the overall schedule²⁹⁷ – Amtrak instead proposed to re-label a portion of existing recover/miscellaneous time as PRT.

There is no principled basis for Amtrak's position. PRT and recovery/miscellaneous time are serve different functions within a schedule and are no interchangeable. PRT is intended to cover minimum required run time, while recovery/miscellaneous time is intended to cover a baseline of anticipated delay above PRT in order to support solid OTP performance.

Recovery/miscellaneous time must be adequate to serve its function. Amtrak has provided no basis for deeming the existing level of recovery/miscellaneous time excessive, so there is no

²⁹⁶ Mr. Blair states that the PRT adjustments are required “to align with the current equipment operating on the Illini/Saluki trains.” Letter from J. Blair to M. Matteucci at 1 (May 3, 2022), (VS (PID) Matteucci/Kuxmann, Ex. 13). He notes that the current equipment is not subject to the speed restriction for safety imposed due to the short shunts at grade crossings experienced with Amtrak's single-level equipment. *Id.* Notably, if Amtrak instead uses single level equipment it would require that even more time be added to the Illini/Saluki schedules in order to compensate for application of the safety slow order at grade crossings.

²⁹⁷ Based on its recent examination of the Illini/Saluki schedules, including the equipment it is running, Amtrak itself has now concluded that PRT is too short in segments, without any finding that it is too long elsewhere in the schedule. See Letter from J. Blair to M. Matteucci (May 3, 2022) (VS (PID) Matteucci/Kuxmann, Ex. 13). Nonetheless, as discussed below, CN's proposal is not that the Board enmesh itself in this proceeding in the details of schedule disputes, but rather that the right to arbitrate such disputes under the Operating Agreement be clarified.

basis for reducing it. To the contrary, scheduling principles typically dictate that recovery time should increase, not decrease, as PRT increases.²⁹⁸ A refusal to correct deficient PRT is a recipe for failure to meet Amtrak performance standards.

In an apparent effort to head off criticism of its refusal to lengthen its “proposed” Illini/Saluki and City of New Orleans train schedules, Amtrak attempts to test those schedules against actual performance in order to demonstrate that they will reliably produce Customer OTP equal to or greater than 80%.²⁹⁹ The problem for Amtrak is that they don’t.

CN analyzed the schedules proposed by Amtrak using actual performance data during a pre-Covid period and it shows that 5 of 6 of those services would very badly fail to achieve 80% COTP, while the 6th (Train 58) would barely meet the standard.³⁰⁰ Amtrak touts that its testing is likewise against “**actual** performance data,”³⁰¹ but unlike CN, it tested its proposed schedules only against the short, unrepresentative recent period of April, 2021 to March, 2022, when COTP was elevated above the norm due to diminished delays resulting from Amtrak not running its full schedules.³⁰² Less traffic means fewer delays.³⁰³

²⁹⁸ See RVS (PID) Matteucci/Kuxmann ¶ 89.

²⁹⁹ See Amtrak Opening Br. (PID) at 56-61.

³⁰⁰ See RVS (PID) Matteucci/Kuxmann at ¶¶ 92, 97.

³⁰¹ Id. at 57 (emphasis in original).

³⁰² A list of Amtrak train suspensions during the period April, 2021 to March, 2022 is attached to RVS (PID) Matteucci/Kuxmann as Exhibit 2.

³⁰³ For example, from January 18, 2022 through April 2022 (which is encompassed during Amtrak’s test period), Amtrak did not run Illini/Saluki train Nos. 391 and 392. In addition to reduced interference with freight trains, this eliminated substantial passenger train interference (PTI) delays ordinarily caused by meets of those trains with Amtrak’s other trains (Nos. 390, 393, 58, and 59) on CN’s primarily single-track railroad with sidings.

Amtrak itself has acknowledged that its recent operations are not representative. In selecting 2019 as its “baseline” for past incentive/penalty earnings (rather than a more recent period) it explained:

“The initial base ‘Ridership Factor’ which Amtrak proposes for each of Amtrak’s routes in a new OA is based upon the amount of incentives which CN earned in 2019 – *the last year during which Amtrak’s trains operated free from the impacts and limitations caused by the Covid-19 pandemic.*”³⁰⁴

Remarkably, despite Amtrak using an unrepresentative period when COTP was elevated, Amtrak’s analysis still showed that 4 of 6 trains at issue would fail to meet the 80% COTP standard (Trains 391 and 59). Having failed even its own skewed test, Amtrak is left to assert that testing it touted against “actual performance” is not critical after all, because, it claims, HRD is simply too high and can be lowered for the months these trains fail to meet the 80% COTP.³⁰⁵ But Amtrak’s evidence does not stand up. Without explanation, Amtrak shifts its analysis from the same period used to test its schedules (April 2021 to March 2022) to the period March 2019 to March 2022, thereby mixing and comparing profoundly different pre-Covid performance (prior to Amtrak suspensions beginning in March, 2020) with the Covid-impacted period. That difference in periods undermines Amtrak’s claims.

As explained above, during normal pre-Covid impacted operations, there was more Amtrak traffic and therefore greater delay and lower COTP. The data cited by Amtrak – which shows greater HRD and lower COTP during the pre-Covid period – merely underscores the point. It does not demonstrate that levels of HRD were or are in any way unreasonably high, much less that HRD can somehow be readily reduced – presumably by reducing Amtrak delays

³⁰⁴ See Amtrak Opening Br. (PID) at 36 (*italics added*).

³⁰⁵ See *id.* at 59-61; VS Weiss at 21-27.

through changes in dispatching. As explained in Section II, only a small share of total HRD (on Illini/Saluki, just 6 to 9.5 minutes per trip during 2019) has anything to do with dispatching and actual CN freight train interference (as counting as CN FTI cross traffic of other carriers at interlockings CN does not control, which Amtrak counts as FTI). (HRD includes, for example, delays due to PTI, CTI, maintenance-of-way, long-term slow orders, non-CN cross traffic at interlockings CN does not control.) Moreover, on any busy predominantly single-line railroad such as CN, there will always be an irreducible minimum of passenger-freight interference.

Likewise, Amtrak's choice of data undermines its argument that updating its schedules so they regularly meet the 80% COTP standard is unnecessary because these trains have "on occasion" achieved months that met 80% COTP.³⁰⁶ First, regardless of its choice of data, that is the wrong test. The parties and the Board should be striving for performance that regularly achieves 80% COTP under normal operating conditions – not once or twice a year. In any event, Amtrak's cherry-picked testing period undermines its claim. As is evident from the charts presented by Mr. Weiss,³⁰⁷ and as confirmed by CN's own testing, Amtrak's proposed schedules would at best produce very low COTP for the 3 Illini/Saluki trains he tested based on normal pre-pandemic operations in 2019. (CN's analysis shows it would fail for all 6 Amtrak trains operating on the IC spine.)³⁰⁸ Further, Mr. Weiss's own data shows that the few months 80% COTP was achieved, came predominantly or exclusively during the Covid-influenced period of reduced delays and inflated COTP.

³⁰⁶ *Id.*

³⁰⁷ VS Weiss at 23-25.

³⁰⁸ See RVS (PID) Matteucci/Kuxmann at ¶¶ 92, 97.

Amtrak's refusal to lengthen its schedules – despite its own admission that PRT in segments for many of those schedules is short and its own evidence that demonstrates its schedules fail consistently to produce 80% COTP under normal operating conditions -- again underscores the importance of CN's proposed clarification of the Operating Agreement to assure that binding arbitration is available to resolve present and future schedule disputes. Amtrak's defense of its "proposed" schedules repeats the mantra that they supposedly "provide CN with a meaningful opportunity to meet its performance obligations."³⁰⁹ As discussed by Dr. Peterson and in Section II, above, Amtrak's incentive/penalty proposal is in fact based on irrational standards that are designed precisely *not* to provide CN (or other Class I hosts to which the same standards would apply) with a reasonable opportunity to earn net incentives. Moreover, the vague "meaningful opportunity" that Amtrak claims is itself one of the weakest imaginable assurances. In this context, where binding dispute resolution is possible (as opposed to FRA's non-binding process), the Board and the parties can and should do better. There is no need for the Illini/Saluki and City of New Orleans services to be operated under suboptimal schedules that disserve Amtrak's riders, disappoint those funding Amtrak's services, and unfairly penalize CN as host.

V. OTHER AREAS OF AGREEMENT OR DISAGREEMENT BETWEEN THE PARTIES.

A. The Parties At Least Partially Agree On Retroactivity.

Amtrak's Opening Brief proposes that any new Operating Agreement apply prospectively only, except to the extent that it incorporates the terms of the PTC Letter Agreement and the

³⁰⁹ Amtrak Opening Br. (PID) at 56.

Safety Appliance Letter Agreement (as defined in CN’s Opening Submission),³¹⁰ each of which provides for retroactivity of its reimbursement requirements. CN agrees with Amtrak that any change to the incentive and penalties system should not have retroactive effect, as there is no way that incentives and penalties offered to motivate CN to improve the performance of Amtrak trains on its lines can affect the handling of trains that have already moved.³¹¹

The parties do not fully agree, however, concerning Amtrak compensating CN for additional incremental costs incurred during the pendency of the proceeding. Amtrak argues that it “should not . . . be saddled with paying nearly ten-years’ worth of [freight train delay] costs accruing after 2013” and that “allowing CN to retroactively collect these costs now would deny Amtrak any chance to implement any sort of operational cost-control measures as to those costs (*id.* at 73). But no retroactivity at all and retroactivity reaching back for 10 years are not the only options.

Amtrak has been on notice from the very beginning of this proceeding that CN would be seeking compensation for the incremental costs of delays to its freight trains due to Amtrak’s use of its lines. At the outset of the proceeding, the Board required the parties to list the issues in the proceeding, and CN prominently listed incremental cost compensation for freight delays due to Amtrak. Amtrak therefore had ample notice and opportunity to implement the “operational cost-control measures” referred to in its Opening Brief.

CN, however, took a reasonable compromise position in its post-Initial Decision Opening Submission. It proposed that compensation for quantified freight train delay costs be retroactive

³¹⁰ These letter agreements, attached as Exhibits 15 and 16, respectively, to the Post-Interim Decision Verified Statement of Michael Matteucci and Scott Kuxmann, provide for reimbursement to CN of Incremental PTC Costs and Incremental Safety Appliance Costs, as defined in the letter agreements.

³¹¹ CN Opening Submission (PID) at 66.

only to September 1, 2019 (i.e., the beginning of the first calendar month following the Board’s Interim Decision). At that point, Amtrak was clearly on notice of the Board’s understanding of “incremental costs” as used in 49 U.S.C. § 24308(a)(2)(B), and that Amtrak could be required to compensate CN for incremental costs that are “specific, verifiable, and quantifiable” (Interim Decision at 23).

CN’s proposal acknowledges CN’s right to recover its incremental costs, but avoids both the potential unfairness of imposing unanticipated compensation obligations and the practical difficulties of calculating uncompensated incremental costs retroactively to the expiration of the 2011 Operating Agreement. The Board should adopt CN’s proposal, as set out in Section 8.8.B of the markup submitted in Tab B of CN’s Post-Interim Decision Opening Submission.

B. Section 8.8 (Term) Should Be Revised to Provide a Seven-Year Contract Term, as Suggested by the Interim Decision and Proposed by Both Parties.

The Interim Decision (at 27) noted that “[t]he Board finds that a seven-year operating agreement term would be reasonable and would balance the concerns of both parties,” and it “encourage[d] the parties to include an evergreen renewal clause in their operating agreement.” Both parties’ markups of the Operating Agreement have proposed modifications to Section 8.8.A to implement that guidance; each has done so imperfectly. CN would not object to the adoption of Amtrak’s proposed revision of Section 8.8.A, but with certain modifications to remedy the imperfections of the language of that proposal.

Amtrak’s proposed revision of Section 8.8.A, like CN’s, provides the option for either party to give the other party a 12-month notice of termination no earlier than seven years after the effective date of the new Operating Agreement. But this would mean that the earliest the Agreement could terminate would be *eight* years, not seven, after the effective date.

Accordingly, if the Board prescribes Amtrak’s proposal, it should modify the proposed language to permit service of a termination notice after six years, to take effect 12 months later. This may be done by changing the second sentence of proposed Section 8.8.A to say, “At any time after [the day and month ordered by the STB], 2028, either Party may give the other Party a written notice to terminate, in which case this Agreement shall terminate twelve (12) months after service of that notice on the other Party.”

Section 8.8 also includes provisions regarding the survival of terms incorporating the provisions of a condition imposed by the Board in 2008, upon the acquisition by CN’s direct and indirect corporate parents (Canadian National Railway Company and Grand Trunk Corporation (“CNR/GTC,”)) of the principal lines of the Elgin, Joliet and Eastern Railway Company (“EJ&E”).³¹² That condition (implementing a settlement agreement between Amtrak and CNR/GTC), preserves Amtrak’s access to the St. Charles Air Line (a CN rail line in downtown Chicago) on terms equivalent to those in effect at the time of the settlement. The condition required the amendment of the 1995 Operating Agreement to incorporate the terms of the condition. Accordingly, the parties to the 1995 Agreement executed an amendment incorporating the terms of the settlement and of the Board’s condition, and providing that its terms would survive the termination of the underlying 1995 Agreement.

The 2011 Operating Agreement superseded the 1995 Operating Agreement, but Section 8.8.B of the 2011 Agreement carried forward the survival provision of its predecessor, providing that the terms of the 2011 Agreement regarding terms of access to the St. Charles Air Line survive termination of that Agreement. (RVS (PID) Matteucci/Kuxmann ¶¶ 61-62.) Now that

³¹² *Canadian Nat’l Ry.—Control—EJ&E W. Co.*, STB Finance Docket No. 35087, slip op. at 64 (S.T.B. served Dec. 24, 2008) (environmental mitigation condition VM37), *petition for rev. denied sub nom. Village of Barrington v. STB*, 636 F.3d 650 (2011).

CN, Amtrak, and the Board are planning to terminate the 2011 Agreement and replace it with a new Agreement, it is appropriate to explicitly terminate the survival provision of Section 8.8.B of the 2011 Agreement, but to replace it with a survival provision in the new Agreement. CN's proposal does that in proposed Sections 8.8.C and 8.8.E, which should be adopted by the Board.

C. The Letters Regarding PTC Costs and Incremental Safety Appliance Costs Must Be Properly Integrated into the Operating Agreement, as Agreed by the Parties.

As explained in CN's Post-Interim Decision Opening Submission (at 98), the PTC Letter Agreement and the Safety Appliance Letter Agreement, executed by CN and Amtrak simultaneously with the 2011 Operating Agreement, obligate the parties to "incorporate into the Operating Agreement the basic terms and conditions of [the] Letter Agreement[s]."³¹³ In the absence of agreement by the parties to amend the Operating Agreement so as to discharge that obligation, CN has asked that any new Agreement prescribed by the Board incorporate the terms.³¹⁴

Amtrak, however, has been curiously reluctant to take steps to incorporate the terms of the Letter Agreements, or even to support actions by CN with that effect. In the earlier phase of this proceeding, Amtrak raised hairsplitting objections to the language proposed by CN to incorporate those terms into the Agreement, but failed to propose any alternative language that it

³¹³ Letter from Joseph H. Boardman (President and Chief Executive Officer, Amtrak) to Paul E. Ladue (Region Director Contracts and Administration, CN) at 3 (VS (PID) Matteucci/Kuxmann, Ex. 15) ("PTC Letter Agreement"); Letter from Joseph H. Boardman to Paul E. Ladue at 3 (VS (PID) Matteucci/Kuxmann, Ex. 16) ("Safety Appliance Letter Agreement").

³¹⁴ VS Ladue/Kuxmann at 53-55 (filed Sep. 4, 2015); SRVS Ladue/Kuxmann, Ex. 1 at App. IV-16 through App. IV-19 (filed Oct. 30, 2017); CN Opening Br. at 113 (filed Jan. 19, 2018); *id.*, Ex. 1 at App. IV-16 through App. IV-19; CN Reply Br. at 107-08 (filed Mar. 2, 2018).

believed would more accurately implement the Letter Agreements’ mandate.³¹⁵ In its Post-Interim Decision Opening Submission, CN again proposed to incorporate the substantive terms of the Letter Agreements, this time offering slightly different contract language in an effort to take into account and accommodate Amtrak’s previous objections.³¹⁶ For its part, Amtrak again failed to propose language incorporating the substantive terms of the letter agreements into the Agreement. Instead, it proposed simply to attach those letters as Exhibit A to the new Agreement (Amtrak Proposed Operating Agreement (PID), Art. I, def. of “Side Letters”). Amtrak represents its proposal as one to incorporate the Letter Agreements into the Operating Agreement “by reference” (Amtrak Opening Br. (PID) at 32, 77; VS Blair ¶ 155), nothing in Amtrak’s proposed contractual language actually says that the terms of the Letter Agreements are being incorporated by reference. That language simply appends the Letter Agreements, without explanation, as if providing them for informational purposes.

Moreover, the language of the Letter Agreements precludes “incorporation” of their terms by simply attaching them as an exhibit to the Operating Agreement. Each Letter Agreement contains a provision that “[u]pon incorporation of the basic terms of this Letter Agreement into the Operating Agreement this Letter Agreement shall terminate.” The clear intent of the parties was that the terms of the Letter Agreements would be integrated into the text of the Operating Agreement, after which those Letter Agreements would cease to have any contractual force.³¹⁷ That would make no sense if the Letter Agreements could be

³¹⁵ See Amtrak Opening Br. at 103-04 (filed Jan. 19, 2018); Amtrak Reply Br. at 116 (filed Mar. 2, 2018).

³¹⁶ CN Opening Submission (PID) at 98-100; *id.*, Tab B, Ex. 2 at App. IV-16 through App. IV-19; VS (PID) Matteucci/Kuxmann at 85-86.

³¹⁷ Indeed, if the obligation to incorporate the Letter Agreements could be satisfied by appending copies of those free-standing documents as an exhibit, it is unclear why the parties

“incorporated” simply by being tacked on to the Operating Agreement as an exhibit. In that case, the “incorporation” would have the paradoxical effect of terminating the binding force of the letters at the very moment of their purported incorporation.³¹⁸ The Board should reject Amtrak’s proposal for such a self-defeating “incorporation” and should instead do what the parties intended be done—integrate the terms of the letters into the Operating Agreement. CN has shown the Board how that can be done, and unless Amtrak can both demonstrate that CN’s proposal fails to achieve that purpose, and that it can provide contractual language that more effectively does so, the Board should adopt CN’s incorporation proposal.

D. The Parties Are Close to Agreement On Confidentiality.

Amtrak proposes to add a new Section 8.14 to the Agreement, providing that “Section 7.2 and Appendixes IV, V and IX of this agreement are confidential” and restricting access by third parties to those portions of the Agreement. CN has no objection to designating Section 7.2 as confidential. That provision, containing the liability and indemnification provisions negotiated by the parties, reflects their voluntary agreement to assign risk between themselves. If the parties had been unable to agree on what Section 7.2 should provide going forward, and the Board therefore had to prescribe liability and indemnification terms, the Board would be guided by its view of the public interest and of what terms it regarded as “reasonable” under 49 U.S.C.

didn’t simply do that themselves when drafting the Operating Agreement, rather than taking on an obligation to incorporate the terms of the Letter Agreements at some future date.

³¹⁸ Surprisingly, it appears that Amtrak may in fact regard its proposed “incorporation” of the Letter Agreements as having already deprived them of any binding force. Both letters contain provisions obligating the parties “to treat this Letter Agreement as confidential” and to refrain from “disclos[ing] it or its terms to any third party without the consent of the other Party.” Notwithstanding this prohibition, the public versions of Amtrak’s Opening Brief and of the Verified Statement of Jim Blair quoted extensively from the text of the letters and discussed their terms on the public record, as if those letters were now of purely historical interest rather than of continuing effect.

§ 24308(a)(2)(A)(ii). It could then be argued that the public would be entitled to know what those terms were, so they could serve as a baseline for future negotiations of comparable terms.³¹⁹ But there is no disagreement between CN and Amtrak about what terms should be included in Section 7.2, and therefore no need to allow their disclosure for the guidance of the public or for transparency of agency decision making.

Amtrak's proposal to make Appendices IV, V, and IX confidential is a different matter. The parties disagree significantly regarding the terms of Appendices IV and V, and the Board's prescription of those terms will almost certainly serve as a template for future prescriptions of terms under 49 U.S.C. § 24308(a)(2)(A)(ii). The structure of those appendices (and of Appendix IX, relating to compensation for access to and use of the St. Charles Air Line, which is derived from Appendix IV and for consistency's sake should be governed by the same confidentiality regime) are therefore a matter of public interest and should not be shielded from public view. The proposal made by CN in its Opening Submission—that the dollar amounts set out in, but not the structure of—those appendices be kept confidential is one that properly balances the parties' need for confidential treatment of their private cost and financial information against the public interest in knowing what constitute "reasonable terms" under statute. The Board should therefore adopt CN's proposed Section 8.14 in lieu of Amtrak's.

³¹⁹ See *Application of Nat'l R.R. Passenger Corp. Under 49 U.S.C. 24308(a)*—*Springfield Terminal Ry.*, 3 S.T.B. 157, 158-62 (1998) (prescribing liability terms); *Nat'l Rail Passenger Corp. Application Under Sec. 402(a) of Rail Passenger Serv. Act*, Finance Docket No. 30426, 1985 ICC LEXIS 318, at *29-*30 (July 5, 1985) (same); *Minnesota Transfer Ry. Ordered to Provide Servs., Tracks & Facilities for Operations of Trains of Nat'l R.R. Passenger Corp. & Establishment of Just & Reasonable Comp. for Such Servs., Tracks & Facilities*, 354 I.C.C. 769, 771-72 (1978) (same).

E. Some of Amtrak's Proposed Revisions to the Operating Agreement Are Acceptable to CN, but Other Unsupported Amtrak Proposals Should Be Rejected.

In accordance with the Board's scheduling order, Amtrak included "a copy of the current operating agreement marked up to show the changes [Amtrak] seeks" (Decision served Mar. 3, 2022, at 2). Amtrak's markup appropriately includes various changes implementing the proposals discussed in its Opening Brief (and the supporting verified statements) regarding compensation, incentives and penalties (including calculation of OTP), reallocation of recovery time in train schedules, lookback and reopener, contract term, confidentiality, and incorporation of side agreements relating to incremental PTC costs and incremental safety appliance costs. CN responds to those proposals elsewhere in this Reply Submission.

But Amtrak's markup also includes many modifications to the Operating Agreement that are neither discussed nor supported in the Opening Brief or its supporting verified statements. To the extent that Amtrak has failed to support substantive modifications with evidence or argument, unless CN agrees to them, the Board should not give them any further consideration.³²⁰ The terms of the current Operating Agreement were all negotiated and agreed to by the parties. If either party now finds those terms unsatisfactory and wishes for the Board to prescribe new ones, varying from those previously agreed to, that party should state the reasons for that variance plainly and up front, not attempt to slip its proposed changes in without discussion. Having failed to offer such reasons in its Opening Brief, Amtrak should be held to have waived its opportunity to do so, and should not be permitted to offer arguments for its

³²⁰ This does not apply to such non-substantive changes as renumbering of sections and subsections to accommodate the insertion or deletion of other numbered provisions.

unsupported proposals for the first time on rebuttal, which would unfairly deprive CN of any opportunity to respond.

1. *Certain of Amtrak's proposed changes are acceptable to CN, which has incorporated them, verbatim or with minor changes, into its own markup of the Operating Agreement.*

While Amtrak, having declined to offer evidence or argument in its Opening Brief supporting certain of its Operating Amendment revisions, should be deemed to have waived its opportunity to provide such support on rebuttal, certain of its proposed changes are not controversial and thus do not require supporting argument if agreed to by CN. CN has no objection to the following changes proposed by Amtrak, and has therefore incorporated them into the sections identified of own revised markup of the Operating Agreement,³²¹ in some cases with minor modifications:

- Deletion of Appendix VI and of references to it in the Agreement.³²²
- Revision of the preamble to reflect the status of the Operating Agreement and this proceeding (including Amtrak's application and the Board's order requiring that the 2011 Agreement be kept in effect until a new agreement is reached by the parties or the Board imposes terms and compensation).³²³ (CN's revised markup includes a clause, not found in Amtrak's proposal but included in CN's previous markup, which will note that that "the STB has issued a final decision in Docket No. FD 35743, prescribing terms and compensation for CN's provision of services and facilities to Amtrak, and have directed the Parties to execute an agreement substantially in the form hereof, to replace the 2011 Agreement.")
- Transfer of the definitions of "Accelerated Speed," "Dwell Time," "FRA Track Class," "Miscellaneous Time," "Other Time Classifications," "Pure Running Time," "Recovery Time," "Schedule Skeleton," from Section 3.2.A to Article I.³²⁴ (Amtrak's markup, however, placed the relocated definition of "Other Time Classifications" before that of "Origin Date." That definition should instead be placed in its correct alphabetical order among the Article I definitions. Also, CN

³²¹ Attached hereto as Tab E.

³²² CN Proposed Operating Agreement (Rev'd), *passim*.

³²³ *Id.*, preamble.

³²⁴ *Id.*, Art. I; *id.*, Sec. 3.2.A.

proposes that the definitions of “Dwell Time,” “Miscellaneous Time,” “Pure Running Time,” and “Recovery Time” be modified to note that they constitute or may constitute components of Amtrak schedules. CN also proposes that the definition of “Pure Running Time” omit Amtrak’s proposed addition of a sentence, which has no parallel in the definitions of other schedule components, stating, “The current Pure Running Times are shown in Appendix II,” and that the definition of “FRA Track Class” be simplified to avoid the implication that FRA directly assigns classifications to individual tracks.)

- Capitalization of the term “Amtrak Trains” throughout the Agreement.³²⁵ (If the term is capitalized, however, a definition should be included in Article I. CN therefore proposes that a new definition be added to Article I, stating that “Amtrak Trains means intercity rail passenger trains operated by Amtrak.”³²⁶)
- Addition of a definition of “Base Timetable Speed” to Article I.³²⁷ (The definition proposed by Amtrak, however, incorrectly refers to “the speed under the heading ‘Base Timetable Speed’ in Appendix I.” There is no such heading in Appendix I, and the proposed definition should therefore be corrected to “the speeds set forth in Appendix I.”)
- Deletion of the definitions of “IC Lines” and “Performance Segment” from Article I.³²⁸
- Deletion, from Section 4.2.A.1, of the words “as set forth in Appendix I (the ‘Base Timetable Speeds’)” (which are unnecessary if the term is defined in Article I).³²⁹
- Insertion of a provision in Section 4.2.B to the effect that “If temporary slow orders are imposed on the Rail Lines and result in operating speeds for the Rail Lines that are below those specified in Section 4.2 of this Agreement, CN will use its best efforts to remedy the slow order condition promptly.”³³⁰
- Modification of Section 4.2.E to provide that the adjustment of speeds described in that provision shall not lengthen Pure Running Time “on the Rail Lines” (rather than “in any Performance Segment”) and to delete the reference to Section 3.2.A as containing the definition of “Pure Running Time.”³³¹
- Modification of Section 4.3.A to provide that Amtrak shall reimburse CN for costs of increasing the Level of Utility on its rail lines at Amtrak’s request, to the extent that

³²⁵ *Id.*, *passim*.

³²⁶ *Id.*, Art. I.

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.*, Sec. 4.2.A.1.

³³⁰ *Id.*, Sec. 4.2.B. In the previous round in this proceeding, CN stated that it had no objection to Amtrak’s proposed inclusion of this provision. CN Reply Br. at 106 n.407.

³³¹ *Id.*, Secs. 3.2.A, 4.2.E

such costs are not reimbursed under Appendix IX as well as under Appendix IV.³³² (While CN agrees with the insertion of a reference to Appendix IX, it does not agree with Amtrak's further changes in Section 4.3.A, which would create uncertainty regarding its interpretation and application, and appear calculated to call into question whether costs incurred in raising the Level of Utility for Amtrak's benefit and at Amtrak's request are reimbursable as incremental costs.)

- Revision of Section 5.3 to reflect the fact that the contract advance amount was increased by the 2011 Operating Agreement, and that the increased amount was paid at the time of that Agreement.³³³
- Revision of the notice provision of Section 8.5 to add the option of providing notice by use of "a nationally recognized overnight courier postage prepaid."³³⁴
- Requirement that the liability provisions of Section 7.2 be kept confidential.³³⁵

2. *The Board should reject other substantive changes that Amtrak has proposed without, or with minimal, supporting argument or evidence.*

Amtrak's markup includes several other substantive proposes other substantive changes to the Operating Agreement that Amtrak seeks to have prescribed, but did not support with substantial argument or evidence. The Board should reject those proposals, on the ground that Amtrak has not even attempted to make a prima facie case for the need or even the desirability of prescribing them in lieu of contractual provisions negotiated and agreed to by the parties, which have successfully governed the operating relationship between Amtrak and CN (and IC before its acquisition by CN) for years, if not decades.³³⁶ But while the Board would be fully justified in

³³² *Id.*, Sec. 4.3.A.

³³³ *Id.*, Sec. 5.3. Amtrak's proposed revision is identical to one made by CN in the Operating Agreement markup that was attached to its Opening Submission, so there is no change to Section 5.3 of the revised markup.

³³⁴ *Id.*, Sec. 8.5.

³³⁵ *Id.*, Sec. 8.14.

³³⁶ The current Operating Agreement has been in effect for 11 years, and its predecessor (containing many of the same terms) was in effect for over 15 years before that. RVS (PID) Matteucci/Kuxmann ¶ 96.

rejecting those proposals solely because of that failure, they are also objectionable on their merits. Accordingly, without prejudice to our position that those proposals should be rejected out of hand, we discuss them in greater detail in the Appendix to this Submission, explaining more fully why, if the Board were to consider their merits, they should be rejected.³³⁷

CONCLUSION

For the reasons discussed above, the Board should reject Amtrak's new proposed HRD-based incentive/penalty scheme and order the parties to execute a new Operating Agreement including the modifications to the existing incentive/penalty and other provisions that were proposed by CN in its Opening Submission in accordance with the Board's direction in its Interim Decision. In addition, the Board should accept other changes to the Operating Agreement that CN has agreed to herein, and reject those that CN has not, as discussed in Section V, above. The parties agree that changes to the provisions of the Operating Agreement regarding Performance Payments and Performance Penalties (as defined in the Operating

³³⁷ This discussion does not extend to unsupported proposals that do not set compensation for Amtrak's use of CN's facilities or for provide for computation of incentives and penalties, but have no purpose except in connection with Amtrak's compensation and incentive/penalty proposals and should be rejected along with those proposals. Those proposals include:

- Replacement of "Performance Payments" with "Quality Payments" (throughout Agreement)
- Insertion into Article I of definitions of "Amtrak Base Passenger Miles," "Amtrak Passenger Miles Prior Year," "Amtrak Routes," "Customer OTP" or "COTP," "Delay Adjustment Factor," "Host-Responsible Delays" or "HRD," "HRD per 110K Train Miles," "Net Performance Penalty," "Net Quality Payment," "Origin Date," "Quality Payments," "Ridership Factor," "Statement of Charges,"³³⁷ and "Statement of Payments"
- Deletion from Article I of definitions of "Net Performance Charges" and "Performance Payments."
- Replacement, in Section 5.2.A.2, of "Base Charges" with "base charges"
- Insertion of "and Statement of Payments Format" to title of Appendix VII and replacement of form in that Appendix with new Amtrak version.

Agreement) should be made prospective. CN should be entitled to compensation for incremental costs of past freight train delays from September 1, 2019, however, as Amtrak's objection that it supposedly lacked sufficient notice of its potential liability for such costs cannot be maintained for the period after service of the Board's Interim Decision on August 9, 2019.

Respectfully submitted,

/s/ David A. Hirsh

David A. Hirsh
James M. Guinivan
Vineeta Kamath
Kelsey N. Weyhing
DENTONS US LLP
1900 K Street, N.W.
Washington, DC 20006
(202) 496-7500
david.hirsh@dentons.com

Tobias S. Loss-Eaton
SIDLEY AUSTIN LP
1501 K Street, N.W.
Washington, DC 20006
(202) 736-8000

Kathryn J. Gainey
CN
Suite 500 North Building
601 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 347-7840

July 26, 2022

APPENDIX

UNSUPPORTED AMTRAK CHANGES THAT SHOULD BE REJECTED

In Section V.E. of the main body of CN's Post-Interim Decision Reply Submission, it was noted that Amtrak's markup of the current Operating Agreement, which it submitted along with its Opening Brief, proposed a large number of changes to the Agreement that Amtrak did not support with evidence or argument. CN has no objection to several of these proposed changes (listed in Section V.E.1) or to having them prescribed by the Board for inclusion in the new Operating Agreement to replace the current one. But to the extent that CN disagrees with Amtrak's proposed changes, the fact that Amtrak failed to present even a prima facie case for adopting them is in itself sufficient reason for the Board to reject them.

Nevertheless, CN wishes to make clear that Amtrak's failure to offer a defense of those proposals, while sufficient to compel their rejection, is far from the sole reason for opposing them, and that if the Board were to consider the proposals on their merits, it should still reject them. To that end, CN offers the following substantive reasons for rejection of Amtrak's unsupported proposals.

I. PROVISIONS RELATING TO INCREMENTAL COSTS

Amtrak has proposed several revisions to the Operating Agreement that would call into question the parties' understanding of the term "incremental costs," increase uncertainty whether certain costs identified in the Agreement as reimbursable are in fact incremental costs, and foreclose the opportunity for CN to suggest that the Agreement does not comprehensively identify all incremental costs incurred by it in hosting Amtrak's trains. The Board should reject all these proposals.

- Deletion of definition of “Incremental Costs” (Article I)

Amtrak’s markup proposes to delete the definition of “Incremental Costs” in Article I and to remove the capitalization of the term wherever it appears in the Operating Agreement. The definition found in the current Operating Agreement (“all costs that CN would not incur but for (a) the operations of Amtrak on the Rail Lines of (b) the provision of associated services to Amtrak pursuant to the Agreement and/or the [Rail Passenger Service] Act”) is perfectly consistent with the definition of that term as found in the Interim Decision,¹ which, consistent with long-standing Board precedent, rejected Amtrak’s crabbed interpretation of the term.² The term (capitalized as a defined term in the current Agreement) is found throughout the Agreement. Striking the definition, as Amtrak proposes, either opens the possibility for Amtrak to propose novel readings of the term with the aim of reducing its obligation to reimburse CN for costs incurred in hosting Amtrak, or it requires insertion of otherwise unnecessary clarifying language (such as that found in Amtrak’s proposed Section 4.2.C) to specify that costs to be reimbursed are those “attributable solely” to action taken to accommodate Amtrak service on CN’s lines.³ No necessity has been shown for this revision, which would appear to be a recipe

¹ “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.” Interim Decision at 22.

² See Interim Decision at 19 n.34, 22 & n. 40.

³ Amtrak’s Opening Brief includes a section (at 71-72) on “Incremental Costs” which mentions its proposed deletion of the definition of “Incremental Costs,” but it does not justify that deletion, other than with the conclusory statement that “Amtrak also proposes that the new OA need not define the term “incremental costs” (Amtrak Opening Br. at 71). It does not argue, or even suggest, that the definition of that term in the Agreement is inconsistent with the Board’s discussion of the term in the Interim Decision or identify any disadvantage to including the definition in the Agreement.

for future disputes and for difficulties in administering the Agreement. The Board should reject it.

- Revision of Sections 4.2.B, 4.2.C, 4.3.A, 4.3.B, and 5.1 (Primarily to Add Language Regarding Incremental Costs and Costs “Solely Attributable” to Actions for Amtrak’s Benefit)

Section 4.2.B, 4.2.C, 4.3.A, 4.3.B, and 5.1 of the current Operating Agreement all require Amtrak to reimburse CN for various expenses incurred by CN for Amtrak’s benefit, and which CN would not incur but for the need to accommodate Amtrak’s services. These sections, requiring reimbursement of expenses incurred by CN at Amtrak’s request and for Amtrak’s benefit, reflect the recognition by the parties, when they negotiated the current Agreement, that those expense are incremental costs for which CN is entitled to compensation under 49 U.S.C. § 24308(a)(2)(B).⁴

Amtrak’s markup, however, proposes revising those sections to include language that purports to limit Amtrak’s reimbursement obligations to “incremental costs” (a term which Amtrak would leave undefined, as noted above) and to costs “solely attributable” to the accommodation of Amtrak, as if those sections did not already only require reimbursement of

⁴ Thus, Section 4.2.B requires Amtrak to reimburse CN for “Incremental Maintenance Costs” (i.e., costs above the cost of maintaining CN’s rail lines at the Base Level of Utility (as defined in the Agreement), to the extent those extra costs are attributable to operation of Amtrak trains), and specifies that those costs are set forth in Appendix IV, Item 6. Section 4.2.C provides that, in the event that FRA changes its track specifications to lower the speed permitted for operations on track as currently configured, and Amtrak wishes CN to alter that configuration to meet the enhanced track specifications so that it may continue operating at current speeds, then Amtrak must reimburse CN for the costs of making the alterations. Section 4.3.A permits Amtrak to require CN to modify its maintenance of any part its rail lines to increase the Level of Utility on that part, provided that Amtrak reimburses CN for the cost of that increased maintenance. Section 4.3.B permits Amtrak to require CN to improve its rail lines, provided that the improvement is made at Amtrak’s sole expense and that Amtrak reimburses CN for any increased maintenance cost made necessary by such improvement. Section 5.1 provides that Amtrak may request non-routine services from CN, but that it must reimburse CN for the incremental costs CN incurs in providing those services.

incremental costs. The inclusion of that additional language, coupled with the deletion of the definition of “incremental costs,” appears to be an invitation for Amtrak to dispute its obligation to pay the costs described in the relevant sections of the Agreement. If it is not Amtrak’s intent to invite such an argument, then its revision of Section 4.2.B is unnecessary and pointless. But if that is Amtrak’s intent, then its revision is inconsistent with the parties’ understanding of “incremental cost” when they negotiated the current Agreement, as well as the Board’s understanding of that term as set forth in the Interim Decision. Either way, the Board should reject Amtrak’s revision.⁵

- Section 5.1.A: Insertion of Language Purporting to Acknowledge that the Operating Agreement Sets Out “All of” CN’s Incremental Costs

Amtrak proposes to insert the words “all of” in Section 5.1.A, so that it would state that “The Parties agree that the amounts to be paid by Amtrak specified in Appendices IV and IX and the Side Letters represent reimbursement to CN of *all of* CN’s incremental costs resulting from Amtrak’s operation of trains over the Rail Lines and for the services and activities provided by CN in connection therewith and specified therein” (emphasis added). This proposal is completely unacceptable. CN decidedly does *not* agree that the Agreement identifies all of the incremental costs arising out of hosting Amtrak, and it would be highly inappropriate for the

⁵ This rejection extends to Amtrak’s proposed deletion, from Section 4.3.A, of the phrase stating that an increase in the Level of Utility above the Base Level of Utility, if made at Amtrak’s request, shall be “at the sole expense of Amtrak,” as the expenses CN incurs in that event would constitute incremental costs, under any reasonable understanding of that term. CN does not, however, call for rejection of other revisions of the listed sections that do not relate to limiting the costs to be reimbursed to “incremental costs,” costs “solely attributable” to hosting Amtrak, and the like. Thus, it does not extend to Amtrak’s proposed insertion, in Section 4.2.B, of language obligating CN to use its best efforts to lift certain temporary slow orders, or to its proposed insertion, in Section 4.3.A, of references to costs reimbursed under Appendix IX as well as Appendix IV.

Board to purport to require CN to affirm something that it firmly believes to be untrue.⁶ There is now no plausible reason for Amtrak to seek imposition by the Board of such a requirement on CN, unless it is to foreclose CN's ability to argue, in any context while the Agreement remains in effect, that there are any incremental costs not enumerated in that Agreement.⁷ Such foreclosure is completely unnecessary, and does not constitute the kind of "reasonable terms" that Congress authorized the Board by 49 U.S.C. § 24308(a)(2)(A)(ii) to impose.⁸

But since Amtrak seeks to resolve what it apparently sees as an ambiguity of the current language of the Agreement and to state implausibly that the Agreement identifies all of CN's incremental costs, it would be appropriate to clarify that language to state the more reasonable position, held by CN, that Appendices IV and IX represent "*a portion of the Incremental Costs* resulting from Amtrak's operation of trains over the Rail Lines," thus acknowledging the possibility that there are more incremental costs than are identified in the Operating Agreement, and that, as contemplated in the Interim Decision (at 23), CN in the future might identify "specific, verifiable, and quantifiable" incremental costs not currently mentioned in that

⁶ The proposition that the Operating Agreement has identified the universe of costs CN has incurred solely as a result of Amtrak's use of its lines, even those that may not be quantifiable, is implausible on its face. CN's witness Steven Peterson discusses CN's position to this effect in his Reply Verified Statement.

⁷ Amtrak offers no reason, other than to state its own "belie[f] that Appendix IV includes all of the currently known and quantifiable 'incremental costs' for which Amtrak must reimburse CN" (Amtrak Opening Br. (PID) at 71; VS Blair ¶ 137).

⁸ Amtrak's request that the Board dictate inclusion of the words "all of" is especially improper given that Amtrak proposed inclusion of those words during negotiations leading up to the 2011 Operating Agreement, and CN firmly rejected that proposal, for the same reason it opposes it now. As a result, the language of the current Agreement simply states that the amounts set out in Appendices IV and V current Agreement stating simply that the amounts set out in Appendices IV and V "represent reimbursement to CN of CN's Incremental Costs," leaving unstated whether that language was merely an acknowledgement that the costs listed in Appendices IV and V were in fact incremental costs, or whether it meant that those costs were all of CN's incremental costs. RVS (PID) Matteucci/Kuxmann ¶ 98.

Agreement. CN therefore calls on the Board to insert the words “a portion of” immediately before “CN’s incremental costs CN’s incremental costs resulting from Amtrak’s operation of trains” in Section 5.1.A.

II. PROVISIONS RELATED TO AMTRAK’S PROPOSED RESTRUCTURING OF THE INCENTIVES/PENALTIES SYSTEM.

As CN argues at length elsewhere, Amtrak’s proposed restructuring of the current system for compensation for hosting Amtrak service on CN lines (including performance-based incentives and penalties) is irrational, punitive, and contrary to the public interest. The Board should therefore reject all modifications to the Operating Agreement that Amtrak has proposed that would implement that restructuring, including in particular its proposed revisions to current Sections 5.2.A, 5.2.B, and 5.2.C, Appendix V, and Appendix VII, its proposed replacement of current Section 5.1.C with a new Section 5.1.B, and its proposed revision of Section 5.1.C and its transfer to a new Section 5.1.B.⁹

Those changes to the Operating Plan merit wholesale rejection, both because they are intrinsically related to Amtrak’s misguided compensation restructuring, and because they propose significant substantive changes, without discussion or justification, to existing procedures for issuing and paying bills. In addition, certain of those proposed changes are objectionable for reasons specific to those provisions, as explained below.

⁹ Amtrak’s markup appears to indicate that it is inserting a new Section 5.2.A and redesignating Sections 5.2.A (Right of Review and Audit), 5.2.B (Records), 5.2.C (Adjustments), and 5.2.D (Revision of Flat Rates) as Sections 5.2.B, 5.2.C, 5.2.D, and 5.2.E, respectively. In fact, the “new” designations for those sections and the ones they have in the current Agreement; the apparent but misleading redesignation appears to be the result of a flaw in the software used to generate Amtrak’s markup.

- Billing Procedures (Section 5.2.A)

Also, Amtrak proposes to insert a new Subsection 5.2.A.1 (“Statement of Payments”) at the beginning of Section 5.2.A, to revise the current language of Section 5.2.A, redesignating it as Subsection 5.2.A.2 (“Statement of Charges”), and to insert a new Subsection 5.2.A.3 (“Revision of Forms and Methods”). These changes to Section 5.2.A would significantly increase the difficulty of administering the Operating Agreement, by creating a complex billing system under which Amtrak would provide CN with a monthly “Statement of Payments” setting out incentives earned and penalties incurred, as well as “flat-rated . . . payments”¹⁰ and “fixed monthly payments” due under Appendices IV and IX, for the preceding month, while CN would provide Amtrak with a monthly “Statement of Charges,” setting forth amounts due to CN under certain listed provisions of Appendix IV, Table 1, but excluding amounts reflected on Amtrak’s Statement of Payments, and by providing detailed but independent procedures regarding disputes over charges.¹¹

Proposed new Section 5.2.A.1 contains a timetable for parties to confer over disagreements regarding the Statement of Charges, but leaves resolution of those disagreements

¹⁰ We presume that the Amtrak markup’s reference to “flat-rated rated payments” is simply a misprint.

¹¹ Amtrak further proposes that Section 5.2.A.2 (“Statement of Charges”) require CN to prepare and submit a Statement of Charges, “clearly and separately set[ting] forth amounts owed to CN . . . and set forth in Appendix IV, Table 1, including Items 1(a), 1(b), 1(c), 2(b), 3, 4(a) and 4(b), 7, 8(a) and 8(b), 9, 10(a), 12, 13(a) and 13(b), 14, 16, 17(a) and 17(b), 18, 19, 21, 22, 23, 24, 26, Appendix IX, Table 1, including items 1(c), 7, 10(a), 17(a) and 17(b), and Authorization Notices submitted by CN in accordance with Amtrak’s Authorization Notice Procedures.” It appears that Amtrak’s intent is that CN calculate all charges under Appendices IV and IX other than the flat-rated and monthly charges set out by Amtrak in the Statement of Payments. If so, the Amtrak’s list of items from the two appendices makes no sense. The list should include the per-train-mile and per-car-mile amounts set out in Items 6, 10(b), and 15 from Appendix IV, Table 1 and Items 6 and 15 from Appendix IX, Table 1, and it should include Items 2(b) and 26 from Appendix IV (which do not exist) or Item 14 (which is merely a cross-reference to Appendix IX).

entirely in Amtrak's hands: if Amtrak and CN agree to the Statement of Payments submitted by Amtrak, or to any adjustment thereto, then the parties will pay each other in accordance with that Statement or adjusted Statement, but if the parties cannot reach agreement on the Statement or any adjustment, then they must pay each other in accordance with the Statement as prepared by Amtrak.¹² At that point, CN's only recourse for overpayments to Amtrak or underpayments to itself is the audit procedure of Section 5.2.B. A contract under which the recipient of services conclusively determines the amount it is to be billed, as proposed by Amtrak, would be extraordinary. Extraordinary provisions require extraordinary justification, and Amtrak has provided no justification for this proposal. The Board should reject it.

