

FLETCHER & SIPPEN LLC

ATTORNEYS AT LAW

29 North Wacker Drive
Suite 800
Chicago, Illinois 60606-3208

Phone: (312) 252-1500
Fax: (312) 252-2400
www.fletcher-sippel.com

ROBERT A. WIMBISH

(312) 252-1504
rwimbish@fletcher-sippel.com

February 19, 2021

301656

VIA ELECTRONIC 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

ENTERED
Office of Proceedings
February 19, 2021
Part of
Public Record

Re: **FD 36332**
National Railroad Passenger Corporation – Petition for Proceeding
under 49 U.S.C. § 24903(c)(2)

Dear Ms. Brown:

Attached for filing in the above-captioned proceeding on behalf of the Commuter Rail Division of the Regional Transportation Authority and the Northeast Illinois Regional Commuter Railroad Corporation (collectively “Metra”) is the **Supplemental Reply Brief of Metra** made in accordance with the procedural order served on December 11, 2020.

Respectfully submitted,

/s/ *R. A. Wimbish*

Robert A. Wimbish
Attorney for Metra

RAW:bs

Attachment

BEFORE THE
SURFACE TRANSPORTATION BOARD

FD 36332

NATIONAL RAILROAD PASSENGER CORPORATION –
PETITION FOR PROCEEDING UNDER 49 U.S.C. § 24903(c)(2)

**SUPPLEMENTAL REPLY BRIEF OF THE
COMMUTER RAIL DIVISION OF THE REGIONAL
TRANSPORTATION AUTHORITY AND THE NORTHEAST ILLINOIS
REGIONAL COMMUTER RAILROAD CORPORATION**

Robert A. Wimbish
Thomas J. Litwiler
Thomas J. Healey
Bradon J. Smith
Fletcher & Sippel LLC
29 North Wacker Drive
Suite 800
Chicago, Illinois 60606
(312) 252-1500

**ATTORNEYS FOR
COMMUTER RAIL DIVISION OF THE
REGIONAL TRANSPORTATION
AUTHORITY AND NORTHEAST
ILLINOIS REGIONAL COMMUTER
RAILROAD CORPORATION**

Dated: February 19, 2021

BEFORE THE
SURFACE TRANSPORTATION BOARD

FD 36332

NATIONAL RAILROAD PASSENGER CORPORATION –
PETITION FOR PROCEEDING UNDER 49 U.S.C. § 24903(c)(2)

**SUPPLEMENTAL REPLY BRIEF OF THE
COMMUTER RAIL DIVISION OF THE REGIONAL
TRANSPORTATION AUTHORITY AND NORTHEAST ILLINOIS
REGIONAL COMMUTER RAILROAD CORPORATION**

Pursuant to the order of the Surface Transportation Board (the “Board”) served in this proceeding on December 11, 2020, Respondents Commuter Rail Division of the Regional Transportation Authority and Northeast Illinois Regional Commuter Railroad Corporation (collectively, “Metra”) offer this Supplemental Reply Brief in response to the January 22, 2021 Supplemental Initial Brief (“Amtrak SIB”) of Petitioner National Railroad Passenger Corporation (“Amtrak”).

BACKGROUND

Metra incorporates herein by reference the Background discussion from its January 22, 2021 Supplemental Initial Brief (“Metra SIB”). Metra adds that, on January 22, 2021, the parties selectively addressed certain of the 16 “unresolved issues” presented to the Board in a jointly-submitted, December 15, 2020 “Supplemental Issues List,” consisting of possible components of an agreement to govern Metra’s continued use of Chicago Union Station (“CUS”) upon which the parties have been unable to agree. Metra observed that “each of the items on the Supplemental Issues List [is] capable of resolution through renewed negotiation

efforts.”¹ Nevertheless, Metra asked the Board either to impose its suggested terms for 6 of the unresolved items, or, preferably, to offer as guidance its preferences on those terms to facilitate renewed negotiation efforts. Amtrak, on the other hand, requested that the Board impose Amtrak’s proposals for 10 of the 16 issues, contending that, pursuant to 49 U.S.C. § 24903(c), the Board can and must prescribe unresolved contract terms to for a CUS agreement.² Of the unresolved issues, Metra and Amtrak commonly sought Board prescription (or guidance) on 5 of them – terminal dwell time (Supplemental Issue No. 1), schedule changes (Supplemental Issue No. 3), service level increases (Supplemental Issue No