- Revisions to Billing Forms (Proposed New Section 5.2.A.3; existing Section 5.2.A)

Amtrak proposes to insert a new Section 5.2.A.3, stating that "[e]ither Party may request revisions in the forms and methods of billing, which will be adopted upon the other Party's approval, which approval shall not be unreasonably withheld, conditioned or delayed." This insertion must be read in conjunction with Amtrak's proposal to delete the language currently in Section 5.2.A.2 providing that if Amtrak requests a revision of the format for the Statement of Charges that "would significantly change the amount of work required by CN in connection with billing Amtrak, then, prior to the implementation of that revision, the Parties will negotiate and determine what, if any, new basis of compensation is appropriate for such activity." That provision reflects the fact, acknowledged by the parties negotiating the 2011 Operating Agreement, that additional costs incurred in administering the Operating Agreement are incremental costs for which CN is entitled to compensation. Amtrak's proposals for Sections

¹² The timetable for payment under the Statement of Payments is not coordinated with the parallel timetable set out in Section 5.2.A.2 for payment under the Statement of Charges.

5.2.A.2 and 5.2.C effectively give Amtrak the unilateral right to demand a new billing format, even if it would impose new and uncompensated administrative costs on CN. Such a deprivation would be inappropriate at any time, unless agreed to by CN in exchange for some concession which it values.

- Review and Audit (Section 5.2.B)

In Section 5.2.B (“Right of Review and Audit”), Amtrak proposes changes that appear to provide that, in addition to Amtrak’s current right to an audit of payments it has made to CN, CN will have a right to audit payments it has made to Amtrak. If this is Amtrak’s intent, then it needs to propose that the opening words of Section 5.2.B be modified to say “Any payment by Amtrak *or* CN”. But in addition to providing for reciprocal rights of audit, Amtrak’s markup proposes to require repayment of overpayments, not if the audit “proves that Amtrak has made payments in excess of its obligations under this Agreement,” but if it “*indicates* that Amtrak or CN” has made such overpayments (emphasis added). This change is either unnecessary tinkering with the contractual language, or it is an unjustified attempt to lower the burden of proof required before a party can be compelled to repay an alleged overpayment

- Adjustments to Past Overpayments, Current Billings

Amtrak proposes to revise Section 5.2.D (“Adjustments”), which provides a procedure for resolving claims of past overpayments or disputes over current billing. The most important of the proposed modifications is to insert “Except as otherwise provided in Appendix V” at the beginning of the Section. This insertion would largely make Section 5.2.D irrelevant, by making Amtrak’s proposed new Appendix V the exclusive procedure for challenging Amtrak’s calculations of incentives and penalties. This would, among other things, cut off CN’s right to make such a challenge more than 60 days following the end of a calendar quarter. Amtrak’s markup of Section 5.2.D also omits the current provision requiring the parties to “develop jointly

a format for presentation of the factual basis and contract references in support of claims for adjustment and to present any such claim as may be developed, as provided in Appendix VII.” And it deprives parties who overpaid or were underpaid for incentives or penalties their right under Section 5.2.D to interest at the 90-day Treasury rate. (Given that Amtrak proposes to determine in the first instance the amount of incentives paid to or penalties incurred by CN, any subsequent adjustment to the amount paid is likely to be in CN’s favor, so that the elimination of the right to interest on overpayments or underpayments appears calculated to benefit Amtrak.)

III. BURDENSOME NEW INFORMATIONAL REQUIREMENTS

Section 7.3 (Inspections and Reports) of the Operating Agreement currently requires CN, upon Amtrak’s reasonable request, to provide Amtrak with reports on Base Level of Utility and operations on CN’s lines. Amtrak would revise this Section to dramatically expand the scope of the required reports. Currently, the requested reports are required to “set forth the speed and slow orders on each line segment of the Rail Lines, the condition and capacity of stations and terminals (including any contractual limitations governing CN’s use of such stations and terminals, the availability and capacity or maintenance facilities for the Rail Lines, and current maintenance procedures for the Rail Lines.” Amtrak would alter this provision so that the report would “include, but not be limited to” the listed subjects, and that they would include “operating and dispatching procedures” as well as maintenance procedures.

These changes not only leave open-ended the extent and scope of the information Amtrak may demand from CN, and which CN would be contractually obligated to provide, but it also specifically authorizes Amtrak to demand information about CN’s operating and dispatching procedures. This would constitute an astonishing authorization for Amtrak, for which Amtrak offers no justification, to delve into sensitive CN business matters. In its so-called “reopener”

provision, Amtrak calls for CN to be required to provide certain information on dispatching, as a remedy in the event that HRD for a particular Amtrak train rises about 925 minutes per 10,000 train-miles. But the proposed modification to Section 7.3 would potentially require CN, as a routine matter, to provide even more extensive information about its operating and dispatching procedures, without any showing of poor contract performance. (It is noteworthy that Amtrak's proposal makes no provision for compensating CN for the incremental costs it would need to incur to comply with Amtrak's information demands.) Amtrak has made an extraordinary proposal for its own benefit without offering extraordinary justification (or any justification at all). The Board should reject it.

IV. INSERTION OF PROPOSED NEW SECTION 5.1.F REQUIRING CN TO PAY COSTS ARISING FROM ANNULLED, RESCHEDULED, OR TERMINATED TRAINS

Amtrak's markup proposes addition of a new Section 5.1.F, providing that:

For any portions of a trip of a scheduled Amtrak Train that, due to reasons within CN's reasonable control, are annulled, cancelled, rescheduled, or do not complete their trips, then CN shall pay Amtrak's reasonable costs, including alternative transportation costs, arising from such annulment, cancellation, rescheduling or failure to complete any portion of a trip.

This proposal is vaguely worded and would, if adopted, inevitably engender disputes, as Amtrak would second-guess what was "within CN's reasonable control," and CN would need to verify Amtrak's alleged "reasonable costs." Moreover, Amtrak provides no evidence that CN has unreasonably caused the "annulment, cancellation, rescheduling or failure to complete any portion of a trip" of an Amtrak train, or is likely to do so, and thus gives no reason for concluding that its proposal addresses any actual or reasonably anticipated problem.

Finally, this proposal is tantamount to a requirement that CN guarantee completion of the runs of its trains over CN's lines. In any voluntary agreement providing for such a guarantee, the

party providing the guarantee will require additional compensation for the risk it assumes in order to provide it. An administrative order requiring a party to bear such a risk without making any provision for compensating it for doing so (as called for by Amtrak's proposal) cannot constitute "reasonable terms and compensation" under 49 U.S.C. § 24308(a). If such a proposal is to be included in an Operating Agreement such as the one governing Amtrak's operations on CN, it properly should either emerge out of negotiations between the parties or should be supported by substantial argument and evidence, in which the parties may raise and discuss the implications and potential consequences of such a novel, including, for example, its interaction with the existing Do Not Count provisions of the Agreement, which already address trains that are annulled, cancelled, or rescheduled, or that do not complete their trips, and its impact on the administration of the Agreement, including the potential for disputes and the suitability of the existing dispute resolution process for handling an increase in disputes.

V. REVISION OF SECTION 3.4.B.2 LIMITING CN'S OBLIGATION TO AVOID EXCESSIVE TRAIN DELAYS SO AS TO APPLY ONLY TO AMTRAK TRAINS

Amtrak's markup would insert the word "Amtrak" into Section 3.4.B.2, so that CN's obligation to make reasonable efforts to "avoid excessive delay to trains" would apply only to Amtrak trains. This insertion is unnecessary, and should be rejected. CN's obligation to avoid unnecessary delays to trains generally necessarily includes a duty to avoid unnecessary delays to Amtrak's trains, whether or not the word "Amtrak" is added. But leaving the contractual language unmodified, so that it refers to unnecessary delays to trains generally, implicitly but appropriately acknowledges CN's duties to its freight customers, which CN retains even when bound by the Operating Agreement, but does not derogate from CN's responsibility, under the contract and statute, to Amtrak and its passengers.

Tab A

PUBLIC VERSION – REDACTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 35743

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

REPLY VERIFIED STATEMENT OF STEVEN R. PETERSON

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. Qualifications

1. My name is Steven R. Peterson. I have previously submitted a verified statement in this matter, which includes a description of my qualifications. An updated copy of my CV is attached as Appendix A.

B. Assignment

2. I have been asked by counsel for Illinois Central Railroad Company and Grand Trunk Western Railroad (collectively “CN”) to analyze Amtrak’s proposed incentive mechanisms (both the financial incentive mechanism and the operational penalties in the “reopener” provisions) that are described in the verified statements of James A. Blair and Yoel Weiss and Amtrak’s brief in this matter, and to compare them to CN’s proposal.

C. Summary of Conclusions

3. There are various ways in which CN can act to support Amtrak’s on-time performance on routes using CN’s network beyond providing Amtrak highest dispatching priority. An incentive program is required to encourage CN to take such actions when it is efficient to do so. A contract that includes incentives for CN to contribute to Amtrak’s on-time performance is more economically efficient than a contract without such incentives.

4. Efficient incentive programs to promote Amtrak’s on-time performance will contract over observable outcomes that are under the control of CN and are directly related to CN’s contribution to Amtrak’s ultimate goal, in this case, on-time performance. Basing an incentive program on outcomes that are not under CN’s control and/or less related to CN’s contribution to Amtrak’s on-time performance weaken incentives to promote Amtrak’s on-time performance, resulting in a less effective incentive program than an efficiently designed program using the same level of incentives.

5. The incentive program in the current Operating Agreement, with CN’s modifications to reflect the Board’s Interim Decision,¹ is structured to achieve economic efficiency. In particular, CN’s proposal focuses on Amtrak’s on-time performance on CN’s lines and on CN’s contribution to Amtrak’s performance. The fact that CN’s proposal modifies the existing program, which was voluntarily agreed upon between CN and Amtrak, to implement the Board’s Interim Decision regarding improvements indicates CN’s proposal is founded on workable and efficient principles.

6. The Board has expressed concern regarding incentive programs that would lead to net penalty payments from CN to Amtrak because such payments would increase CN’s subsidy of Amtrak by the amount of the penalties.² The implication of that concern is that an effective incentive program in this context should be designed to yield net positive incentive.

7. Unlike CN’s proposal, Amtrak’s proposed incentive program is economically inefficient because it incorporates performance measures that are not under CN’s control and/or are not directly related to the on-time performance the program is intended to promote. For example, Amtrak’s proposal bases incentive payments on customer on-time performance (“COTP”), which is measured for a train’s full route, which may involve multiple host railroads.³ 20 of Amtrak’s 26 trains that run over CN’s lines are primarily operated on other host railroads’

¹ Application of the National Railroad Passenger Corporation under 49 U.S.C. § 24308(a)—Canadian National Railway Company, Docket No. FD 35743, August 8, 2019 (hereinafter “Interim Decision”) at 16.

² Interim Decision at 16.

³ COTP measures the on-time performance at all stations weighted by the number of passengers detraining at each station. FRA, *Metrics and Minimum Standards for Intercity Passenger Rail Service*, 85 Fed. Reg. 72,972, 72,974 (Nov. 16, 2020) (“FRA Metrics and Standards”), *codified at* 49 C.F.R. pt. 273.

networks, which makes it unlikely that CN's actions will be a major determinant of COTP for these services.⁴ Amtrak's proposal also bases incentive payments on Host-Responsible Delay ("HRD"), as defined and measured by Amtrak, which depends in significant part on factors that are not under CN's control, such as passenger train interference from scheduled meets, commuter train interference, and delays resulting from cross traffic at interlockings controlled by other railroads.

8. Analysis of Amtrak's incentive proposal indicates that it would be expected to provide essentially no positive incentive to promote Amtrak's on-time performance. The poor incentive characteristics of Amtrak's proposal are the result of the net incentives being reduced relative to the existing program. Based on historic performance, Amtrak's proposal would be expected to result in penalties of approximately \$ [REDACTED] in 2019, a year in which CN actually earned incentive payments of approximately \$ [REDACTED] under the existing operating agreement between CN and Amtrak.⁵

9. Amtrak is correct when it states that it "is not proposing a true 'reopener' provision" in its proposed Operating Agreement.⁶ Economically, a reopener is an opportunity to negotiate new terms preferred by both parties when a contract has proved to be deficient or to no longer reflect market circumstances.⁷ Instead, Amtrak proposes a program of escalating interference with CN's operations that starts when a single train has quarterly CN HRD greater than 924 minutes per 10,000 train-miles. Amtrak's proposal would impose significant reporting and supervisory costs on CN, escalating to Amtrak's dispatching CN's rail lines in the United States that host the Amtrak train at issue.⁸ Amtrak's dispatching CN's rail lines in the interest of its passenger services without regard for the costs to other users of CN's network is likely to

⁴ Lincoln Service, Blue Water, Wolverine, and Texas Eagle are primarily hosted by railroads other than CN. See, e.g., Amtrak, Host Railroad Report, Amtrak Train Performance on Host Railroads, Data through April 2022 at 9-10.

⁵ See RVS Matteucci/Kuxmann (PID) ¶ 69. I understand that CN takes the position that Amtrak underpaid it in 2019. I take no position on that dispute but use the amount Amtrak actually paid CN for purposes of my analysis.

⁶ Opening Brief of National Railroad Passenger Corporation, May 27, 2022 (hereinafter "Amtrak Opening Br. (PID)") at 67 n. 48.

⁷ See, e.g., Drew Fudenberg and Jean Tirole, *Game Theory* (Cambridge, MA: MIT Press, 1991), p. 419.

⁸ Amtrak Opening Br. (PID) 67-71.

undermine the efficient use of the network for CN's freight customers, which would hurt shippers as well as consumers who rely on rail transportation for the goods that they buy. CN's freight revenues greatly exceed Amtrak's passenger revenues, indicating that the potential economic costs to freight customers likely exceed the benefits to Amtrak. Moreover, the incremental cost to CN of Amtrak's presence on CN's rail lines if Amtrak dispatched those rail lines solely or primarily in its own interest would be higher than under CN dispatching. Amtrak should pay CN the incremental costs of its presence on CN's network, and thus, Amtrak should be responsible for and cover the increase in incremental costs of its dispatching. Amtrak has not proposed to do so, however. As a result, CN would be further subsidizing Amtrak's passenger service.

II. THE AMTRAK-CN OPERATING AGREEMENT SHOULD INCORPORATE EFFICIENT INCENTIVES FOR CN TO CONTRIBUTE TO AMTRAK'S ON-TIME PERFORMANCE

A. The Economics of Contractual Incentives

10. As I described in my prior statement, an economically efficient operating agreement covering Amtrak's access to CN's rail lines should provide incentives to Amtrak to avoid making demands for the use of CN's network that impose disproportionate costs on freight shippers (and ultimately consumers) relative to the value of passenger rail service created. Requiring Amtrak to pay CN's full incremental cost of Amtrak's use of CN's rail lines would lead Amtrak to internalize the costs its operations impose on CN, as required for economic efficiency.⁹

11. In addition, an economically efficient operating agreement should provide incentives to CN to support Amtrak's goal of achieving at least 80% on-time performance.

12. As described in my previous statement, Amtrak does not pay the full incremental cost of its presence on CN's network because incremental costs that are known to be substantial are not included in Amtrak's compensation to CN.¹⁰ The consequence of Amtrak not paying the

⁹ The incremental cost of Amtrak's use of CN's rail lines is the difference between CN's total cost when CN hosts Amtrak and CN's total cost when Amtrak does not use CN's rail lines.

¹⁰ VS (PID) Peterson ¶¶ 13-15.

full incremental cost of its presence on CN's network is that Amtrak's costs of access and use of CN's network do not incentivize Amtrak to be efficient in its requests to use CN's lines (*i.e.*, Amtrak has no disincentive to seek to use CN resources that have higher incremental cost than the benefits derived from that use).

13. To avoid increasing CN's subsidy of Amtrak, Amtrak's incentive proposal cannot yield *net* penalties over time. On this point, the Board noted that it was "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."¹¹ Put differently, Amtrak's access to CN's network for incremental cost should limit Amtrak to using carrots rather than sticks (on balance) in its incentive program. An incentive system that is not expected to yield meaningful net incentives that CN can retain provides little or no economic incentive for CN to support Amtrak's on-time performance.

B. The Economically Appropriate Structure of Incentives to Promote Amtrak's On-Time Performance

14. Economic principles imply that a plan to provide efficient incentives will focus on CN's contribution to the desired outcomes – Amtrak COTP of at least 80% and minimizing the lateness of those trains that do arrive late – as directly and precisely as practicable with available information. In this case, these principles imply that CN should earn incentives when it contributes to the objective of enhancing Amtrak's COTP, even if an Amtrak train is late as the result of events outside of CN's control (*e.g.*, a train's late arrival to CN's network and so forth) and not poor dispatching or other performance by CN.

15. All parties to an incentive program want to be able to plan whether the program will reliably yield payments or penalties, given the efforts made in hitting performance thresholds. The importance of using the best information available to implement an incentive program is elevated when penalties are relatively less available as part of an incentive program. Incentive payments based on measures that are not strongly connected to CN's efforts and successful contributions to Amtrak's on-time performance imply that CN cannot reliably earn

¹¹ Interim Decision at 16.

incentive payments even if it undertakes costly efforts to support strong COTP. An incentive system based on a weak connection to CN's efforts and success would provide weak (and possibly ineffective) incentives for CN to undertake costly actions to benefit Amtrak.

16. A rationally designed incentive program should make use of relevant information available to the parties that strengthens the relationship between incentive payments and the actions Amtrak desires from CN. Using information relating to train delay and performance, including, for example, train disruptions due to weather events, accidents, delays due to other railroads, late arrivals by Amtrak, and so forth allows an incentive system to more accurately reflect CN's contribution. An incentive program making use of as much information as practicable to connect incentive payments to CN's contribution efficiently encourages CN to use its experience and expertise in support of Amtrak's performance goals.

17. I defer to experts in the operation and dispatching of railroads to address in detail what factors affecting on-time performance are not under CN's direct or reasonable control. However, economic considerations indicate there are factors unrelated to CN's performance as a host that affect Amtrak's on-time performance on CN's network.

- a) Other Railroads' Dispatching Decisions and Signals. If an Amtrak train is late because it cannot proceed through an interlocking on CN's system that is *controlled by another railroad*, a rationally designed incentive system would not attribute poor performance to CN because this delay does not imply that CN failed to support Amtrak's on-time performance.
- b) Delays Caused by Amtrak. If Amtrak delays its own train, excellent host performance may not prevent "low" on-time performance. Meets of two Amtrak trains, in which one Amtrak train delays another on CN's mostly single-track railroad, are also generally the result of Amtrak's schedule rather than CN's efforts.¹² A rationally designed incentive system would not attribute poor performance to CN because these delays do not imply that CN failed to support Amtrak's on-time performance.

- c) Events Outside of CN's Control. Personal and non-CN commercial vehicle accidents at an at-grade crossing that cause delays are not under CN's control. Similarly, weather events and flooding that make lines temporarily impassible are not under CN's control.
- d) Delays Caused by Other Hosts: On routes with multiple hosts, Amtrak's on-time performance on the service and at stations on CN's rail lines will depend on the performance of other hosts for the same train. Accounting for delays that result from problems on other hosts' rail lines is important to efficiently preserving CN's incentives.
- e) Maintenance of Way. An incentive system that provides incentives to delay routine maintenance of way or other productive capital investments in the rail lines risks being counter-productive. Maintenance of way and other productive investment activities are necessary to the safe and efficient operation of the railroad for the benefit of all users, including Amtrak.¹³

18. Because Amtrak's on-time performance depends on factors beyond those that CN can materially or directly influence, any incentive program of an Amtrak-CN operating agreement must take these other factors as given when rewarding/penalizing CN's contributions to Amtrak's on-time performance.

III. CN'S PROPOSED INCENTIVE PROGRAM USES RELEVANT, AVAILABLE INFORMATION TO TARGET INCENTIVES EFFICIENTLY AND INCORPORATES THE BOARD'S INTERIM DECISION

A. Overview

19. The purpose of the incentive program included in the proposed operating agreement is to induce CN to use its experience and expertise to contribute to Amtrak's performance, specifically, the goal of 80% COTP. CN's proposal incorporates available

¹² VS (PID) Matteucci/Kuxmann at 7.

¹³ RVS (PID) Taylor at ¶ 49.

information regarding the cause of delays at stations and checkpoints on CN's rail lines so that resulting incentive payments and penalties reflect CN's contribution to Amtrak's on-time performance. Thus, CN's proposal focuses on directly incentivizing CN's contribution to Amtrak's ultimate objective, getting passengers to their destinations on time as measured by COTP (i.e., an objective supported by Amtrak, CN, and the Federal Railroad Administration).

20. CN's proposal avoids use of metrics that are not specific to CN's contribution to Amtrak's on-time performance or that are influenced by other railroads. As a result, CN's proposal gives certainty to Amtrak and CN about how CN's performance will contribute to the incentive payments CN receives. The tight linkage between CN's performance and incentive payments lessens the potential for the incentive program to be economically ineffective. As a result, CN's proposal avoids the potentially weak incentives and other pitfalls of Amtrak's proposal.

21. Finally, as described below, CN's proposal also reflects the Board's Interim Decision regarding changes to the incentive program included in the CN-Amtrak Operating Agreement.

B. CN's Proposed Incentive Program

22. CN's incentive proposal is described at length in CN's Opening Submission, including the joint verified statement of Michael Matteucci and Scott Kuxmann, filed in May. I focus here on the economic characteristics of CN's proposal and its focus on measures of CN's contribution to Amtrak's on-time performance.

23. CN's incentive proposal is based on the performance measurement that is included in the current Operating Agreement, which provides for incentive payments to CN when Amtrak trains achieve specified levels of on-time performance when operating on CN's rail lines (based on the run time on CN's lines (only) required to arrive at stations "on time" as

defined in the agreement). To determine Amtrak's on-time performance in that sense, the incentive program applies relief items where a run-time delay is not under CN's control.¹⁴

24. For example, under CN's proposed Operating Agreement, a train is treated as on-time at a station if its arrival time does not exceed an amount greater than allowed tolerances plus the amount of time that a train departs late from its origin point on CN.¹⁵ If CN's performance was the cause of excessive train delays, however, the train will be treated as late for purposes of calculating incentive payments. Thus, relief items can result in a late train being treated as on-time if CN's performance as a host is strong.¹⁶ This approach is consistent with the economic principles described above. Specifically, the approach uses available information so that Amtrak pays incentives to CN when CN's performance hosting an Amtrak train was strong and collects penalties from CN when CN is responsible for trains arriving late.¹⁷ This approach yields a predictable relationship between CN's performance as a host and the incentive payments it receives.

25. CN's proposed changes to the calculation of incentive payments incorporate the Board's guidance in its Interim Decision. Under CN's proposal, CN would earn incentives if on-time performance is 80% or greater.¹⁸ The schedule would also eliminate the existing "neutral zone" between 70% and 80% on-time performance, in which CN neither receives incentive payments nor is assessed penalties, per the Board's Interim Decision.¹⁹ To determine the percentage of arrivals that are on time, CN's proposal weighs each checkpoint by the share of riders detraining at each station.²⁰ Thus, CN's proposed measure of on-time performance reflects

¹⁴ Post-Interim Decision Opening Submission of Illinois Central Railroad Company and Grand Trunk Western Railroad (hereinafter "CN Opening Br. (PID)"), Exhibit 1 at App. V-2-V-5.

¹⁵ CN Opening Br. (PID), Exhibit 1 at App. V-2.

¹⁶ VS (PID) Matteucci/Kuxmann at 10-11 n. 13 and 60.

¹⁷ VS (PID) Matteucci/Kuxmann at 10-11.

¹⁸ VS (PID) Matteucci/Kuxmann at 15; CN Opening Br. (PID) at Tab B, Exhibit 2 (CN Clean Revised Operating agreement), V-9.

¹⁹ VS (PID) Matteucci/Kuxmann at 16; Interim Decision at 14.

²⁰ VS (PID) Matteucci/Kuxmann at 13; CN Opening Br. (PID), Tab B, Exhibit 2 (CN Clean Revised Operating agreement), V-8. In addition, CN proposes adding checkpoints at the end of each CN segment that does not end at a station. VS (PID) Matteucci/Kuxmann at 12-13.

the Board's Interim Decision regarding the incorporation of all stations into the on-time measure and accounting for the on-time experience of every passenger Amtrak serves.²¹

26. CN's proposed incentive schedule includes a "timeliness multiplier" that accounts for the average number of minutes that a train is late.²² Under CN's proposal, CN will earn higher incentive payments if Amtrak's trains are late by less than the standard tolerance of 15 minutes. And CN will pay increasing penalties as Amtrak's trains are late by greater amounts above tolerance. This feature of CN's proposal is also consistent with the Board's Interim Decision,²³ since it provides CN the incentive to reduce the degree of lateness of trains that arrive late.

27. Importantly, CN's proposal retains the "lookback" provision that limits CN's penalty payments to the amount of net incentive payments (*i.e.*, incentive payments less penalties) paid to CN in the previous 12 months.²⁴ This provision ensures that the incentive program does not yield net penalties to CN, which would increase CN's subsidy of Amtrak.

28. Finally, CN's proposed Operating Agreement provides that if CN's net incentive payments for any category of trains tracked in the proposed incentive program are less than zero for six consecutive months, CN and Amtrak will work jointly to investigate the causes of the deficient performance and adopt measures to address the poor performance, with the ability to resort to binding arbitration to resolve disputes as necessary.²⁵

29. The proposed incentive program uses the available information to directly measure CN's performance as an Amtrak host and CN's contribution to Amtrak's on-time performance. By using available information to evaluate CN's performance, the performance plan creates a predictable relationship between CN's efforts on behalf of Amtrak and the

²¹ Interim Decision at 11 n. 25.

²² VS (PID) Matteucci/Kuxmann at 16; CN Opening Br. (PID) at Tab B, Exhibit 2 (CN Clean Revised Operating agreement), V-9 – V-10.

²³ Interim Decision at 14.

²⁴ VS (PID) Matteucci/Kuxmann at 17; CN Opening Br. (PID) at Tab B, Exhibit 2 (CN Clean Revised Operating agreement), pp. V-12 – V-13.

²⁵ CN Opening Br. (PID) at Tab B, Exhibit 2 (CN Clean Revised Operating agreement), V-13.

incentive payments CN can expect to receive. The fundamental measure of on-time performance reflects performance at stations on CN's lines, weighted by the share of detraining passengers at each station. This encourages attention to maintaining on-time operations at all stations but encourages greater attention to stations used by more Amtrak passengers.

IV. AMTRAK'S PROPOSED INCENTIVE PROGRAM USES INPUTS THAT ARE NOT REASONABLY UNDER CN'S CONTROL AND MAKES NO ECONOMIC SENSE

30. Amtrak's proposed formula for calculating incentives to be paid to CN on a service is the product of three inputs, the Ridership Factor, COTP, and, most importantly, the Delay Adjustment Factor, which depends solely on CN's HRD. As described below, CN's HRD determines through the Delay Adjustment Factor whether CN will earn an incentive or be assessed a penalty on an Amtrak service.

31. The calculation of the Ridership Factor for a given service begins with the amount that Amtrak paid to CN in incentives in 2019, the last year prior to the COVID-19 pandemic.²⁶ Amtrak calculates the Ridership Factor on a quarterly basis by dividing 2019 incentive payments by a factor of four. This quarterly value is then adjusted for inflation since 2019. Amtrak states that it uses the inflation-adjusted "prior earnings to calculate a number that ensures that CN earns a similar amount of inflation-adjusted incentives under the new OA as it earned in 2019, if the subject route performs near 80% COTP."²⁷ To purportedly allow CN to earn the 2019 level of incentives, Amtrak divides the inflation-adjusted Ridership Factor by 80% to offset the effect of including COTP as a multiplier in its incentive formula.²⁸ Finally, Amtrak proposes to adjust the

²⁶ Amtrak Opening Br. (PID) at 36. For the Illini/Saluki service, Amtrak uses an average of the incentive payments received by CN in 2020/2021, because by Amtrak's calculation (as to which I understand there is a long-running dispute between the parties) CN earned no incentives for that service in 2019. *Id.*

²⁷ Amtrak Opening Br. (PID) at 36; Blair VS ¶ 39.

²⁸ If on-time performance equals Amtrak's target of 80% COTP, the COTP factor in the incentive equation and the scaling of the Ridership Factor offset each other.

Ridership Factor annually, beginning in 2024, based on the number of passenger miles actually travelled on the service during the preceding two years.²⁹

32. The second input into Amtrak's incentive payment formula is COTP or customer on-time performance, which the Federal Railroad Administration defines as "the percentage of all customers on an intercity passenger rail train who arrive at their detraining point no later than 15 minutes after their published scheduled arrival time."³⁰ The product of the Ridership Factor and the COTP factor is a dollar figure that, when COTP approximates 80%, will be close to the amount of incentives CN earned on the service in 2019, adjusted for inflation.

33. The third input into Amtrak's incentive-payment/penalty formula is the Delay Adjustment Factor, which is based on the minutes of HRD on CN's portion of an Amtrak route per 10,000 train-miles. HRD represents delays recorded by Amtrak under codes for which Amtrak attributes delays to the host railroad.³¹

34. Amtrak describes the Delay Adjustment Factor as "an adjustment based upon the number of minutes of CN's HRDs on the subject route during the quarter (as determined by Amtrak pursuant to its existing procedures for recording delays impacting its trains)."³² Table 1, below, shows the relationship between HRD and the Delay Adjustment Factor that Amtrak proposes to use to calculate CN's incentive and penalty payments.³³ Apparently based on data (which were not provided with his statement) regarding the performance of Amtrak trains nationwide (*i.e.*, mostly concerning trains not involved in this case), Amtrak witness Yoel Weiss asserts that "it is clear that there is an association between 80% COTP and approximately 900 minutes of HRD per 10,000 train-miles."³⁴ This presumably explains why the Delay Adjustment Factor changes from penalties to incentives when HRD falls from the range of 925-949 minutes

²⁹ See Amtrak Opening Br. (PID) at 38 for a detailed description of Amtrak's proposed calculation; *see also* Blair VS ¶¶ 41-43.

³⁰ 49 C.F.R. § 273.5(a).

³¹ See, *e.g.*, Host Railroad Report, Amtrak Train Performance on Host Railroads, Data through April 2022, p. 12 for a list of HRD codes.

³² Amtrak Opening Br. (PID) at 40.

³³ Blair VS ¶¶ 48-52.

³⁴ Weiss VS ¶ 85.

of HRD to the range of 900 to 924 minutes of HRD. I address Amtrak's Delay Adjustment Factor below.

Table 1
Amtrak's Proposed Delay Adjustment Factor Based on CN HRD

CN HRD per 10,000 Train-miles	Delay Adjustment Factor
0-449	125%
500-599	120%
600-649	115%
650-699	110%
700-749	105%
750-799	100%
800-824	80%
825-849	60%
850-874	40%
875-899	20%
900-924	10%
925-949	-20%
950-974	-40%
975-999	-60%
1,000-1,049	-80%
1,050-1,099	-100%
1,100-1,149	-110%
1,150-1,199	-120%
1,200-1,299	-130%
1,300-1,399	-140%
1,400-1,499	-150%
1,500-1,599	-160%
1,600-1,699	-170%
1,700-1,799	-180%
1,800-1,999	-190%
2,000-2,199	-200%
2,200-2,399	-210%
2,400-2,599	-220%
2,600-2,799	-230%
2,800-2,999	-240%
3,000 or greater	-250%

35. Amtrak proposes to calculate the incentive payment or penalty for a service for a given quarter by “multiplying: (a) the Ridership Factor; by (b) the COTP for the route for the quarter; and by (c) the Delay Adjustment Factor.”³⁵ The purported goal of Amtrak’s formula is to provide incentives to CN to encourage CN to support Amtrak’s on-time performance as measured by COTP. Amtrak’s formula, however, ignores available information relevant to CN’s contribution to Amtrak’s on-time performance in favor of factors outside of CN’s control. As a result, Amtrak’s incentive program weakly relates CN’s efforts on behalf of Amtrak to the incentive payments CN can expect to receive relative to CN’s proposal.

A. By Basing Its Incentives and Penalties Proposal on HRD, Amtrak Fails to Focus Directly on CN’s Contribution to COTP

36. In Amtrak’s incentive proposal, the product of Ridership and COTP factors yields a dollar value that is multiplied by the Delay Adjustment Factor to determine CN’s incentive or penalty for the quarter. Whether CN receives an incentive payment (or a penalty) depends entirely on the Delay Adjustment Factor, which, in turn, depends only on the minutes of HRD per 10,000 train-miles on CN’s rail lines.

37. HRD is a poor metric on which to base an incentive program to support Amtrak’s on-time performance. Despite its name, HRD is only partly under CN’s control, which weakens the link between CN’s efforts on behalf of Amtrak and the incentive payments it will receive or the penalties that will be assessed. Moreover, Amtrak’s own data (reflected in the graph at paragraph 83 of Mr. Weiss’s statement) show that there is wide variation in the relationship between HRD and COTP, which indicates that the nationwide average relationship between HRD and COTP across all host freight railroads and all routes on which Amtrak’s incentive proposal depends cannot be presumed to be appropriate to the specific routes CN hosts. Moreover, the calibration of the Delay Adjustment Factor based on HRD is unexplained, unsupported, and is designed asymmetrically to favor penalties over incentives. As a result, it is unlikely to yield financial incentives to CN to support Amtrak’s on-time performance.

³⁵ Amtrak Opening Br. (PID) at 40; *see also* Blair VS ¶ 45.

38. Minutes of HRD represent the delays experienced under certain Amtrak delay codes.³⁶ While Amtrak’s codes may indicate a delay that occurred on a host’s rail lines, the codes categorize certain of the delays as HRD that are not under the host’s control or should not be discouraged by Amtrak’s incentive program, and therefore should not be taken to indicate poor performance by the host.

39. For example, HRD includes interference from freight trains and commuter trains as well as interference from the meeting or passing of other passenger trains, which are, of course, Amtrak’s own trains. Amtrak-Amtrak meets on CN’s primarily single-track network occur daily as part of normal Amtrak schedules, not as the result of poor performance by CN.³⁷ I understand that Amtrak’s HRD coding also categorizes delays experienced on CN’s rail lines due to cross traffic at interlockings that are controlled by railroads other than CN as “freight train interference,” or “FTI,” which is an Amtrak subcategory of HRD.³⁸ Such delays are out of CN’s control and should not be regarded as indicative of poor CN performance.

40. Amtrak’s proposed standard of 924 minutes of HRD per 10,000 train-miles is unsupported and not applicable to many routes. For example, as discussed by Messrs. Matteucci and Kuxmann, Amtrak’s Texas Eagle and Lincoln services have multiple hosts and use CN’s lines for just 35 miles running from downtown Chicago to a tower controlled by Union Pacific Railroad just outside Joliet, Illinois.³⁹ The major source of CN HRD for these trains as recorded by Amtrak is cross-traffic at interlockings that CN does not control.⁴⁰ On a 35-mile segment, a delay as short as 6 minutes amounts to over 1,700 minutes of HRD per 10,000 train-miles attributable to cross-traffic – which Amtrak records as HRD. Under Amtrak’s proposal, these unavoidable delays would result in penalties and, under the “reopener” provision I discuss in Section VI below, in Amtrak’s costly supervision and control of dispatching and maintenance

³⁶ Amtrak Opening Br. (PID) at 47-48; Host Railroad Report, Amtrak Train Performance on Host Railroads, Data through April 2022, p. 12.

³⁷ VS (PID) Matteucci/Kuxmann at 7.

³⁸ RVS (PID) Matteucci/Kuxmann ¶ 23.

³⁹ RVS (PID) Matteucci/Kuxmann ¶ 27.

⁴⁰ RVS (PID) Matteucci/Kuxmann ¶ 26.

functions on CN's freight railroad, even if these trains arrive to their CN endpoints on time and with little or no delay caused by CN.⁴¹

41. HRD also includes delays from activities that should not be discouraged. For example, HRD includes delays resulting from maintenance of way on CN's network. Of course, maintenance of way is critical to the safe and reliable operation of trains on CN's rail lines, including Amtrak's trains, and should not be discouraged.

42. Amtrak asserts that HRD on CN's rail lines captures CN's efforts to support Amtrak's on-time performance.⁴² While certain aspects of HRD can be influenced by CN, other aspects of HRD cannot. As a result, HRD is an inferior indicator of CN's efforts to support Amtrak's on-time performance relative to CN's proposed approach, which uses more detailed information about the causes of Amtrak's delays and is thus a better basis for evaluating CN's performance.

B. Amtrak's Proposed Delay Adjustment Factor Is Economically Unsupported and Yields Economically Untenable Results

43. Central to Amtrak's incentive proposal is its Delay Adjustment Factor that affects "the amount of incentives CN will receive (or the penalty it will incur)."⁴³ Amtrak proposes that when HRD minutes are between 900 and 924, CN will earn incentives and the Delay Adjustment Factor will be 10%.⁴⁴ The point at which Amtrak has pegged the break between penalties and incentives appears to be based on the analysis of Yoel Weiss. Mr. Weiss presents the chart reproduced in Figure 1 below, which he claims represents the monthly relationship between HRD and Amtrak's COTP for trains on Amtrak's host railroads between April 2019 and March 2022.⁴⁵

⁴¹ This example illustrates the problem that even small amounts of delay on routes that use only a short segment of CN's network can have very high HRD from short and expected delays that are outside of CN's control.

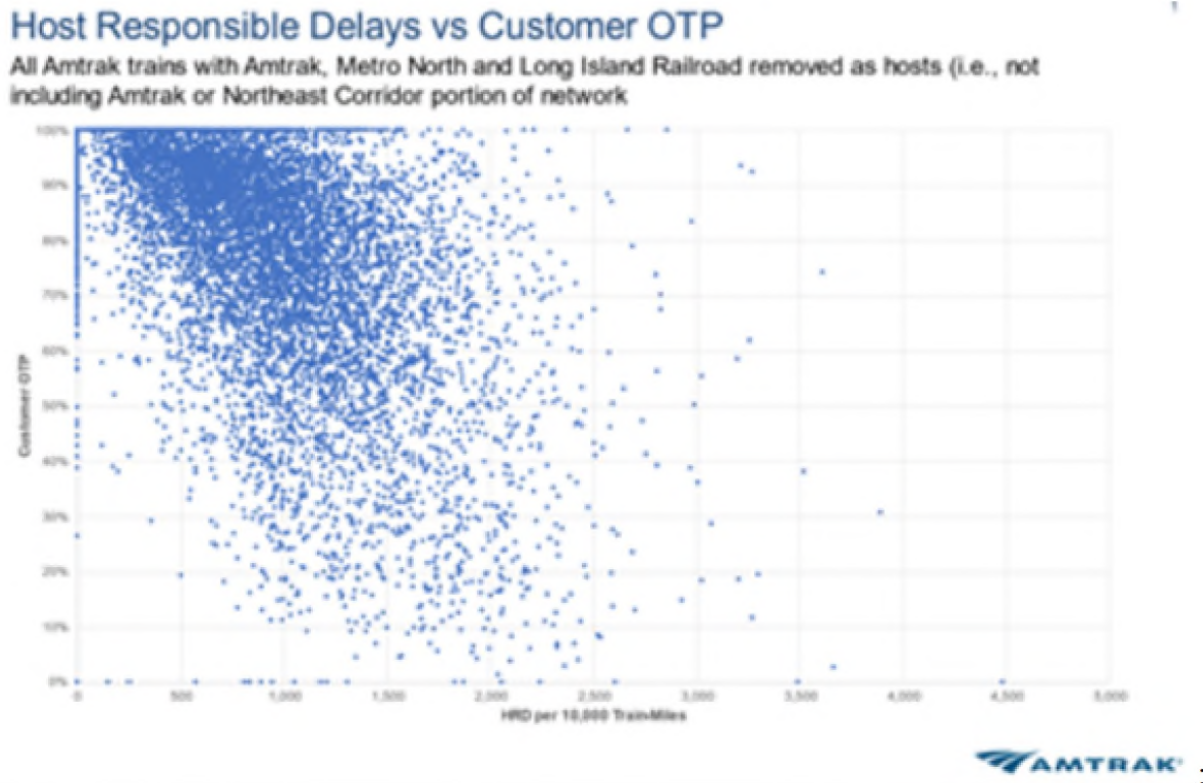
⁴² Amtrak Opening Br. (PID) at 47-48.

⁴³ Blair VS ¶¶ 49-51.

⁴⁴ Blair VS ¶ 49.

⁴⁵ Weiss VS ¶¶ 82-83.

Figure 1
Reproduction of Weiss's Host HRD-COTP Chart



44. Based on the data in the above chart, Mr. Weiss concludes “it is clear that there is an association between 80% COTP and approximately 900 minutes of HRD per 10,000 train-miles.”⁴⁶ Specifically, he asserts that across all trains and hosts represented in the chart, the average COTP and HRD were 77% COTP and 920 minutes of HRD per 10,000 train-miles, and the median was 82% COTP and 887 minutes of HRD per 10,000 train-miles.⁴⁷ Given the wide variation in the relationship between COTP and HRD on for different trains, as illustrated in Mr. Weiss’s chart, the relevance of either the median or the mean HRD and COTP is entirely unsupported.

45. In addition, Mr. Weiss’s chart explicitly illustrates the incoherence of Amtrak’s proposal by explicitly showing that there will be many in which HRD will exceed 924 minutes

⁴⁶ Weiss VS ¶ 85.

⁴⁷ *Id.*

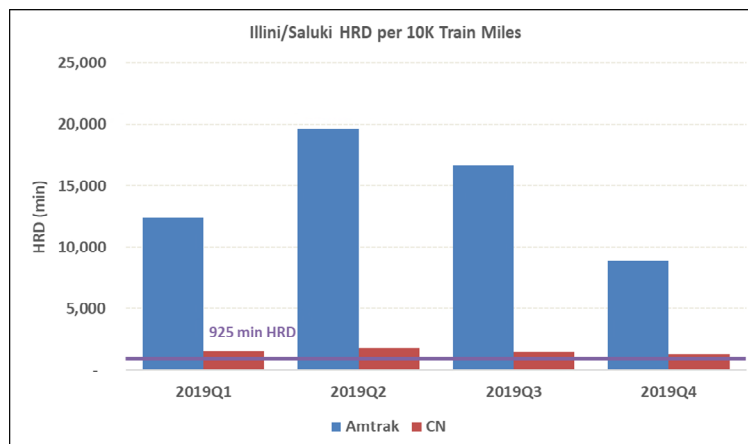
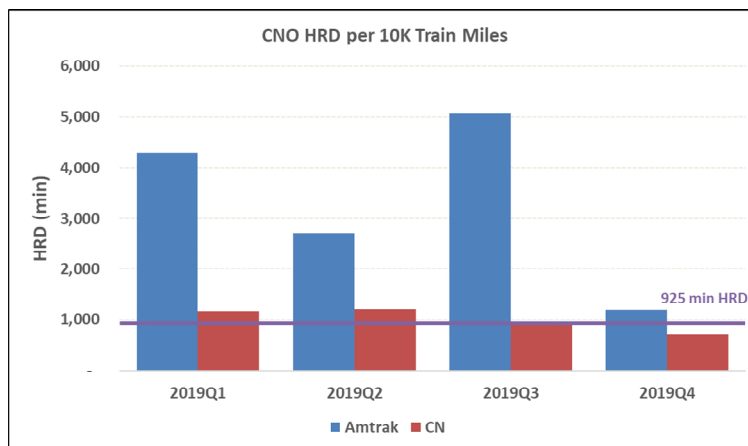
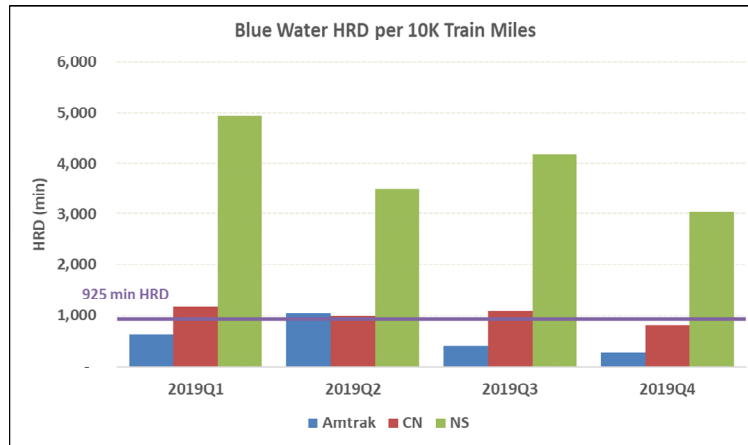
per 10,000 train-miles, and thus be a basis for penalties under Amtrak's proposal, notwithstanding that the train arrives on time or that the service achieves at least 80% COTP. Amtrak's proposal threatens to penalize CN even in instances where CN's performance supports Amtrak arriving as scheduled and on time.

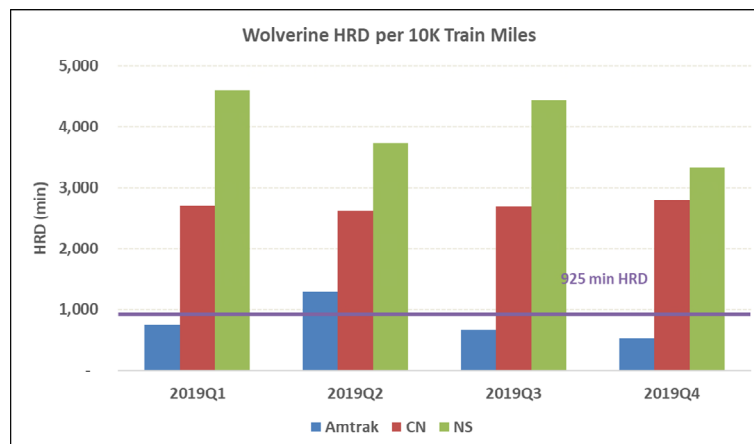
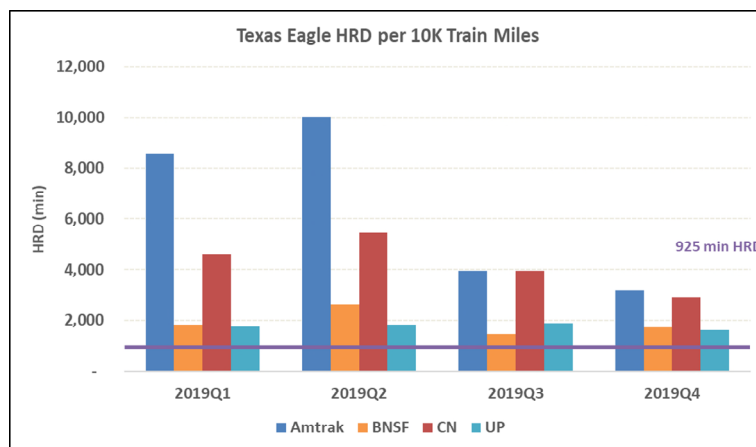
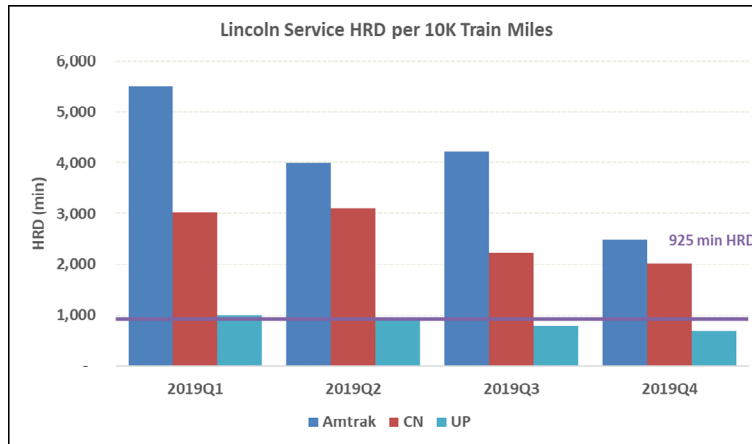
46. Differences among Amtrak's routes and the networks on which they operate imply that the national average and the median COTP and HRD are not appropriate benchmarks for all Amtrak routes. Some routes have large amounts of freight and commuter rail traffic, while others are less traveled. Some run through urban areas with considerable cross traffic, others run primarily through prairie. Some routes are double- or triple-tracked and some, like much of CN's network, are single-tracked, which makes the meeting and passing of trains more complicated.⁴⁸ These considerations indicate that levels of HRD and its relationship to COTP is likely to vary widely across various segments of Amtrak routes hosted by different railroads. Yet Amtrak assumes that all hosts for all trains should meet the same HRD standard, measured against a PRT baseline, which is economically unsupported and contrary to the evidence of variation in Figure 2 and Mr. Weiss's data.

47. The inapplicability of a 924-minute HRD standard to all railroads hosting Amtrak routes is evident from the wide range of HRD for each host observed on the six routes CN hosts. Figure 2, below, shows that HRD on the Amtrak services that CN hosts varies widely by host and frequently exceeds 925 minutes per 10,000 train-miles. These results are consistent with the discussion above regarding the factors that contribute to wide variation in HRD, such as traffic at interlockings controlled by other railroads, multiple users of the rail network, and whether the relevant track segment is single- or double-tracked, for example.

⁴⁸ See, e.g., RVS (PID) Taylor ¶ 21.

Figure 2
HRD by Host on CN-Hosted Amtrak Services





48. Figure 2 also illustrates that Amtrak frequently has higher HRD per 10,000 train-miles than the freight railroads hosting other portions of the service. Presumably Amtrak does not attribute its own high HRD on some services to its own poor dispatching. Clearly, HRD is driven by a wide variety of factors other than dispatching and many of these factors are out of host railroads' control.

49. Other considerations show that HRD is a poor basis for evaluating whether a host railroad should receive incentives or be assessed penalties. HRD measurements do not reflect trains' actual schedules and the realistic time required for a train to cover a certain distance given real-world considerations. I understand that Amtrak schedules include pure run time, or "PRT" (*i.e.*, the time of a perfect run without delays), plus additional schedule time in the form of recovery and/or miscellaneous time to protect on-time performance, and provide passengers with realistic schedule expectations, by allowing time for ordinary, anticipated levels of delay. Recovery time should be sufficient to account for anticipated HRD and other delays. If, for example, a train regularly encounters 20 minutes or more of HRD due to cross-traffic at interlockings controlled by other carriers, assuming the schedule's pure run time is accurate, it should generally include at least 20 minutes of recovery time in order to maintain solid OTP during normal operating conditions. Such anticipated or unavoidable delays are not evidence that a host failed to support Amtrak's on-time performance and need not affect COTP for schedules that reflect anticipated normal levels of delay. Penalizing CN for delays that it cannot avoid or that are within the expectations reflected in Amtrak's schedule makes no economic sense. Yet Amtrak's proposal ignores schedule recovery time and treats all delays the same, whether to an on-time or late train.

50. Moreover, Mr. Weiss's analysis fails to recognize that not all minutes of delay have the same impact on COTP. Specifically, delays at the beginning of a trip may be difficult to make up and lead to poor COTP on a train's entire run. In contrast, delays at the end of a route affect only the passengers detraining at the stations at the end of the route and have a smaller effect on COTP. Thus, Mr. Weiss's assumption of a stable causal relationship between minutes of HRD delay and COTP is incorrect.⁴⁹

C. Ridership Depends on Factors Outside of CN's Control

51. Amtrak proposes to adjust the Ridership component of its incentive formula annually beginning in 2024 based on the change in the number of passenger miles on the route

⁴⁹ This was explained at length by Professor Dubin during an earlier phase of this proceeding. *See generally* RVS Dubin at 16-18 (filed Sept. 14, 2017).

relative to the previous two years.⁵⁰ Thus, according to Amtrak, CN stands to earn greater incentives if Amtrak's ridership increases, giving CN the incentive to help Amtrak increase the number of passengers using Amtrak.⁵¹ As discussed below, Amtrak fails to note that increased ridership may equally – and perversely – lead to increased penalties under its proposal.

52. The purported aligning of CN's and Amtrak's objectives as the result of including Ridership as a factor in incentive payments CN receives is economically vacuous. Amtrak suggests only one mechanism through which CN would possibly have a meaningful effect on Amtrak's ridership, "good on-time performance."⁵² Thus, the inclusion of Ridership in Amtrak's incentive formula cannot encourage CN to do anything that is not incentivized by an incentive proposal such as CN's, which is directly focused on supporting Amtrak's on-time performance.

53. Inserting a Ridership Factor into the incentive formula can only dilute CN's incentive to improve Amtrak's on-time performance. Many factors outside of CN's control affect Amtrak's ridership. For example, Amtrak's ridership will depend on the fares that Amtrak charges and the quality and efficiency of Amtrak's own operations. In addition, as potential Amtrak passengers consider their transportation options, they would consider the cost of travel by car and/or air, which CN cannot control. Likewise, factors outside of CN's control such as the severity of the Covid pandemic. As a result, the introduction of the Ridership Factor into Amtrak's incentive formula weakens the relationship between CN's efforts to support Amtrak's on-time performance and the financial incentives that CN can expect to receive for such efforts.

⁵⁰ Amtrak Opening Br. (PID) at 38.

⁵¹ Blair VS ¶ 59; Amtrak Opening Br. (PID) at 43-44.

⁵² Amtrak Opening Br. (PID) at 34.

D. COTP Is Measured for Trains' Full Routes and Is Not Reasonably Under CN's Control

54. COTP is not a measure of host performance; it is a measure of Amtrak train performance. Further, it is measured for the full route run by an Amtrak train. For any train route that has multiple host railroads, CN may have little control over COTP, particularly if that route runs only a relatively short distance on CN's rail lines. Even on routes that run primarily on CN's rail lines, such as City of New Orleans, Amtrak's and third parties' operations, and other exogenous factors (including weather and other acts of nature) also affect the route-level COTP. For example, if Amtrak leaves the origin late in Chicago, has mechanical breakdowns, or exceeds its dwell time at a station to offload passengers or baggage, the train's COTP would suffer. As another example, extreme heat, cold, or flooding can significantly affect the COTP of Amtrak's trains. Thus, COTP is affected by many factors outside of CN's control. When COTP is low for reasons other than CN's performance, the potential incentives available to CN would fall.

55. "Amtrak acknowledges that considering COTP as a factor in its calculations does not account for whether a Host Railroad (or a particular Host Railroad on a multi-Host route) is actually responsible for delays which caused Amtrak trains to be late."⁵³ Thus, Amtrak effectively recognizes that the introduction of the whole-route-level COTP measure into its incentive formula weakens the relationship between CN's efforts, which affect Amtrak's on-time performance on CN's rail lines, and the incentive payments CN can expect to receive under Amtrak's proposal. By doing so, the use of COTP also weakens the financial incentives contained in Amtrak's proposal relative to an incentive program that used metrics that directly measure CN's support for Amtrak's on-time performance.

E. Amtrak's Formula to Calculate Incentives and Penalties Does Not Make Economic Sense

56. Finally, the way Amtrak incorporates its three factors into an incentives or penalties calculation is by simply multiplying them together. Amtrak's incentive formula is economically unfounded. Amtrak ostensibly includes the COTP and Ridership factors because it

⁵³ Amtrak Opening Br. (PID) at 46.

seeks to encourage CN to act in ways that will tend to increase COTP and Ridership, even though, as discussed above, there may be little if any connection between CN's actions and either of those factors. But because those factors act as multipliers, whenever CN earns a penalty (based solely on its HRD), it will be penalized *more* when COTP and Ridership are *higher*.

57. That raises the possibility that a train hosted by CN could be achieving over 80% COTP – Amtrak's ostensible goal – and yet CN will incur substantial financial penalties based on that train's performance. And that appears, based on Mr. Weiss's data, to be a very real possibility: as Figure 1 above shows, his data reflect many Amtrak trains with HRD above 924 minutes per 10,000 miles and COTP above 80%.

V. AMTRAK'S INCENTIVE PROPOSAL APPEARS TO YIELD LIMITED OR NO FINANCIAL INCENTIVES TO CN FOR SUPPORTING AMTRAK'S ON-TIME PERFORMANCE

58. As discussed above, Amtrak proposes to calculate the incentive payment or penalty for a route for a given quarter by “multiplying: (a) the Ridership Factor; by (b) the COTP for the route for the quarter; and by (c) the Delay Adjustment Factor.”⁵⁴ According to Amtrak, this formula seeks “to assure that CN's potential incentive earnings under the new OA are not less than what CN earned in 2019 under the 2011 OA.”⁵⁵

59. As a simplified example, consider an Amtrak service on which CN earned \$800,000 of annual incentives in 2019 under the existing agreement. CN's incentives are \$200,000 per quarter, on average. Amtrak proposes dividing the quarterly value up by 80%, thereby scaling it up to \$250,000, so that CN will have the opportunity to earn the same amount under the new formula that it earned in 2019 if “the subject route performs near 80% COTP.”⁵⁶ For simplicity, in this example, assume inflation is zero and there are no changes in ridership, which implies that the Adjusted Ridership Factor is \$250,000. Assume further that the service's

⁵⁴ Amtrak Opening Br. (PID) at 40.

⁵⁵ *Id.* at 43.

⁵⁶ That is, the product of the scaled-up Ridership Factor and the Target COTP are equal to the average quarterly incentive payment before adjustment (*i.e.*, $\$250,000 \times 0.80 = \$200,000$). Amtrak Opening Br. (PID) at 36.

COTP is 80%. The base amount to which the Delay Adjustment Factor would then be applied would be \$200,000 – the same amount CN earned for the service on an average quarter in 2019.

60. Assume that CN’s HRD for that service is 910 minutes per 10,000 train-miles, which would be consistent with Mr. Weiss’s contention that 80% COTP is on average “associated” with HRD close to 900 minutes per 10,000 train-miles. The Delay Adjustment Factor that corresponds to 910 minutes of HRD in Table 1 is 10%. 10% of \$200,000 is \$20,000. Thus, CN’s quarterly incentive payment would be 10% of what it earned in 2019.

61. Analysis described below indicates that if CN were to perform as it actually did in 2019 under Amtrak’s proposed incentive program, Amtrak would assess penalties on CN on most services in most quarters. In short, Amtrak’s proposed plan essentially drives the financial incentives that CN could expect to earn to zero. The operative “incentive” built into Amtrak’s proposal is clearly a stick rather than a financial carrot. The stick is the negative consequences for CN resulting from Amtrak’s “reopener” clause, which allows Amtrak to intrude into and ultimately to take over CN’s dispatch of portions of CN’s network if just one Amtrak train has HRD greater than 925 minutes per 10,000 train-miles.

A. Amtrak’s Incentive Proposal Would Assess Penalties against CN for Performance Comparable to 2019

62. Amtrak acknowledges that CN earned incentives on every Amtrak service it hosts during the base years selected by Amtrak – 2019 for all services other than Illini/Saluki, and 2020/2021 (average) for Illini/Saluki. Amtrak’s proposed incentive plan, however, would assess penalties on CN for each and every one of the Amtrak services it hosts for the same performance.⁵⁷

63. When tested against CN’s real-world performance in the base years, Amtrak’s proposal would assess penalties on CN. Specifically, Amtrak’s proposal would be expected to result in *penalties* of approximately \$ [REDACTED] in 2019, in which CN actually earned

⁵⁷ On CN’s past incentives and penalties, see RVS (PID) Matteucci/Kuxmann ¶69.

incentive payments of approximately \$ [REDACTED] under the existing operating agreement between CN and Amtrak.⁵⁸

B. The Delay Adjustment Factor Is Unbalanced and Is Designed to Generate Penalties

64. The primary reason that Amtrak's proposed formula generates penalties where CN previously earned incentives is Amtrak's design of the Delay Adjustment Factor. If COTP is 80%, the product of the Ridership Factor and COTP is roughly equal to the incentives CN earned in the base years. The Delay Adjustment Factor scales up or down the base-year incentive amount and provides for an incentive payment equal to 10% of the base-year incentive for performance of 900-924 minutes of HRD per 10,000 train-miles, which Mr. Weiss asserts corresponds to roughly 80% COTP. Thus, performance matching Mr. Weiss's assumptions would yield incentives of roughly 10% of those paid in the base years for performance that hit Amtrak's targets.

65. Amtrak's Delay Adjustment Factor is also skewed to generate penalties. For example, improvements to HRD per 10,000 train-miles are not rewarded in the same manner as deteriorations are penalized. At the lower end of HRD per 10,000 train-miles (i.e., "0-449"), the Delay Adjustment Factor raises incentives to 125% of the baseline derived from 2019 incentive levels. At the higher end of HRD per 10,000 train-miles (i.e., "3,000 or greater"), however, it assesses penalties of *negative* 250% of the baseline. Amtrak fails to explain this unbalanced feature of its Delay Adjustment Factor.

66. In addition, if a host railroad has on average 900-924 minutes of HRD per 10,000 train-miles on a route over time, it is entirely possible that Amtrak's formula would impose net penalties on the host railroad. Suppose CN achieves 900 minutes of HRD per 10,000 train-miles on a given route during one quarter and 930 minutes during the subsequent quarter. According to Amtrak's Delay Adjustment Factor, CN would earn an incentive payment of 10% of the product of the Ridership Factor and COTP for this route in the first quarter and a penalty of 20% of the product of the Ridership Factor and COTP in the next quarter. If these two quarters are otherwise

⁵⁸ See *id.*

identical, CN would earn, on average, a penalty of 5% of the base-year incentive across these two quarters for performance that, on average, met Amtrak's proposed HRD benchmark.

C. Amtrak's Proposed Lookback Provision Contributes to the Weak Financial Incentives Provided by Amtrak's Incentive Proposal

67. The current operating agreement includes a "lookback" provision that prevents net penalties from being imposed over any 12-month period. The lookback allows Amtrak to collect financial penalties from CN, but only up to the level of net incentives earned by CN in the preceding 12 months. Under Amtrak's proposed incentive plan, Amtrak would have the entire term of the operating agreement, eight years (seven years, plus one year for notice of termination, under Amtrak's proposal⁵⁹) rather than 12 months, to offset any net incentives earned by CN. Amtrak admits that the reason for the proposed extension of the lookback period is that it allows Amtrak a longer period of time to offset incentives with penalties.⁶⁰

68. Under Amtrak's proposal, no net incentive previously earned would be shielded from later penalties during the full term of the operating agreement. Given the imbalance of Amtrak's proposal toward penalties, CN could reasonably expect that Amtrak's incentive proposal would generate no net financial incentive to support Amtrak's on-time performance. Amtrak's proposal therefore fails to fulfill one of the primary functions of an economically efficient incentive provision for an Amtrak-host Operating Agreement.

VI. Amtrak "Reopener" Provision Is Economically Inefficient

69. Amtrak proposes a one-sided and inefficient "reopener" provision that would apply whenever CN's HRD for one train exceeds 924 minutes per 10,000 train-miles for one quarter. As discussed above, that level of HRD is not a meaningful or reliable indication of poor performance by CN (since HRD depends on conditions on a route and includes many delays CN does not control). As discussed below, it is not an unusually high HRD level for Amtrak hosts in general.

⁵⁹ RVS (PID) Matteucci/Kuxmann ¶71.

⁶⁰ Amtrak Opening Br. (PID) at 62-66.

70. Reopeners can be economically efficient when they allow the parties to a contract to negotiate efficient solutions to problems. By this standard and by its own admission, Amtrak is not proposing a true reopener.⁶¹ Instead Amtrak proposes to exercise influence and ultimately control over CN's dispatching on lines that host Amtrak and, in addition, to exercise control over the scheduling of CN's routine maintenance on those lines.

71. In short, Amtrak proposes a contract under which CN would relinquish to Amtrak the usual economic privileges of ownership, specifically the right to determine how one's assets are used. Of course, if Amtrak exerts control over CN's dispatching, the incremental cost of Amtrak's presence on CN's rail lines will increase, including likely increased delays to freight traffic.⁶² Amtrak does not appear to recognize that the incremental cost it imposes on CN would increase once it exercised its "reopener," and especially after it took direct control of CN's dispatch. Amtrak does not propose to compensate CN for these increased costs. Thus, CN would not be compensated for the full incremental cost of Amtrak's presence (or for any of the consequences of its dispatching decisions) on CN's rail lines. Because Amtrak would not bear the costs it imposed on CN, Amtrak would have the incentive to dispatch CN's rail lines without regard for the consequences or cost to CN, its customers, or other freight or commuter railroads that operate over CN's rail lines. Amtrak's poor incentives, indicate that its dispatch of CN's network would be inefficient.

72. The consequences of Amtrak's proposal are not limited to the immediate effects of Amtrak's inefficient dispatch. If CN is not free to operate the assets in which it has invested to serve its customers effectively, CN would be expected to lose business and income as the result of its lower quality service and higher costs. In short, CN would be a less effective competitor for its customers' freight business. Moreover, the value of any investment CN might make in its network would be reduced by its lack of freedom to operate the network optimally. Thus, the economic consequence of the reduction of CN's control over its network is a reduced incentive to invest in the network.

⁶¹ *Id.* at 67 n. 48 ("Amtrak notes it is not proposing a true 'reopener' provision.").

⁶² Interim Decision, p. 22 ("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.").

A. Amtrak's Proposed "Reopener"

73. Amtrak's "reopener" provides for a "tiered" approach to its proposed supervision and control of CN's dispatching and maintenance.⁶³

- **Tier 1.** The first tier of Amtrak's proposal to exercise supervision and control is triggered when CN's HRD exceeds 924 minutes per 10,000 train-miles for *a particular Amtrak train* for one quarter.⁶⁴ Under Tier 1, CN must provide information on a monthly basis for each instance of a delay of 5 minutes or more to that train that Amtrak codes as HRD. The required information includes (1) why the delay occurred; (2) how the delay could have been avoided; (3) dispatcher name and supervisor; (4) whether and when the dispatcher was counseled; and (5) any corrective actions taken to prevent a repeat of the delay.⁶⁵ In addition, CN must provide Amtrak and the Board with access to CN's dispatch screens for the Amtrak route which includes that particular train.⁶⁶
- **Tier 2.** The second tier of Amtrak's proposal to exercise supervision and control is triggered if there are two consecutive quarters in which CN's HRD for a single train exceeds 924 minutes per 10,000 train-miles.⁶⁷ When Tier 2 is triggered Amtrak seeks, in addition to the Tier 1 requirements, that it be able to designate a representative to sit alongside CN's dispatchers.⁶⁸ In addition, Amtrak proposes that CN must obtain Amtrak's prior written approval to schedule any non-emergency right of way repair or maintenance of way that is expected to affect the on-time performance of Amtrak trains.⁶⁹
- **Tier 3.** Tier 3 is triggered following four consecutive quarters in which CN's HRD for a single train exceeds 924 minutes per 10,000 train-miles.⁷⁰ In addition to the requirements

⁶³ Amtrak Opening Br. (PID) at 67.

⁶⁴ Amtrak Opening Br. (PID) at 68.

⁶⁵ Amtrak Opening Br. (PID) at 68.

⁶⁶ Amtrak Opening Br. (PID) at 68.

⁶⁷ Amtrak Opening Br. (PID) at 69.

⁶⁸ Amtrak Opening Br. (PID) at 69.

⁶⁹ Amtrak Opening Br. (PID) at 69-70.

⁷⁰ Amtrak Opening Br. (PID) at 70.

of Tiers 1 and 2, Amtrak seeks to “take over (either directly or through a third-party) dispatching on the Amtrak route at issue on CN’s system”⁷¹ for at least two years.

B. Amtrak’s Proposed “Reopener” Is Triggered by Events that Are Not Directly Related to CN’s Support for Amtrak’s On-Time performance and Is Economically Inefficient

1. Amtrak’s HRD Threshold for Authorizing Its Supervision and Control Is Unfounded

74. There is no economic justification for Amtrak’s proposal that it be authorized to supervise and control key aspects of its host’s operations based on what could be very small deviations from performance that would merit an incentive payment. This is particularly the case because Amtrak has selected the 924-minute HRD threshold based generally on the average (or median) relationship between COTP and HRD across Amtrak routes nationwide. There is no economic basis to assert that Amtrak’s 924-minute threshold is appropriate for assessing that CN’s performance as a host is poor given the specific circumstances of CN’s network and its mix of freight, passenger, and commuter trains, crossings of other railroads, and so forth.

75. Amtrak’s proposal to supervise and control are triggered under Amtrak’s plan when CN’s HRD only marginally exceeds the national average HRD calculated by Mr. Weiss, and they could be triggered even if the train at issue is achieving or surpassing Amtrak’s objective of 80% COTP. The conclusion that Amtrak’s proposal punishes “average” performance is further substantiated by the fact that its proposal takes effect at an HRD threshold that marks the first HRD range that incurs a financial penalty rather than a positive incentive payment. (See Table 1.) In other words, if CN’s performance is even modestly below average or levels that would yield incentives to CN, Amtrak’s proposal would allow Amtrak to monitor and interfere with CN’s operations via dispatching and scheduling of maintenance.

2. Amtrak’s Proposed “Reopener” Is Economically Inefficient

76. Including reopeners in long-term contracts to set guidelines for addressing inefficiencies between the parties that may arise over time can be efficient. Allowing for

⁷¹ Amtrak Opening Br. (PID) at 70.

renegotiation provides the parties to the contract a convenient way to identify factors that may have changed or not developed as expected during the course of the contract and adjust the contract to address new information or changed circumstances. As noted, Amtrak's proposal is not a true reopener. It is a punitive and inefficient measure that gives Amtrak increasing operational supervision and control over CN's freight train operations through dispatching and maintenance activities, all on CN assets, which Amtrak does not own, and all without Amtrak having to compensate CN for the associated increased incremental costs CN incurs.

77. Transferring supervision, and ultimately control, of CN's complex dispatch decisions to Amtrak, an entity that is motivated to benefit only a small segment of traffic (*i.e.*, its own trains) is inefficient. Amtrak has poor incentives to balance the costs it imposes on CN and others that rely on CN's rail network, such as freight customers, other freight railroads, and commuter railroads, when Amtrak supervises or controls CN's dispatching decisions. The Tier 1 reporting requirements alone would require significant amounts of costly dispatcher time and supervisor time that would distract them from their normal responsibilities. Amtrak's proposal makes no provision to pay these costs. Moreover, Amtrak does not acknowledge that its proposal intrudes on the relationships between CN's management and its supervisors, and its dispatchers, which I understand has serious labor relations implications.⁷²

78. At Tier 2, Amtrak seeks the opportunity to veto CN's maintenance decisions. I understand that CN's maintenance is planned long in advance and is managed to maintain a safe and reliable rail network for all stakeholders who depend upon the network.⁷³ Amtrak's incentives to delay maintenance, likely increasing total maintenance costs, without regard for the impact of maintenance delays on other stakeholders and the safety of the rail network is economically inefficient and imposes risks on all of the network's stakeholders (CN, its employees and customers, other users of the network such as other freight railroads, Amtrak, and commuter railroads).

⁷² RVS (PID) Taylor VS ¶¶ 43, 46; RVS (PID) Sullivan ¶¶ 6-7.

⁷³ RVS (PID) Taylor ¶ 49.

79. At Tier 3, Amtrak proposes to take over the dispatch of potentially large sections of CN's rail network that host Amtrak trains. Again, Amtrak's incentives are solely focused on its passenger trains, without regard for the impact on freight shippers, CN, other railroads, or commuter railroads that depend on the efficient dispatch of CN's rail lines. Allowing Amtrak with its narrow interests to take over the dispatch of CN's network would be costly to CN, its customers, and other freight and commuter railroads and economically inefficient. Notably, Amtrak's proposal makes no provision to bear costs or consequences associated with its dispatch of CN's rail lines, even if it were to unintentionally snarl freight traffic, delay commuter trains, or make dispatch decisions that led to accidents.

80. Allowing Amtrak to dispatch CN's network according to its narrow interests would be expected to increase freight delays and would be costly to freight shippers, their customers, and everyday consumers who rely on efficient freight service. The threat to efficiency is obvious because the value CN creates from its network greatly exceeds the value that Amtrak creates by using CN's network. As a result, the opportunities for Amtrak to do harm to freight movements is likely to outweigh the potential for Amtrak to increase the value of its passenger service. CN's R-1 indicates that CN earned roughly \$3.02 billion in freight revenue in 2021 using the 5,720 route miles that make up its U.S. network. Thus, CN earned about \$528,000 per route-mile used.⁷⁴ Amtrak uses 1,147 route-miles of CN's U.S. network, excluding overlapping portions of CN-hosted routes. Amtrak's earned revenue and subsidies of approximately \$45 million from its use of CN's network in 2021.⁷⁵ Based on CN's revenue per route-mile, CN generated more than \$606 million in 2021 revenue from the CN route-miles that Amtrak uses for its services. In short, CN produces more than 13 times more value from a route-mile of its network than Amtrak does.⁷⁶ Clearly, the potential for harm to CN's freight business and CN's freight shippers from allowing Amtrak to dispatch CN's network is large.

⁷⁴ See my workpapers.

⁷⁵ Amtrak revenue is annualized based on the three quarters of revenue reported by Amtrak in 2021 and allocated to CN-hosted portions of routes based on mileage. Revenue includes state subsidies. See my workpapers

⁷⁶ Excluding subsidies, Amtrak's revenue from its use of CN's network is about \$25.3 million. CN generates nearly 24 times as much revenue using the portion of its network that Amtrak uses for its passenger services.

81. Amtrak's proposal, if applied to all Class I hosts, would lead to Amtrak's supervising and ultimately dispatching portions of the networks of five of the six Class I railroads that hosted Amtrak services during 2018 and 2019 prior to the Covid pandemic. As shown in Figure 3, of 64 host-route combinations, only 9 would have avoided Amtrak's Tier 1 supervision, and only three additional routes, for a total of 12, would have escaped Tier-2 supervision and intervention, under which Amtrak would observe dispatching from railroad's control rooms and possibly veto railroads' maintenance plans. Under Amtrak's proposal, Amtrak would have taken over dispatch of 40 of the 64 host-route combinations based on host performance in 2018 and 2019.⁷⁷

⁷⁷ See my workpapers.

Figure 3
Class I Railroads Subject to Amtrak Supervision and Control Based on Performance
2018-2019

Host Grouped	Route	Minutes of HRD per 10,000 Train Miles								Tier 1 Intervention Trigger	Tier 2 Intervention Trigger	Tier 3 Intervention Trigger
		2018Q1	2018Q2	2018Q3	2018Q4	2019Q1	2019Q2	2019Q3	2019Q4			
BNSF	California Zephyr	801	1,170	1,317	1,149	1,850	1,820	1,620	1,156	Yes	Yes	Yes
BNSF	Cascades	1,406	1,333	1,329	1,348	1,472	1,109	1,010	914	Yes	Yes	Yes
BNSF	Coast Starlight	798	902	738	653	698	558	498	474	No	No	No
BNSF	Empire Builder	894	1,131	1,326	788	1,103	952	862	658	Yes	Yes	No
BNSF	Heartland Flyer	1,718	2,334	2,414	2,057	1,288	2,250	2,023	1,614	Yes	Yes	Yes
BNSF	Illinois	515	695	560	667	559	753	833	710	No	No	No
BNSF	Pacific Surfliner	1,011	1,039	1,531	1,329	1,261	1,260	968	1,526	Yes	Yes	Yes
BNSF	San Joaquins	1,156	856	1,020	1,051	930	1,067	1,192	1,145	Yes	Yes	Yes
BNSF	Southwest Chief	543	750	814	752	683	805	842	784	No	No	No
BNSF	Sunset Ltd	1,647	1,263	1,192	2,301	2,806	3,003	2,116	1,981	Yes	Yes	Yes
BNSF	Texas Eagle	1,445	1,105	2,559	2,366	1,822	2,634	1,441	1,724	Yes	Yes	Yes
CN	Adirondack	3,650	2,586	3,263	3,276	3,488	4,040	4,402	4,104	Yes	Yes	Yes
CN	Blue Water	1,083	943	685	700	1,180	993	1,089	800	Yes	Yes	No
CN	City of New Orleans	1,691	1,314	1,044	1,080	1,162	1,212	958	730	Yes	Yes	Yes
CN	Illini/Saukui	2,094	1,846	1,668	1,581	1,547	1,809	1,514	1,309	Yes	Yes	Yes
CN	Lincoln Service	1,850	1,494	1,405	1,986	3,018	3,117	2,221	2,029	Yes	Yes	Yes
CN	Sunset Ltd	15,670	14,394	15,326	30,245	16,832	23,342	15,455	20,364	Yes	Yes	Yes
CN	Texas Eagle	2,784	3,049	1,907	2,949	4,612	5,460	3,957	2,902	Yes	Yes	Yes
CN	Wolverine	1,881	1,998	1,989	2,025	2,712	2,633	2,702	2,800	Yes	Yes	Yes
CP	Adirondack	613	832	817	718	652	871	889	652	No	No	No
CP	Empire	641	696	694	638	536	919	605	642	No	No	No
CP	Empire Builder	547	664	1,062	428	830	594	520	475	Yes	No	No
CP	Hawatha	224	255	312	300	254	318	361	265	No	No	No
CSX	Auto Train	1,335	1,440	1,185	1,139	1,268	1,264	1,255	1,160	Yes	Yes	Yes
CSX	Capitol Ltd	1,010	1,618	1,163	1,023	810	955	987	728	Yes	Yes	Yes
CSX	Cardinal	1,252	1,010	885	915	818	731	792	733	Yes	Yes	No
CSX	Carollian	1,860	1,897	1,760	1,396	1,324	1,406	1,312	1,222	Yes	Yes	Yes
CSX	Crescent	2,326	2,553	4,329	1,916	2,750	3,074	4,513	2,387	Yes	Yes	Yes
CSX	Empire	1,470	1,328	1,100	901	1,047	1,066	1,177	1,138	Yes	Yes	Yes
CSX	Hoozier	1,620	525	615	862	496	430			Yes	No	No
CSX	Lake Shore Ltd	1,285	967	1,048	859	673	876	909	750	Yes	Yes	No
CSX	Michigan	552	432	415	464	350	473	500	439	No	No	No
CSX	Northeast Regional	1,789	2,118	1,966	1,340	1,297	1,183	1,132	888	Yes	Yes	Yes
CSX	Palmetto	1,107	1,251	1,175	899	899	947	945	811	Yes	Yes	No
CSX	Silver Meteor	983	1,073	834	668	717	828	810	679	Yes	Yes	No
CSX	Silver Star	1,450	1,238	1,081	994	1,040	885	1,008	826	Yes	Yes	Yes
CSX	Sunset Ltd									No	No	No
NS	Blue Water	2,409	2,787	3,899	3,637	4,946	3,502	4,190	3,046	Yes	Yes	Yes
NS	Capitol Ltd	2,302	2,494	2,793	3,138	2,226	2,220	2,155	2,147	Yes	Yes	Yes
NS	Cardinal	1,213	1,632	1,248	2,007	1,802	1,857	1,633	1,364	Yes	Yes	Yes
NS	Carollian	662	1,002	1,056	1,398	839	872	679	613	Yes	Yes	No
NS	Crescent	1,901	2,297	1,936	1,739	1,540	1,362	1,301	1,367	Yes	Yes	Yes
NS	Hoozier	3,582	2,689	5,515	4,212	11,107	5,917			Yes	Yes	Yes
NS	Lake Shore Ltd	2,616	2,957	3,116	3,445	2,017	2,228	2,200	2,205	Yes	Yes	Yes
NS	Michigan	1,834	2,377	2,977	2,763	3,374	3,235	3,236	3,032	Yes	Yes	Yes
NS	Northeast Regional	489	667	657	876	647	769	875	765	No	No	No
NS	Pennsylvanian	975	1,530	1,562	1,426	1,204	1,793	1,386	1,046	Yes	Yes	Yes
NS	Piedmont	902	1,536	1,220	1,218	675	814	586	478	Yes	Yes	No
NS	Silver Star	920	762	766	1,520	852	1,151	516	369	Yes	No	No
NS	Sunset Ltd									No	No	No
NS	Wolverine	2,476	2,718	3,767	3,894	4,614	3,737	4,438	3,325	Yes	Yes	Yes
UP	California Zephyr	728	793	726	626	772	753	883	655	No	No	No
UP	Capitol Corridor	621	741	385	550	563	594	532	575	No	No	No
UP	Cardinal	5,979	7,277	8,462	6,064	6,462	5,174	4,100	5,429	Yes	Yes	Yes
UP	Cascades	1,143	1,146	1,266	1,223	1,817	1,782	1,225	1,377	Yes	Yes	Yes
UP	Coast Starlight	1,245	1,170	1,380	1,150	1,480	1,360	1,236	1,262	Yes	Yes	Yes
UP	Heartland Flyer									No	No	No
UP	Hoozier	7,658	3,455	4,929	4,805	8,844	8,099			Yes	Yes	Yes
UP	Lincoln Service	1,028	1,062	947	1,003	1,019	885	793	702	Yes	Yes	Yes
UP	Missouri	633	710	957	709	1,198	994	1,965	1,012	Yes	Yes	Yes
UP	Pacific Surfliner	1,376	1,144	1,254	1,691	1,473	1,496	1,443	1,559	Yes	Yes	Yes
UP	San Joaquins	1,092	1,615	941	1,076	1,092	1,086	1,039	1,096	Yes	Yes	Yes
UP	Sunset Ltd	1,561	1,548	2,071	1,803	1,987	1,818	1,926	1,635	Yes	Yes	Yes
UP	Texas Eagle	1,541	1,789	2,181	1,833	1,738	1,846	1,879	1,605	Yes	Yes	Yes
Total Class 1 Host Routes										64	64	64
Host Routes Affected by Amtrak's Proposal										51	48	40
% of Total Class 1 Routes										80%	75%	63%

82. Figure 3 demonstrates that if Amtrak's proposed "reopener" scheme had been effect during 2018 and 2019, most Class I railroads would have accrued penalties on the services they hosted. In addition, many of the freight railroad corridors owned by BN, CN, CSX, NS and UP would have been subject to dispatching by Amtrak under Tier 3 of Amtrak's proposal. The breadth of Amtrak's intrusion into freight railroads' operations under its proposal indicates that the proposal could have harmful effects on the freight industry as a whole, on its customers, and on the U.S. economy.



CURRICULUM VITAE

Steven R. Peterson, Ph.D.

OFFICE: Compass Lexecon
200 State Street
9th Floor
Boston, MA 02109
(617) 520-0200 main
(617) 520-0217 direct
speterson@compasslexecon.com

PROFESSIONAL EXPERIENCE

Compass Lexecon
Boston, MA
Executive Vice President, April 2013 – present
Managing Director, Boston Office, January 2007 – June 2010
Senior Vice President, January 2006 – March 2013
Managing Director, August 1999 – December 2005

The Economics Resource Group, Inc.
Senior Economist, 1992 – July 1999
Economist, 1990 – 1992

Northeastern University, Boston, MA
Adjunct Faculty, 2011 – 2017

Harvard University, Cambridge, MA
Teaching Fellow, 1989 – 1990

EDUCATION

Harvard University, Cambridge, MA
Ph.D. in Economics, 1992
Dissertation: “Strategic Aspects of Litigation and Settlement”

University of California, Davis
A.B., Economics, 1987, Highest Honors

TESTIMONY AND CONSULTING EXPERIENCE

Canadian National Railway

Before the Surface Transportation Board, In re Application of the National Railroad Passenger Corporation under 49 U.S.C. § 24308(a), Docket No. FD 35743, Verified Statement of Steven R. Peterson, May 27, 2022.

MGM Studios

Consultant to MGM on acquisition by Amazon Inc. (2022).

Equal Justice Under Law

Nathan Wright et al., v. Family Support Division of the Missouri Department of Social Services et al., in the United States District Court for the Eastern District of Missouri Eastern Division. Affidavit (November 15, 2019). Deposition (December 4, 2019). Rebuttal Affidavit (January 31, 2020).

Google, LLC

In re: *Determination of Rates and Terms for the Digital Performance of Sound Recording and Making of Ephemeral Copies to Facilitate Those Performances*, before the United States Copyright Royalty Judges, The Library of Congress. Written Direct Testimony (September 23, 2019, Amended December 10, 2019). Written Rebuttal Testimony (January 10, 2020, Amended February 7, 2020). Trial Testimony (August 25-26, 2020).

Radio Music License Committee

Radio Music License Committee v. Broadcast Music, Inc., in the United States District Court for the Southern District of New York. Expert Report (July 22, 2019). Expert Rebuttal Report (August 19, 2019). Deposition (September 11, 2019).

Legal Aid Justice Center

Damian Stinnie et al., v. Richard Holcomb in his official capacity as the Commissioner of the Virginia Department of Motor Vehicles, in the United States District Court for the Western District of Virginia, Charlottesville Division. Hearing Testimony (November 15, 2018). Expert Report (May 1, 2019). Deposition (May 24, 2019).

Keweenaw Bay Indian Community

Keweenaw Bay Indian Community v. Nick A. Khouri et al., in the United States District Court for the Western District of Michigan. Expert Report (May 25, 2018). Supplemental Report (August 3, 2018). Deposition (September 6, 2018).

United States Soccer Federation, Inc.

North American Soccer League, LLC v. United States Soccer Federation, Inc. in the United States District Court for the Eastern District of New York. Declaration (October 16, 2017). Reply Declaration (November 1, 2017).

Radio Music License Committee

In an Arbitration before the Hon. Vaughn Walker, Kenneth R. Feinberg, Esq., and Lee A. Freeman, Jr., Esq. between: *SESAC, Inc., SESAC, LLC, and SESAC Holdings, Inc., Claimants v. Radio Music License Committee, Respondent*, Expert Report (December 23, 2016). Reply Expert Report (January 23, 2017). Hearing Testimony (February 23 and March 10, 2017).

Radio Music License Committee

Radio Music License Committee v. Global Music Rights, LLC. in the United States District Court for the Eastern District of Pennsylvania. Declaration (November 18, 2016). Declaration (July 21, 2017).

TransCanada Corporation

Consultant to TransCanada Corporation on its acquisition of Columbia Pipeline Group (March – June 2016).

Sanum Investments Limited

In an Arbitration Under the Rules of the Singapore International Arbitration Centre between: *Sanum Investment Limited, Claimant, versus ST Group Co., Ltd., Sithat Xaysoulivong, S.T. Vegas Co., Ltd., S.T. Vegas Enterprise Ltd., Xaya Construction Co., Ltd. and Xaysana Xaysoulivong, Respondents*, Witness Statement, with Joseph P. Kalt and Eric Henson (April 20, 2016).

National Association of Broadcasters and Pandora Media, Inc.

In re: *Determination of Royalty Rates and terms for Ephemeral Recording and Digital Performance of Sound Recordings*, before the United States Copyright Royalty Judges, Library of Congress. Expert Report (February 23, 2015), Deposition Testimony (March 24, 2015), Hearing Testimony (May 14, 2015).

National Association of Broadcasters

In re: *Antitrust Consent Decree Review: American Society of Composers, Authors and Publishers/Broadcast Music, Inc.* Comments on Behalf of the National Association of Broadcasters (August 6, 2014).

Leidos, Inc.

United States of America v. Leidos, Inc., in the United States District Court for the District of Columbia. Expert Report (March 28, 2014).

Radio Music License Committee

Radio Music License Committee v. SESAC, Inc., SESAC, LLC, and SESAC Holdings, Inc. in the United States District Court for the Eastern District of Pennsylvania. Declaration (November 14, 2013). Deposition (December 4, 2013). Trial Testimony (December 10, 2013).

BJ's Wholesale Club, Inc.

Irene Cappalli v. BJ's Wholesale Club Inc. in the United States District Court, District of Rhode Island. Expert Report (March 15, 2012). Deposition (April 27, 2012). Declaration (February 12, 2013).

National Marine Fisheries Service

Consultant to National Marine Fisheries Service on market power and excessive-share limits in the Surf Clam and Ocean Quahog fisheries (2010 – 2011).

Energy Intensive Manufacturers Working Group

Coalition for Responsible Regulation, Inc. et al. v. United States Environmental Protection Agency, in the United States Court of Appeals for the District of Columbia Circuit. Declaration (September 14, 2010).

Amex Construction Company, Inc.

ExxonMobil Oil Corporation v. Amex Construction Company, Inc., in the United States District Court, Northern District of Illinois, Eastern Division. Expert Report (February 15, 2010). Deposition (March 2, 2010).

Delta Air Lines, Inc.

Consultant to Delta Air Lines on LaGuardia/Reagan National Airport slot swap with U.S. Airways (2009 – 2010).

Imperial Credit Industries, Inc.

In re: Imperial Credit Industries, Inc., in the United States Bankruptcy Court, Central District of California, Santa Ana Division. Rebuttal Report (April 27, 2007). Trial Testimony (May 22, 2008).

Delta Air Lines, Inc.

Consultant to Delta Air Lines on Delta-Northwest merger (2007 – October 2008).

Greater Lakeside Corporation

The Higbee Company v. Greater Lakeside Corporation, Causeway LLC of Delaware, Broadway Management Corporation, and Jeffrey Feil, in the United States District Court for the Eastern District of Louisiana. Expert Report (September 18, 2007). Supplemental Expert Report (September 25, 2007). Deposition (October 19, 2007).

TransCanada Corporation

Consultant to TransCanada Corporation on its acquisition of ANR Group (2007).

Exxon Mobil Corporation

JAAM, Inc., d/b/a Tigerland Exxon v. Exxon Mobil Corporation and Mon Valley Petroleum, Inc., in the United States District Court for the Western District of Pennsylvania. Expert Report (January 12, 2007).

Finova Capital

In Re: Finova Capital Corporation and Finova Mezzanine Capital, Inc., in the United States Bankruptcy Court for the District of Delaware. Expert Report (May 19, 2006). Deposition (August 2, 2006).

Volvo Cars of North America, Inc.

Bay Ridge Volvo American, Inc. et al. v. Volvo Cars of North America, Inc., in the United States District Court Southern District of New York. Expert Report (June 1, 2005). Deposition (August 17, 2005). Supplemental Expert Report (November 11, 2005).

Israel Electric Corporation, Ltd.

Israel Electric Corporation Ltd. vs. the Public Utilities Authority, the Minister of National Infrastructures, the Minister of Finance, the Israel Securities Authority and the Government Corporations Authority (Request for Injunction): In the Israeli Supreme Court, No. /04, August 2004. Statement (August 30, 2004), with Joseph P. Kalt and Paul B. Vasington.

Flying J, Inc.

Flying J, Inc. v. Comdata Network, Inc., in the United States District Court of Utah (Northern Division). Declaration (June 22, 2004). Damages Report (June 22, 2004). Deposition (October 6, 2004). Hearing Testimony (November 19, 2004).

Musicmatch, Inc.

Gracenote, Inc. v. Musicmatch Inc., In the United States District Court Northern District of California (Oakland Division). Expert Report (February 17, 2004). Declaration (February 24, 2004). Deposition (March 2004).

Monica Pappas, Bill DeVitt, and Monica Pappas Associates

The Healthcare Financial Group, Inc., v. Monica Pappas DeVitt et al., in the District Court, Arapahoe County, Colorado. Filed written expert testimony on lost-profits damages (February 2003).

Ticketmaster Corporation

Evaluated damages from asserted anti-competitive conduct (2003).

Amoco Production Company, Amerada Hess Corporation, and Shell Western E&P, Inc.

Assessed fair market value of CO₂ for payment of royalties. Analyzed issues of market structure of CO₂ industry and marketability of CO₂ at the well (2002).

American Airlines

Conducted analysis of market structure, capacity additions, and pricing in an antitrust suit asserting predatory conduct (2001).

For a Mutual Insurance Company

Conducted market research and performed benchmarking analyses to establish pricing approach and prices for new internet services (2000).

Bass Enterprises Production Company

Assessed fair market rental value of oil-bearing property temporarily taken by the federal government (2000).

Boeing Company

Filed declaration of behalf of Boeing Company (Delta Launch Services, Inc.) for a NASA administrative proceeding regarding release of contract information under the Freedom of Information Act (2000).

Honeywell, Inc.

Conducted study of damages arising from monopolization in the market for ring laser gyroscope inertial navigation systems. Conducted analysis of damages arising from patent infringement (1998).

British Airways, Plc.

Conducted study of the competitive effects of British Airways' proposed alliance with American Airlines. Advised on and assisted with presentations before the European Commission (1998).

HarperCollins Publishers

Brother Records, Inc., et al., v. HarperCollins Pub. Inc., et. al. Filed written expert testimony on damages in libel litigation (December 1997).

Northeast Utilities

Before the Federal Energy Regulatory Commission, OA97-237-000, ER 97-1079-000, and EC97-35-000. Conducted analysis of competition in the New England generation market. Filed affidavit in support of NU's Answer to Requests to Reject or Condition Approval of Market-Based Rates (with Frank A. Felder) (July 1997).

McDonnell Douglas Corporation

McDonnell Douglas Corporation v. National Aeronautics and Space Administration, in the U.S. District Court for the District of Columbia. Filed affidavit describing how the public release of cost and price information affects negotiations and competition in markets for launch services (November 1996).

Pennzoil

Before the Federal Energy Regulatory Commission, Docket No, IS95-35-000. Provided written direct testimony (October 1996) and oral testimony (January 1997) on the cost of capital of oil pipeline facilities.

Pennzoil

Before the Federal Energy Regulatory Commission, Docket No. IS94-37-000 and Docket No. IS 94-23-000. Provided written direct testimony (April 1995) and oral testimony (November 1995).

BP Exploration (Alaska) Inc.

Modeled the costs and benefits associated with increased enhanced oil recovery activities within the Prudhoe Bay Unit (1995).

Burlington Northern Industries-Santa Fe Pacific Corporation

Performed cost-benefit analysis of the proposed Burlington Northern/Santa Fe merger. Analyzed the benefits accruing to shippers from expanded single-line service (1994 – 1995).

PUBLICATIONS AND RESEARCH

“Using Economics to Identify Common Impact in Antitrust Class Certification,” American Bar Association, Section of Antitrust Law, Economics Committee Newsletter, Vol. 11, No. 1, Spring 2011 (with Andrew Lemon).

“Rigorous Analysis to Bridge the Inference Gap in Class Certification” (with Andrew Lemon), *Journal of Competition Law and Economics*, March 2011.

“Oil Price Volatility and Speculation” (with Kenneth Grant), *The Energy Daily*, August 25, 2009.

“Understanding Today’s Crude Oil and Product Markets” (with Kenneth Grant and David Ownby), American Petroleum Institute, 2006.

“Understanding Natural Gas Markets” (with Charles Augustine and Bob Broxson), American Petroleum Institute, 2006.

“Regulatory Failure in the California Electricity Crisis” (with Charles Augustine), *The Electricity Journal*, August/September 2003.

“Market Power Analysis in a Dynamic Electric Power Industry” (with F. Felder), *The Electricity Journal*, April 1997.

“Testing the Merits of Providing Customized Risk Management” (with Frank A. Felder and Sarah E. Tobiason), 17th Annual North American Conference of the United States Association for Energy Economics, International Association for Energy Economics, October 1996.

“Competition Between Regulators and Venue Shopping by Natural Gas Pipelines in California” (with Joseph P. Kalt), 14th Annual Conference of the Advanced Workshop in Regulation and Public Utility Economics, May 1995.

“Environmental Regulation and International Competitiveness: What Does the Evidence Tell Us?” (with Adam B. Jaffe, Paul R. Portney, and Robert N. Stavins), *Journal of Economic Literature*, Vol. 33, March 1995.

“Implementation of the Core of a Two Person Exchange Economy without Integer Games or Refinements of Nash Equilibrium” (with Simon Grant, Stephen King, and Ben Polak), *Economics Letters*, 1992.

OTHER REPORTS AND PRESENTATIONS

“The Economic Impact of Delta Air Lines Seattle Expansion,” (with Bryan Keating). August 14, 2015.

“Antitrust Analysis of Aftermarkets,” American Bar Association, Section of Antitrust, 2010 Spring Meeting (with Edward Schwartz and Paula Render).

“Do Environmental Regulations Impair Competitiveness? A Critical Review of Economic Studies” (with Barry Galef and Kenneth Grant). Prepared by ICF Consulting Group and The Economics Resource Group, Inc., for the Office of Policy Analysis and Review, Office of Air and Radiation, U.S. Environmental Protection Agency, September 1995.

“Indexing Natural Gas Pipeline Rates” (with Amy B. Candell, Joseph P. Kalt, Sheila M. Lyons, and Stephen Makowka). Explored indexing as a form of Incentive regulation for natural gas pipelines and created the Pipeline Producer Price Index that could be used to implement indexing proposals. The Economics Resource Group, Inc., April 1995.

“Environmental Regulations and the Competitiveness of U.S. Industry” (with A. Jaffe, P. Portney and R. Stavins), U.S. Department of Commerce, Economics and Statistics Administration, Washington, DC, NTIS No. PB-93-193514, July 1993.

HONORS AND AWARDS

Jacob K. Javits Fellow, Harvard University, 1987 – 1991

Phi Beta Kappa, University of California, Davis, 1987

VERIFICATION

I, Steven R. Peterson, declare under penalty of perjury under the laws of the United States that I have read the foregoing verified statement, that I know the facts asserted therein, and that the same are true as stated. Further, I certify that I am qualified to and authorized to submit this verified statement.

Executed on July 26, 2022.



Steven R. Peterson

Tab B

PUBLIC VERSION - REDACTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 35743

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

VERIFIED STATEMENT OF DEREK TAYLOR

TABLE OF CONTENTS

I.	AMTRAK’S PROPOSAL IS UNJUSTIFIED, SINCE CN ALREADY GIVES AMTRAK PREFERENCE	4
A.	The Realities of Dispatching.....	4
B.	Preference	9
II.	AMTRAK’S INCENTIVES AND PENALTIES PROPOSAL IS UNREALISTIC	13
III.	AMTRAK’S “REOPENER” PROPOSAL IS UNWORKABLE AND POSES A RISK TO SAFETY	15
A.	Amtrak’s “Reopener” Is Hair-Triggered, Punishing CN Notwithstanding Good Performance by CN	16
B.	“Tier 1”: Burdensome Intrusions into Core Dispatching Functions and Data, after Just One Quarter	17
C.	“Tier 2”: Even More Burdensome Intrusions into Dispatching, and Amtrak Control over CN’s Maintenance of Its Freight Railroad, after Just Two Quarters.....	21
D.	“Tier 3”: Long-Term Take-Over of CN Dispatching, after Four Quarters, by Amtrak or Its Designee.....	24
E.	Amtrak’s “Reopener” Is Unfair and Unsustainable.....	29

VERIFIED STATEMENT OF DEREK TAYLOR

1. My name is Derek Taylor. I am the Vice President of Transportation for the Southern Region of Canadian National Railway Company, a position I have held since June 2022. In that capacity, I have overall supervisory responsibility for CN's U.S. operations, including the operation of the Illinois Central Railroad Company (IC) and Grand Trunk Western Railroad Company (GTW) lines on which Amtrak runs (collectively "CN," along with the other U.S. rail operating subsidiaries).

2. From 2021 to 2022, I was CN's Vice President of Operational Excellence and was responsible for driving improvement across CN's key operating metrics. Before that, I was Vice President of Transportation for CN's Eastern Region (2019-21); Vice President of Transportation for CN's Southern Region (2018-19); I was General Manager of the Regional Operations Center ("ROC") and PTC Implementation for CN's Southern Region (2016-18); General Manager Midwest Division (2012-16); General Superintendent of BC South and the Greater Vancouver Terminal (2009-12); and Superintendent of the Memphis Zone (on the IC) (2005-09). I first joined CN as a Management Trainee in Winnipeg in 2000. I hold a Bachelor of Arts degree from DePauw University in Indiana.

3. My two decades of experience at CN mean that I am highly familiar with key aspects of CN's operations, including freight and passenger train dispatching, maintenance and improvement of lines, strategic investments, employee relations, and marketing. Among other things, when I was General Manager of the ROC in 2016-18, I directly supervised CN's dispatch center in Homewood, Illinois.

4. I testified at an earlier stage of this proceeding (in 2017). I reaffirm that my testimony then was accurate, and that it remains an accurate description of CN's dispatching

process today. In this Verified Statement, I explain from a practical railroading perspective why Amtrak's latest proposal in this case is unjustified and unworkable.

5. Amtrak seeks radical changes in the basic structure of the operating agreement under which CN has hosted and partnered with Amtrak for decades, changes that would impose large penalties on CN where previously it earned incentive payments, and that would compel CN and its freight customers to subsidize Amtrak. And in its so-called "reopener," Amtrak seeks to interfere with, and ultimately take over, essential aspects of CN's freight rail operations – its dispatching and maintenance – if Amtrak's trains on CN's lines experience what Amtrak considers to be "high" "Host-Responsible Delay" ("HRD") that Amtrak's own employees determine. Both aspects of Amtrak's self-serving proposal would inflict significant harm on CN, CN's freight customers, the millions of consumers they serve, and the U.S. economy more broadly. Amtrak's proposal is not justified.

6. My colleagues Michael Matteucci and Scott Kuxmann address in a separate statement the details of the CN-Amtrak relationship, including points on which the parties have historically agreed, specific types of delay incurred by Amtrak trains on CN's lines, and how exactly Amtrak's proposal with respect to incentives and penalties would work. I understand that Dr. Steven Peterson provides a broader perspective on the fundamental flaws in Amtrak's proposal as a matter of economic theory and its implications if adopted (as Amtrak appears to intend) on a nationwide basis. I defer to them on those points, and focus here on an examination of Amtrak's proposals from a practical railroading perspective. I conclude that Amtrak's proposals are unjustified and a threat to the operations of the interconnected freight railroad system.

7. Amtrak's proposals are unjustified because CN operates its railroad safely, efficiently, and properly for the benefit of passengers (including Amtrak's passengers and those of commuter railroads such as Metra that cross CN's lines) as well as CN's thousands of freight customers and the millions of consumers they serve. Amtrak's proposals would compel CN to subsidize Amtrak, and generally treat as Amtrak's property the railroad CN built and maintains. And they are unsafe and unworkable: Amtrak proposes to intrude into and ultimately take over CN's core freight railroad operational functions, which would raise safety, efficiency, and labor relations concerns, harming freight customers and the U.S. economy. What Amtrak proposes – apparently as an industry-wide model – is tantamount to expropriation, and entirely unsustainable.

I. AMTRAK’S PROPOSAL IS UNJUSTIFIED, SINCE CN ALREADY GIVES AMTRAK PREFERENCE

8. Amtrak’s proposal would reduce CN’s net compensation for hosting Amtrak and intrude on CN’s running its own railroad. Amtrak’s justification for that appears to be its assumption that freight railroad hosts in general – or at least, those with what Amtrak deems “high” HRD – cause Amtrak trains to have low Customer On-Time Performance (“COTP”) by systematically denying them preference.¹ That premise, at least as applied to CN, is wrong.

9. In operating and dispatching its railroad, CN provides Amtrak’s trains with preference. That does not and cannot mean Amtrak trains will never be delayed due to causes including other rail traffic (including from delays from other Amtrak trains, commuter trains and other cross-traffic that CN does not control), maintenance, slow orders, equipment issues, and accidents. Delays are an inevitable reality of railroading, especially on a mixed use, primarily single-line railroad such as CN’s IC spine. But CN accords Amtrak’s trains the highest dispatching priority on its railroad. To understand CN’s dispatching and handling of Amtrak and other traffic (and what Amtrak’s proposal to take over CN’s dispatching would entail), one must first understand how dispatching works in practice.

A. The Realities of Dispatching

10. Dispatching is at the very heart of railroad operations. It is a complex and important discipline requiring the judgment, skill, and knowledge of experienced railroading professionals working together as a team.² Dispatching errors can have disastrous results,

¹ See Amtrak Opening Br. (PID) at 27-28.

² CN’s highly skilled dispatchers are represented by the American Train Dispatchers Association (“ATDA”). Potential labor issues that could arise from Amtrak’s proposal are addressed in the separate Verified Statement of Thomas Sullivan, CN’s Senior Director – U.S. Labor Relations.

including accidents or traffic backups that have cascading effects impairing fluidity throughout the network. Sound dispatching judgment is essential to CN's goal of running a rail network that serves all users – freight and passenger – safely, reliably, and efficiently. Unsound dispatching that causes unnecessary delays to freight trains would lessen the quality of both passenger and freight service, impair freight customer relationships (especially for time-sensitive intermodal customers with highly competitive options), and require additional resources (e.g., crews, locomotives, and railcars), assuming they are available.

11. Dispatching requires the complex judgments of trained and experienced dispatchers. There is, at least on the IC and GTW lines on which CN hosts Amtrak, no such thing as dispatching a single train in isolation. A dispatcher is responsible for managing a network segment, including all the trains on it and the trains that may come on it in the near future, to ensure safe and reliable operations.

12. Dispatching for CN's entire U.S. network is handled at a single office suite in Homewood, staffed by a total of about 100 dispatchers and supervisors and headed by a Superintendent. On a typical shift, there will be twelve dispatchers, divided into three regional teams (Midwest (lines north of Chicago), Chicago (roughly, Chicago to Champaign and east of Chicago encompassing all of Michigan), and Gulf (further south on the IC spine)), three Chiefs supervising them, and one Senior Manager, physically present in the suite. Each regional team may be directing as many as [REDACTED] on or seeking access to the main line at any given time, including Amtrak trains, CN long-distance and local freight trains, and trains from other railroads that operate over portions of CN's U.S. freight rail network, and the team must also consider commuter and freight cross-traffic. The suite is largely open plan, with individual dispatcher desks, set a few feet apart, surrounding the core where the supervisors are based. The

open-plan setup is designed to enable the dispatchers to work as a professional team, consulting frequently regarding new information, any problems on the line, and hand-offs from one segment (or shift) to another, and sharing feedback and best practices. That said, dispatchers spend most of their time at their desks, surrounded by five to eight computer monitors for each dispatcher that provide various kinds of data the dispatchers factor into their professional judgments, and talking frequently to train crews to obtain up-to-the minute information and provide directions.

13. Dispatching entails complex advance planning and adjustments. It begins with train service plans, set long in advance, which are designed to enable CN to deploy its assets to serve its customers safely and reliably and to minimize the conflicts that inevitably arise between multiple trains needing to use a line segment. A key aspect of those train service plans is that they are designed to minimize delays to Amtrak trains arising from train meets. In other words, CN's efforts to avoid delays to Amtrak trains begin even before it starts to dispatch trains on a given day. Then dispatchers continuously work as a team to review data from and beyond their individual segments to see how trains are performing as compared to their service plans, the condition of the lines (including maintenance work), and what adjustments need to be made to promote network fluidity to provide safe and reliable freight rail transportation. It is not unusual for the dispatch team to adjust plans several hours in advance to avoid a train meet at a location that could cause undue delays. It is also frequently essential to make last-minute adjustments, especially when unexpected complications arise, such as an Amtrak (or other) train arriving onto CN's lines out of its scheduled slot, an equipment failure stopping or slowing a train on the line, weather and track conditions, or trespassers on the line.

14. In making each of these professional judgments, our dispatch team has to consider multiple factors, using multiple sources of confidential information from various CN databases –

hence the multiple screens. Dispatchers have access to and consider information about a wide range of variables. In addition to talking to train crews about what they are currently seeing and experiencing, dispatchers access and use line maps (including, for example, siding locations and lengths), train service plans, train locations, speeds, lengths, horsepower ratios, and priority categories, signals information, track speeds and conditions, maintenance and weather information, information regarding cross-traffic, and information that discloses whether a train is carrying rail sensitive security (e.g., hazmat) freight. The data that CN dispatchers use every day come from a mix of commercial and proprietary systems (including Positive Train Control (“PTC”) and Precision Dispatch System (“PDS”) systems, some of which are unique to CN or customized for CN. The critical importance of the dispatch suite as the nerve center of CN’s operations is reflected in the investments CN has made to create a state-of-the-art facility. Recent major investments in dispatching technology include an upgrade from the Digicon dispatch system to Traffic Management and Dispatch System (“TMDS”) in 2009, and an upgrade to the advanced PDS system in 2020.

15. Safety is always our top priority. As between trains operating on CN’s network, Amtrak trains have the highest priority, followed by intermodal trains, then core trains, then local trains. Dispatchers must dispatch trains according to their priority, but that involves making predictions about how long it will take a train to clear a line segment or reach a siding, determining how to handle three-way meets and other complex situations to maintain network fluidity, and considering what will happen to a train after a meet. For example, if a low-priority train is delayed to enable a high-priority train to pass, that delay might result in the low-priority train causing a longer delay for another high-priority train, or network gridlock, later; or the high-priority train might suffer the same length of delay a few miles down the line if it were not

delayed at the initial meet; or the low-priority train might be delayed through the end of its crew's shift with given hours of service, which could lead to costs and network disruptions associated with a potential re-crew event on the main line. All of these judgments entail considering multiple factors, making predictions under uncertainty, and professional judgment, informed by experience and local knowledge.

16. Most of our dispatchers have five or more years of dispatching experience on CN's lines, and many have prior railroading experience before graduating to dispatching. Dispatchers are trained for and assigned specific network regions, because local knowledge and experience is critical. A new dispatcher serves what amounts to an apprenticeship, watching and working under the direct supervision of an experienced dispatcher; dispatchers are not allowed to make independent decisions related to dispatching trains for their entire first year. In addition, dispatchers are given continuous feedback and are subject to multiple levels of supervision. Above and with each team of dispatchers in the suite are multiple Chiefs and a Senior Manager, and above the Senior Manager is a Superintendent. Dispatcher performance is reviewed regularly, with particular emphasis on minimizing avoidable delays to the highest priority trains on our network – Amtrak's trains. In addition, the supervisors on site advise and consult with individual dispatchers throughout their shift, flagging issues and reviewing best practices. In general, supervision occurs through an informal process, which respects the judgment, teamwork, and professionalism of individual dispatchers. That environment encourages open exchange of information between dispatchers and supervisors. Teamwork and good morale are critical in an environment such as the dispatching center.

B. Preference

17. Amtrak alleges, without evidence, that freight railroads generally have historically “disregarded” their Amtrak preference obligations.³ At least for CN, nothing could be further from the truth. I will not undertake to explain every one of the thousands of dispatching judgments involving Amtrak and CN freight trains that CN dispatchers make every month. But I will explain, on a systemic basis, how our team makes those judgments to ensure that Amtrak is given the highest priority in dispatching, and how the results vindicate their judgments.

18. As a threshold matter, I want to emphasize that “high” “Host Responsible Delay” (HRD) does not indicate a failure to give preference. Amtrak defines HRD over-broadly to include delays CN cannot – or cannot reasonably – avoid, and Amtrak’s own conductors decide whether to categorize a delay as HRD under procedures that afford CN no effective opportunity to challenge and correct those attributions.

19. As Mr. Matteucci and Mr. Kuxmann explain, most delays that Amtrak classifies as HRD have nothing to do with the subject-matter of preference – whether dispatchers “prefer” Amtrak trains to freight trains when managing potential conflicts between them.⁴ For example, Amtrak includes in HRD delays due to track conditions, signal outages, required maintenance, necessary slow orders, commuter trains, and even other Amtrak trains. Even Amtrak’s more specific sub-category of “Freight Train Interference” (“FTI”), which is often a small percentage of HRD, includes delays that have nothing to do with preference, such as delays due to cross traffic at interlockings controlled by other carriers. I understand such cross-traffic is in fact, the largest source of delay for the portion of Amtrak’s Texas Eagle and Lincoln services operated on

³ Amtrak Opening Br. (PID) at 31.

⁴ See generally RVS Matteucci/Kuxmann (PID) ¶ 33.

CN.⁵ And even “FTI” delays involving CN’s freight trains do not indicate preference violations: on predominantly single-line tracks, even trains with the highest priority will sometimes experience delays due to meets with other trains, albeit (because they are preferred) less delay than other trains.

20. The reality is that CN diligently and consistently gives Amtrak the highest dispatching priority. CN assigns Amtrak trains priority over every type of freight train. Dispatchers are required to abide by that priority and their supervisors continuously monitor their performance to ensure that they do so and take safe and reasonable measures to avoid unnecessary delays to Amtrak trains. The dispatch center regularly receives statistics concerning OTP of and delays to Amtrak trains and these reports are shared with the teams and discussed regularly. There is an ongoing and continuous dialogue between dispatchers, chiefs, and management to ensure that the entire team is implementing best practices to prioritize Amtrak trains without compromising safety and while maintaining overall network fluidity. Dispatchers are strongly encouraged to, and regularly do, “escalate” issues to their superiors as they arise if and when it appears that an Amtrak train will be delayed.

21. CN’s dispatchers regularly clear CN’s freight trains – even its highest-priority intermodal trains – out of the way to give priority to an Amtrak train, even when doing so entails delays to the CN freight train that may be significantly longer than the avoided delay to the Amtrak train, and even when those freight train delays have adverse effects on CN’s operations down the line. To take a recent example, in the early evening of July 18, 2022, CN dispatchers responded creatively to minimize potential delays to a northbound Amtrak train in the City of New Orleans service (#58) in light of heavy rains. Once the dispatchers received an alert of high

⁵ See *id.* ¶ 26.

winds due to approaching storms, they understood that rainfall was heavy enough to create the risk of ballast washout, which could require freight trains to reduce speed on the track, which could lead to the Amtrak train overtaking and then being delayed by them. The dispatchers directed two northbound freight trains between Lambert, Mississippi, and Memphis, Tennessee, to go into sidings 30 to 40 miles ahead of Amtrak train #58 in order to clear a route for that Amtrak train to proceed unimpeded, thus causing two freight trains to incur substantial delays. As noted above, it is inevitable that Amtrak trains will be delayed by meets with trains, including CN freight trains, other Amtrak trains, and commuter trains. As I described above, CN plans for scheduled meets that will avoid delays to Amtrak trains. But a wide range of variables – including Amtrak trains arriving out-of-slot, equipment failures, trespassers, extreme weather, etc. – can frustrate those plans. Zero delay from train meets (including meets between Amtrak trains) is a practical impossibility on a primarily single-track network with limited sidings. Avoiding delays to Amtrak trains whenever we reasonably can is something CN and its dispatch team does every day; achieving zero FTI is practically impossible, and the effort to reach that point would impair network fluidity in ways that would harm every network user, including Amtrak.

22. This is especially true given Amtrak's broad definition of a "delay," which does not measure delays against Amtrak's schedule, although its schedules include time for anticipated delays, but rather measures "delays" against a theoretical perfect, unobstructed Amtrak run. There are occasions, for example, when placing an Amtrak train in a siding briefly is the best way to minimize delay to the Amtrak train. In such circumstances, Amtrak is better served by a brief deviation along the siding than by sitting waiting for an extended period on the

main line. Nonetheless, Amtrak treats any diversion of its trains into a siding as an HRD “delay.”

23. There are other occasions when holding multiple freight trains just to avoid an uncertain possibility of a brief delay to an Amtrak train that is running late would make no sense and would unduly harm network fluidity (which would adversely affect other Amtrak trains, as well as freight trains). But CN does everything that it safely and reasonably can to schedule and move freight trains to avoid meets that will impose significant delays on Amtrak trains, and CN gives the Amtrak train priority when it can.

24. CN’s dispatchers’ diligent and skilled professional work in giving Amtrak priority is reflected in the data. Amtrak and CN each record delays to their own trains resulting from meets with each other’s trains. CN records delays that Amtrak trains cause to CN freight trains as “FA” delays (generating a conservative assessment of those delays because CN does not record delays of less than between 10 and 30 minutes, with the threshold depending on the CN train type).⁶ Amtrak records as FTI all delays to its passenger trains on CN’s lines that Amtrak attributes to freight train conflict, with no minimum threshold. A comparison between FA delays to CN trains and FTI delays to Amtrak trains shows that CN trains are delayed far more by meets with Amtrak trains than vice versa. In December 2019, for example, the ratio of FA delays to FTI delays was approximately 11:1.⁷ Moreover, this comparison understates the difference in delay because (1) Amtrak’s FTI measure of delays includes long and short delays, whereas CN’s FA measure only includes delays longer than the thresholds by train type that are between 10 and 30 minutes, and (2) Amtrak’s FTI measure includes a significant proportion of delays due to

⁶ See VS Summerfield *et al.* (PID), parts III.A. and III.B.

⁷ RVS Matteucci/Kuxmann (PID) ¶ 31.

foreign carrier cross-traffic at interlockings that CN does not control, rather than due to conflicts with CN freight trains.

25. Giving Amtrak preference entails significant delays to CN and the goods of its freight customers. Nonetheless, the data clearly reflect that CN provides Amtrak priority even over its highest-priority freight trains. The premise of Amtrak's proposal is wrong – CN *does* give Amtrak preference.

II. AMTRAK'S INCENTIVES AND PENALTIES PROPOSAL IS UNREALISTIC

26. CN operates a freight railroad to serve its many freight customers and millions of end-users, which it has built over the years through continuous and heavy re-investment. CN recognizes its obligation to host and provide preference to Amtrak, but CN should also have a meaningful opportunity to earn net incentive payments when it works diligently to serve Amtrak.

27. I understand that, as CN detailed in its Post-Interim Draft Opening Submission, present incremental cost compensation under the Operating Agreement falls far short of covering CN's actual incremental costs of hosting Amtrak. From a practical, freight operations perspective, Amtrak's 26 trains impose disproportionate burdens on dispatching resources (because of their priority), line capacity (because of their priority and faster speeds), and managerial resources (because the Amtrak relationship is complex and has been a source of disputes). CN schedules and dispatches its freight trains to avoid or minimize delays due to meets with Amtrak trains, and CN incurs substantial incremental costs as a result, which will not be fully reimbursed even under CN's proposal.

28. Ever since Amtrak was created, CN and other freight hosts have received some compensation through incentive and penalty provisions in operating agreements that provide meaningful opportunities to earn positive incentive payments if the host railroad does a good job

helping Amtrak meet its OTP goals as measured by their operating agreement. Amtrak's incentive and penalty proposal, however, would effectively prevent CN from earning net incentives.

29. The gist of Amtrak's proposal is that CN would earn no net incentives unless HRD, as defined and measured by Amtrak, averaged 924 minutes or less per 10,000 miles, and could only potentially earn net incentives comparable to what it has earned in the past if HRD averaged below 800 minutes per 10,000 miles.⁸ That proposal is not realistic.

30. Amtrak cites data from 2021 to 2022 – when freight traffic was reduced generally due to the Covid pandemic and when Amtrak was not running all of its trains – to provide a misleading impression that its HRD standard is reasonably achievable.⁹ At least in many circumstances, under normal conditions, Amtrak's proposed HRD standard is not. I understand that nationwide, in the most recent quarters prior to the period affected by Covid, most Amtrak trains, on most host railroads, have recorded levels of HRD above 924 minutes per 10,000 miles.¹⁰ As a matter of railroading reality, pegging compensation to a 924 HRD level as Amtrak proposes would give a freight railroad like CN no reasonable opportunity to accrue meaningful net incentive payments in the majority of cases. Instead, Amtrak's incentives and penalties proposal – and every use of what Amtrak calls “CN HRD” in its proposal – is a recipe for CN and its freight customers to be compelled to subsidize Amtrak.

⁸ See Blair VS ¶ 52.

⁹ See generally VS Weiss ¶¶ 38-79.

¹⁰ See RVS Matteucci/Kuxmann (PID) ¶ 56.

III. AMTRAK’S “REOPENER” PROPOSAL IS UNWORKABLE AND POSES A RISK TO SAFETY

31. Perhaps the most troubling aspect of Amtrak’s proposal is its so-called “reopener.”¹¹ I am familiar with contractual reopeners from extensive experience in the railroad industry. A reopener is a provision in a long-term contract that provides an opportunity for the parties to work together to revise the contract – by negotiation or, if necessary, arbitration – if it disappoints the reasonable express expectations of the parties or circumstances change significantly such that the agreement is not working as intended.

32. Amtrak’s proposal is not a reopener. It is a one-sided, intrusive regulatory prescription for Amtrak to commandeer core aspects of CN’s freight railroad if, for a brief period, Amtrak trains do not achieve precisely the results for Amtrak that, as “CN HRD,” Amtrak measures at its sole discretion. I have extensive experience with railroad hosting arrangements – ranging from Amtrak operating agreements to similar agreements with commuter railroads to trackage rights agreements and interchange agreements. I have never before seen anything comparable to Amtrak’s “reopener” proposed, much less adopted. Even for a large financial reward (which Amtrak is not offering), no railroad would ever agree to allow Amtrak to take over the dispatching and maintenance of its network as Amtrak proposes. Amtrak’s proposal is unprecedented and inappropriate.

33. Below I describe the specific characteristics and “Tiers” of Amtrak’s “reopener,” and why they are unworkable and unsafe. Then, I explain how its adoption would harm CN, the integrity of its network, its customers, and the broader economy.

¹¹ See VS Blair ¶¶ 118-134.

A. Amtrak's "Reopener" Is Hair-Triggered, Punishing CN Notwithstanding Good Performance by CN

34. Amtrak's "reopener" would apply if, for a brief period of time (one calendar quarter for "Tier 1," two quarters for "Tier 2," four quarters for "Tier 3"), any one of the 26 Amtrak trains CN hosts incurred HRD on CN's lines (as defined and measured by Amtrak) exceeding 924 minutes per 10,000 train-miles (an unreasonable threshold). That would mean that Amtrak's "reopener" would apply even if:

- CN is diligently giving preference to Amtrak trains;
- Amtrak is, with CN's help, achieving its stated goal of 80% or higher COTP on all 26 Amtrak trains hosted by CN;
- HRD is below 924 on 25 of the 26 Amtrak trains hosted by CN; and
- HRD on the service which includes the train at issue averages below 924, and therefore CN is earning net incentives on that service even under Amtrak's incentives and penalties proposal;
- For a train with a short segment on CN's lines, a small number of minutes of HRD have been incurred (for example, on the Wolverine service, which CN hosts for just 27.5 miles, 924 minutes per 10,000 miles equates to just 2.54 minutes of delay per trip); and
- CN HRD on the one train that exceeds 924 HRD does so only marginally, and is below typical historical levels and/or substantially elevated due to issues beyond CN's control (e.g., cross traffic at interlockings controlled by other railroads and late-arriving Amtrak trains).

35. It seems that Amtrak has decided that it no longer wants to incur the expense of incentivizing CN to serve Amtrak well through the normal commercial means of incentive payments.

B. “Tier 1”: Burdensome Intrusions into Core Dispatching Functions and Data, after Just One Quarter

36. “Tier 1” would apply after just one quarter during which just one CN-hosted Amtrak train has HRD in excess of 924 minutes per 10,000 miles as determined by Amtrak.

Then, for a minimum of six months, CN would be required to:

- provide a detailed report to Amtrak and the Board on every instance of what Amtrak records as an HRD delay in excess of five minutes, detailing how the delay occurred, how it could have been prevented, the names of the dispatcher on duty and the dispatcher’s supervisor, whether and when the dispatcher was “counseled,” and “[a]ny other corrective actions taken to prevent repeat of the delay,” and
- “provide Amtrak and the Board with on-line view access to CN’s dispatch screens for the Amtrak route which includes the non-performing train at issue, with approval to record data from those screens for use in any Board investigation pursuant to PRIIA § 213.”¹²

37. Those requirements would be “at Amtrak’s sole discretion.”¹³ They would be burdensome and enormously intrusive, especially insofar as they could contain information about dispatchers and their supervisors.

38. First, five-minute delays are an unavoidably frequent occurrence in the practical world of railroading on CN’s single-track lines, and such brief delays typically have little effect on OTP, since schedules build in time (in Amtrak schedules, known as “recovery time” or “miscellaneous time”) for the unavoidable delays that are part of everyday railroad operations. Consider, for example, one of Amtrak’s best performing long-distance services nationwide, the CN-hosted City of New Orleans service (“CNO”). I understand that, in November 2021, while the CNO was achieving strong OTP – 86% COTP – Amtrak recorded 203 “HRD” delays of five

¹² *see also* VS Blair ¶ 124.

¹³ Amtrak OA Redline, Appendix V, § 4.1(a)(1).

minutes or more for that service.¹⁴ Over 78% of those HRD delays were brief – less than 15 minutes.¹⁵

39. The reporting burden Amtrak proposes to impose on CN at Tier 1 (and as part of Tiers 2 and 3) would be significant. For each delay, CN would have to reconstruct after the fact what happened. (CN does not know in real time whether Amtrak has recorded a five-minute or longer delay, or coded it as HRD, and anyway, CN dispatchers and supervisors should not be distracted from performing their critically important function of dispatching CN's railroad safely to repeatedly stop mid-shift to write reports.) Then dispatchers and supervisors would have to consult. Then they would have to prepare narrative responses for each delay. The time spent preparing reporting on the delay would potentially be greater than the duration of the delay.

40. That reporting burden would divert dispatchers and their supervisors from their critically important jobs while producing no incremental value (and imposing on CN incremental costs – CN would likely need to hire new personnel to manage the reporting burden alone – for which Amtrak proposes no compensation). As Mr. Matteucci and Mr. Kuxmann explain, the vast majority of HRD delays – whether due to routine maintenance, Amtrak trains that arrive late, foreign interlockings, or other issues – cannot reasonably be avoided, and a large percentage of them have nothing to do with dispatching, meaning that demands to name and “counsel” individual dispatchers would serve no appropriate purpose.¹⁶ The same dispatchers who are responsible for dispatching the CNO are also responsible for dispatching the Illini/Saluki service, which generally has lower COTP. These dispatchers do not dispatch the two Amtrak services differently. CN does not claim that every one of thousands of decisions its dispatchers make

¹⁴ See RVS Matteucci/Kuxmann (PID) ¶ 83.

¹⁵ See *id.*

¹⁶ See RVS Matteucci/Kuxmann (PID) ¶ 33.

every month is perfect; that would be expecting the impossible in any system requiring complex professional judgments. But CN already has a system of review, consultation, advice, monitoring, and supervision in place – one that respects dispatchers’ professionalism and fosters teamwork – to refine best practices and optimize dispatcher performance. Amtrak provides no reason to believe that adding large volumes of paperwork and intruding into personnel information of dispatchers and their supervisors would improve it. To the contrary, as Mr. Sullivan explains, Amtrak’s proposal would jeopardize the collaborative working environment and morale in CN’s dispatch center.

41. Second, Amtrak’s proposed requirement that CN provide continuous online access to dispatch screens is unnecessary and unduly intrusive and burdensome. Given the nature of dispatching, the information and data at issue could not be isolated to Amtrak’s trains, and indeed Amtrak proposes that CN be required to provide data for the entire “route” along which the train at issue travels, such as between Chicago to Carbondale for an Illini/Saluki train or between Chicago to New Orleans for a City of New Orleans train.¹⁷ Amtrak does not explain what it would do with those data and information, other than use them in the future if a PRIIA investigation is launched, or how it would protect the confidentiality and security of the information.

42. There is no value, and much mischief, in having Amtrak virtually sit over dispatchers’ shoulders on a continuous basis. That would cause harm to dispatcher privacy and morale and entail significant logistical burdens and unnecessary dissemination of important confidential data. Especially viewed in real time, CN’s dispatch screens include data that are both competitively sensitive and sensitive from a security standpoint. For example, as discussed

¹⁷ See, e.g., VS Blair ¶ 124(b).

above, those data identify, in real time, which types of train are where, including train types that are most likely to be carrying of sensitive cargos (e.g., flammable, hazardous materials). For those reasons, and particularly to minimize security risks, CN (like other railroads) guards dispatch data closely on a need-to-know basis, even within CN. The real-time data generally do not leave the dispatching offices, and only a limited group of CN employees, each of whom receives training in data protection, can access them. Physical access to the dispatch center is restricted to those employees with a need to be present. Any system providing real-time remote access to Amtrak would entail significant risks to those confidential data.

43. Perhaps the most troubling aspect of Amtrak's Tier 1 proposal is the impact that it would have on CN's dispatch center. As described above, CN's open-plan dispatch center is designed and operated to facilitate professional teamwork, information-sharing, and constructive feedback, with dispatchers communicating frequently with supervisors and train crews. Such a professional environment is essential to efficient and safe dispatching in the interests of all network users, promoting network fluidity, and maximizing line capacity. However, dispatchers' work environment and conditions would be compromised if they know that throughout their shifts, an outsider will be looking virtually over their shoulder, watching the contents of their dispatch screens online in real time. Under Amtrak's proposal, a mere five-minute HRD delay, which a CN dispatcher could not avoid, would result in their identification, by name, to Amtrak and the Board, as well as whether they were "counseled" and whether "corrective action" was taken.. I believe that would have a negative impact on information-sharing, teamwork, morale, and dispatcher performance. It could, as Mr. Sullivan elaborates, lead to significant labor-management relations problems and union objections. And it could impair CN's efforts to retain and attract new dispatchers.

44. As I noted above, I have extensive experience with all kinds of railroad hosting arrangements – from Amtrak operating agreements, to freight-commuter rail agreements, to interchange agreements, to trackage rights agreements. One railroad hosting another’s trains is a common occurrence. But the idea of the tenant railroad demanding reports, including employee personnel information, on virtually every delay is unprecedented. Amtrak’s “Tier 1” is unwarranted, unduly burdensome, unduly intrusive, and unworkable. As I describe below, its “Tier 2” and “Tier 3” are even worse.

C. **“Tier 2”: Even More Burdensome Intrusions into Dispatching, and Amtrak Control over CN’s Maintenance of Its Freight Railroad, after Just Two Quarters**

45. After just two quarters in which one train had HRD, as recorded by Amtrak, exceeding 924 minutes per 10,000 miles, Amtrak’s proposal would extend the “Tier 1” burdens and intrusions discussed above for at least a year and add two more intrusive and burdensome elements.

46. First, Amtrak’s proposal would intrude further into CN’s dispatching offices by compelling CN to allow Amtrak and Board representatives to come into CN’s dispatching offices and *physically* look over dispatchers’ shoulders.¹⁸ Having Amtrak intruding into the dispatch center and looking over a professional’s shoulder all day is a recipe for bad employee morale, bad labor-management relations, and distraction that can lead to flawed decision-making. Dispatchers are frequently in conversation on headsets with train crews; outsiders attempting to listen in on calls would interfere with that. Dispatchers make complex judgments critical to safety, network fluidity and efficiency for all users of the CN network; having someone look over their shoulder who is solely focused on Amtrak trains, one of the many users

¹⁸ See, e.g., VS Blair ¶ 128.

of the network, would make an already challenging professional job substantially more difficult. And inserting an outsider into the dispatchers' union-represented workspace could create significant complications under the applicable collective bargaining agreement, as Mr. Sullivan explains.

47. Second, Amtrak's "Tier 2" would go beyond the realm of dispatching – and thus, beyond the realm of anything even arguably preference-related – by requiring CN to “obtain Amtrak’s prior written approval before scheduling any non-emergency Right of Way (‘ROW’) repair (such as signal upgrades) or Maintenance of Way (‘MOW’) work which is reasonably expected to impact the on-time performance of Amtrak trains on the subject route.”¹⁹ Amtrak apparently seeks an ability to veto any non-emergency CN maintenance work that might “serve to delay Amtrak’s trains” to any extent on the “subject route.”²⁰ Between them, the Amtrak trains (Illini/Saluki and City of New Orleans) are running approximately 20 hours per day on the IC mainline. So in practice that implies that under Amtrak’s proposal it could veto, and set CN’s schedules for, all non-emergency maintenance on the IC’s main line stretching from Chicago to New Orleans. Similarly, Amtrak could seek to control much of CN’s non-emergency maintenance on GTW lines. Yet, as Mr. Sullivan explains, CN has agreements with unions representing maintenance of way and signal employees that include available work days and shift start times for non-emergency maintenance work on CN’s lines.²¹

48. Amtrak offers no justification for that proposal, and there is none. As part of its efforts to be a good host and abide by and earn incentive payments under the existing Operating Agreement, CN notifies Amtrak well in advance about upcoming maintenance that could affect

¹⁹ VS Blair ¶ 129.

²⁰ *Id.*

²¹ VS Sullivan (PID) ¶10.

Amtrak trains, and CN works cooperatively with Amtrak to implement temporary schedule adjustments where necessary. Moreover, CN has every incentive to schedule maintenance efficiently to minimize disruption to trains on its network generally, and to Amtrak trains in particular, and it does so. Amtrak's proposal is a solution in search of a problem. I am unaware of any significant disputes with Amtrak in recent years concerning the scheduling of maintenance, and I understand that Amtrak has not raised concerns about CN's scheduling of maintenance at any prior stage of this proceeding.

49. Allowing a tenant railroad – particularly one that represents a small percentage of traffic – to dictate a host's maintenance scheduling is unprecedented and unworkable. Maintenance scheduling is a complex, and critically important, aspect of freight railroad operations that is performed well in advance and coordinated across CN's network to take account of scheduling and work block season for the territory. Proper maintenance is, of course, vital for the safe and efficient operation of the rail network in the interests of all users. It is especially important for trains that travel at higher speeds, and the trains that travel at the highest speeds on CN's network are Amtrak's passenger trains. Amtrak benefits greatly from CN's excellent maintenance record, as reflected in the operation of the CNO service as one of the best-performing long-distance routes in the country.

50. Efficient maintenance scheduling requires detailed long-term planning, and also flexibility. CN plans at least a year in advance to schedule and deploy maintenance crews and materials efficiently across its network, and then makes adjustments as necessary, taking into account:

- geography (maintenance is much more efficient if conducted along a line, sequentially, than if crews and materials are frequently having to be transferred to distant locations);

- climate (various forms of maintenance work cannot be performed efficiently in cold winter conditions or, especially in the south, in peak-heat summer conditions);
- seasonal traffic (CN endeavors to schedule maintenance to minimize disruptions at times of peak seasonal traffic);
- hours of work (CN schedules work for hours while taking into account the scheduling provisions in maintenance crews' collective bargaining agreements, which include defined shift start times); and
- unexpected developments (for example, CN has recently revised its maintenance schedules in Q2 2022 due in part to export grain shipments to the Gulf caused by supply disruptions stemming from the war in Ukraine).

51. That complex and important planning process requires experience and a thorough knowledge and understanding of CN's whole network and the continuously evolving demands and conditions on it. Amtrak, of course, does not have the necessary experience, knowledge, and current information to determine maintenance scheduling on CN's network; only CN has that. Given veto control over CN's maintenance scheduling, I am concerned that Amtrak would not appreciate the complex factors that affect the interests of all network users and employees and would instead narrowly pursue its own interests. And even if Amtrak exercised its veto control reasonably, having to obtain advance permission from Amtrak whenever CN needed to adjust its maintenance schedules would be highly disruptive for CN. CN is best positioned to determine how to maintain its own railroad, and Amtrak's proposal to interfere with that right of the host railroad is impractical and unworkable.

D. "Tier 3": Long-Term Take-Over of CN Dispatching, after Four Quarters, by Amtrak or Its Designee

52. Amtrak's most extreme proposal would come into play after four quarters during which a single CN-hosted Amtrak train incurred CN HRD exceeding the 924 threshold. Based on the history of Amtrak trains generally, I understand that this would not be an unusual

occurrence: as recently as last month, for example, 42 out of 53 Amtrak services hosted by Class I carriers had HRD exceeding 924 minutes per 10,000 miles.²²

53. At “Tier 3,” Amtrak proposes that it (or a third-party it designates) could take over CN’s dispatching, for at least two years, “on the Amtrak route at issue.”²³ For example, if one CNO train exceeded 924 HRD for a year, Amtrak could control all dispatching on the IC main line between Chicago and New Orleans. That would mean dispatching over the route of all trains – the vast majority of which are, of course, freight trains. (As discussed in Section I.A above, it is impossible to dispatch a single train in isolation; a dispatcher is responsible for all trains moving over a portion of CN’s network.)

54. The notion that Amtrak could commandeer CN’s entire dispatching operation for the IC spine (or for the portion of the GTW that hosts Amtrak) is utterly unprecedented and unworkable. No host railroad would ever allow a tenant to take control of its dispatching as part of a contractual agreement. CN’s railroad, and its dispatch center in Homewood, are CN’s property, not Amtrak’s. Other railroads that operate over interlockings controlled by CN expect CN to perform the dispatching. CN’s dispatchers are employed by CN, not Amtrak. CN’s freight train crews are employed by CN, not Amtrak, and look to CN to safely run the railroad. And all of CN’s union-represented employees have collective bargaining agreements with CN, not Amtrak.

55. Beyond the fundamental point that Amtrak has no right to commandeer CN’s railroad, the unworkability of Amtrak’s proposal is obvious. As described in Section I.A. above,

²² See Amtrak, Host Railroad Report: Amtrak Train Performance on Host Railroads (June 2022) (data through June 2022), *available at* <https://www.amtrak.com/content/dam/projects/dotcom/english/public/documents/corporate/HostRailroadReports/June-2022-Amtrak-Host-Railroad-Report.pdf>.

²³ VS Blair ¶ 132.

properly dispatching CN's railroad requires dispatching experience and training, local knowledge of the territory, knowledge of CN's customized and proprietary dispatching systems, knowledge of CN's policies regarding, for example, priorities between different types of freight trains, and a holistic view of the CN network. Amtrak does not have that, and nor would anyone it selected as its designee.

56. Amtrak's Opening Submission does not explain how it would propose to dispatch a freight railroad, how it would safeguard the confidential information of CN and its customers, and how it would address the inevitable labor disputes.

57. Nor does Amtrak explain how it would serve CN's freight customers. CN communicates closely with its freight customers, using several communication tools and resources such as the CN ONE platform that allows customers to track their CN shipments in real time, review updates to planned service, and make changes to their scheduled service (among other features), and CN's Service Delivery team, which is available around the clock, seven days a week, to assist customers. Having Amtrak control CN's dispatching would, at a minimum, disrupt and complicate those communications and harm CN's ability to reliably deliver for freight customers.

58. Employment and labor relations issues could be particularly problematic. As Mr. Sullivan explains, CN's dispatchers are represented by the ATDA pursuant to the collective bargaining agreement with Wisconsin Central. Dispatching activity involving the movement of trains, issuance of work authorities, and necessary recordkeeping that falls within the "scope language" of the ATDA collective bargaining agreement must be performed by ATDA-represented Wisconsin Central employees.²⁴ ATDA would likely consider Amtrak's proposal as

²⁴ RVS (PID) Sullivan ¶ 4

a violation of the applicable collective bargaining agreement. Permitting a dispatcher employed by Amtrak or its designee “to perform such work would inevitably cause a labor dispute and an actual or threatened strike against Wisconsin Central.”²⁵

59. Even more troubling is the issue of what policies Amtrak would pursue if allowed to commandeer CN’s dispatching. CN works hard to meet the needs of all users of the network – CN’s freight customers, Amtrak passengers, and commuter rail passengers alike. Amtrak’s incentives are different: the quality of service provided to freight customers or commuter passengers on CN’s lines, and the costs to CN of providing that service, do not directly affect Amtrak. Therefore, Amtrak would likely focus solely on its own trains in a way that could delay CN freight trains even more than at present, and that would certainly add costs to freight service for which Amtrak does not propose to compensate CN.

60. Amtrak’s own statements confirm that. The essential – but false – premise of all Amtrak’s arguments in this case appears to be that if HRD levels are “high,” that means that a host railroad is not giving Amtrak preference.²⁶ If Amtrak thinks CN is not giving it preference when (as described in Section I.B above) CN is dispatching in a way that ensures that CN trains incur more than ten times as much delay from meeting Amtrak trains as vice versa, what is the notion of “preference” that Amtrak would seek to implement if it controlled CN’s dispatching? I am concerned that, consistent with arguments Amtrak has made in the past, Amtrak would dispatch its trains like an extreme form of “Presidential motorcade,” pushing all freight trains out of the way and excluding them from lengthy sections of the main line when Amtrak trains are operating to prevent even the remotest chance of any potential delays to Amtrak trains, without

²⁵ RVS (PID) Sullivan ¶ 8

²⁶ See, e.g., VS Blair ¶ 20.

regard even to how best to move freight trains out of the way to minimize the resulting disruption.

61. That would be disastrous for CN, CN's freight customers, consumers, and the broader economy they serve. Self-interested dispatching by Amtrak based on an extreme "Presidential motorcade" notion of "preference" would ensure that intermodal trains would be late regularly, which could risk losing CN's time-sensitive customers and degrade the beneficial progress CN has made in the last ten years in growing intermodal traffic. Dispatching by Amtrak could delay other freight trains so that crew assignments that are currently achieved during one crew shift (such as trips between Chicago and Carbondale) could instead require two crews to complete them, entailing not just financial costs (for additional crew hours, overtime, and re-crew expenses) but also a further strain on available resources during periods when freight demand is high. Moreover, mismanagement of the network and excessive delays at any one point on the line would have cascading effects down the line, especially as large numbers of freight trains would be forced to share line capacity during a severely reduced number of hours per day. As noted above, the six Illini/Saluki and CNO trains that operated daily between Chicago and Carbondale before the pandemic were, between them, on that line for approximately 20 hours a day. So if Amtrak took an extreme "Presidential motorcade" approach to dispatching, barring freight trains from the line whenever they were anywhere near an Amtrak train, substantial segments of CN's IC spine could be closed to freight traffic for substantial periods of time every day.

62. There is no limiting principle to how far Amtrak will take its extreme "Presidential motorcade" theory of preference if Tier 3 comes into effect. It is unclear, for example, how Amtrak would perform dispatching over segments with other passenger trains.

For example, Amtrak has not stated how it would dispatch its own Lincoln and Texas Eagle trains and the Metra trains which run on CN's Joliet Sub.

63. Under its proposal, Amtrak would not be accountable for any of adverse effects on CN, its freight customers, the freight rail network, the broader economy, and other users of CN's network such as interchange trains or trackage rights trains of other freight railroads or commuter trains. Perversely, if Amtrak failed to reduce CN HRD below 924 while it was dispatching CN's lines, then Amtrak could maintain control of CN's dispatching indefinitely.

64. Finally, Amtrak's proposal would add insult to injury by providing that while it took over CN's dispatching – potentially indefinitely – CN could earn no incentives “for the impacted Amtrak Route” under the Operating Agreement. That appears to mean that even if CN were consistently earning incentives on five out of six trains on the IC spine, and even if CN were continuing to provide excellent maintenance and other services that kept HRD down and enabled Amtrak to meet its COTP goals while Amtrak commandeered CN's dispatching, CN would not be compensated. That is yet one more point highlighting the thoroughly self-serving nature of Amtrak's proposal.

E. Amtrak's “Reopener” Is Unfair and Unsustainable

65. The fundamental problem with Amtrak's proposal, and especially its “reopener,” is that it treats CN's railroad as Amtrak's property. CN built its railroad with freight revenues. Much to Amtrak's benefit, CN invests heavily in maintaining and improving that railroad, by re-investing freight revenues. As Rob Reilly, CN's Executive Vice President and Chief Operating Officer, testified at the Board's hearing on rail service in April, CN has made upwards of \$10

billion in capital investment in its network, re-investing over 20% of its revenues.²⁷ Those infrastructure investments include investments that have significantly benefited Amtrak, by adding line capacity or improving speeds on the segments on which it operates. Amtrak has not contributed, and does not propose to contribute, to those investments.

66. Amtrak's proposal threatens severe harm to CN's reliable freight service. If Amtrak were to control operations on CN's IC spine (or GTW line) for an extended period of time and impose a "Presidential motorcade" model of dispatching, CN's service for freight customers would be even further delayed, which could jeopardize CN's ability to offer a competitive service product as compared to alternative modes of transportation, which over the long run could harm CN's ability to reinvest in the network on which Amtrak relies.

67. Amtrak is entitled to good service, including preference. CN recognizes that and provides that. But freight service matters too. CN moves goods across its network in America. That business is vital to millions of American consumers, to contributing solutions to aid in response to supply chain challenges, to moving export grain to the U.S. Gulf where it is needed during the war in Ukraine, and to moving energy where it is needed. CN's services on the IC spine are important for its freight customers and the millions of American consumers they serve, and the U.S. economy as a whole. An approach that would put Amtrak in charge of dispatching and deploying routine maintenance on CN's IC spine and/or other important parts of CN's freight rail network and risk further delaying freight commodities and commuter passengers due to Amtrak's "Presidential motorcade" view of preference is unfair and unworkable.

²⁷ *Urgent Issues in Freight Rail Service*, No. EP 770, Written Testimony of Robert Reilly at 2 (filed May 10, 2022).

VERIFICATION

I, Derek Taylor, declare under penalty of perjury that I have read the foregoing verified statement, that I know the facts asserted therein, and that the same are true as stated. Further, I certify that I am qualified to and authorized to submit this verified statement on behalf of Canadian National Railway Company and its subsidiaries.

Executed on July 26, 2022.

A handwritten signature in black ink, appearing to read "Derek Taylor", is positioned above a horizontal line.

Derek Taylor

Tab C

PUBLIC VERSION - REDACTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 35743

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

**POST-INTERIM DECISION JOINT REPLY VERIFIED STATEMENT OF
MICHAEL MATTEUCCI AND SCOTT KUXMANN**

TABLE OF CONTENTS

I.	AMTRAK’S HRD-BASED INCENTIVES AND PENALTIES PROPOSAL USES A DEFECTIVE METRIC AND STANDARD, IS CALCULATED TO DEPRIVE CN OF ANY MEANINGFUL OPPORTUNITY TO EARN NET INCENTIVES, AND IS OTHERWISE UNREASONABLE.....	2
A.	HRD Is a Misleading and Unreliable Metric, and Ill-Suited to Serve as a Basis for a Contractual Incentives and Penalties Scheme.....	6
1.	<i>Amtrak’s Definition of HRD Is Grossly Over-Broad</i>	7
2.	<i>Amtrak’s Measurement of HRD Is Also Overbroad and Unreliable</i>	18
B.	Amtrak’s “One-Size-Fits-All” 924 Minutes of HRD per 10,000 Train-Miles Standard Ignores the Realities of Different Amtrak Services, Conflicts with CN’s and Amtrak’s Common Approach to Scheduling, and Produces Absurd Results Applied to Short Segments.	20
1.	<i>Amtrak’s One-Size-Fits-All Approach Conflicts with Its Own Schedules</i>	23
2.	<i>Amtrak’s One-Size-Fits-All Approach Using an HRD/10,000 Miles Metric Yields Absurd Results for Short Segments</i>	28
C.	924 Minutes of HRD per 10,000 Miles Is Not a Standard that Amtrak’s Hosts, or Amtrak Itself, Can Regularly Meet in Practice in Normal Circumstances.	29
D.	CN Can Do Very Little to Affect Amtrak’s COTP and Ridership Factors.	34
1.	<i>COTP</i>	36
2.	<i>Ridership Factor</i>	38
E.	Amtrak’s Penalties and Incentives Proposal Is Calculated to Penalize CN for Performance that Has Earned Incentives under the Existing Agreement, and to Impose Massive Penalties on Amtrak Hosts Generally.....	40
1.	<i>Contrary to Mr. Blair’s Implication of Revenue-Neutrality, Amtrak’s Proposal Would Replace Incentives for CN with Huge Penalties for the Same Performance</i>	40
2.	<i>Amtrak’s Proposal Would Have Similarly Extreme Effects on Other Hosts</i>	43
II.	AMTRAK’S “REOPENER” IS BASED ON FALSE PREMISES AND UNREALISTIC ASSUMPTIONS.	44
III.	SCHEDULES FOR THE SIX AMTRAK TRAINS WITH THE GREATEST MILEAGE OPERATING OVER CN HAVE NOT YET BEEN ADJUSTED AS THEY MUST BE FOR COTP TO WORK, AND AMTRAK’S “PROPOSED” SCHEDULES DO NOT RESOLVES ALL ISSUES.....	47
A.	CN and Amtrak Are Still Negotiating on the Illini/ Saluki and City of New Orleans Schedules.....	47

B.	Although Amtrak Has Conceded that Additional PRT Should Be Added to the Illini/Saluki Schedules, It Nonetheless Refuses to Lengthen Those Schedules.	48
C.	Amtrak’s “Proposed Schedules” Are Not Set Appropriately to Achieve 80% Customer OTP or to Afford CN a “Meaningful Opportunity” to Earn Incentives.	50

HIGHLY CONFIDENTIAL – FILED UNDER SEAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 35743

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

**POST-INTERIM DECISION JOINT REPLY VERIFIED STATEMENT OF
MICHAEL MATTEUCCI AND SCOTT KUXMANN**

1. We are Michael Matteucci and Scott Kuxmann. On May 27, 2022, we submitted a verified statement (“RVS (PID) Matteucci/Kuxmann”) in this case, which set forth our qualifications.

2. In our earlier statement, we discussed the principal changes which CN proposes to make in its existing Operating Agreement with Amtrak.¹ In this reply verified statement, we address various arguments and proposals made in Amtrak’s Opening Submission (including the supporting verified statements of James Blair and Yoel Weiss). In doing so, we aim not to repeat points made in our May 2022 Statement in favor of CN’s incentives and penalties and

¹ CN and Amtrak executed an Operating Agreement in 2011, which by its terms expired at the end of August 11, 2013. An order of the Board served in this proceeding on August 9, 2013 directed CN to continue to provide facilities and services (including rail lines) to Amtrak on an interim basis under the terms and conditions of the Operating Agreement in effect on August 11, 2013. We refer to that Agreement as the “2011 Operating Agreement” or, because it has been continued in force by Board order, as the “current” or “present” Agreement. A copy of the 2011 Agreement, incorporating all amendments made by the parties, is the base document for the CN’s comparisons submitted as Exhibit 2 of Tab B of CN’s Post-Interim Decision Opening Submission and as Exhibit 1 of Tab E of CN’s Post-Interim Decision Reply Submission (“CN Proposed Operating Agreement (Rev’d)”).

incremental cost compensation proposals. Instead, we focus on Amtrak’s proposals. In Part I, we discuss Amtrak’s incentives and penalties proposal, which defies mixed-use railroading realities, uses defective and irrelevant metrics, imposes an unreasonable standard, and is calculated to deny CN any meaningful opportunity to earn net incentives. In Part II, we briefly discuss Amtrak’s three-tier “reopener” proposal, which would represent an unwarranted and unworkable intrusion on CN’s dispatching; we defer to our colleague Derek Taylor for a fuller discussion of that proposal. In Part III, we explain the nature and status of current disputes between CN and Amtrak regarding the schedules for the Amtrak services on the IC line, which, along with the general need for a fair and efficient process to update schedules over time, provide important reasons for CN’s proposal to clarify that schedule disputes are subject to binding arbitration.

I. AMTRAK’S HRD-BASED INCENTIVES AND PENALTIES PROPOSAL USES A DEFECTIVE METRIC AND STANDARD, IS CALCULATED TO DEPRIVE CN OF ANY MEANINGFUL OPPORTUNITY TO EARN NET INCENTIVES, AND IS OTHERWISE UNREASONABLE.

3. As we have explained in our prior statements, incentives and penalties provisions in operating agreements between CN and Amtrak have for decades followed what we understand to be the past and present industry standard model. To recap, the key characteristics of that model are:

- a. It is checkpoint-based. That is to say, it bases compensation on whether Amtrak’s trains arrive “on-time” at checkpoints (almost always Amtrak stations) on CN’s lines;
- b. “On-time” for that purpose is defined in a negotiated, tailored way, sometimes referred to as “contract OTP”: it measures timeliness relative to the run time

on CN's lines set forth in Amtrak's public schedules (thus eliminating impacts on timeliness that occur on other hosts' lines), factoring in a "tolerance" period, and extra time is credited for "relief items," which represent kinds of delay that the parties have agreed are beyond CN's reasonable control;

- c. OTP exceeding 80%, measured thus, is rewarded with incentive payments; lower OTP incurs penalties; and
- d. A "lookback" provision ensures that in any given 12-month period, penalties will not exceed incentives, *i.e.*, CN will not be compelled to pay Amtrak a financial subsidy (in addition to the subsidy inherent in hosting Amtrak while not recovering the full incremental costs of doing so).

4. Our understanding of the Board's Interim Decision is that the Board approved the checkpoint-based model as described above (after both parties proposed such a model, although Amtrak also proposed a different model based on so-called "Host-Responsible Delay" ("HRD")), with some caveats. Specifically, the Board indicated that there should be checkpoints at all stations,² the parties should work together to ensure that relief items accurately and specifically reflect delays that CN cannot reasonably control,³ there should be no neutral zone between incentives and penalties,⁴ and there should be a "degree of lateness factor" that makes compensation vary not just with whether a train is late, but with how late it is if it is late.⁵ As described in our May 2022 Statement, those points are reflected in CN's new proposal.

² Interim Decision at 11.

³ *Id.* at 24.

⁴ *Id.* at 14.

⁵ *Id.*.

5. Amtrak's new proposal takes a very different approach. It has no checkpoints, no relief items, no 80% OTP standard, and no lateness multiplier, and its "lookback" provision would apply over a minimum of eight years, instead of one, thereby creating the possibility that CN could have multiple years during which it is compelled to pay Amtrak a financial subsidy in addition to hosting Amtrak.

6. In form, Amtrak's proposal involves multiplying three factors: (1) a Ridership Factor, which, in essence, takes the incentive payments CN accrued for a service under the existing Operating Agreement in 2019 and adjusts them in proportion to subsequent increases or decreases in passenger-miles on the service concerned; (2) a COTP factor, which adjusts the product of the Ridership Factor calculation in proportion to deviations above or below 80% Customer On-Time Performance ("COTP"), which is measured on the train's entire route, including portions not on CN's lines; and (3) a "Delay Adjustment Factor," which determines whether CN earns incentives or pays penalties based on whether Amtrak records CN HRD for the train above or below 924/925 minutes per 10,000-train miles, and multiplies the product of the Ridership Factor and the COTP factor OTP by various percentages, ranging from 125% to minus 250%, based on the HRD level.⁶

7. In substance, our understanding of Amtrak's proposal is this: it is all about HRD. To be sure, under Amtrak's proposal, if Amtrak's ridership or COTP goes up 10%, CN's incentives (or penalties) will go up 10%. But whether CN earns incentives or penalties is determined entirely by whether its HRD minutes per 10,000 miles are above or below 924/925.⁷ Moreover, the size of the incentives or penalties varies much more with HRD (which itself is, in

⁶ See generally Amtrak OA Redline, Appendix V, §§ I-III & Tables 1-2; Blair VS ¶¶ 35-53.

⁷ See Blair VS ¶¶ 50-51.

our experience, much more variable than Amtrak ridership) than with the other two factors. In particular, while very low HRD could lead to a 25% increase in incentives relative to 2019 levels, high HRD could lead to penalties at levels as high as two and a half times (250%) the level of incentives CN accrued in 2019.⁸

8. Insofar as Amtrak's proposal is all about HRD, it is a radical departure from the traditional checkpoint-based system, despite Amtrak having previously proposed a checkpoint-based proposal and the Board having indicated approval in principle of checkpoint-based systems. Amtrak's new proposal is much more similar to its original proposal in this case (which the Board criticized and did not adopt in its Interim Decision⁹).

9. In that original proposal, just as in Amtrak's new proposal, Amtrak proposed to determine whether CN earned incentives and paid penalties solely based on HRD, and to use HRD to calibrate incentives and penalties.¹⁰ But Amtrak's original proposal differed from its new one in proposing HRD standards at different levels (above which penalties would apply, below which incentives would apply) for different services.¹¹

10. Below, we address both defects that are inherent in any HRD-based proposal and defects that are specific to Amtrak's new proposal. But at the outset, we note Amtrak's inconsistency. The HRD standards in Amtrak's new proposal – and the judgments they imply as to what constitutes “good” or “bad” performance – are profoundly inconsistent (in both directions) with its old proposal. For example, Amtrak previously proposed an HRD standard of

⁸ *See id.* ¶ 52.

⁹ *See* Interim Decision at 11 n.26, 14.

¹⁰ *See* Amtrak Opening Statement at 12-18 (filed Sept. 4, 2015).

¹¹ *See id.* at 14; Sacks VS at 12 (filed Sept. 4, 2015).

1073 minutes per 10,000 miles – not 924 – for the Lincoln service.¹² There is simply no good explanation for that inconsistency. Nothing has changed with respect to the services in question that would dramatically change the HRD levels that indicate “good” performance by CN.

Amtrak’s original HRD proposal was rejected by the Board, and FRA declined to set an HRD standard in the final on-time performance rule. Amtrak’s new HRD proposal ignores every characteristic of a service – its schedule, its length on CN, the amount of freight and passenger traffic on the line, the amount of cross-traffic, *etc.* – and pretends that there is a one-size-fits-all level of HRD per 10,000 miles that indicates “good” or “bad” host performance on every Amtrak service in the country.

A. HRD Is a Misleading and Unreliable Metric, and Ill-Suited to Serve as a Basis for a Contractual Incentives and Penalties Scheme.

11. The first major problem with Amtrak’s proposal concerns its principal metric: HRD. The essential premise of Amtrak’s proposed incentives and penalties scheme and its so-called “reopener” is clear: it assumes that HRD exceeding 924 minutes per 10,000 train-miles indicates “bad” performance by a host and that the host is not giving Amtrak preference,¹³ such that the host should be subjected to (1) financial penalties, and (2) intrusive outside interference in dispatching and deploying maintenance of its freight railroad. The premise is wrong, in part because HRD is a misleading, overbroad and unreliable metric.

12. HRD is a metric invented and defined by Amtrak alone. (FRA has adopted it as one of many delay metrics to be reported, but was not involved in defining it, did not set any standard for it, and also adopted a Disputed Delays metric in recognition of the fact that HRD

¹² See Sacks VS at 12.

¹³ See, *e.g.*, Blair VS ¶ 20; Amtrak Br. (PID) at 31.

represents only the views of Amtrak, with which CN and other host railroads disagree.¹⁴) It is in Amtrak's interest to define HRD broadly, since Amtrak would prefer that hosts, rather than itself, be held responsible when Amtrak fails to achieve OTP. Amtrak has defined HRD much too broadly to be used as the key metric in a contractual incentives and penalties scheme.

13. The HRD metric has some utility. Since it is defined and measured by Amtrak, the fact that Amtrak codes a delay as *non*-HRD is significant – it amounts to a concession by Amtrak that the host is not responsible for that delay. HRD is employed accordingly in CN's incentives and penalties proposal as, in effect, the initial relief item: if Amtrak has conceded that a delay is not CN's fault, that delay should not be counted against CN in determining whether CN has done its part to help Amtrak achieve OTP.

14. But the converse does not apply: if Amtrak self-servingly attributes responsibility for a delay to CN based on its over-broad definition of HRD, that should not entitle Amtrak to pay CN less for its hosting services. Hence, CN's proposal provides, as the Operating Agreements between the parties concerning the IC have always provided, for other relief items.

1. Amtrak's Definition of HRD Is Grossly Over-Broad

15. As defined by Amtrak, HRD includes many delays which CN cannot reasonably prevent or control, and such delays outside of CN's control could have nothing to do with giving Amtrak preference.. In many circumstances, delays clearly beyond CN's reasonable control amount to majority of the delays Amtrak records as HRD and exceed, or come close to, the 924 HRD minutes per 10,000 mile level Amtrak proposes as the standard for CN's performance. Below we provide some examples, which are far from exhaustive, to illustrate this problem.

¹⁴ 49 C.F.R. § 273.5(d).

16. **PTI.** Amtrak classifies as HRD “Passenger Train Interference,” or “PTI” – *i.e.*, delays to an Amtrak train because of meets with other Amtrak trains. At least some level of such delays is absolutely unavoidable. For example, the IC spine is almost entirely a single-track line. In normal circumstances – outside the period affected by the Covid pandemic – Amtrak runs six trains on that line daily (four Illini/Saluki, two City of New Orleans). Amtrak’s own schedules provide for its northbound and southbound trains to traverse the same segments of the single line main at the same time – *i.e.*, to meet, meaning that at least one of the trains must be delayed. CN has worked with Amtrak to schedule those “meets” to cause minimal delay, but for many reasons, including delays (*e.g.*, Amtrak delays departing Amtrak’s Chicago Union Station) that Amtrak concedes are its responsibility, those meets frequently do not occur as and where scheduled. When that happens, CN dispatchers work hard to find other meeting points where delay can be minimized, but longer delays are inevitable. Overall, both through planning and through real-time adjustments, CN does its best to minimize Amtrak’s PTI delays, but such delays are, to a very large extent, unavoidable under the circumstances and not a delay caused by CN.

17. Two points about PTI data recorded by Amtrak should be noted. First, for some trains, PTI is regularly a large portion of HRD. For example, in December 2019, City of New Orleans Train No. 58 had 644 minutes of PTI out of 1,928 total minutes of HRD.¹⁵ Second, Mr. Weiss’s Verified Statement relies heavily on data from the period 2020-2022, during large portions of which (due to Covid) Amtrak did not run several of its trains on CN’s lines. Fewer

¹⁵ See workpaper: Delay_Summary_Analysis.xlsx, tab “Exhibits”. Unless otherwise specified, all data regarding the performance of Amtrak trains used in this statement are derived from reports published by Amtrak and FRA, reports provided by Amtrak to CN, or Amtrak’s ARROW database.

Amtrak trains running on CN's lines entailed fewer Amtrak-Amtrak meets, and so less PTI. For example, Table 1 below shows that when, in 2020, Amtrak suspended some of its trains on the IC spine, the PTI incurred by one of the remaining trains, Illini/Saluki Train No. 390, significantly decreased.¹⁶

Table 1:

PTI Decline During COVID Period for Train #390 on IC Spine



Insofar as Mr. Weiss suggests that high COTP and/or low HRD should be achievable for Amtrak's trains running on CN under the schedules he proposes, and supports that suggestion using data from the period when various Amtrak trains were cancelled, any inferences that might be drawn from his testimony should be adjusted to take that into account.

18. **CTI.** Amtrak classifies as HRD "Commuter Train Interference," or "CTI," delays that an Amtrak train incurs due to a meet with a commuter train. Such meets occur at interlockings on the CN's IC spine, which commuter trains not hosted by CN cross, and on CN's

¹⁶ See workpaper: Delay_Summary_Analysis.xlsx, tab "Exhibits".

Joliet Sub, which hosts Amtrak's Lincoln and Texas Eagle Services and Metra commuter trains. As with PTI, CN works with Amtrak to create schedules that will limit CTI if adhered to. But as with PTI, trains are frequently not on schedule. Particular problems arise when southbound Amtrak trains depart late (due to reasons attributable to Amtrak or third parties) from Chicago Union Station, causing them to miss their allocated "slot" and run into rush-hour commuter traffic. That problem – for which CN is plainly not responsible – is a large reason why CTI on the Lincoln and Texas Eagle services is frequently high. Problems likewise arise on northbound trains that arrive late to Joliet station, creating delays which can be compounded if CN does not get a green light at Union Tower (which is controlled by Union Pacific Railroad). Relying solely on HRD to determine whether CN accrues penalties or incentives, and thus penalizing CN for cross-traffic, which involves no CN trains and which depends substantially on Amtrak's own performance with respect to timely departures from its own station, is completely unreasonable.

19. **DSR.** Amtrak also classifies as HRD delays due to slow orders, which Amtrak codes as DSR. CN imposes slow orders, which reduce the permitted track speed on a section of CN's line, in various circumstances when safety requires them. That may be due to extreme weather or other track conditions. These delays are necessary and critical to the basic maintenance of the lines. They may also be due to the characteristics of the single-level equipment Amtrak has chosen to run on CN's lines, as was true for several years until March 2020, when Amtrak chose to run single-level equipment for Illini/Saluki trains, which gave rise to a "short shunt" problem that accounted for a large proportion of delays to the Illini/Saluki trains. During that period, Amtrak ran trains on the Illini/Saluki service that were not properly equipped to reliably, at normal track speed, activate CN's system that signals that a train is coming, thereby creating a potential hazard at grade-level crossings if CN had not imposed a

slow order. These “short shunt” delays accounted for over 46% of delays on the Illini/Saluki service in 2019.¹⁷ CN and Amtrak continue to dispute responsibility for those “short shunt” delays as a contractual matter, but under its HRD metric, Amtrak classified them as CN’s responsibility. Recently, Amtrak has elected to primarily run double level equipment that is permitted to run at track speed.

20. It is indisputable that slow orders are a necessary and required part of track and infrastructure maintenance and repair. It is also beyond reasonable dispute that the approach taken by Amtrak’s HRD metric, of categorically classifying all slow order delays as “host-responsible,” is unfair and unreasonable. Safety is CN’s top priority. Amtrak trains have priority over all other trains on CN’s lines, but not over safety.

21. **DMW.** Relatedly, Amtrak also classifies as HRD (and codes as “DMW”) delays due to CN maintenance work on the CN freight lines over which Amtrak runs. Such maintenance is essential for the benefit of all network users, and for the delays that sometimes unavoidably causes. As Mr. Taylor explains in more detail, not just emergency maintenance, but regular scheduled maintenance, is essential, and there are numerous constraints on how and when CN can schedule maintenance that make it not reasonably possible to schedule “around” Amtrak trains.¹⁸ That is particularly true on the IC line, on which Amtrak trains were scheduled to be present for a total of approximately 20 hours a day before the pandemic.¹⁹

¹⁷ See CN Comments on Proposed Metrics and Standards at 38 (“Figure 5 – Percentage of Delays Categorized by Amtrak as ‘Host Responsible’ on the Illini/ Saluki Service (2019 data)”) (filed at FRA June 1, 2020).

¹⁸ See RVS (PID) Taylor ¶¶ 49-51.

¹⁹ See CN Proposed Operating Agreement (Rev’d), App. II (showing existing schedules for Amtrak services on CN lines).

22. CN gives Amtrak advance notice of maintenance work where possible, and does its best to avoid undue delays to Amtrak trains due to maintenance. But CN cannot reasonably avoid some delays to Amtrak trains due to maintenance, and it would not be in the interests of Amtrak and its passengers to compel CN or give CN financial incentives to defer the maintenance of the lines that serve them. Maintenance is, thus, another component of HRD that should not be counted against CN, as Amtrak's HRD-based proposals do.

23. None of the above examples (PTI, CTI, DSR, and DMW) involve "Freight Train Interference," or "FTI," the only sub-category of HRD that has anything potentially to do with the extent to which CN gives Amtrak trains priority over CN's own freight trains. For many Amtrak services hosted by CN, FTI is substantially less than half of total HRD. In other words, most HRD has, by definition, nothing to do with any supposed possible failure to give preference.

24. **Foreign-controlled and automated interlockings.** Further, even FTI is not all about Amtrak meets with CN trains – much less, about preference. Amtrak classifies as FTI, and attributes to CN, delays that occur to Amtrak trains while on CN's lines that are due to cross-traffic – *i.e.*, other freight railroads' freight trains running on their lines that cross over CN's lines. Amtrak classifies those delays as CN FTI even when the interlocking where the lines cross is controlled by the other freight railroad, or by an automated system – *i.e.*, where CN is not involved in the decision to let the other railroad's train traverse the crossing before the Amtrak train.

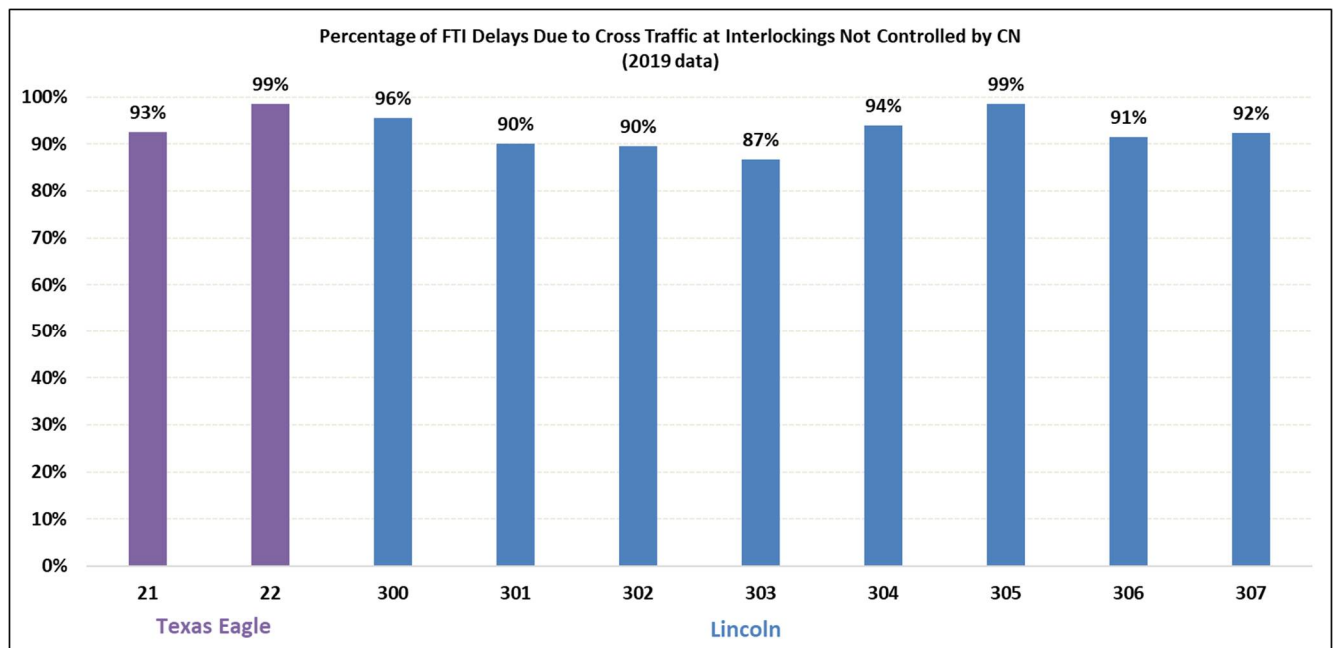
25. The practical reality is that CN cannot control delays at foreign-controlled and automated interlockings. CN should not be penalized for them. Amtrak has previously recognized that, agreeing with CN to include a relief item in prior Operating Agreements

(including the present one) covering foreign-controlled and automated interlockings.²⁰ But Amtrak’s new proposal, relying solely on HRD without any relief items, would penalize CN for these matters beyond CN’s reasonable control.

26. The issue of delays at foreign-controlled interlockings is quantitatively significant, too. For example, as the graph below shows, on the Lincoln and Texas Eagle services, almost all delay Amtrak records as FTI is due to foreign-controlled interlockings.

Figure 1:

Lincoln/Texas Eagle Foreign-Controlled Interlocking Delays as FTI Component



27. In 2019, that foreign-controlled interlocking delay for the Lincoln and Texas Eagle services accounted for an average of 6.7 minutes per trip for the Texas Eagle service, and 3.5 minutes per trip for the Lincoln. Over the just under 35-mile route those trains travel on CN’s lines, those numbers equate to 1,924 and 1,005 HRD minutes per 10,000 train-miles,

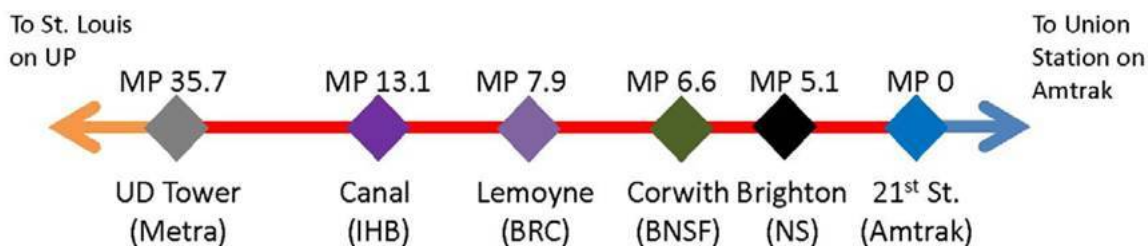
²⁰ See 2011 Operating Agreement, App. V, § A.1.g; *id.*, App. VI, § D.10.

respectively. In other words, delays due to foreign-controlled interlocking alone would ensure that under Amtrak's proposed 924 HRD standard, CN would be subject to penalties.

28. The following schematic, showing the Lincoln/Texas Eagle route and the foreign-controlled interlockings that cross it, makes clear why they regularly incur such high levels of foreign-controlled interlocking delay:

Figure 2:

Joliet Sub Interlockings Controlled by Other Carriers Where the Lincoln and Texas Eagle Services Regularly Experience Delays



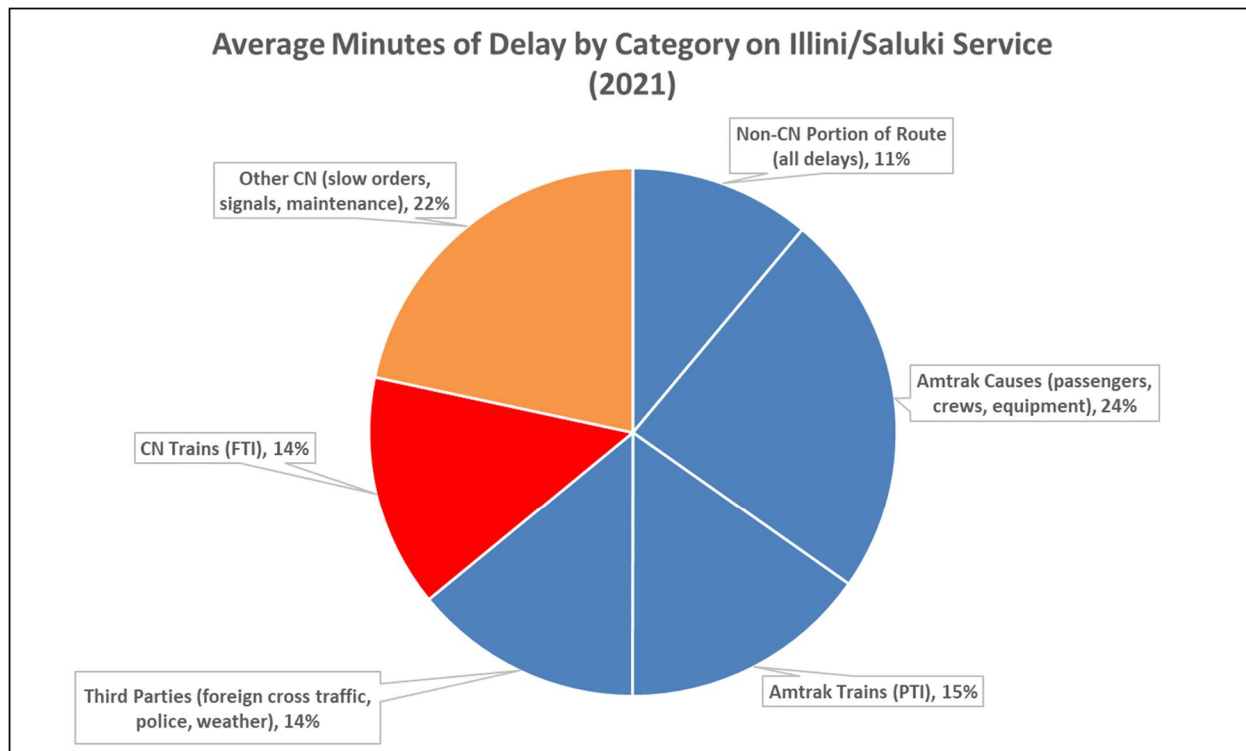
29. Further, the issue of foreign-controlled interlockings causing significant delay that Amtrak treats as HRD is not confined to the Joliet Sub. On the IC spine, the Illini/Saluki trains experience significant delay, under Amtrak's HRD per 10,000 train-miles metric, from commuter cross-traffic at interlockings controlled by commuter lines, such as Metra's interlocking at Kensington.

30. A brief review of the types of delay incurred by Amtrak's Illini/Saluki service will serve to illustrate how these various types of delay that CN cannot reasonably control combine to represent most of what Amtrak records as "HRD," leaving little or negative "room" for any FTI involving CN's own trains below Amtrak's proposed 924 minutes of HRD per 10,000 train-miles threshold. As the pie-chart for the Illini/Saluki service below illustrates, the categories of "HRD" delay discussed above generally represent *most* of the delays Amtrak

records as CN HRD. In other words, **most** of the delays Amtrak asks the Board to penalize CN for pursuant to Amtrak’s proposal are delays beyond CN’s reasonable control.

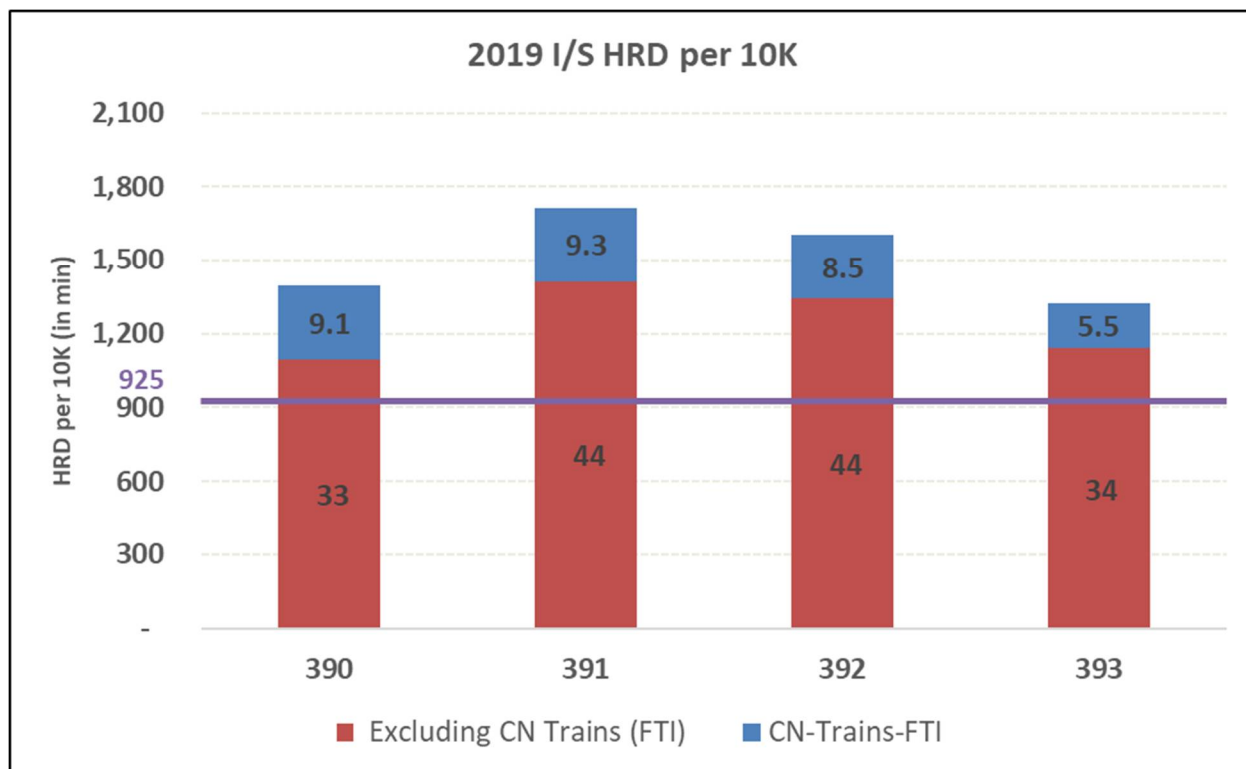
Figure 3:

Components of FTI for the Illini/Saluki Service



31. Looked at another way, and using 2019 data (to avoid the Covid-affected period during which Amtrak ran reduced trains), the “HRD” delays to the Illini/Saluki that do **not** involve FTI associated with actual interference with CN’s freight trains (i.e., excluding foreign cross traffic at interlockings CN does not control) **exceeded** Amtrak’s proposed threshold. In other words, with **zero** FTI associated with actual interference with CN’s freight trains, CN would still have been subject to penalties under Amtrak’s 924 HRD standard. The graph below also strikingly reflects how little FTI associated with CN freight trains underlies Amtrak’s complaints – between five and ten minutes per trip on average:

Figure 4



32. In highlighting these delays that are unfairly attributed to CN by Amtrak’s overbroad HRD metric, we do not concede that other delays are fairly attributed to CN. In particular, we do not concede that remaining FTI delays, involving CN freight trains, are within CN’s reasonable control, and they certainly do not represent failure to give preference. As Mr. Taylor explains, at any given time, there may be [REDACTED] – including CN’s freight trains, freight trains from other railroads, and Amtrak’s trains – using, or seeking to use, the CN mainline on any of the three major segments over which Amtrak runs.²¹ Amtrak has not partnered with CN in investing in additional infrastructure that would reduce train meets. CN has invested in infrastructure that adds capacity, CN gives Amtrak trains priority over all freight

²¹ See RVS Taylor (PID) ¶ 12.

trains, and CN works hard to reduce delays to Amtrak trains to the extent it reasonably can.²²

That work is reflected in the data. Amtrak and CN each record delays to their own trains resulting from meets with each other's trains. CN records delays that Amtrak trains cause to CN freight trains as "FA" delays (generating a conservative assessment of those delays because CN does not record delays of less than between 10 and 30 minutes, with the threshold depending on the CN train type).²³ Amtrak records as FTI all delays to its passenger trains on CN's lines that Amtrak attributes to freight train conflict, with no minimum threshold. A comparison between FA delays to CN trains and FTI delays to Amtrak trains shows that CN trains are delayed far more by meets with Amtrak trains than vice versa. In December 2019, for example, the ratio of FA delays to FTI delays was approximately 11:1.²⁴ Moreover, this comparison understates the difference in delay because (1) Amtrak's FTI measure of delays includes long and short delays, whereas CN's FA measure only includes delays longer than the thresholds by train type that are between 10 and 30 minutes, and (2) as have discussed, Amtrak's FTI measure includes a significant proportion of delays due to cross-traffic at foreign controlled interlockings. Nonetheless, on a mixed-use, single-track line, some level of CN/Amtrak train meets and FTI delays is unavoidable.

33. In sum, most of what Amtrak calls "HRD" is beyond CN's reasonable control. Most of it has nothing to do with even the potential subject matter of preference – when an Amtrak train and CN freight train meet. And neither HRD levels nor FTI levels indicate anything about whether CN gives Amtrak trains the highest priority – which it does.

²² See generally *id.* ¶¶ 17-25.

²³ See VS Summerfield *et al.* (PID), parts III.A. and III.B.

²⁴ See workpaper: Delay_Summary_Analysis.xlsx, tab "FTI vs FA."

2. *Amtrak's Measurement of HRD Is Also Overbroad and Unreliable*

34. Amtrak's reliance on HRD metrics as the centerpiece of its proposal is problematic for another reason, too. The above points all go to the overbreadth of Amtrak's *definition* of HRD. But the *measurement* of HRD exacerbates the problem. Amtrak's own conductors decide how much time to record as a delay, and what delay category to attribute it to. They have a natural incentive to code delay as HRD, thereby absolving Amtrak – and themselves – from any responsibility for delays. And they have a limited, “windshield” perspective – they may see the freight train ahead of them, but, for example, be unaware of another Amtrak train in front of it or third-party trespasser that caused it to stop, or of the reality that CN had planned a meet that would avoid delay to the Amtrak train but that plan was frustrated because the Amtrak train did not arrive onto the line segment at its scheduled time.

35. We appreciate the Board's concern, expressed in the Interim Decision, that determining the root cause of every delay could be infeasible, and accordingly, CN's current proposal does not provide for routine “root cause” analysis.²⁵ However, there remains a significant problem with Amtrak conductors' HRD coding. Indeed, in creating a metric for Disputed Delays, FRA recognized that there is a problem with Amtrak's HRD coding.²⁶ Amtrak's HRD coding is regularly inaccurate and records more HRD than actually occurs, even under Amtrak's overbroad definition of HRD. Not only does Amtrak's definition of HRD extend to many delays for which the host cannot reasonably be held responsible, but Amtrak regularly assigns HRD codes to events that, even under Amtrak's own definitions, should be characterized as Amtrak-responsible or third-party-responsible delays. (We described several

²⁵ See Interim Decision at 24.

²⁶ See 49 C.F.R. § 273.5(d); FRA Metrics and Standards, 85 Fed. Reg. at 72,981-82.

examples of Amtrak's mis-coding in our previous statement.²⁷) Amtrak's delay codes are assigned at the unilateral discretion of by Amtrak's train conductors. CN may argue for correction of mis-codings by the conductor, but ultimately all CN can do is request changes, while Amtrak retains unilateral discretion to make requested corrections or deny them. Amtrak's proposed Operating Agreement would make the unilateral assignment of delay codes determinative of whether CN receives incentives or pays penalties for Amtrak's performance, and if so, the magnitude of those payments. In theory, CN could seek correction through the dispute resolution process set out in Article VI (*i.e.*, arbitration under the Amtrak Arbitration Agreement of April 16, 1971), but that process is too cumbersome to be used to resolve the many disputes that arise each week over Amtrak's delay coding. So as a practical matter, Amtrak would remain the final authority as to whether CN earns incentives or incurs penalties.

36. CN, recognizing the limitations of arbitration as a practical means of resolving routine disputes, has proposed to improve that process for resolving billing disputes, which would include disputes over attribution of delays in connection with billing. Under CN's proposal, each party would be required to designate a single point of contact with authority to resolve disputes over amounts billed, including assignment of causes for delays to Amtrak trains for purposes of computing incentives and penalties. (CN anticipates that allowing it to deal with such an authorized representative would remove the possibility, which CN now frequently faces, of having what CN thought was resolution of a dispute over coding overturned by Amtrak employees with whom CN never comes into contact.) Billing disputes that could not be resolved by these two designated individuals would then be subject to a formal escalation process that

²⁷ VS (PID) Matteucci/Kuxmann at 30-32 (delays properly coded as SYS (Crew & System, an Amtrak-responsible delay) instead coded by Amtrak as RTE (Routing), DCS (Signal Delays), or DSR (Slow Order Delays), all categories of HRD).

would require referral of the issue to CN's Senior Director – Interline Services and Amtrak's Senior Director-Host Railroads. If they were unable to come to agreement, then CN's proposal provides for discussions of the matter between CN's Vice President, Southern Region and his or her Amtrak counterpart. And if no resolution could be reached through this formal process, then either party could invoke its existing right to arbitration, but it is CN's hope and expectation that this would rarely be necessary if the designated officers and employees were required to confer and consider the disputed issues.

B. Amtrak's "One-Size-Fits-All" 924 Minutes of HRD per 10,000 Train-Miles Standard Ignores the Realities of Different Amtrak Services, Conflicts with CN's and Amtrak's Common Approach to Scheduling, and Produces Absurd Results Applied to Short Segments.

37. As we noted above, in 2015 Amtrak at least attempted, in its prior HRD-based proposal, to recognize the reality that different services have very different characteristics that lead to different HRD levels.²⁸ Its new proposal abandons that effort in favor of a one-size-fits-all approach that would impose a 924 HRD minutes per 10,000 train-miles standard on every CN-hosted-segment. Presumably, since it derived that standard from nationwide non-CN-specific data and offers no reason why CN should be subject to it if its freight competitors are not, Amtrak intends to apply the same standard to every freight-railroad-hosted segment of an Amtrak service nationwide if the Board approves it.

38. If the point is to distinguish "good" hosting from "bad," that uniformity makes no sense. The six Amtrak trains that run on the IC spine are hosted on the same line, with the

²⁸ As CN demonstrated in response, however, Amtrak's 2015 proposal was defective in many ways. Among other defects, it attempted to determine what level of HRD would correspond to 80% All-Stations OTP, taking schedules as fixed, and failing to address at all what level of HRD was achievable given the particular circumstances of the service at issue. *See generally* Ladue/Kuxmann RVS at 3-11, 30-45 (filed Sept. 14, 2017); Dubin RVS (filed Sept. 14, 2017).

same maintenance, and dispatched by the same dispatchers, but they regularly have significantly different levels of HRD and FTI, as well as significantly different FTI to HRD ratios and varying “associations” between HRD, FTI, and COTP, as the following table shows.

Table 2:
HRD, FTI & COTP of Amtrak Trains on the IC Spine

Route	Train #	Quarter	COTP	CN HRD/10K	CN FTI/10K	CN FTI vs CN HRD
CNO	58	2019Q1	71%	1,183	546	46%
CNO	59	2019Q1	54%	1,141	619	54%
Illini/Saluki	390	2019Q1	44%	1,369	316	23%
Illini/Saluki	391	2019Q1	19%	1,571	305	19%
Illini/Saluki	392	2019Q1	21%	1,876	540	29%
Illini/Saluki	393	2019Q1	38%	1,360	333	24%
CNO	58	2019Q2	68%	1,173	550	47%
CNO	59	2019Q2	60%	1,251	715	57%
Illini/Saluki	390	2019Q2	28%	1,708	535	31%
Illini/Saluki	391	2019Q2	11%	2,162	582	27%
Illini/Saluki	392	2019Q2	15%	1,953	389	20%
Illini/Saluki	393	2019Q2	25%	1,413	334	24%
CNO	58	2019Q3	80%	933	280	30%
CNO	59	2019Q3	76%	966	430	44%
Illini/Saluki	390	2019Q3	41%	1,361	270	20%
Illini/Saluki	391	2019Q3	10%	1,814	240	13%
Illini/Saluki	392	2019Q3	20%	1,651	156	9%
Illini/Saluki	393	2019Q3	29%	1,227	134	11%
CNO	58	2019Q4	83%	775	217	28%
CNO	59	2019Q4	86%	685	244	36%
Illini/Saluki	390	2019Q4	54%	1,138	201	18%
Illini/Saluki	391	2019Q4	25%	1,483	246	17%
Illini/Saluki	392	2019Q4	37%	1,436	158	11%
Illini/Saluki	393	2019Q4	34%	1,179	88	7%

Those different levels do not indicate that CN dispatchers are according preference to the City of New Orleans service – one of Amtrak’s best-performing long-distance services – and denying it

to the Illini/Saluki service, or that CN is doing more of what it reasonably can do to avoid delays to northbound Illini/Saluki trains than to southbound Illini/Saluki trains. What they indicate is that different, largely unavoidable, problems cause different levels of delay to different trains running at different times with different schedules in different directions. For example, southbound Illini/Saluki trains are often late leaving Chicago Union Station due to delays even Amtrak admits are its responsibility. Such delays at the start of a train's route tend to frustrate CN's efforts to schedule meets in such a way that freight trains can be parked in sidings and avoid any delay to Amtrak trains. (CN of course still works hard to avoid delays to Amtrak trains in those circumstances, as described in Mr. Taylor's statement, but it is not feasible to avoid all delays when Amtrak trains arrive out-of-slot.)

39. A one-size-fits-all HRD standard makes even less sense when services on different routes are compared. For example, Amtrak trains, Amtrak schedules, and commuter trains are the main determinants of PTI and CTI (which is why PTI and CTI fell precipitously during the Covid pandemic), not host performance. It is self-evident that a route on which only one pair of Amtrak trains and no commuter trains run will have lower PTI and lower CTI than a route on which multiple Amtrak-Amtrak and Amtrak-commuter meets occur daily. Likewise, unavoidable levels of FTI are different for different routes. For example, for the Texas Eagle and Lincoln services, a substantial level of delay Amtrak codes as FTI is due to cross-traffic at foreign-controlled interlockings, which is beyond CN's control.

40. More broadly, relatively "high" HRD per 10,000 train-miles is to be expected when Amtrak is running multiple trains over a single-track line which also serves freight traffic, as is true of CN's lines on which Amtrak runs near the nation's primary freight rail hub,

Chicago, where rail lines of six Class I hosts and multiple short-lines cross. Much lower HRD would typically be expected on double-track lines, or on remote rural lines without interlockings.

1. Amtrak's One-Size-Fits-All Approach Conflicts with Its Own Schedules

41. These obvious railroading realities underlie much of the cooperative work CN and Amtrak have done together for decades. In building schedules, CN has always understood that Recovery Time and Miscellaneous Time – the remaining schedule components in addition to theoretical “Pure Run Time” (“PRT”)²⁹ and Dwell Time at Amtrak stations – are, and should be, designed to reasonably represent the level of “delays” (versus PRT) that would typically occur given the particular sources of delay that exist on each route. While CN and Amtrak sometimes disagree on specifics (as we discuss in Section III, below), the shared premise has always been that schedules must be customized to the route and train characteristics in order to set realistic expectations for passengers who rely on those schedules.

42. This approach is reflected not only in the parties’ shared history, but also in current schedules to which Amtrak has agreed. Amtrak’s schedules for its CN-hosted trains include different amounts of Recovery Time and Miscellaneous Time, and those different amounts are not simply proportional to PRT or to mileage; they are customized to reflect different expected levels of delay. Even within individual services, schedules for particular trains include different levels of Recovery Time and Miscellaneous for, *e.g.*, northbound and southbound trains. For example, the schedule for the northbound City of New Orleans Train No. 58 includes minutes 158 minutes of combined Recovery Time and Miscellaneous Time; for southbound Train No. 59, the number is 187.

²⁹ PRT is, or at least should be, the theoretical minimum time the trip of the train would take, taking into account track configuration, maximum permitted train speed, and train consist, if it incurred no delays from any cause.

43. Schedules cannot be simplistically translated into expected total delay levels that would yield particular levels of COTP for several reasons. Among others, not all delay is equal. For example, delay at the start of a trip, before every checkpoint, affects COTP more than delay at the end of a trip, before just the last checkpoint; and infrequent instances of major delay may affect COTP more or less than frequent instances of brief delay.³⁰ In addition, the interaction of schedules, delays and tolerance is complex. But different schedules are plainly designed to accommodate different levels of total delay while achieving OTP.

44. The table below illustrates this point, and also reflects that Amtrak has, through its schedules, implicitly acknowledged levels of HRD substantially higher than 924 minutes per 10,000 train-miles as normal and acceptable. For the 22 out of 26 CN-hosted Amtrak services that have net positive Recovery Time and Miscellaneous Time, our table shows the amount of Recovery Time and Miscellaneous Time. In other words, it shows the amount of “delay” time (versus PRT) Amtrak has built into the schedule to reflect anticipated and reasonable delays. It then converts that amount of delay into minutes per 10,000 train miles. In every case except one (the Texas Eagle), Amtrak’s schedules (even without tolerance) imply expected “delays” exceeding 1,000 minutes per 10,000 train-miles.

45. We acknowledge, of course, that not all delay anticipated in a schedule is HRD delay. Our table accounts for that in two ways. First, in the “50% Allocation” column, we grant for the sake of argument a suggestion that Amtrak has made – that just 50% of expected delay should be allocated to HRD.³¹ That assumption is highly generous to Amtrak, given that Amtrak

³⁰ See *generally* RVS Dubin (filed Sept. 4, 2015); RVS (PID) Peterson ¶ 50.

³¹ See Amtrak Rebuttal Submission at 40-41 (filed Sept. 14, 2017); *see also* Interim Decision at 25 (calling instead for allocation of Recovery Time based on “real-world operating conditions”).

defines HRD so broadly that, according to Mr. Weiss, about 67 to 70% of delay versus PRT on Amtrak services nationwide is HRD.³² But even under that erroneous assumption, the vast majority of schedules imply levels of HRD substantially in excess of 924 minutes per 10,000 train-miles. (The main exception, the Illini/Saluki service schedules, are the subject of the principal schedule dispute between the parties currently, as discussed in Section III below.)

46. Second, the parties agreed in the existing Operating Agreement to an allocation between them of Recovery and Miscellaneous Time in the schedules for the services that run on IC lines (only) in the form of “Recovery Time Base” (“RTB”) provisions that, effectively, set aside certain Recovery and Miscellaneous Time for Amtrak’s sole use.³³ In the “RTB Allocation” column, we determine CN’s allocation of Recovery and Miscellaneous Time on that basis and convert it to HRD minutes per 10,000 miles. Again, the numbers vary widely, reflecting the different realities that cause different levels of delay to different trains, but generally exceed 924.

³² Weiss VS ¶ 81.

³³ The current Agreement assigns a RTB to each segment between checkpoints on the IC lines used by Amtrak. In determining whether an Amtrak train should be counted as on time (or “within tolerance”) at a checkpoint, the current Agreement provides for adjustments to the arrival time of the train to allow “relief time” for certain delays deemed to be outside CN’s control, but only to the extent that such delays exceed the RTB for the segment.

Table 3

Recovery & Miscellaneous Minutes Included in Amtrak/CN Existing Schedules³⁴

Train Line	Train No.	Recovery Time	Misc. Time	Recovery + Misc. Time Minutes Per 10,000 Miles (to nearest Whole Number) ³⁵	50% Allocation (to nearest Whole Number)	RTB-Based Allocation to CN (to nearest whole number) ³⁶
Texas Eagle	22	0	3	860	430	287
City of New Orleans	58	127	31	1703	852	1326
City of New Orleans	59	151	36	2016	1008	1563
Lincoln	300	7	0	2006	1003	1433
Lincoln	301	5	0	1433	717	860
Lincoln	302	7	0	2006	1003	1433
Lincoln	304	7	0	2006	1003	1433
Lincoln	306	7	0	2006	1003	1433
Wolverine	350	15	3	6545	3273	3636
Wolverine	351	2	4	2182	1091	3636
Wolverine	352	18	3	7636	3818	3636
Wolverine	353	3	3	2182	1091	3636
Wolverine	354	19	3	8000	4000	3636
Wolverine	355	3	3	2182	1091	3636
Blue Water	364	15	23	2394	1197	2836
Blue Water	365	38	9	2962	1481	2836
Illini-Saluki	390	26	5	1011	506	587
Illini-Saluki	391	26	14	1304	652	880
Illini-Saluki	392	26	10	1174	587	750
Illini-Saluki	393	26	14	1304	652	880

³⁴ See workpaper: Table 1 – Recovery Misc Minute per 10k train miles.

³⁵ This column represents the total Recovery plus Miscellaneous minutes included in the schedule, divided by trip length (in miles) and multiplied by 10,000 to normalize it to Amtrak's per 10,000 train-miles metric.

³⁶ This column represents the total Recovery plus Miscellaneous minutes included in the schedule, minus the RTB allocated to non-CN-responsible delays, divided by trip length (in miles) and multiplied by 10,000 to normalize it to Amtrak's per 10,000 train-miles metric.

47. Amtrak's own schedules reflect that PRT is a theoretical construct, divorced from running times that can reasonably be expected; reasonable and expected delay times per 10,000 train-miles vary widely by service and by train, and reasonable and expected levels of HRD built into schedules generally exceed 924 minutes of HRD per 10,000 miles by far, even without taking tolerance into account.

48. Amtrak's new proposal, relying on a one-size-fits-all HRD standard of 924, takes precisely the opposite approach from its schedules and prior agreements, setting expectations – standards for host performance – that are bound to be unrealistic in many cases because they take no account whatsoever of the specific sources and types of “delay” (versus PRT) that affect the train at issue. In doing so, Amtrak proposes to impose financial penalties on CN, and even ultimately take over control of CN's dispatching, based on levels of “delay” versus PRT that its own schedules indicate are acceptable, including delays that may not make any Amtrak trains late.³⁷ Amtrak's uniform HRD standard is inconsistent with railroading realities, inconsistent with its own scheduling practices, and inconsistent with the passenger expectations its own schedules have set. And its proposal is unjustifiably punitive, punishing CN even when CN exceeds the expectations implied by Amtrak's own schedules.

³⁷ We acknowledge, of course, that a schedule that, through its Recovery Time, anticipates 1,000 minutes of HRD per 10,000 miles will not always cause a train that incurs less than 1,000 minutes of HRD per 10,000 miles to achieve strong COTP. That is because Recovery Time that is not used on a given segment (between stations) is not carried over to the next segment. But what that reflects is that delay minutes should not all be treated as an undifferentiated mass. Delays that occur in a situation where they cause a train to exceed its Recovery Time matter; “delays” versus PRT that are within the scheduled Recovery Time for a particular segment do not, and avoiding such delays will just cause the passengers to sit at the next station until the Recovery Time for that segment has expired. The failure to differentiate delays that make a train late from those that have no significant effect is a fundamental flaw in Amtrak's HRD-based proposal, and in any HRD-based proposal.

2. *Amtrak's One-Size-Fits-All Approach Using an HRD/10,000 Miles Metric Yields Absurd Results for Short Segments*

49. One context in which a fixed per-10,000 miles HRD standard yields particularly unrealistic results is for short segments. The Lincoln, Texas Eagle, and Wolverine services run on CN's lines run on segments of 27.5 or 34.9 total route miles. For such short segments, the per 10,000 miles aspect of Amtrak's proposed contractual metric and standard has a magnifying effect: brief delays that are typically unavoidable and insignificant to the overall running time of the train can translate into huge numbers when normalized to the per 10,000 train-miles metric. Amtrak's 924 minutes HRD per 10,000 miles standard amounts to 2.54 minutes per train trip for the Wolverine (over 27.5 miles) and 3.22 minutes per train trip for the Lincoln and the Texas Eagle (34.9 route miles). For each of those services, an Amtrak train could run with zero HRD for 29 trips out of 30 in a month, which would presumably tend to lead to high OTP, but have one trip in which an isolated incident on the line for which Amtrak blames CN delays it for 77 minutes (on the Wolverine) or 94 minutes (on the Lincoln or Texas Eagle). By any reasonable standard, 29 flawless trips out of 30 would be deemed reliable service. Under Amtrak's scheme, CN would be exceeding 924 HRD minutes per 10,000 train-miles, and as such subject to financial penalties and on a course to have Amtrak pursue its three-tier penalty proposal that will result in Amtrak taking over CN's dispatching.

50. The problem of applying a per 10,000 train-miles standard to a short segment is equally significant for segments that experience regular, but unavoidable, relatively short delays. The Texas Eagle and Lincoln trains provide a case in point. As we described above, they both experience substantial and unavoidable levels of what Amtrak unfairly categorizes as HRD in the form of delays due to cross-traffic at interlockings CN does not control and delays due to Metra commuter trains that are exacerbated when Amtrak arrives outside its scheduled slot. As noted

above, the great majority of the delays of the Texas Eagle and Lincoln trains which Amtrak characterizes as HRD are delays for cross-traffic at these foreign-controlled interlockings, which CN has no ability to avoid or control.

51. Another case in point is the Wolverine service. On its 27.5 mile run on CN's lines, the Wolverine is "delayed" every day due to permanent slow orders that Amtrak codes as HRD. CN and Amtrak specifically agreed to those slow orders under the Operating Agreement because Amtrak recognized that they could only be eliminated by a substantial capital investment that would, in effect, be for the sole benefit of Amtrak, and Amtrak chose to accept the delays rather than fund that investment.³⁸ Deeming those delays HRD and seeking to penalize CN for them and even potentially use them as a trigger for Amtrak's three-tier penalty proposal that will ultimately result in Amtrak taking over CN's dispatching would amount to a complete failure on Amtrak's part to abide by that agreement, and would be fundamentally unfair.

C. 924 Minutes of HRD per 10,000 Miles Is Not a Standard that Amtrak's Hosts, or Amtrak Itself, Can Regularly Meet in Practice in Normal Circumstances.

52. Amtrak bases its proposed 924 HRD standard on an analysis by Mr. Weiss that claims to show an "association" between 80% COTP and HRD at around 924 minutes per 10,000 train-miles.³⁹ We defer to Dr. Peterson for expert comments on Mr. Weiss's analysis, but several things about it are readily apparent to us.⁴⁰

53. First, Mr. Weiss's own graph shows huge variation as to what levels of HRD are "associated" with 80% (or other levels of) COTP. Amtrak's most recent Monthly Host Report

³⁸ VS Ladue/Kuxmann at 48-49 (filed Sept. 5, 2015).

³⁹ See Weiss VS ¶ 83.

⁴⁰ See generally RVS Peterson (PID) ¶¶ 34, 43-50.

(reporting data through June 2022) illustrates the tremendous variability in the relationship between those two variables. For example, over the 12 months ending June 2022, the City of New Orleans service experienced HRD of 890 minutes per 10,000 train-miles, and COTP of 69.7%; Illini/Saluki trains had lower HRD – 848 minutes per 10,000 train-miles, but also lower COTP – 59.5%. For multi-host services such as the other four Amtrak services that CN hosts, any “association” between COTP (which is measure at a whole train level) and individual host HRD will, of course, be all the more attenuated.

54. Second, Mr. Weiss’s dataset is very likely biased towards lower HRD levels than his theory should imply. Mr. Weiss takes his data from April 2019 through March 2022.⁴¹ That period should be considered unrepresentative of likely future performance. During most of that period, both freight and passenger traffic was significantly impacted by the Covid pandemic. For example, beginning in March 2020, Amtrak suspended two of its four Illini/Saluki trains (which remain suspended to date), four of its eight Lincoln service trains (which were not resumed until August 2021), and four of its six Wolverine trains (which also were not resumed until August 2021). In October 2020, Amtrak reduced operations of its two City of New Orleans trains and its two Texas Eagle trains from daily service to thrice-weekly service (restoring full service on the Texas Eagle on May 24, 2021, and only Monday through Friday service on the City of New Orleans on May 31, 2021). With fewer trains operating, there were fewer train meets and passes, so generally less HRD, and higher COTP, than under normal conditions.

55. In addition, in November 2020 FRA issued its Metrics and Standards Rule, in which it adopted 80% COTP as a standard,⁴² urged Amtrak and hosts to revise schedules to make

⁴¹ Weiss VS ¶ 82.

⁴² 49 C.F.R. § 273.5(a).

COTP more achievable,⁴³ and created a schedule certification process for that purpose.⁴⁴ As we discuss in Section III below, pursuant to that schedule certification process, Amtrak and CN have modified various schedules and certified 20 out of 26 schedules. CN understands that a similar progress has occurred between Amtrak and other hosts. Since the express goal of that process is to raise COTP by means of schedule adjustment – *i.e.*, without relying on changes in HRD – we would expect that, in general, COTP levels “associated” with any given level of HRD would be higher now, and even higher once the schedule adjustment and certification process is completed, than in the period from which Mr. Weiss pulled his data.

56. Finally, Mr. Weiss’s analysis does not address what to us, as practical railroaders, is the more important question: is 924 HRD a reasonable, feasible standard? We have already explained above that given variability in individual trains and services, a uniform standard makes no sense: it may be easy to achieve for some trains and services and impossible for others. Nonetheless, a sense of whether Amtrak’s demands are realistic, and what adopting Amtrak’s standard would mean for the freight rail industry, can be gathered by comparing Amtrak’s 924 HRD standard to current HRD data (published by Amtrak itself) on Amtrak services hosted by freight rail hosts nationwide. As the table below shows, the results are stark: most Amtrak trains, and most hosts, would “fail” a 924 HRD standard:

Table 4:
HRD per Amtrak Monthly Host RR Report for June 2022⁴⁵

Type	Service	Host	HRD/10K Miles	HRD Target
------	---------	------	---------------	------------

⁴³ FRA Metrics and Standards, 85 Fed. Reg. at 72,978.

⁴⁴ 49 C.F.R. § 273.5(c).

⁴⁵ Amtrak, Host Railroad Report: Amtrak Train Performance on Host Railroads (June 2022) (data through June 2022), *available at*:

NEC Corridor Routes	Richmond / Newport News / Norfolk	CSX	1,184	Fail
NEC Corridor Routes	Richmond / Newport News / Norfolk	NS	1,067	Fail
NEC Corridor Routes	Roanoke	NS	922	Pass
Non-NEC Corridor Routes	Capitol Corridor	UP	742	Pass
Non-NEC Corridor Routes	Carolinian	CSX	1,243	Fail
Non-NEC Corridor Routes	Carolinian	NS	812	Pass
Non-NEC Corridor Routes	Cascades	BNSF	1,459	Fail
Non-NEC Corridor Routes	Cascades	UP	1,719	Fail
Non-NEC Corridor Routes	Ethan Allen Express	CP	368	Pass
Non-NEC Corridor Routes	Maple Leaf	CSX	1,614	Fail
Non-NEC Corridor Routes	New York - Niagara Falls	CSX	1,238	Fail
Non-NEC Corridor Routes	Heartland Flyer	BNSF	1,881	Fail
Non-NEC Corridor Routes	Hiawatha	CP	168	Pass
Non-NEC Corridor Routes	Carl Sandburg / Illinois Zephyr	BNSF	862	Pass
Non-NEC Corridor Routes	Illini / Saluki	CN	977	Fail
Non-NEC Corridor Routes	Lincoln Service	CN	2,511	Fail
Non-NEC Corridor Routes	Lincoln Service	UP	1,110	Fail
Non-NEC Corridor Routes	Blue Water	CN	412	Pass
Non-NEC Corridor Routes	Blue Water	NS	3,466	Fail
Non-NEC Corridor Routes	Pere Marquette	CSX	170	Pass
Non-NEC Corridor Routes	Pere Marquette	NS	3,698	Fail
Non-NEC Corridor Routes	Wolverine	CN	2,238	Fail
Non-NEC Corridor Routes	Wolverine	NS	3,942	Fail
Non-NEC Corridor Routes	Pacific Surfliner	BNSF	1,620	Fail
Non-NEC Corridor Routes	Pacific Surfliner	UP	3,130	Fail
Non-NEC Corridor Routes	Pennsylvanian	NS	1,569	Fail
Non-NEC Corridor Routes	Piedmont	NS	579	Pass
Non-NEC Corridor Routes	San Joaquins	BNSF	1,359	Fail
Non-NEC Corridor Routes	San Joaquins	UP	1,323	Fail
Long-Distance Routes	Auto Train	CSX	1,550	Fail
Long-Distance Routes	California Zephyr	BNSF	1,089	Fail
Long-Distance Routes	California Zephyr	UP	2,232	Fail
Long-Distance Routes	Capitol Ltd	CSX	925	Fail
Long-Distance Routes	Capitol Ltd	NS	2,248	Fail
Long-Distance Routes	Cardinal	CSX	1,112	Fail
Long-Distance Routes	Cardinal	NS	1,598	Fail
Long-Distance Routes	City Of New Orleans	CN	1,385	Fail
Long-Distance Routes	Coast Starlight	BNSF	1,230	Fail
Long-Distance Routes	Coast Starlight	UP	1,519	Fail
Long-Distance Routes	Crescent	NS	1,919	Fail
Long-Distance Routes	Empire Builder	BNSF	776	Pass
Long-Distance Routes	Empire Builder	CP	762	Pass
Long-Distance Routes	Lake Shore Ltd	CSX	1,098	Fail
Long-Distance Routes	Lake Shore Ltd	NS	1,969	Fail
Long-Distance Routes	Palmetto	CSX	1,143	Fail
Long-Distance Routes	Silver Star	CSX	1,054	Fail

<https://www.amtrak.com/content/dam/projects/dotcom/english/public/documents/corporate/HostRailroadReports/June-2022-Amtrak-Host-Railroad-Report.pdf>.

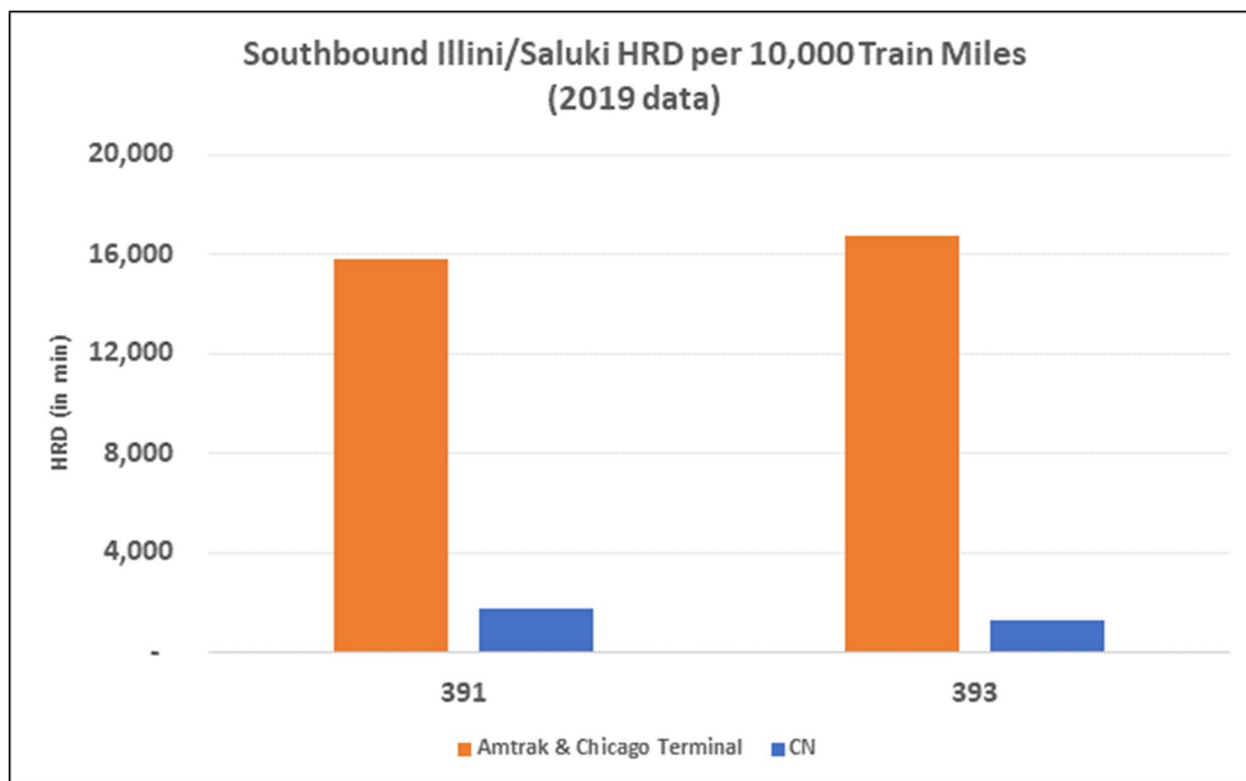
Long-Distance Routes	Silver Star	NS	1,249	Fail
Long-Distance Routes	Southwest Chief	BNSF	1,464	Fail
Long-Distance Routes	Sunset Ltd	BNSF	2,360	Fail
Long-Distance Routes	Sunset Ltd	UP	2,333	Fail
Long-Distance Routes	Texas Eagle	BNSF	1,054	Fail
Long-Distance Routes	Texas Eagle	CN	2,615	Fail
Long-Distance Routes	Texas Eagle	UP	2,102	Fail
			Total	53
			Total Fail	42
			% Fail	79%

57. In other words, if Amtrak’s proposal was adopted nationwide, it would immediately start collecting financial payments (penalties) from most of its hosts (subject to lookback). And it would immediately be on a path, under its proposed “reopener” provision, to control its hosts’ deploying maintenance and dispatching of their freight railroads. We can see the attraction of that outcome for Amtrak, but it would be disastrous for CN, the freight rail industry nationwide, and the freight customers and end-users who depend on freight rail service.

58. One further set of data reinforces how unreasonable and self-serving Amtrak’s proposal is. As noted above, a significant issue encountered particularly by southbound Amtrak trains on the IC spine is delays at the start of their trip, leaving Amtrak’s Chicago Union Station. The City of New Orleans and Illini/Saluki trains travels for 2.5 miles on tracks owned by Amtrak and Chicago Terminal at the northern end of their route, and experience extraordinarily high levels of delay on that segment. As host of that segment, Amtrak regularly exceeds the 924 HRD minutes per 10,000 miles standard by huge margins, as the following chart, comparing Amtrak and Chicago Terminal delays to delays Amtrak attributes to CN as HRD, reflects:

Figure 5:

Amtrak/Chicago Terminal vs. CN HRD on Southbound Illini/Saluki Trains



D. CN Can Do Very Little to Affect Amtrak’s COTP and Ridership Factors.

59. The other two elements in Amtrak’s incentives and penalties proposal are COTP and a Ridership Factor. There are several ideas that appear to be embedded in these factors on which CN agrees with Amtrak, but the formula Amtrak proposes (multiplying Ridership Factor by COTP factor by HRD-based “Delay Adjustment Factor”) does not yield an incentive scheme that reflects CN’s efforts to help Amtrak achieve COTP.

60. First, we agree on the goal of achieving high COTP for Amtrak. Second, we agree that it is reasonable to calibrate incentives in light of incentive levels under the existing Operating Agreement, which we believe has generally worked well to support cooperation

between Amtrak and CN. And third, we agree that there are some ways in which Amtrak train-miles might be relevant.

61. CN's proposal reflects all of these points. As we have explained, its checkpoint-based OTP metric focuses on CN's contribution to Amtrak's COTP, using an 80% standard. By retaining most features of the existing Operating Agreement, subject to changes indicated by the Board's Interim Decision, it will tend to lead to incentives and, where appropriate, penalties, at a similar order of magnitude to those that applied under the existing Operating Agreement. And, consistent with the existing Operating Agreement, incentives and penalties under CN's proposal are tied to route miles and to number of trips so that if, for example, Amtrak runs fewer train trips (as it did during the period affected by the Covid pandemic), CN's opportunity to earn incentives will be proportionately smaller.

62. Amtrak's proposal differs in ways that would make CN's compensation depend substantially on factors CN has little, if any, influence over. Under Amtrak's proposal, incentives and penalties would be calculated under a formula in which:

Quarterly Incentive or Penalty =

A “baseline” historic level of incentives earned for a service
(based on 25% of 2019 (or for Illini/Saluki 2020-2021 average) net annual incentives
earned, indexed for inflation & reduced or increased beginning in 2024
by the % change in Amtrak passenger miles from 2019)

X

A Customer OTP % adjustment
(Customer OTP % average for the service for the quarter (based on full train routes,
including all hosts) divided by 80%)

X

A % “Delay Adjustment Factor” by which Amtrak assigns
a positive percentage for incentives when Amtrak’s measure of “Host Responsible
Delay” per 10,000 train-miles for a service is below 924 (on a scale from 10-120%) and assigns a
negative percentage for penalties when it exceeds 924 (on a scale from -20% to -250%).

I. COTP

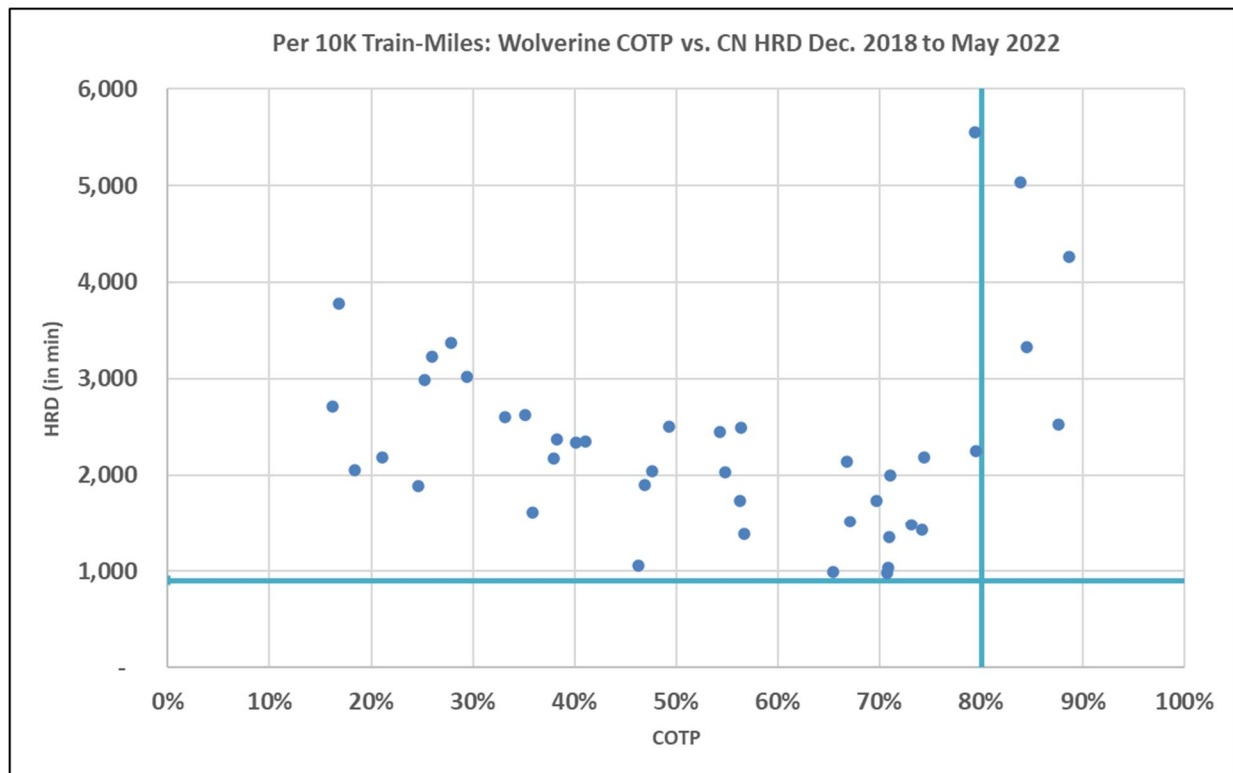
63. First, whereas the traditional checkpoint-based contract OTP metric reflects CN’s performance, COTP reflects a wide range of factors that even Amtrak agrees are entirely beyond CN’s control: Amtrak-Responsible Delays, Third-Party-Responsible Delays, and delays (and scheduling issues) that do not even involve the movement of an Amtrak train on CN’s lines.

64. This is particularly apparent for multi-host trains. Of the 26 regularly scheduled Amtrak trains operating on CN lines in the United States, CN operates substantially less than 50% of the mileage on 20 trains. On the 16 trains in the Texas Eagle, Wolverine, and Lincoln services, CN hosts less than 12.5% of total route miles. HRD on CN’s portions of those routes barely affects COTP for the train, as the illustrative scatterplot below showing CN HRD and

COTP on the Wolverine, reflects. Of course, the subset of HRD that CN can reasonably control has even less impact on overall COTP.⁴⁶

Figure 6:

COTP vs. CN HRD for the Wolverine Service



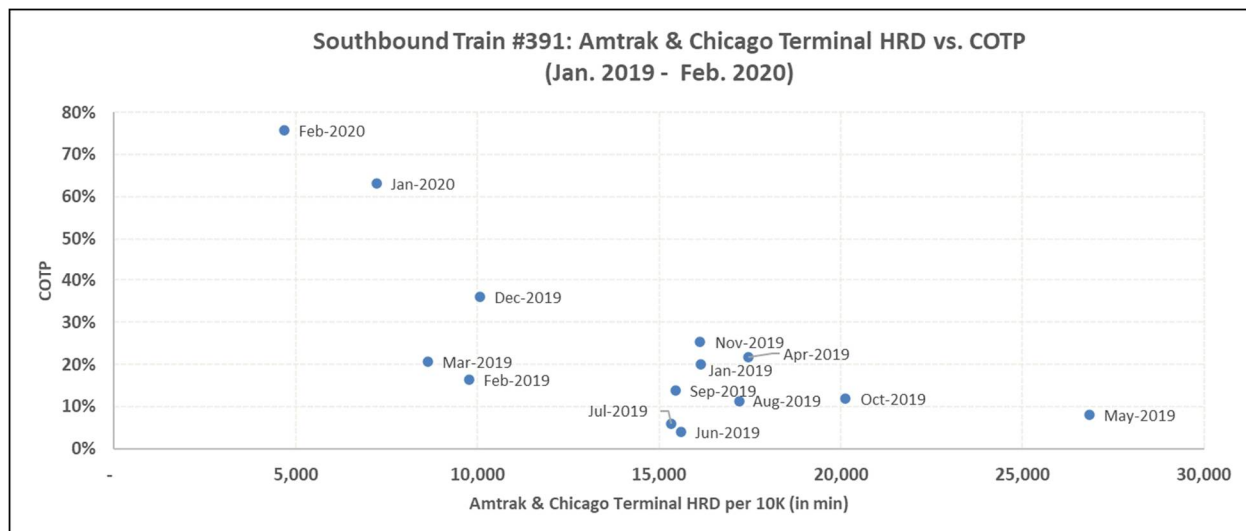
65. But it is also true of the City of New Orleans and Illini/Saluki services. For example, as noted above, the 2.5 miles including and adjacent to Chicago Union Station that Amtrak hosts consistently has levels of delay, which Amtrak admits are its responsibility, that are vastly disproportionate to its length. Moreover, on southbound trains, those delays have an out-sized effect on COTP, both because being at the start of the trip, they affect OTP at every

⁴⁶ See workpaper: Scatter_Plots_HRD_vs_COTP (“Per 10K Train-Miles: Wolverine COTP vs. CN HRD Dec. 2018 to May 2022”).

station, and disrupt scheduled meets down the line. The graph below reflects the association between Amtrak delays before the train reaches CN's lines and COTP for the southbound Illini/Saluki trains.

Figure 7:

Amtrak/Chicago Terminal Delays and COTP for Southbound Illini/Saluki Trains



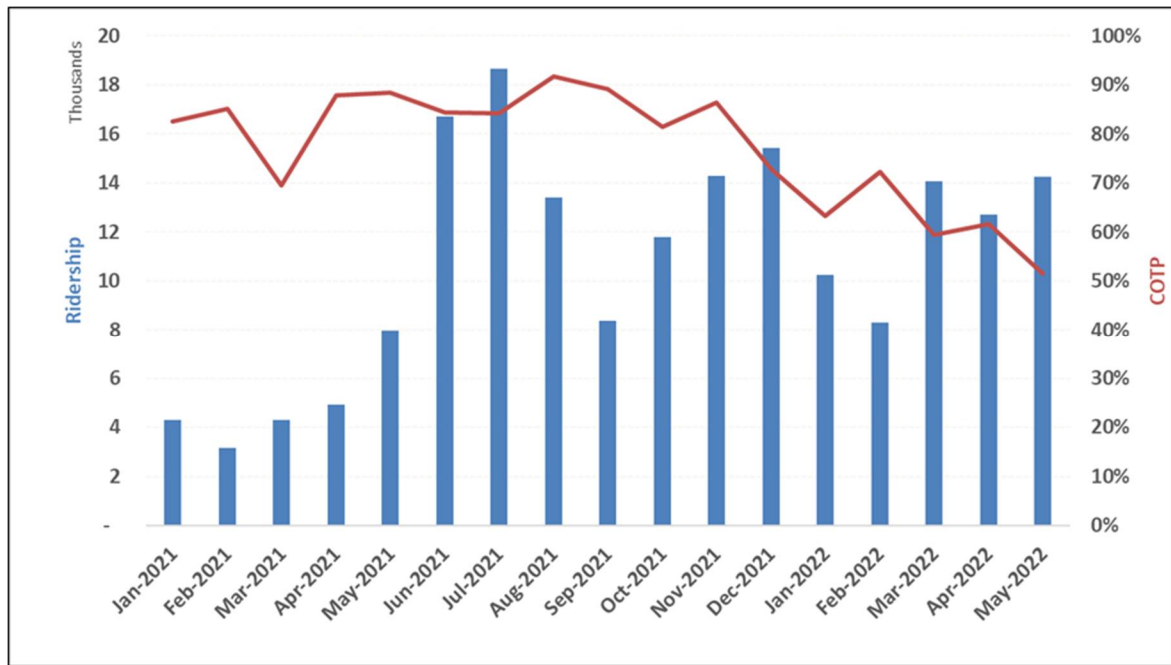
Reducing CN's incentive payments because COTP falls because Amtrak fails to achieve timely operation on its own lines would reward Amtrak for operating poorly and unfairly penalize CN for delays that even Amtrak admits have nothing to do with CN's performance as host.

2. *Ridership Factor*

66. Second, Amtrak's proposal would make incentives and penalties vary based on Amtrak's "passenger miles" over the preceding two years, rather than based on its current train miles. CN appreciates and supports Amtrak's goal of higher ridership, but realistically CN has little or no influence on Amtrak's ridership. Even on services CN hosts almost entirely, CN's performance as host appears to have essentially no discernible influence on Amtrak's ridership. That is not surprising, since there is no clear or consistent relationship between COTP (much less, CN HRD) and Amtrak ridership, as the graph below illustrates.

Figure 8:

COTP vs. Ridership for the City of New Orleans Service



Perhaps not surprisingly, passengers who elect to take a train that is scheduled to take over 19 hours from Chicago to New Orleans appear to be more sensitive to Covid, ticket prices, fuel costs and other factors over which CN has no influence than to marginal delays. Insofar as Amtrak’s goal in factoring ridership into its incentives and penalties proposal is to give CN more incentives for good performance, we can clearly state that doing so will not further that goal. CN already has strong incentives under the existing Operating Agreement, and under CN’s proposal, to do what it reasonably can to assist Amtrak to achieve high levels of OTP, and CN already does so. Adding in ridership, over which CN has no influence other than by influencing OTP, would add nothing in terms of incentives and just add an essentially random and unpredictable element to CN’s compensation. Of course, that is even more true for services on which CN is a minority host, where it has even less influence.

67. In addition, Amtrak's proposal appears to have a bizarre feature, which may or may not be intentional. Because the Ridership Factor and the COTP factor act as multipliers, it appears that higher COTP and/or increased ridership will lead to the increased penalties on CN if HRD minutes per 10,000 train-miles are even marginally above 924. That makes no sense as a matter of incentives, and is patently unfair.

E. Amtrak's Penalties and Incentives Proposal Is Calculated to Penalize CN for Performance that Has Earned Incentives under the Existing Agreement, and to Impose Massive Penalties on Amtrak Hosts Generally.

1. *Contrary to Mr. Blair's Implication of Revenue-Neutrality, Amtrak's Proposal Would Replace Incentives for CN with Huge Penalties for the Same Performance*

68. Mr. Blair appears to imply that Amtrak's proposal is designed to give CN a reasonable opportunity to earn much the same net incentives going forward as it did under the existing Operating Agreement – *i.e.*, to be more-or-less revenue-neutral. He suggests that Amtrak's proposal aims to “ensure[] that CN earns a similar amount of inflation-adjusted incentives under the new OA as it earned in 2019, if the subject route performs near 80% COTP.”⁴⁷ Amtrak's proposal does not ensure that; far from it. Amtrak's Ridership Factor and COTP factor can yield a dollar figure that is similar to what CN earned in 2019, but then the principal element of Amtrak's proposal, the HRD-based “Delay Adjustment Factor,” kicks in. As Dr. Peterson explains, the “Delay Adjustment Factor” creates a large bias in favor of net penalties. For one thing, at the level of HRD Amtrak says is “associated” with 80% COTP, 900-924 HRD minutes per 10,000 miles, the “Delay Adjustment Factor” means that CN receives just 10% of the dollar figure that approximates to its 2019 incentives. In addition, as Dr. Peterson

⁴⁷ VS Blair ¶ 39.

elaborates, the “Delay Adjustment Factor” is skewed from that point to allow for far larger penalties than incentives.⁴⁸

69. CN and Amtrak both have ready access to data that allows us to test whether Amtrak’s proposal would be revenue-neutral, and what effect it would actually have. We have a record of what Amtrak paid CN in incentives in calendar year 2019, and we have the COTP and CN HRD that Amtrak recorded for the trains CN hosts in 2019. We can ignore the Ridership Factor, since under Amtrak’s proposal that would not apply until 2024. So it is a simple matter to compare actual incentive payments in 2019 to the incentives and penalties that CN would have accrued in 2019 if Amtrak’s proposal applied. The following table sets forth that comparison:

Table 5:

2019 Incentive/Penalty under Amtrak’s Proposal vs. Amounts Paid by Amtrak and Additionally Claimed by CN⁴⁹

Year	Amtrak Routes	Incentive/Penalty Under Amtrak’s Proposal	Amtrak Paid
2019	Blue Water	\$ ([REDACTED])	\$ [REDACTED]
2019	City of New Orleans	\$ ([REDACTED])	\$ [REDACTED]
2019	Illini/Saluki	\$ ([REDACTED])	\$ [REDACTED]
2019	Lincoln	\$ ([REDACTED])	\$ [REDACTED]
2019	Texas Eagle	\$ ([REDACTED])	\$ [REDACTED]
2019	Wolverine	\$ ([REDACTED])	\$ [REDACTED]
2019 Total		\$ ([REDACTED])	\$ [REDACTED]

70. The comparison is stark. Far from being revenue-neutral, Amtrak would, for the same performance with the same COTP results, replace net incentives of [REDACTED] (the amount that Amtrak paid CN for 2019 performance, which does not include additional claims by

⁴⁸ See generally RVS Peterson (PID) ¶¶ 34, 64-66.

⁴⁹ See workpaper: Delay_Summary_Analysis.xlsx, tab “Exhibits.”

CN) with net penalties of \$ [REDACTED].⁵⁰ That would represent a massive redistribution, and a massively punitive change to CN's compensation. There is no reasonable basis for that – especially since, as we have demonstrated, most of the HRD on which Amtrak premises its proposal is neither reasonably avoidable by CN nor in any way related to preference. And it would represent an unsustainable compelled subsidy of Amtrak by CN.

71. To be sure, over the eight-year life of the Operating Agreement under Amtrak's proposal, the lookback provision would protect CN from net penalties. But with Amtrak's proposed changes to the lookback, it would not protect CN from multiple years of paying penalties or massive penalties in a bad month. And at best that would leave CN with no compensation above the incomplete incremental cost compensation provided for under the Operating Agreement and no financial incentive to help Amtrak achieve its OTP goals.

72. Finally, Amtrak's proposed changes to the traditional lookback provision would severely weaken it. In our experience, CN and Amtrak have always operated under terms including a 12-month lookback that ensures that over a year, CN will not pay more in penalties than it receives in incentives. We also understand that to be an industry-standard term. In addition, in the last Operating Agreement in 2011, CN and Amtrak specifically agreed to apply the lookback provision to groups of trains, rather than to all 26 Amtrak trains CN hosts together, so that if significant problems were experienced that caused CN to accrue penalties on one service (as later occurred, according to Amtrak, based on its analysis – which CN disputes – of

⁵⁰ We note that our calculation of CN's 2019 incentives earnings, which is based on calendar year 2019, does not align with (although it is similar in order of magnitude to) what we understand to be Amtrak's. *See* Amtrak Br. (PID) at 37. Since Amtrak did not provide workpapers or otherwise explain its numbers, we have been unable to determine the basis on which it calculated the 2019 incentives baseline it used. But our point holds regardless of those details: Amtrak's proposal would replace substantial net incentives with substantial net penalties for the same performance.

the short shunt problem that arose with Amtrak's chosen equipment for Illini/Saluki trains), CN's financial incentives to excel in assisting Amtrak to achieve OTP for its other services would not be impaired.

73. Having unsuccessfully attempted to persuade the Board to eliminate the lookback provision altogether, Amtrak now seeks to revise it so that it applies over the entire contract term, rather than 12 months, and across all CN-hosted Amtrak trains. No problem has arisen with the existing lookback provision that would justify that change; indeed, because of CN's diligent efforts to help Amtrak achieve OTP, it has almost never come into play. But Amtrak's proposed revisions to the lookback would leave CN much more exposed to a sustained period of net penalties, potentially based on just one out of six services experiencing significant problems. Amtrak's proposed changes to the lookback are, thus, an additional feature that, far from maintaining revenue-neutrality, would create a substantial chance that CN could earn no net incentives at all.

2. *Amtrak's Proposal Would Have Similarly Extreme Effects on Other Hosts*

74. Above, we showed that most of the time, under normal conditions, Amtrak's 924 HRD standard, which it derived from a nationwide, non-CN-specific analysis and which it presumably seeks to apply nationwide, is not met by most hosts for most Amtrak trains on most routes. That implies, obviously, that if Amtrak's approach were applied nationwide, other hosts would find themselves deprived of financial incentives to improve Amtrak's performance, subject to massive penalties, and reliant on the lookback provisions to avoid being compelled to actually pay to host Amtrak service.

II. AMTRAK’S “REOPENER” IS BASED ON FALSE PREMISES AND UNREALISTIC ASSUMPTIONS.

75. We defer to Mr. Taylor to provide detailed comments regarding Amtrak’s so-called “reopener” proposal, but we raise a few brief points here.

76. Amtrak’s “reopener” seems to be premised on the notion that if what Amtrak records as CN HRD on a single Amtrak train exceeds 924 minutes per 10,000 train-miles for one to four quarters, that is indicative of “bad” host performance. As we explained above, that is a false premise.

77. First, nationwide, according to Amtrak’s own data, most Amtrak service segments hosted by freight railroads, and many hosted by Amtrak itself, regularly have more than 924 HRD minutes per 10,000 train-miles. In other words, adoption of Amtrak’s proposal would potentially result in Amtrak taking over dispatching and exercising control over maintenance for much of the freight rail network in the United States.

78. Indeed, the “Tier 3” scenario under which Amtrak proposes that it would be authorized to take over the dispatching of freight rail lines on which it is hosted – a single Amtrak train having HRD for that host exceeding 924 minutes per 10,000 train-miles for four consecutive quarters – is by no means unusual. As Dr. Peterson shows, it appears from data published by Amtrak and FRA that during the last two calendar years before the Covid pandemic hit, 2018-19, *most* – about 60% of – Class I-hosted segments for Amtrak trains nationwide had four consecutive quarters during which they exceeded 924 minutes of HRD per 10,000 miles. In other words, Amtrak’s Tier 3, applied generally, would be a prescription for Amtrak to take over dispatching of most of the freight railroad segments, on five of the six Class I railroads, on which it runs trains nationwide.

79. Second, most delays Amtrak codes as HRD involve problems that CN cannot reasonably avoid, and/or issues that have nothing to do with the handling of Amtrak/CN freight meets – much less, with preference.

80. Third, since HRD is measured against PRT, and not against actual train schedules, HRD at 924 or higher does not even indicate that an Amtrak train is late in relation to the schedule Amtrak set and passengers rely on. For example, in June 2021 CN HRD per 10,000 train miles for the City of New Orleans service was 974 minutes while COTP was 84%.

81. Fourth, particularly on short segments, isolated delays can result in “high” HRD per 10,000 miles notwithstanding diligent and successful efforts by CN to enable Amtrak to achieve consistently high COTP.

82. Fifth, the same dispatching team dispatches multiple Amtrak trains and sometimes multiple Amtrak services on a route. The same CN dispatchers that Amtrak criticizes for the dispatching of the Illini/ Saluki services dispatch the City of New Orleans service, which is one of Amtrak’s best performing long distance services. If one train has “high” HRD but the others do not, the inference should be that there may be problems particular to that one train, not that the dispatchers are failing to prioritize Amtrak’s train. Despite that, Amtrak’s three-tier penalty proposal could allow Amtrak to ultimately take over dispatching, and veto maintenance, on an entire route if one train has “high” HRD.

83. Amtrak’s prescription based on that false premise is likewise unrealistic. As Mr. Taylor explains, CN’s dispatchers already give Amtrak preference and do everything they reasonably can to help Amtrak achieve OTP consistent with safety and network fluidity.⁵¹ As we have shown, most delays experienced by most Amtrak trains on CN’s lines are unrelated to the

⁵¹ See Taylor RVS ¶¶ 17-25.

professional decisions made by CN's dispatchers. Having Amtrak intrusively looking over the shoulders of CN dispatchers and their supervisors and demanding extra paperwork will not improve their professional judgment, and it will have no effect on a large proportion of HRD delays, which are not even related to dispatching. Moreover, Amtrak's "Tier 1" reporting proposal would impose significant burdens for little if any purpose. Five-minute delays are an unavoidably frequent occurrence in the practical world of railroading on CN's single-track lines, and, given Recovery Time, such brief delays typically have little effect on Amtrak's OTP. For example, in November 2021, the City of New Orleans achieved 86% COTP, notwithstanding that Amtrak recorded 203 "HRD" delays of five minutes or more for that service, 78% of them less than 15 minutes.⁵² And at Amtrak's "Tiers 2 and 3," having Amtrak take over dispatching from CN and authorizing Amtrak to veto CN's plans for scheduled maintenance of its lines would be harmful for all network users, including Amtrak itself.⁵³

84. We have been closely involved in working together with Amtrak for many years. On a day to day basis, CN and Amtrak operational staff work closely and cooperatively to solve individual problems as they arise in specific contexts, with the common goal of achieving high Amtrak OTP while running a safe, sustainable and efficient freight rail line. The traditional "carrot" approach under Amtrak-freight host operating agreements offer freight railroads realistic targets and positive financial incentives to achieve them, has worked well, and has delivered excellent day-to-day operational cooperation and generally good results measured under the operating agreement. Convening operational personnel from both Amtrak and CN to review issues and engage in problem-solving together – the kind of process that would be required by a

⁵² See *workpaper: Delay_Summary_Analysis.xlsx*, tab "Reporting_Burden."

⁵³ See *generally* Taylor RVS ¶¶ 31-67.

true “reopener” – also works well. Amtrak’s proposed “stick” approach of denying CN a realistic opportunity to earn net incentives and threatening CN with an Amtrak takeover of CN’s deploying maintenance and dispatching based on unrealistic metrics and a one-size-fits-all standard would not work nearly so well to incentivize OTP to benefit Amtrak and its passengers.

III. SCHEDULES FOR THE SIX AMTRAK TRAINS WITH THE GREATEST MILEAGE OPERATING OVER CN HAVE NOT YET BEEN ADJUSTED AS THEY MUST BE FOR COTP TO WORK, AND AMTRAK’S “PROPOSED” SCHEDULES DO NOT RESOLVES ALL ISSUES.

A. CN and Amtrak Are Still Negotiating on the Illini/ Saluki and City of New Orleans Schedules.

85. In its Interim Decision, the Board recognized that the schedules for Amtrak’s trains operating on CN’s lines must be set to “give CN a meaningful opportunity to meet its performance obligations,” and it encouraged the parties “to work together to develop new contract schedules.”⁵⁴ In particular, it stated that “if all stations were checkpoints, recovery time would have to be redistributed,” and that the “parties may agree to specific terms regarding schedule lengths” (*id.*).⁵⁵ In its Opening Submission, CN reiterated the need to adjust the Amtrak schedules, noting (at 68) that the parties had agreed on certification of 20 of the 26 regularly scheduled daily Amtrak trains that operate over CN’s lines in the United States. CN also noted that, although the parties had exchanged proposals, they had not yet agreed on schedules for the Amtrak trains operating on CN’s IC spine—the four Illini/Saluki trains and the two City of New Orleans trains (CN Opening Submission at 68-69; VS (PID))

⁵⁴ Interim Decision at 11.

⁵⁵ The FRA has made a similar observation regarding the need to align Amtrak schedules with the Customer OTP metric set by that agency in accordance with section 207 of PRIIA. 85 Fed. Reg. at 72.978

Matteucci/Kuxmann at 69-70).⁵⁶ The parties agree that, under either of their proposals, “backloaded” recovery time in the schedules for those six trains must be redistributed appropriately to promote OTP at all stations. They have, however, long disagreed over other aspects of these schedules, including how to address the fact that PRT for various segments of these trains’ schedules is too short.

86. Recognizing the difficulty that the parties have had in reaching agreement that would allow them to certify these six schedules, CN on March 23, 2022 proposed to Amtrak that the parties at least move forward with a redistribution of recovery time.⁵⁷ Amtrak responded on May 3, 2022 with a counter-proposal, to which CN responded on June 28, 2022.⁵⁸ CN remains hopeful the parties will reach agreement at least on a redistribution of recovery time for these trains, but to date the parties have not reached agreement.

B. Although Amtrak Has Conceded that Additional PRT Should Be Added to the Illini/Saluki Schedules, It Nonetheless Refuses to Lengthen Those Schedules.

87. Amtrak’s May 3, 2022 counter-proposal did not simply propose redistributing recovery time. It also lengthened PRT for several segments on the Illini/Saluki train schedules, implicitly acknowledging that PRT for those segments was insufficient, meaning that even a theoretically perfect run would take longer than the PRT currently in the schedule. But rather

⁵⁶ These six trains, operating on IC’s spine between Chicago and New Orleans (in the case of the City of New Orleans trains) or between Chicago and Carbondale (in the case of the Illini/Saluki trains) have the greatest mileage hosted by CN.

⁵⁷ See Letter from M. Matteucci to J. Blair (Mar. 23, 2022) (VS (PID) Matteucci/Kuxmann, Ex. 12)).

⁵⁸ See Letter from J. Blair to M. Matteucci (May 3, 2022) (VS (PID) Matteucci/Kuxmann, Ex. 13; Letter from M. Matteucci to J. Blair (June 28, 2022) (attached hereto as Exhibit 1).

than correcting PRT simply by lengthening it in various segments of each train⁵⁹ – which would have resulted, as it should, in lengthening the overall schedule – Amtrak’s proposal, in effect, merely shifted a portion of existing recovery/miscellaneous time to PRT and relabeled it as such.⁶⁰

88. There is no principled basis for Amtrak’s position to steal time from Recovery/Miscellaneous Time and reallocate to PRT. PRT and recovery/miscellaneous time serve different functions within a schedule and are not interchangeable. PRT is intended to cover minimum required run time, while recovery/miscellaneous time is intended to cover a baseline of anticipated delay above PRT in order to support solid OTP. Amtrak’s acknowledgement that PRT is too short means that PRT (and the overall schedule) should be lengthened.

89. Recovery/miscellaneous time must be adequate to serve its function. Amtrak has provided no basis for finding existing recovery/miscellaneous time to be excessive and thus in need of reduction. It has contradicted standard scheduling principles, which typically dictate that recovery time should increase, not decrease, as PRT increases. Amtrak’s refusal to correct deficient PRT is a recipe for failure to meet Amtrak performance standards.

⁵⁹ Mr. Blair states that the PRT adjustments are required “to align with the current equipment operating on the Illini/Saluki trains.” Letter from J. Blair to M. Matteucci at 1 (May 3, 2022), attached at VS (PID) Matteucci/Kuxmann, Ex. 13. He notes that the equipment currently being used by Amtrak on the Illini/Saluki trains is not subject to the speed restriction that CN imposed for safety reasons due to the short shunts at grade crossings experienced with Amtrak’s single-level equipment. *Id.* If Amtrak instead uses single-level equipment would require that even more time be added to the Illini/Saluki schedules in order to compensate for application of the safety slow order at grade crossings.

⁶⁰ Based on the Board’s recent examination of the Illini/Saluki schedules, including the equipment it is running, Amtrak itself has now concluded that PRT is too short in segments, without any finding that it is too long elsewhere in the schedule. *See* Letter from J. Blair to M. Matteucci (May 3, 2022), attached at VS (PID) Matteucci/Kuxmann, Ex. 13. Nonetheless, as discussed below, CN’s proposal is not that the Board enmesh itself in this proceeding in the details of schedule disputes, but rather that the right to arbitrate such disputes under the Operating Agreement be clarified.

- C. Amtrak’s “Proposed Schedules” Are Not Set Appropriately to Achieve 80% Customer OTP or to Afford CN a “Meaningful Opportunity” to Earn Incentives.

90. Amtrak has tried to downplay the consequences of the parties’ failure to agree on schedules for the six Amtrak trains hosted on the IC line, citing its own “proposed” schedules, which, it says, provide CN with “a meaningful opportunity to meet its performance obligations” (Amtrak Opening Br. at 56) (quoting Interim Decision at 11); see also VS Blair ¶ 97; VS Weiss ¶¶ 38-79. Amtrak’s schedule proposals do not solve the problem. Although Amtrak claims that its proposed schedules will reliably produce Customer OTP equal to or greater than 80%,⁶¹ CN’s analysis shows that they will not.

91. The June 28, 2022 letter that I (Michael Matteucci) sent to Mr. Blair discusses the data-driven process that CN uses to analyze schedules.⁶² CN’s process (which appears to be similar to the one that Amtrak used) is based on running proposed schedules against actual past performance data, using scheduled and actual arrival and departure times, actual ridership data, the location and duration of delays. But where Amtrak’s analysis of the six uncertified schedules apparently focused solely on the period April 2021 to March 2022 (*see* VS Weiss ¶¶ 44-79), CN tested schedules against both recent and earlier pre-pandemic periods to develop a broader view that is more likely to accurately represent future performance than the pandemic time period. CN asked that Amtrak likewise test its proposed revised schedules against both pre- and post-Covid periods.⁶³ As I pointed out, and Amtrak itself has acknowledged (Amtrak Opening Br. at 36), it is important to do so because operations during the pandemic are not representative of

⁶¹ *See* Amtrak Opening Br. at 56-61; VS Blair ¶ 98; VS Weiss ¶¶ 43, 58.

⁶² Letter from M. Matteucci to J. Blair (June 28, 2022), attached as Ex. 1.

⁶³ Ex. 1 (Letter from M. Matteucci to J. Blair (June 28, 2022)) at 1.

normal operations.⁶⁴ Beginning in March 2020 and continuing through 2021, Amtrak suspended several of the trains that normally operate over CN's lines. It is hardly surprising that during a period of reduced passenger (and freight) traffic, COTP of the trains that continued to operate increased even though the schedules have not been updated to align to the new COTP metric (and HRD, including PTI, fell), given that fewer trains ran and Amtrak's trains had fewer meets with other trains. Now that Amtrak has resumed operation of some, but not all of the trains that it had suspended, COTP has begun to decline, particularly for those trains with existing schedules that were not designed for the COTP metric. As of July 25, 2022, Amtrak has not responded to CN's request that Amtrak test its proposed schedules against pre- and post-Covid traffic volumes.

92. CN applied its process to analyze the schedules proposed by Amtrak in its Opening Brief by using actual performance data during pre-Covid periods. Our analysis shows that fall six of the trains at issue would fall short of 80% COTP, with the Illini/Saluki trains far below that standard.⁶⁵ Amtrak proclaims that its testing is likewise against "**actual** performance data,"⁶⁶ but unlike CN, Amtrak tested its proposed schedules only against the short,

⁶⁴ Another potential difference in approach, which results in CN truly optimizing schedules at their present length for Customer OTP while Amtrak does not, is that CN's analysis focuses on increasing *overall* passenger weighted OTP, whereas Amtrak states that the focus of its LASER analysis is "to better ensure on-time arrivals at the highest passenger-volume stations." Amtrak Opening Br. at 57; *id.* at 58 (Recovery Time was reallocated to protect on-time arrivals at the highest passenger volume stations). Some of the corrections and improvements proposed by CN to Amtrak's last proposed schedules would more efficiently allocate recovery time away from some heavily used stations "where Amtrak appears to have overallocated recovery time with the result that trains would regularly arrive early." Ex. 1 (Letter from M. Matteucci to J. Blair (June 28, 2022)) at 2.

⁶⁵ The results of that analysis are included in our confidential workpapers: Amtrak 2022 CNOL Proposal - COTP Estimates Amtrak 2022 I-S Proposal - COTP Estimates; I-S and CNOL Ridership Weighting (2019 data).

⁶⁶ Amtrak Opening Br. at 57 (emphasis in original).

unrepresentative recent Covid period between April 2021 and March 2022 when COTP was elevated above the norm during the pandemic during which there was less traffic and fewer delays.⁶⁷

93. Amtrak itself has acknowledged that its recent operations are not representative. In selecting 2019 as its “baseline” for past incentive/penalty earnings (rather than a more recent period) it explained:

The initial base “Ridership Factor” which Amtrak proposes for each of Amtrak’s routes in a new OA is based upon the amount of incentives which CN earned in 2019 – *the last year during which Amtrak’s trains operated free from the impacts and limitations caused by the Covid-19 pandemic.*^[68]

94. Remarkably, Amtrak’s own analysis showed that, even during an unrepresentative period in which COTP was elevated, four of the six trains at issue (Trains Nos. 390, 392, 393, and 58) would fail to meet the 80% COTP standard.⁶⁹ For example, Train No. 393 had 52.37% COTP and Train 392 measured marginally better with 67.29% COTP.⁷⁰ Having failed even its own skewed test, Amtrak asserts that testing against “actual performance” is not critical after all, because, it claims, historical data from April 2019 through March 2022 shows a “direct[] correlate[ion]” between high HRD and low COTP; HRD is simply too high on these four trains,

⁶⁷ A list of Amtrak train suspensions during the period from April 2021 through March 2022 is attached to this statement as Exhibit 2. For example, from January 18, 2022 through April 2022 (which overlaps with Amtrak’s test period), Amtrak did not run Illini/Saluki train Nos. 391 and 392. This not only reduced freight train interference (FTI), but it also substantially reduced passenger train interference (PTI) delays by eliminating the need for those trains to meet with other Amtrak trains (i.e., Nos. 390, 393, 58, and 59) moving in the opposite direction on CN’s primarily single-track railroad.

⁶⁸ Amtrak Opening Br. at 36 (*italics added*) (citing VS Blair ¶ 37).

⁶⁹ VS Weiss ¶¶ 61-61 (HRD of 731 but COTP of 73.81% on Train 390); 66-67 (HRD of 897 but COTP of 67.29% on Train 392); 71 (HRD of 691 but COTP of 52.37% on Train 393); 75-76 (HRD of 850 but COTP of 74.55% on Train 58).

⁷⁰ VS Weiss ¶¶ 66-67, 71.

it asserts, and CN could achieve 80% COTP simply by reducing HRD.⁷¹ As explained above, Amtrak's approach of lumping most delays, including delays CN cannot reasonably avoid or control, together as HRD and then putting the entire responsibility on CN to meet unrealistic expectations set by Amtrak is unreasonable and unsustainable and will result in failure.

95. To support its assertion that 80% COTP is achievable for Trains Nos. 390, 392, 393, and 58, Amtrak points out that those trains achieved 80% COTP during several months between March 2019 and March 2022.⁷² To make this observation, however, Amtrak without explanation shifts its analysis from the 12-month period used to test its schedules (April 2021 to March 2022) to the 36-month period March 2019 to March 2022, thereby mixing and comparing different pre-Covid performance (prior to Amtrak suspensions that began in March 2020) with the Covid-impacted period. That difference in periods completely undermines Amtrak's claims.

96. As explained above, during normal pre-Covid impacted operations, there was more Amtrak traffic and therefore greater delay and lower COTP. The data cited by Amtrak – which shows greater HRD and lower COTP during the pre-Covid period – merely underscores the point. Moreover, Amtrak does not demonstrate that levels of HRD can be sufficiently or realistically reduced through changes in dispatching. As discussed above, the amount of actual train-to-train interference is a fraction of overall HRD. For example, as shown in above (¶ 31), for the Illini/Saluki services such interference accounts for only about 6 to 9.5 minutes per trip.

97. Likewise, Amtrak's undermines its argument that updating its schedules so they regularly meet the 80% COTP standard is unnecessary because these trains have “on occasion”

⁷¹ Amtrak Opening Br. at 59-60; *see also* VS Weiss ¶¶ 58-79.

⁷² VS Weiss ¶¶ 63, 65, 68, 70, 72, 74, 77, 79.

achieved months that met 80% COTP.⁷³ First, regardless of its misrepresented choice of data and time periods, that is the wrong test. The parties and the Board should be striving for performance that regularly achieves 80% COTP under normal operating conditions – not once or twice a year. In any event, Amtrak’s cherry-picked testing period undermines its claim. As is evident from the charts presented by Mr. Weiss,⁷⁴ and as confirmed by CN’s own testing discussed above, Amtrak’s proposed schedules would at best produce very low COTP for the three Illini/Saluki trains he tested based on normal pre-pandemic operations in 2019. (Our analysis shows it would fail for all 6 Amtrak trains operating on the IC spine.) Further, Mr. Weiss’s own data shows that the few months 80% COTP was achieved came predominantly or exclusively during the Covid-influenced period of reduced traffic and correspondingly reduced delays.

⁷³ Amtrak Opening Br. at 59-60; VS Weiss ¶¶ 58-79.

⁷⁴ VS (PID) Weiss ¶¶ 64, 69, 73, 79 (at 23-25).

VERIFICATION

I, Michael Matteucci, declare under penalty of perjury that I have read the foregoing joint verified statement, that I know the facts asserted therein, and that the same are true as stated. Further, I certify that I am qualified to and authorized to submit this joint verified statement on behalf of Canadian National Railway Company and its subsidiaries.

Executed on July 26, 2022.

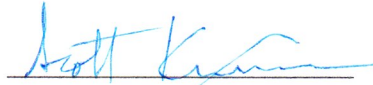
A handwritten signature in blue ink, consisting of stylized, overlapping loops and strokes, positioned above a horizontal line.

Michael Matteucci

VERIFICATION

I, Scott Kuxmann, declare under penalty of perjury that I have read the foregoing joint verified statement, that I know the facts asserted therein, and that the same are true as stated. Further, I certify that I am qualified to and authorized to submit this joint verified statement on behalf of Canadian National Railway Company and its subsidiaries.

Executed on July 26, 2022.

A handwritten signature in blue ink, appearing to read "Scott Kuxmann", is written over a horizontal line.

Scott Kuxmann

Exhibit 1



Michael A. Matteucci
Senior Director – Interline Services

17641 So. Ashland Avenue
Homewood, IL 60430-1345
T 708.332.3598

June 28, 2022

Jim Blair
Senior Director, Host Railroads
National Railroad Passenger Corporation
30th Street Station
4th Floor, 4N-163
Philadelphia, PA 19104

Dear Jim:

Thank you for your May 3, 2022 letter responding to my proposal that we redistribute recovery time for the trains in the City of New Orleans (CNO) and Illini/Saluki services immediately, rather than waiting to reach agreement concerning added run time for those services. We are pleased that you agree that redistribution of recovery time is critical to the meaningful application of the FRA's new Customer OTP performance standard and such redistribution should be done immediately.

Your letter proposes modifications to CN's proposed schedule changes, and provides a high level description of Amtrak's review process. That process is elaborated on in your opening submission in Finance Docket No. 35743, filed May 27, 2022 ("Opening Submission"). CN uses a similar data driven process based on running proposed schedules against actual past performance data (using scheduled and actual arrival and departure times, actual ridership data, the location and duration of delays), but rather than focus solely on the period April 2021 to March 2022, as Amtrak has apparently done (see Opening Submission, VS Weiss at ¶¶ 44-79), we tested schedules against both recent and earlier pre-pandemic periods to develop a broader view that is more likely to accurately represent future performance. We ask Amtrak to likewise test proposed revised schedules against both pre- and post-Covid periods. Doing so is important because recent and current operations are not representative of normal operations. Likewise, the train performance you cite as having met 80% COTP standard during this period is misleading because it is not representative of performance during a period of normal operations. Amtrak is continuing to run partial schedules. For example, CNO trains are not running 7 days a week and two of the four Illini-Saluki trains are suspended. In addition, Amtrak ridership remains well below pre-pandemic levels. Reduced numbers of trains and passengers results in reductions in delay, including, for example, reductions in passenger train interference and passenger-related

delays. As a result, premising schedules and performance expectations on current performance risks setting the trains up for failure in future circumstances in which more normal, higher levels of those delays are likely.

Turning first to the revised CNO schedules, based on our broader analysis, we suggest some further refinements to the allocation of recovery time to produce higher COTP. Our proposed changes can be seen in the attached skeletons for the CNO trains (58 & 59). The thrust of those proposed changes is to more efficiently allocate recovery time away from some of the larger stations where Amtrak appears to have overallocated recovery time with the result that trains would regularly arrive early. The improvements in COTP resulting from CN's proposed changes are modest for train 58 and more substantial for train 59.

The schedules for the Illini/Saluki trains (390, 391, 392 & 393) present a different issue. Your proposal acknowledges that PRT is too short for these schedules, and you propose increasing PRT by 9 minutes for each of the northbound trains (390, 392) and by 7 minutes for each of the southbound trains (391, 393). Notably, your 2020 schedule proposals went further; they recognized that PRT was too short by 15 minutes for the northbound trains and 14 minutes for the southbound trains. CN, of course, has been arguing for years that PRT is too short for these schedules and has pressed for greater increases in run time. Given our agreement that PRT is too short for these schedules, in addition to reallocating existing recovery time, it would clearly be appropriate to increase PRT so these trains have a reasonable opportunity to regularly achieve 80% COTP during periods of normal operation. (As noted above, achieving 80% COTP during recent times of abnormal, diminished operations is not meaningful and cannot be relied upon.)

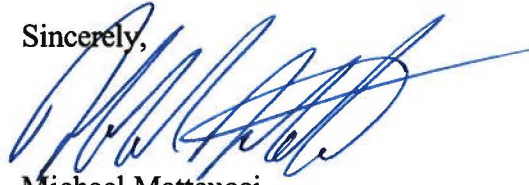
We are disappointed that despite Amtrak's recognition that PRT – a central building block of its schedules – needs to be lengthened, its proposal would not increase schedule length at all. Instead, it would re-label a portion of existing recovery/miscellaneous time as PRT. There is no principled basis for doing that. PRT should be increased to at least what Amtrak concedes is necessary, although CN does not agree that that will suffice. PRT and recovery/miscellaneous time are not interchangeable. They serve different functions within a schedule. PRT is intended to cover minimum required run time, while recovery/miscellaneous time is intended to cover a baseline of anticipated delay above PRT in order to support solid OTP performance. Recovery/miscellaneous time must be adequate to serve its function. Amtrak has provided no basis for deeming the existing level of recovery/miscellaneous time excessive, so there is no basis for reducing it. Indeed, scheduling principles typically dictate that recovery time should increase, not decrease, as PRT increases. A refusal to consider any increase in total schedule time is a recipe for failure in the context of trains that have historically had inadequate PRT and COTP consistently below the 80% standard.

Even if Amtrak remains unwilling to agree to the complete schedules CN has proposed for certification, CN urges Amtrak to at least address the deficiency in PRT that Amtrak has itself conceded exists, and to do so without tying those changes to an unjustified reduction in recovery/miscellaneous time.

If Amtrak is unwilling to do that, we again propose that we leave disagreements over PRT and schedule length aside for now, and focus instead on an appropriate reallocation of existing recovery time. To that end, in the attached proposed schedules CN has replicated Amtrak's proposed redistribution of run time, but without shifting time between recovery/miscellaneous time and PRT. That means CN's revised interim proposal would not change total run time, total PRT, or total recovery/miscellaneous time from the current schedule, leaving disputes over total run time and other schedule components for another day.

We hope that at a minimum the redistribution of recovery time may be completed right away. As pointed out in my last letter, doing so will immediately improve COTP, and immediately benefit Amtrak's passengers by providing them with more accurate and meaningful scheduled station arrival times. We appear to be close to agreement on a redistribution of recovery time for the CNO trains and, even if we must put aside our disagreements on how to deal with insufficient PRT, we should be able to agree on redistribution of recovery time for the Illini/Saluki trains. Further, if Amtrak wishes to add PRT in particular segments without a reduction recovery/miscellaneous time, we would not object (e.g., time might be added for trains 391 and 393 to compensate for Amtrak delays due to the St. Charles Airline Bridge being out of service after Amtrak's contractor cut its underwater signal cable). Finally, we continue to hope that our exchange of proposals may bring us closer to a full agreement on these schedules that would allow us to "certify" them in accordance with FRA's final rule.

Sincerely,

A handwritten signature in blue ink, appearing to read "Michael Matteucci", with a stylized flourish at the end.

Michael Matteucci

Enclosures

Amtrak May 2022 Proposed Schedule - City of New Orleans/Train 58

RR	Mileage	Services	PRT	Recovery Minutes	Misc. Adjust.	Dwell Minutes	Arrive	Depart	Station
AMT	0.0	T,E,FA,I,W,G						1:45 PM	New Orleans, LA CT
CNIC	3.7		10				1:55 PM	1:55 PM	XSU - Southport Jct
CNIC	11.5		10				2:05 PM	2:05 PM	Orleans Jct
CNIC	13.7		3				2:08 PM	2:08 PM	Skip
CNIC	24.7		10				2:18 PM	2:18 PM	Freier
CNIC	37.8		10				2:28 PM	2:28 PM	Manchac
CNIC	53.3		14	2		3	2:44 PM	2:47 PM	Hammond, LA
CNIC	105.4		45	2		2	3:34 PM	3:36 PM	F McComb, MS
CNIC	129.2		22			2	3:58 PM	4:00 PM	F Brookhaven, MS
CNIC	149.8		19			2	4:19 PM	4:21 PM	F Hazlehurst, MS
CNIC	183.3	e	42	20	0	16	5:23 PM	5:39 PM	Jackson, MS
CNIC	227.7		54	2		2	6:35 PM	6:37 PM	F Yazoo City, MS
CNIC	280.2	i	48	4		5	7:29 PM	7:34 PM	Greenwood, MS
CNIC	336.5		52			2	8:26 PM	8:28 PM	F Marks, MS
CNIC	405.4	E,e	76	30	5	20	10:19 PM	10:39 PM	Memphis, TN
CNIC	491.6		98	2		2	12:19 AM	12:21 AM	F Newbern-Dyersburg, TN
CNIC	527.4		37	5		2	1:03 AM	1:05 AM	F Fulton, KY
CNIC	577.3		51				1:56 AM	1:56 AM	Mounds Jct
CNIC	592.2		11	2			2:09 AM	2:09 AM	Wetlaugh
CNIC	604.3		18				2:27 AM	2:27 AM	Anna
CNIC	624.9	T,E	24	12	3	5	3:06 AM	3:11 AM	Carbondale, IL
CNIC	680.6		52			2	4:03 AM	4:05 AM	F Centuria, IL
CNIC	733.8		45	0		1	4:50 AM	4:51 AM	F Effingham, IL
CNIC	760.6		23	6	0	2	5:20 AM	5:22 AM	F Mattoon, IL (Charleston)
CNIC	805.2		37	5	8	5	6:12 AM	6:17 AM	Champaign-Urbana, IL
CNIC	877.1		69	0		2	7:16 AM	7:18 AM	F Kankakee, IL
CNIC	909.5		27	18		3	8:03 AM	8:06 AM	Homewood, IL
AMT	931.6		30	17	15		9:08 AM	9:08 AM	XCS - Clark St.
CT	932.3		16				9:24 AM	9:24 AM	XCR - Roosevelt Rd.
AMT	933.8	Le	7		-16		9:15 AM		Chicago, IL CT
			Total Pure Run	Total Recovery Minutes	Total Misc. Adj.	Total Dwell	Total Schedule Time		
NOL-XSU			10	0	0	0	10		
XSU-MEM			405	69	5	54	524		
MEM-XCS			512	67	26	24	629		
XCS-CHI			23	0	-16	0	7		
XSU-XCS			917	127	31	78	1153		
NOL-CHI			950	127	15	78	1170		

CN June 2022 Proposed Schedule - City of New Orleans/Train 58

RR	Mileage	Services	PRT	Recovery Minutes	Misc. Adjust.	Dwell Minutes	Arrive	Depart	Station
AMT	0.0	T,E,FA,I,W,G						1:45 PM	New Orleans, LA CT
CNIC	3.7		10				1:55 PM	1:55 PM	XSU - Southport Jct
CNIC	11.5		10				2:05 PM	2:05 PM	Orleans Jct
CNIC	13.7		3				2:08 PM	2:08 PM	Skip
CNIC	24.7		10				2:18 PM	2:18 PM	Freier
CNIC	37.8		10				2:28 PM	2:28 PM	Manchac
CNIC	53.3		14	6		3	2:48 PM	2:51 PM	Hammond, LA
CNIC	105.4		45	4		2	3:40 PM	3:42 PM	F McComb, MS
CNIC	129.2		22	1		2	4:05 PM	4:07 PM	F Brookhaven, MS
CNIC	149.8		19			2	4:26 PM	4:28 PM	F Hazlehurst, MS
CNIC	183.3	e	42	10		16	5:20 PM	5:36 PM	Jackson, MS
CNIC	227.7		54			2	6:30 PM	6:32 PM	F Yazoo City, MS
CNIC	280.2	i	48	4		5	7:24 PM	7:29 PM	Greenwood, MS
CNIC	336.5		52	0		2	8:21 PM	8:23 PM	F Marks, MS
CNIC	405.4	E,e	76	36	5	20	10:20 PM	10:40 PM	Memphis, TN
CNIC	491.6		98			2	12:18 AM	12:20 AM	F Newbern-Dyersburg, TN
CNIC	527.4		37	6		2	1:03 AM	1:05 AM	F Fulton, KY
CNIC	577.3		51				1:56 AM	1:56 AM	Mounds Jct
CNIC	592.2		11				2:07 AM	2:07 AM	Wetlaugh
CNIC	604.3		18				2:25 AM	2:25 AM	Anna
CNIC	624.9	T,E	24	14	3	5	3:06 AM	3:11 AM	Carbondale, IL
CNIC	680.6		52			2	4:03 AM	4:05 AM	F Centuria, IL
CNIC	733.8		45			1	4:50 AM	4:51 AM	F Effingham, IL
CNIC	760.6		23	10	0	2	5:24 AM	5:26 AM	F Mattoon, IL (Charleston)
CNIC	805.2		37	7	8	5	6:18 AM	6:23 AM	Champaign-Urbana, IL
CNIC	877.1		69			2	7:22 AM	7:24 AM	F Kankakee, IL
CNIC	909.5		27	14		3	8:05 AM	8:08 AM	Homewood, IL
AMT	931.6		30	15	15		9:08 AM	9:08 AM	XCS - Clark St.
CT	932.3		16				9:24 AM	9:24 AM	XCR - Roosevelt Rd.
AMT	933.8	Le	7		-16		9:15 AM		Chicago, IL CT
			Total Pure Run	Total Recovery Minutes	Total Misc. Adj.	Total Dwell	Total Schedule Time		
NOL-XSU			10	0	0	0	10		
XSU-MEM			405	61	5	54	525		
MEM-XCS			512	66	26	24	628		
XCS-CHI			23	0	-16	0	7		
XSU-XCS			917	127	31	78	1153		
NOL-CHI			950	127	15	78	1170		

Difference between CN and Amtrak Proposed Schedules

PRT	Recovery Minutes	Misc. Adjust.	Dwell Minutes	Arrive	Depart	Station
0	0	0	0	0	0	New Orleans, LA CT
0	0	0	0	0	0	XSU - Southport Jct
0	0	0	0	0	0	Orleans Jct
0	0	0	0	0	0	Skip
0	0	0	0	0	0	Freier
0	0	0	0	0	0	Manchac
0	4	0	0	4	4	Hammond, LA
0	2	0	0	6	6	F McComb, MS
0	1	0	0	7	7	F Brookhaven, MS
0	0	0	0	7	7	F Hazlehurst, MS
0	-10	0	0	-3	-3	Jackson, MS
0	-2	0	0	-5	-5	F Yazoo City, MS
0	0	0	0	-5	-5	Greenwood, MS
0	0	0	0	-5	-5	F Marks, MS
0	6	0	0	1	1	Memphis, TN
0	-2	0	0	-1	-1	F Newbern-Dyersburg, TN
0	1	0	0	0	0	F Fulton, KY
0	0	0	0	0	0	Mounds Jct
0	-2	0	0	-2	-2	Wetlaugh
0	0	0	0	-2	-2	Anna
0	2	0	0	0	0	Carbondale, IL
0	0	0	0	0	0	F Centuria, IL
0	0	0	0	0	0	F Effingham, IL
0	4	0	0	4	4	F Mattoon, IL (Charleston)
0	2	0	0	6	6	Champaign-Urbana, IL
0	0	0	0	6	6	F Kankakee, IL
0	-4	0	0	2	2	Homewood, IL
0	-2	0	0	0	0	XCS - Clark St.
0	0	0	0	0	0	XCR - Roosevelt Rd.
0	0	0	0	0	0	Chicago, IL CT
Total Pure Run	Total Recovery Minutes	Total Misc. Adj.	Total Dwell	Total Schedule Time	Percent Change	
NOL-XSU	0	0	0	0	0.0%	
XSU-MEM	0	1	0	1	0.2%	
MEM-XCS	0	-1	0	-1	-0.2%	
XCS-CHI	0	0	0	0	0.0%	
XSU-XCS	0	0	0	0	0.0%	
NOL-CHI	0	0	0	0	0.0%	

Amtrak May 2022 Proposed Schedule - City of New Orleans/Train 59

RR	Mileage	Services	PRT	Recovery Minutes	Misc. Adjust	Dwell Minutes	Arrive	Depart	Station
AMT	0.0	Le,FA,I,W,G,M						8:05 PM	Chicago, IL
CT	0.7		2				8:07 PM	8:07 PM	XRF-Roosevelt Rd.
CNIC	2.2		15				8:22 PM	8:22 PM	XCS - Clark St
CNIC	24.3		28	0		3	8:50 PM	8:53 PM	Homewood, IL
CNIC	56.7		27	2		2	9:22 PM	9:24 PM	F Kankakee, IL
CNIC	128.6		63	11		5	10:38 PM	10:43 PM	Champaign-Urbana, IL
CNIC	173.2		37			2	11:20 PM	11:22 PM	F Mattoon, IL
CNIC	200.0		23			1	11:45 PM	11:46 PM	F Effingham, IL
CNIC	253.2		44	2		2	12:32 AM	12:34 AM	F Centralia, IL
CNIC	308.9	T,E	51	5	6	5	1:36 AM	1:41 AM	Carbondale, IL
CNIC	329.5		24				2:05 AM	2:05 AM	Anna
CNIC	341.6		18				2:23 AM	2:23 AM	Wetaugh
CNIC	356.5		10				2:33 AM	2:33 AM	Mounds Jct.
CNIC	406.4	E,e,M	50	3		2	3:26 AM	3:28 AM	F Fulton, KY
CNIC	442.2		38	2		2	4:08 AM	4:10 AM	F Newbern-Dyersburg, TN
CNIC	528.4	t	95	46	10	13	6:41 AM	6:54 AM	Memphis, TN
CNIC	597.3		74		5	2	8:13 AM	8:15 AM	F Marks, MS
CNIC	653.6		51	3	5	5	9:14 AM	9:19 AM	Greenwood, MS
CNIC	706.1		47			2	10:06 AM	10:08 AM	F Yazoo City, MS
CNIC	750.5	e	53	15	10	9	11:26 AM	11:35 AM	Jackson, MS
CNIC	784.0		32	1		2	12:08 PM	12:10 PM	F Hazlehurst, MS
CNIC	804.6		18	1		2	12:29 PM	12:31 PM	F Brookhaven, MS
CNIC	828.4		20	1		2	12:52 PM	12:54 PM	F McComb, MS
CNIC	880.5		42	8		3	1:44 PM	1:47 PM	Hammond, LA
CNIC	896.0		17				2:04 PM	2:04 PM	Manchac
CNIC	909.1		10				2:14 PM	2:14 PM	Frenier
CNIC	920.1		10				2:24 PM	2:24 PM	Skip
CNIC	922.3		3				2:27 PM	2:27 PM	Orleans Jct.
CNIC	930.1		10	51	0		3:28 PM	3:28 PM	XSU - Southport Jct
AMT	933.6		26		-7		3:47 PM		New Orleans, LA

	Total Pure Run	Total Recovery Minutes	Total Misc. Adj.	Total Dwell	Total Schedule Time
CHI-XCS	17	0	0	0	17
XCS-MEM	508	71	16	37	632
MEM-XSU	387	80	20	27	514
XSU-NOL	26	0	-7	0	19
XCS-XSU	895	151	36	64	1146
CHI-NOL	938	151	29	64	1182

CN June 2022 Proposed Schedule - City of New Orleans/Train 59

RR	Mileage	Services	PRT	Recovery Minutes	Misc. Adjust	Dwell Minutes	Arrive	Depart	Station
AMT	0.0	Le,FA,I,W,G,M						8:05 PM	Chicago, IL
CT	0.7		2				8:07 PM	8:07 PM	XRF-Roosevelt Rd.
CNIC	2.2		15				8:22 PM	8:22 PM	XCS - Clark St
CNIC	24.3		28	0		3	8:50 PM	8:53 PM	Homewood, IL
CNIC	56.7		27	2		2	9:22 PM	9:24 PM	F Kankakee, IL
CNIC	128.6		63	15		5	10:42 PM	10:47 PM	Champaign-Urbana, IL
CNIC	173.2		37	3		2	11:27 PM	11:29 PM	F Mattoon, IL
CNIC	200.0		23			1	11:52 PM	11:53 PM	F Effingham, IL
CNIC	253.2		44	2		2	12:39 AM	12:41 AM	F Centralia, IL
CNIC	308.9	T,E	51	10	6	5	1:48 AM	1:53 AM	Carbondale, IL
CNIC	329.5		24				2:17 AM	2:17 AM	Anna
CNIC	341.6		18				2:35 AM	2:35 AM	Wetaugh
CNIC	356.5		10				2:45 AM	2:45 AM	Mounds Jct.
CNIC	406.4	E,e,M	50	1		2	3:36 AM	3:38 AM	F Fulton, KY
CNIC	442.2		38	1		2	4:17 AM	4:19 AM	F Newbern-Dyersburg, TN
CNIC	528.4	t	95	35	10	13	6:39 AM	6:52 AM	Memphis, TN
CNIC	597.3		74		5	2	8:11 AM	8:13 AM	F Marks, MS
CNIC	653.6		51	11	5	5	9:20 AM	9:25 AM	Greenwood, MS
CNIC	706.1		47	4		2	10:16 AM	10:18 AM	F Yazoo City, MS
CNIC	750.5	e	53	25	10	9	11:46 AM	11:55 AM	Jackson, MS
CNIC	784.0		32			2	12:27 PM	12:29 PM	F Hazlehurst, MS
CNIC	804.6		18	0		2	12:47 PM	12:49 PM	F Brookhaven, MS
CNIC	828.4		20	3		2	1:12 PM	1:14 PM	F McComb, MS
CNIC	880.5		42	8		3	2:04 PM	2:07 PM	Hammond, LA
CNIC	896.0		17				2:24 PM	2:24 PM	Manchac
CNIC	909.1		10				2:34 PM	2:34 PM	Frenier
CNIC	920.1		10				2:44 PM	2:44 PM	Skip
CNIC	922.3		3	0			2:47 PM	2:47 PM	Orleans Jct.
CNIC	930.1		10	31	0		3:28 PM	3:28 PM	XSU - Southport Jct
AMT	933.6		26		-7		3:47 PM		New Orleans, LA

	Total Pure Run	Total Recovery Minutes	Total Misc. Adj.	Total Dwell	Total Schedule Time
CHI-XCS	17	0	0	0	17
XCS-MEM	508	69	16	37	630
MEM-XSU	387	82	20	27	516
XSU-NOL	26	0	-7	0	19
XCS-XSU	895	151	36	64	1146
CHI-NOL	938	151	29	64	1182

Difference between CN and Amtrak Proposed Schedules

PRT	Recovery Minutes	Misc. Adjust	Dwell Minutes	Arrive	Depart	Station
0	0	0	0	0	0	Chicago, IL
0	0	0	0	0	0	XRF-Roosevelt Rd.
0	0	0	0	0	0	XCS - Clark St
0	0	0	0	0	0	Homewood, IL
0	0	0	0	0	0	F Kankakee, IL
0	4	0	0	4	4	Champaign-Urbana, IL
0	3	0	0	7	7	F Mattoon, IL
0	0	0	0	7	7	F Effingham, IL
0	0	0	0	7	7	F Centralia, IL
0	5	0	0	12	12	Carbondale, IL
0	0	0	0	12	12	Anna
0	0	0	0	12	12	Wetaugh
0	0	0	0	12	12	Mounds Jct.
0	-2	0	0	10	10	F Fulton, KY
0	-1	0	0	9	9	F Newbern-Dyersburg, TN
0	-11	0	0	-2	-2	Memphis, TN
0	0	0	0	-2	-2	F Marks, MS
0	8	0	0	6	6	Greenwood, MS
0	4	0	0	10	10	F Yazoo City, MS
0	10	0	0	20	20	Jackson, MS
0	-1	0	0	19	19	F Hazlehurst, MS
0	-1	0	0	18	18	F Brookhaven, MS
0	2	0	0	20	20	F McComb, MS
0	0	0	0	20	20	Hammond, LA
0	0	0	0	20	20	Manchac
0	0	0	0	20	20	Frenier
0	0	0	0	20	20	Skip
0	0	0	0	20	20	Orleans Jct.
0	-20	0	0	0	0	XSU - Southport Jct
0	0	0	0	0	0	New Orleans, LA
Total Pure Run	Total Recovery Minutes	Total Misc. Adj.	Total Dwell	Total Schedule Time	Percent Change	
NOL-XSU	0	0	0	0	0.0%	
XSU-MEM	0	-2	0	-2	-0.3%	
MEM-XCS	0	2	0	2	0.4%	
XCS-CHI	0	0	0	0	0.0%	
XSU-XCS	0	0	0	0	0.0%	
CHI-NOL	0	0	0	0	0.0%	

Amtrak May 2022 Proposed Schedule - Saluki/Train 390

RR	Mileage	Services	PRT	Recovery Minutes	Misc. Adjust.	Dwell Minutes	Arrive	Depart	Station
CNIC	0.0	t,e,l						7:30 AM	Carbondale, IL CT
CNIC	20.3		19	1		1	7:50 AM	7:51 AM	Du Quoin, IL
CNIC	55.7		30	1		1	8:22 AM	8:23 AM	Centralia, IL
CNIC	108.9		44	1		1	9:08 AM	9:09 AM	Effingham, IL
CNIC	135.7		22	1		1	9:32 AM	9:33 AM	Mattoon, IL (Charleston)
CNIC			30		5		10:08 AM	10:08 AM	XTI - <i>Tolono</i>
CNIC	180.3		8	5		3	10:21 AM	10:24 AM	Champaign-Urbana, IL
CNIC	194.3		13	0		1	10:37 AM	10:38 AM	Rantoul, IL
CNIC	227.0		26	0		1	11:04 AM	11:05 AM	Gilman, IL
CNIC	252.2		22	3		1	11:30 AM	11:31 AM	Kankakee, IL
CNIC	284.6		27	10		2	12:08 PM	12:10 PM	Homewood, IL
AMT	306.7		28	0			12:38 PM	12:38 PM	XCS - <i>16th Street</i>
AMT	308.9	T,E	20	0	2		1:00 PM		Chicago, IL CT
			Total Pure Run	Total Recovery Minutes	Total Short Shunt Adj.	Total Dwell	Total Schedule Time		
			289	22	7	12	330		

CN June 2022 Proposed Schedule - Saluki/Train 390

RR	Mileage	Services	PRT	Recovery Minutes	Misc. Adjust.	Dwell Minutes	Arrive	Depart	Station
CNIC	0.0	t,e,l						7:30 AM	Carbondale, IL CT
CNIC	20.3		20			1	7:50 AM	7:51 AM	Du Quoin, IL
CNIC	55.7		31			1	8:22 AM	8:23 AM	Centralia, IL
CNIC	108.9		43	2		1	9:08 AM	9:09 AM	Effingham, IL
CNIC	135.7		23			1	9:32 AM	9:33 AM	Mattoon, IL (Charleston)
CNIC			27	3	5		10:08 AM	10:08 AM	XTI - <i>Tolono</i>
CNIC	180.3		8	5		3	10:21 AM	10:24 AM	Champaign-Urbana, IL
CNIC	194.3		12	1		1	10:37 AM	10:38 AM	Rantoul, IL
CNIC	227.0		25	1		1	11:04 AM	11:05 AM	Gilman, IL
CNIC	252.2		21	4		1	11:30 AM	11:31 AM	Kankakee, IL
CNIC	284.6		27	10		2	12:08 PM	12:10 PM	Homewood, IL*
AMT	306.7		28				12:38 PM	12:38 PM	XCS - <i>16th Street</i>
AMT	308.9	T,E	17	0	5		1:00 PM		Chicago, IL CT
			Total Pure Run	Total Recovery Minutes	Total Short Shunt Adj.	Total Dwell	Total Schedule Time		
			282	26	10	12	330		

Difference Between CN and Amtrak Proposed Schedules - Saluki/Train 390

PRT	Recovery Minutes	Misc. Adjust.	Dwell Minutes	Arrive	Depart	Station
0	0	0	0	0	0	Carbondale, IL CT
1	-1	0	0	0	0	Du Quoin, IL
1	-1	0	0	0	0	Centralia, IL
-1	1	0	0	0	0	Effingham, IL
1	-1	0	0	0	0	Mattoon, IL (Charleston)
-3	3	0	0	0	0	XTI - <i>Tolono</i>
0	0	0	0	0	0	Champaign-Urbana, IL
-1	1	0	0	0	0	Rantoul, IL
-1	1	0	0	0	0	Gilman, IL
-1	1	0	0	0	0	Kankakee, IL
0	0	0	0	0	0	Homewood, IL
0	0	0	0	0	0	XCS - <i>16th Street</i>
-3	0	3	0	0	0	Chicago, IL CT
Total Pure Run	Total Recovery Minutes	Total Misc. Adj.	Total Dwell	Total Schedule Time		
-7	4	3	0	0		

Amtrak May 2022 Proposed Schedule - Illini/Train 392

RR	Mileage	Services	PRT	Recovery Minutes	Misc. Adjust.	Dwell Minutes	Arrive	Depart	Station
CNIC	0.0	T,E,I						4:15 PM	Carbondale, IL CT
CNIC	20.3		19	1		1	4:35 PM	4:36 PM	Du Quoin, IL
CNIC	55.7		30	1		1	5:07 PM	5:08 PM	Centralia, IL
CNIC	108.9		44	1		1	5:53 PM	5:54 PM	Effingham, IL
CNIC	135.7		22	2		1	6:18 PM	6:19 PM	Mattoon, IL (Charleston)
CNIC			30		5		6:54 PM	6:54 PM	XTI - Tolono
CNIC	180.3		8	3		3	7:05 PM	7:08 PM	Champaign-Urbana, IL
CNIC	194.3		13	2		1	7:23 PM	7:24 PM	Rantoul, IL
CNIC	227.0		26	0		1	7:50 PM	7:51 PM	Gilman, IL
CNIC	252.2		22	0		1	8:13 PM	8:14 PM	Kankakee, IL
CNIC	284.6		27	12		2	8:53 PM	8:55 PM	Homewood, IL
AMT	306.7		28	0			9:23 PM	9:23 PM	XCS - 16th Street
AMT	308.9	t,e	20	0	2		9:45 PM		Chicago, IL CT
			Total Pure Run	Total Recovery Minutes	Total Misc. Adj.	Total Dwell	Total Schedule Time		
			289	22	7	12	330		

CN June 2022 Proposed Schedule - Illini/Train 392

RR	Mileage	Services	PRT	Recovery Minutes	Misc. Adjust.	Dwell Minutes	Arrive	Depart	Station
CNIC	0.0	T,E,I						4:15 PM	Carbondale, IL CT
CNIC	20.3		20			1	4:35 PM	4:36 PM	Du Quoin, IL
CNIC	55.7		31			1	5:07 PM	5:08 PM	Centralia, IL
CNIC	108.9		43	2		1	5:53 PM	5:54 PM	Effingham, IL
CNIC	135.7		23	1		1	6:18 PM	6:19 PM	Mattoon, IL (Charleston)
CNIC			27	3	5		6:54 PM	6:54 PM	XTI - Tolono
CNIC	180.3		8	3		3	7:05 PM	7:08 PM	Champaign-Urbana, IL
CNIC	194.3		12	3		1	7:23 PM	7:24 PM	Rantoul, IL
CNIC	227.0		25	1		1	7:50 PM	7:51 PM	Gilman, IL
CNIC	252.2		21	1		1	8:13 PM	8:14 PM	Kankakee, IL
CNIC	284.6		27	12		2	8:53 PM	8:55 PM	Homewood, IL
AMT	306.7		28	0			9:23 PM	9:23 PM	XCS - 16th Street
AMT	308.9	t,e	17		5		9:45 PM		Chicago, IL CT
			Total Pure Run	Total Recovery Minutes	Total Short Shunt Adj.	Total Dwell	Total Schedule Time		
			282	26	10	12	330		

Difference Between CN and Amtrak Proposed Schedules - Illini/Train 392

PRT	Recovery Minutes	Misc. Adjust.	Dwell Minutes	Arrive	Depart	Station
0	0	0	0	0	0	Carbondale, IL CT
1	-1	0	0	0	0	Du Quoin, IL
1	-1	0	0	0	0	Centralia, IL
-1	1	0	0	0	0	Effingham, IL
1	-1	0	0	0	0	Mattoon, IL (Charleston)
-3	3	0	0	0	0	XTI - Tolono
0	0	0	0	0	0	Champaign-Urbana, IL
-1	1	0	0	0	0	Rantoul, IL
-1	1	0	0	0	0	Gilman, IL
-1	1	0	0	0	0	Kankakee, IL
0	0	0	0	0	0	Homewood, IL
0	0	0	0	0	0	XCS - 16th Street
-3	0	3	0	0	0	Chicago, IL CT
Total Pure Run	Total Recovery Minutes	Total Misc. Adj.	Total Dwell	Total Schedule Time		
-7	4	3	0	0		

Amtrak May 2022 Proposed Schedule - Illini/Train 393

RR	Mileage	Services	PRT	Recovery Minutes	Misc. Adjust.	Dwell Minutes	Arrive	Depart	Station
AMT	0.0	T,E,FA,W,I						4:05 PM	Chicago, IL
CNIC	2.2		15				4:20 PM	4:20 PM	XCS - 16th Street
CNIC	24.3		26	0		2	4:46 PM	4:48 PM	Homewood, IL
CNIC	56.7		27	1		1	5:16 PM	5:17 PM	Kankakee, IL
CNIC	81.9		22	2		1	5:41 PM	5:42 PM	Gilman, IL
CNIC	114.6		27	0		1	6:09 PM	6:10 PM	Rantoul, IL
CNIC	128.6		14	11		3	6:35 PM	6:38 PM	Champaign-Urbana, IL
CNIC			10		5		6:53 PM	6:53 PM	XTI - Tolono
CNIC	173.2		28	3		1	7:24 PM	7:25 PM	Mattoon, IL
CNIC	200.0		23	0		1	7:48 PM	7:49 PM	Effingham, IL
CNIC	253.2		46	0		1	8:35 PM	8:36 PM	Centralia, IL
CNIC	288.6		31	0		1	9:07 PM	9:08 PM	Du Quoin, IL
CNIC	308.9		18	9	0		9:35 PM		Carbondale, IL
			Total Pure Run	Total Recovery Minutes	Total Misc. Adj.	Total Dwell	Total Schedule Time		
			287	26	5	12	330		

CN June 2022 Proposed Schedule - Illini/Train 393

RR	Mileage	Services	PRT	Recovery Minutes	Misc. Adjust.	Dwell Minutes	Arrive	Depart	Station
AMT	0.0	T,E,FA,W,I						4:05 PM	Chicago, IL
CNIC	2.2		13				4:18 PM	4:18 PM	XCS - 16th Street
CNIC	24.3		26	0		2	4:44 PM	4:46 PM	Homewood, IL
CNIC	56.7		25	3		1	5:14 PM	5:15 PM	Kankakee, IL
CNIC	81.9		21	3		1	5:39 PM	5:40 PM	Gilman, IL
CNIC	114.6		25	2		1	6:07 PM	6:08 PM	Rantoul, IL
CNIC	128.6		12	13		3	6:33 PM	6:36 PM	Champaign-Urbana, IL
CNIC			10		5		6:51 PM	6:51 PM	XTI - Tolono
CNIC	173.2		24	7		1	7:22 PM	7:23 PM	Mattoon, IL
CNIC	200.0		23	0		1	7:46 PM	7:47 PM	Effingham, IL
CNIC	253.2		46	0		1	8:33 PM	8:34 PM	Centralia, IL
CNIC	288.6		32	0		1	9:06 PM	9:07 PM	Du Quoin, IL
CNIC	308.9	t,e	21	2	5		9:35 PM		Carbondale, IL
			Total Pure Run	Total Recovery Minutes	Total Misc. Adj.	Total Dwell	Total Schedule Time		
			278	30	10	12	330		

Difference Between CN and Amtrak Proposed Schedules - Illini/Train 393

PRT	Recovery Minutes	Misc. Adjust.	Dwell Minutes	Arrive	Depart	Station
0	0	0	0	0	0	Chicago, IL
-2	0	0	0	-2	-2	XCS - 16th Street
0	0	0	0	-2	-2	Homewood, IL
-2	2	0	0	-2	-2	Kankakee, IL
-1	1	0	0	-2	-2	Gilman, IL
-2	2	0	0	-2	-2	Rantoul, IL
-2	2	0	0	-2	-2	Champaign-Urbana, IL
0	0	0	0	-2	-2	XTI - Tolono
-4	4	0	0	-2	-2	Mattoon, IL
0	0	0	0	-2	-2	Effingham, IL
0	0	0	0	-2	-2	Centralia, IL
1	0	0	0	-1	-1	Du Quoin, IL
3	-7	5	0	0	0	Carbondale, IL
Total Pure Run	Total Recovery Minutes	Total Misc. Adj.	Total Dwell	Total Schedule Time		
-9	4	5	0	0		

Amtrak May 2022 Proposed Schedule - Saluki/Train 391

RR	Mileage	Services	PRT	Recovery Minutes	Misc. Adjust.	Dwell Minutes	Arrive	Depart	Station
AMT	0.0	T,E,FA,W,I						8:15 AM	Chicago, IL
CNIC	2.2		15				8:30 AM	8:30 AM	XCS - 16th Street
CNIC	24.3		26	0		2	8:56 AM	8:58 AM	Homewood, IL
CNIC	56.7		27	3		1	9:28 AM	9:29 AM	Kankakee, IL
CNIC	81.9		22	2		1	9:53 AM	9:54 AM	Gilman, IL
CNIC	114.6		27	0		1	10:21 AM	10:22 AM	Rantoul, IL
CNIC	128.6		14	12		3	10:48 AM	10:51 AM	Champaign-Urbana, IL
CNIC			10		5		11:06 AM	11:06 AM	XTI - Tolono
CNIC	173.2		28	0		1	11:34 AM	11:35 AM	Mattoon, IL
CNIC	200.0		23	0		1	11:58 AM	11:59 AM	Effingham, IL
CNIC	253.2		46	0		1	12:45 PM	12:46 PM	Centralia, IL
CNIC	288.6		31	0		1	1:17 PM	1:18 PM	Du Quoin, IL
CNIC	308.9		18	9	0		1:45 PM		Carbondale, IL
			Total Pure Run	Total Recovery Minutes	Total Misc. Adj.	Total Dwell	Total Schedule Time		
			287	26	5	12	330		

CN June 2022 Proposed Schedule - Saluki/Train 391

RR	Mileage	Services	PRT	Recovery Minutes	Misc. Adjust.	Dwell Minutes	Arrive	Depart	Station
AMT	0.0	T,E,FA,W,I						8:15 AM	Chicago, IL
CNIC	2.2		13				8:28 AM	8:28 AM	XCS - 16th Street
CNIC	24.3		26	0		2	8:54 AM	8:56 AM	Homewood, IL
CNIC	56.7		25	5		1	9:26 AM	9:27 AM	Kankakee, IL
CNIC	81.9		21	3		1	9:51 AM	9:52 AM	Gilman, IL
CNIC	114.6		25	2		1	10:19 AM	10:20 AM	Rantoul, IL
CNIC	128.6		12	14		3	10:46 AM	10:49 AM	Champaign-Urbana, IL
CNIC			10		5		11:04 AM	11:04 AM	XTI - Tolono
CNIC	173.2		24	4		1	11:32 AM	11:33 AM	Mattoon, IL
CNIC	200.0		23	0		1	11:56 AM	11:57 AM	Effingham, IL
CNIC	253.2		46	0		1	12:43 PM	12:44 PM	Centralia, IL
CNIC	288.6		32	0		1	1:16 PM	1:17 PM	Du Quoin, IL
CNIC	308.9	t,e	21	6	1		1:45 PM		Carbondale, IL
			Total Pure Run	Total Recovery Minutes	Total Misc. Adj.	Total Dwell	Total Schedule Time		
			278	34	6	12	330		

Difference Between CN and Amtrak Proposed Schedules - Saluki/Train 391

PRT	Recovery Minutes	Misc. Adjust.	Dwell Minutes	Arrive	Depart	Station
0	0	0	0	0	0	Chicago, IL
-2	0	0	0	-2	-2	XCS - 16th Street
0	0	0	0	-2	-2	Homewood, IL
-2	2	0	0	-2	-2	Kankakee, IL
-1	1	0	0	-2	-2	Gilman, IL
-2	2	0	0	-2	-2	Rantoul, IL
-2	2	0	0	-2	-2	Champaign-Urbana, IL
0	0	0	0	-2	-2	XTI - Tolono
-4	4	0	0	-2	-2	Mattoon, IL
0	0	0	0	-2	-2	Effingham, IL
0	0	0	0	-2	-2	Centralia, IL
1	0	0	0	-1	-1	Du Quoin, IL
3	-3	1	0	0	0	Carbondale, IL
Total Pure Run	Total Recovery Minutes	Total Misc. Adj.	Total Dwell	Total Schedule Time		
-9	8	1	0	0		

Exhibit 2

YEAR	MONTH	SERVICE	TRAIN	SUSPENSIONS	REASON SUSPENDED
2020	March	I/S	391	21-31	COVID
			392	21-31	COVID
			301	21-31	COVID
			302	21-31	COVID
			304	21-31	COVID
		Wolverine	305	21-31	COVID
			350	21-31	COVID
			353	21-31	COVID
			354	19-31	COVID
			355	19-31	COVID
	April	I/S	391	1-30	COVID
			392	1-30	COVID
			301	1-30	COVID
		Lincoln	302	1-30	COVID
			304	1-30	COVID
			305	1-30	COVID
		Wolverine	350	1-30	COVID
			353	1-30	COVID
			354	1-30	COVID
		CNOL	355	1-30	COVID
			58	3-30	Bonnet Carre Spillway gates opened
			59	2-30	Bonnet Carre Spillway gates opened
	May	I/S	391	1-31	COVID
			392	1-31	COVID
			301	1-31	COVID
		Lincoln	302	1-31	COVID
			304	1-31	COVID
			305	1-31	COVID
		Wolverine	350	1-31	COVID
			353	1-31	COVID
			354	1-31	COVID
		CNOL	355	1-31	COVID
			58	1	Bonnet Carre Spillway gates opened
	June	I/S	391	1-30	COVID
			392	1-30	COVID
			301	1-30	COVID
		Lincoln	302	1-30	COVID
			304	1-30	COVID
			305	1-30	COVID
		Wolverine	350	1-30	COVID
			353	1-30	COVID
			354	1-30	COVID
		CNOL	355	1-30	COVID
			58	7,8	Tropical Depression Cristobal
			59	6,7	Tropical Depression Cristobal
	July	Blue Water	365	1	no apparent reason (NAR)
			391	1-31	COVID
			392	1-31	COVID
		Lincoln	301	1-31	COVID
			302	1-31	COVID
			304	1-31	COVID
		Wolverine	305	1-31	COVID
			350	1-31	COVID
			353	1-31	COVID
		CNOL	354	1-31	COVID
			355	1-31	COVID
			58	25, 26, 27	Hurricane Laura
	August	I/S	59	24, 25, 26	Hurricane Laura
			22	30	n/a
			391	1-30	COVID
		Lincoln	392	1-30	COVID
			301	1-30	COVID
			302	1-30	COVID
		Wolverine	304	1-30	COVID
			305	1-30	COVID
			350	1-31	COVID
		CNOL	353	1-31	COVID
			354	1-31	COVID
			355	1-31	COVID
	September	I/S	58	25, 26, 27	Hurricane Laura
			59	24, 25, 26	Hurricane Laura
			22	30	n/a
		Lincoln	391	1-30	COVID
			392	1-30	COVID
			301	1-30	COVID
		Wolverine	302	1-30	COVID
			304	1-30	COVID
			305	1-30	COVID
			350	1-30	COVID

YEAR	MONTH	SERVICE	TRAIN	SUSPENSIONS	REASON SUSPENDED
2021	October	CNOL	353	1-30	COVID
			354	1-30	COVID
			355	1-30	COVID
			351	9	n/a
			58-1	14, 15, 16	Hurricane Sally
				21	originated at Jackson, high water at Lake Pontchartrain
			58-2	15, 16	Hurricane Sally
			59-1	14, 15	Hurricane Sally
			59-2	13, 14, 15	Hurricane Sally
				20	terminated at Jackson, high water at Lake Pontchartrain
		I/S	391	1-31	COVID
			392	1-31	COVID
		Lincoln	301	1-31	COVID
			302	1-31	COVID
			304	1-31	COVID
			305	1-31	COVID
		Wolverine	350	1-31	COVID
			353	1-31	COVID
			354	1-31	COVID
			355	1-31	COVID
		CNOL	58	as of Oct. 5, train originates W/F/Sun only	COVID
				9	Hurricane Delta
				28	Tropical Storm Zeta
			59	as of Oct. 5, train originates M/Th/Sat only	COVID
		Texas Eagle	21	as of Oct. 5, train originates T/F/Sun only	Hurricane Delta
			22	as of Oct. 5, train originates M/W/Sat only	COVID
	November	I/S	391	1-30	COVID
			392	1-30	COVID
		Lincoln	301	1-30	COVID
			302	1-30	COVID
			304	1-30	COVID
			305	1-30	COVID
		Wolverine	350	1-30	COVID
			353	1-30	COVID
			354	1-30	COVID
			355	1-30	COVID
		CNOL	351	16	n/a
			58	train originates W/F/Sun only	COVID
			59	train originates M/Th/Sat only	COVID
		Texas Eagle	21	train originates T/F/Sun only	COVID
			22	train originates M/W/Sat only	COVID
	December	I/S	391	1-31	COVID
			392	1-31	COVID
		Lincoln	390	17	n/a
			301	1-31	COVID
			302	1-31	COVID
			304	1-31	COVID
		Wolverine	305	1-31	COVID
			350	1-31	COVID
			353	1-31	COVID
			354	1-31	COVID
		CNOL	355	1-31	COVID
			352	23	n/a
			351	24, 31	n/a
			58	train originates W/F/Sun only	COVID
		Texas Eagle	59	train originates M/Th/Sat only	COVID
			21	train originates T/F/Sun only	COVID
			22	train originates M/W/Sat only	COVID
			58	train originates W/F/Sun only	COVID
	January	I/S	59	train originates M/Th/Sat only	COVID
			391	1-31	COVID
		CNOL	392	1-31	COVID
			21	train originates T/F/Sun only	COVID
			22	train originates M/W/Sat only	COVID
			58	train originates W/F/Sun only	COVID
		Lincoln	59	train originates M/Th/Sat only	COVID
			301	1-31	COVID
			302	1-31	COVID
			304	1-31	COVID
		Wolverine	305	1-31	COVID
			350	1-31	COVID
			353	1-31	COVID
			354	1-31	COVID
		I/S	355	1-31	COVID
			351	17	n/a
			390	15	SCAL Bridge work
			393	15	SCAL Bridge work

YEAR	MONTH	SERVICE	TRAIN	SUSPENSIONS	REASON SUSPENDED
February	February	CNOL	58	train originates W/F/Sun only	COVID
			59	train originates M/Th/Sat only	COVID
		I/S	391	1-28	COVID
			392	1-28	COVID
			390	3, 17	n/a
			393	16	n/a
			21	train originates T/F/Sun only	COVID
		Texas Eagle	22	train originates M/W/Sat only	COVID
			301	1-28	COVID
		Lincoln	302	1-28	COVID
			304	1-28	COVID
			305	1-28	COVID
			300	13, 14	n/a
			303	13, 14	n/a
			306	13	n/a
			307	13	n/a
		Wolverine	350	1-28	COVID
			353	1-28	COVID
			354	1-28	COVID
			355	1-28	COVID
		Blue Water	351	17	n/a
			364	16	n/a
			365	17	n/a
March	March	CNOL	58	train originates W/F/Sun only	COVID
			59	train originates M/Th/Sat only	COVID
		I/S	391	1-31	COVID
			392	1-31	COVID
		Texas Eagle	21	train originates T/F/Sun only	COVID
			22	train originates M/W/Sat only	COVID
		Lincoln	301	1-31	COVID
			302	1-31	COVID
			304	1-31	COVID
			305	1-31	COVID
		Wolverine	350	1-31	COVID
			353	1-31	COVID
			354	1-31	COVID
			355	1-31	COVID
April	April	CNOL	58	train originates W/F/Sun only	COVID
			59	train originates M/Th/Sat only	COVID
		I/S	391	1-30	COVID
			392	1-30	COVID
		Texas Eagle	21	train originates T/F/Sun only	COVID
			22	train originates M/W/Sat only	COVID
		Lincoln	301	1-30	COVID
			302	1-30	COVID
			304	1-30	COVID
			305	1-30	COVID
		Wolverine	350	1-30	COVID
			353	1-30	COVID
			354	1-30	COVID
			355	1-30	COVID
May	May	CNOL	58	train originates W/F/Sun only, until May 31 return to full service	COVID
			59	train originates M/Th/Sat only, until May 31 return to full service	COVID
		Texas Eagle	21	train originates T/F/Sun only, until May 24 return to full service	COVID
			22	train originates M/W/Sat only, until May 24 return to full service	COVID
		I/S	391	1-31	COVID
			392	1-31	COVID
		Lincoln	301	1-31	COVID
			302	1-31	COVID
			304	1-31	COVID
			305	1-31	COVID
		Wolverine	350	1-31	COVID
			353	1-31	COVID
			354	1-31	COVID
			355	1-31	COVID
			351	26	n/a
June	June	I/S	391	1-30	COVID
			392	1-30	COVID
		Lincoln	301	1-30	COVID
			302	1-30	COVID
			304	1-30	COVID
			305	1-30	COVID
		Wolverine	350	1-30	COVID
			353	1-30	COVID
			354	1-30	COVID
			355	1-30	COVID

YEAR	MONTH	SERVICE	TRAIN	SUSPENSIONS	REASON SUSPENDED
	July	CNOL	352	26	n/a
			355	26, 27	n/a
			58-2	15	vehicle struck in first leg of trip
			I/S	391	COVID
			392	1-18	COVID
		Lincoln	390	8	Wentworth Bridge work
			393	8	Wentworth Bridge work
			301	1-18	COVID
			302	1-18	COVID
			304	1-18	COVID
	August	CNOL	305	1-18	COVID
			350	1-31	COVID
			353	1-31	COVID
			354	1-31	COVID
			355	1-31	COVID
		Wolverine	352	19-31	Amtrak track work
			351	12	n/a
			58-1	28-31	Hurricane Ida
			59-2	27-31	Hurricane Ida
			352	1-31	Amtrak track work
	September	CNOL	353	1-31	Amtrak track work
			58-1	1-8	Hurricane Ida recovery
				9-27 originated at Jackson	Hurricane Ida recovery
			59-2	1-7	Hurricane Ida recovery
				8-26 terminated at Jackson	Hurricane Ida recovery
		Lincoln	303	29, 30	CN work block
			306	29, 30	CN work block
		Wolverine	352	1-6	Amtrak track work
			353	1-6	Amtrak track work
			301	31	n/a
	October	Lincoln	304	3, 31	n/a
					n/a
	December	CNOL	58-1	13	n/a
				31	n/a
			58-2	1, suspended past McComb	semi-strike
				31	n/a
			59-2	12	n/a
		Wolverine		31	n/a
			355-1	16	earlier Wolverine train encountered trespasser strike
			58	15	n/a
				29, 30; beginning 29 originates Mon-Fri only	COVID
			59	15	n/a
2022	January	CNOL		29, 30; beginning 29 originates Mon-Fri only	COVID
				15	n/a
				29, 30; beginning 29 originates Mon-Fri only	COVID
			I/S	390	n/a
			393	8	n/a
		Texas Eagle	391	18-31	COVID
			392	18-31	COVID
			21	15	n/a
				beginning 26 originated on CN M/T/F/Sat/Sun only	COVID
			22	16	n/a
	February	Wolverine		beginning 26 originated on CN T/W/Sat/Sun/M only	COVID
			351	26	n/a
			352	25	n/a
			353	8	n/a
			354	8	n/a
		CNOL	58	2, 3	winter storm
				1, 4-28, originates Mon-Fri only	COVID
			59	2, 3	winter storm
				1, 4-28, originates Mon-Fri only	COVID
			I/S	390	winter storm
			393	2, 3	winter storm
			391	1-28	COVID
			392	1-28	COVID
		Texas Eagle	21	originated on CN M/T/F/Sat/Sun only	COVID
			22	originated on CN T/W/Sat/Sun/M only	COVID
		Lincoln	300	3	winter storm
				18, 25	n/a
			301	14	mechanical issues
				18	n/a
			302	3	winter storm
			304	14, 17	n/a
			305	2	winter storm
				17	n/a
			307	2	winter storm
		Blue Water	364	3	winter storm
			365	3	winter storm
		Wolverine		3	winter storm
			352	3	winter storm

YEAR	MONTH	SERVICE	TRAIN	SUSPENSIONS	REASON SUSPENDED
			351	3	winter storm
			353	3	winter storm
			350	3	winter storm
				14	n/a
			354	2, 3	winter storm
			355	2, 3	winter storm
				14	n/a
			355-1	13 did not carry passengers	n/a
			355-2	13	n/a
	March	CNOL	58	1-31 originates Mon-Fri only	COVID
			59	1-31 originates Mon-Fri only	COVID
		I/S	390	19, 20 terminated Homewood	Wentworth Bridge work
			393	19, 20 originated Homewood	Wentworth Bridge work
			391	1-31	COVID
			392	1-31	COVID
		Texas Eagle	21	originated on CN M/T/F/Sat/Sun only	COVID
			22	originated on CN T/W/Sat/Sun/M only	COVID

Tab D

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 35743

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

VERIFIED STATEMENT OF THOMAS M. SULLIVAN

1. My name is Thomas M. Sullivan. I am employed by Illinois Central Railroad Company (“IC”) as Senior Director – U.S. Labor Relations. I have overall responsibility for the negotiation and administration of collective bargaining agreements governing union-represented employees on the U.S. railroad companies that are indirect, wholly-owned subsidiaries of Canadian National Railway Company (“CNR”), a Canadian corporation. These rail companies include IC, Grand Trunk Western Railroad Company, Wisconsin Central Ltd. (“Wisconsin Central”), Chicago, Central & Pacific Railroad Company, Cedar River Railroad Company, Bessemer and Lake Erie Railroad Company, and The Pittsburgh & Conneaut Dock Company. For ease of reference, I refer to these U.S. railroad companies collectively as “CN” in this Verified Statement.

2. Wisconsin Central employees dispatch all trains operated by the CN operating railroads in the United States. Over the course of several years, the separate dispatch operations of CNR’s U.S. subsidiaries were consolidated and integrated into the Wisconsin Central dispatch center in Homewood, Illinois.

3. The train dispatchers employed by Wisconsin Central are referred to as “Rail Traffic Controllers” (“RTCs”). All of Wisconsin Central’s RTCs are represented, for purposes of collective bargaining, by the American Train Dispatchers Association (“ATDA”). I have overseen negotiation and administration of the collective bargaining agreement between Wisconsin Central and ATDA. Wisconsin Central is currently in the process of negotiating changes to its collective bargaining agreement with the ATDA. In this round of collective bargaining, Wisconsin Central is participating in national multi-employer negotiations (referred to as “national handling”), and I serve as CN’s representative in the national handling process. By virtue of my job responsibilities, I am familiar with the terms of the collective bargaining agreement between Wisconsin Central and ATDA.

4. The collective bargaining agreement between Wisconsin Central and ATDA contains a “Scope Rule” that gives ATDA-represented RTCs work jurisdiction over dispatching activity that involves the movement of trains, issuance of work authorities, and the creation and maintenance of necessary records incident thereto with respect to all CN lines in the United States. As the collective bargaining agreement states: “In other words, as long as it is necessary for a human being to perform this work, it will be an RTC.” The full text of the Scope Rule is as follows:

RULE 1. (Scope)

Section A. This agreement shall govern the hours of service and working conditions of Rail Traffic Controllers (RTC). The term “rail traffic controller” as herein used shall include Trick, Relief and Extra Board Dispatchers. The terms “train dispatcher” and “Rail Traffic Controller (RTC)” are interchangeable.

Section B. Duties. This class shall include positions in which the duties of incumbents are to be responsible for, but not limited to, the movement of trains, the issuance of work authorities for the protection of maintenance of way, signal and other employees working on or near the tracks, and the keeping of necessary records

incident thereto shall be performed by RTCs on their assigned territory. To the extent that such positions are necessary, RTCs shall perform the work associated with CTC and Track Warrant machines, or any other computer/equipment/machines used for the dispatching of trains. In other words, as long as it is necessary for a human being to perform this work, it will be an RTC.

5. I understand that National Railroad Passenger Corporation (“Amtrak”) has proposed a three-tier penalty provision to be added to the operating agreement between CN and Amtrak.¹ I understand under its Tier 1, Amtrak has proposed that CN would be required to provide monthly written reports to Amtrak and the Surface Transportation Board addressing every delay to an Amtrak train in excess of five minutes that Amtrak considers “host-responsible” (many of which, I understand, bear little if any relation to dispatching decisions). Amtrak proposes that such reports would include the following information: (1) why the delay occurred; (2) how the delay could have been avoided; (3) the individual names of the dispatcher involved in dispatching the train and his or her supervisor; (4) whether and when the dispatcher was counseled; and (5) any corrective actions taken to prevent a repeat of the delay. Under Tier 1, Amtrak also seeks the right to monitor dispatchers’ work screens remotely on a continuous, real-time basis. Under Tier 2, Amtrak additionally seeks to be able to designate a representative to sit alongside CN’s dispatchers in CN’s dispatch center and to require CN to obtain Amtrak’s prior written approval before scheduling any non-emergency maintenance that is expected to affect the on-time performance of Amtrak trains. Under Tier 3 (in addition to Tier 1 and Tier 2), I understand that Amtrak has proposed that it could, under certain circumstances, take over CN’s dispatching on CN’s lines that host Amtrak for a minimum of two years and potentially use dispatchers who are not employees of Wisconsin Central. I further understand, from CN officers

¹ Amtrak Opening Brief (PID) at 66-71; VS Blair ¶¶ 118-34.

who are knowledgeable about train dispatching, that it would be impossible for such a non-Wisconsin Central dispatcher to dispatch only Amtrak trains. Because of the functional integration of CN trains and passenger trains on CN lines, the responsibility for safe dispatching of CN's lines must be performed by a dispatcher with full knowledge and responsibility for all trains operating over that segment of track, other on-track equipment, and personnel that might occupy any segment of the line being dispatched.

6. As elaborated in the verified statement of Derek Taylor, under Amtrak's Tier 1 proposal, CN would be required to name individual dispatchers involved in dispatching Amtrak trains that were delayed and name their supervisors. Amtrak's Tier 1 and Tier 2 proposals would allow Amtrak to monitor the performance of dispatchers in real time. Both of these proposals would intrude upon CN's employment relationship with its dispatchers to the detriment of employee morale and teamwork and effective labor-management relations. Dispatchers and their union, the ATDA, might consider these modifications, particularly identifying individual dispatchers by name in reports to Amtrak and the Board, to be a unilateral change in the terms and conditions of dispatchers' employment under Wisconsin Central's collective bargaining agreement with ATDA and thus violative of the Railway Labor Act ("RLA").

7. These concerns would be exacerbated at Tier 2 insofar as Amtrak would be authorized to have a representative literally look over the shoulder of CN's RTCs as they work. That would likely create a complicated and tense dynamic in the dispatch center, and it would potentially subject RTCs to conflicting supervision and direction, which also could be construed as an additional unilateral change to terms and conditions of employment and inconsistent with CN's "continuing authority to supervise and direct the manner of [the RTCs'] service" under 45 U.S.C. § 151.

8. At Tier 3, Amtrak's proposal could replace CN's dispatchers with dispatchers who are not employed by Wisconsin Central and then have those individuals dispatch CN lines over which Amtrak runs. Even if CN's dispatchers remained in place but were placed under the supervision and direction of Amtrak or its designee, that could be considered a unilateral change to terms and conditions of employment of union-represented dispatchers. Because of the clarity and breadth of the Scope Rule contained in the collective bargaining agreement between Wisconsin Central and ATDA, permitting an employee other than a Wisconsin Central RTC to perform such work would inevitably cause a labor dispute and an actual or threatened strike against Wisconsin Central. See *Wheeling & Lake Erie Ry. Co. v. Bhd. of Locomotive Eng'rs*, 789 F.3d 681 (6th Cir. 2015) (example of a labor dispute involving performance of work reserved to union-represented employees by persons outside the craft). That is true whether the dispatcher was an Amtrak employee (even if the dispatcher was union-represented by the ATDA) or employed by a third party, because such dispatchers would not be employees covered by the Wisconsin Central-ATDA collective bargaining agreement.

9. Moreover, even if a court were to rule that ATDA could not strike over Amtrak or third-party dispatching on CN lines, such a dispute would be subject to arbitration under the RLA. In such an arbitration, ATDA would likely seek, among other things, an order requiring the railroad to cease and desist from allowing Amtrak or third party employees to perform dispatching of trains over CN rail lines, plus financial compensation for any Wisconsin Central employees that may have been deprived of work opportunities. If an arbitrator were to find in favor of ATDA, CN would be bound by the arbitrator's decision.

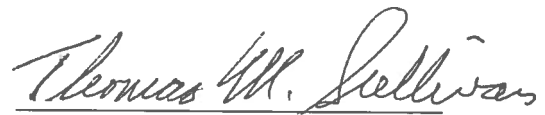
10. Additionally, CN has collective bargaining agreements with the Brotherhood of Maintenance of Way Employees Division and the Brotherhood of Railway Signalmen that specify

the available work days and shift start times during which non-emergency Right of Way and Maintenance of Way work may be performed on CN rail lines. Such non-emergency work is scheduled well in advance as part of CN's annual capital planning process and is designed to minimize track outages and safely complete the work. Such scheduling must take account of time needed to mobilize equipment and forces in addition to the time during which the work is performed. Amtrak's proposal to exercise authority over the scheduling of such work could jeopardize CN's ability to properly maintain its track and related infrastructure to minimize track outages as well as increase the amount of overtime work required by employees. I understand Amtrak has not offered in its proposal to pay for such additional unnecessary overtime work to perform non-emergency maintenance.

VERIFICATION

I, Thomas M. Sullivan, declare under penalty of perjury that I have read the foregoing verified statement, that I know the facts asserted therein, and that the same are true as stated. Further, I certify that I am qualified to and authorized to submit this verified statement on behalf of Canadian National Railway Company and its subsidiaries.

Executed on July 26, 2022.


Thomas M. Sullivan

Tab E

REDACTED

CERTIFICATE OF SERVICE

I, James M. Guinivan, hereby certify that I have, on July 26, 2022, caused the foregoing Post-Interim Decision Reply Submission of Illinois Central Railroad Company and Grand Trunk Western Railroad to be served upon all parties of records via electronic mail, as indicated below.

**Highly Confidential, Confidential
and Public Versions:**

Timothy J. Collazzi
Jerry A. Cuomo
LANDMAN CORSI BALLAINE & FORD, P.C.
One Gateway Center
22nd Floor
Newark, New Jersey 07102
tcollazzi@lcbf.com
jcuomo@lcbf.com

Mark S. Landman
LANDMAN CORSI BALLAINE & FORD, P.C.
120 Broadway
13th Floor
New York, New York 10271
mlandman@lcbf.com

Public Version: OTHER PARTIES OF RECORD

Arun Rao
arun.rao@dot.wi.gov

David Rankin
david.rankin@BNSF.com

Hanna Chouest
hanna.chouest@nscorp.com

Karyn Booth
karyn.booth@thompsonhine.com

Michael Murphy
mmurphy@gibsondunn.com

Jim Mathews
narp@narprail.org

Josephine S. Jordan
jjordan1@up.com

/s/ James M. Guinivan
James M. Guinivan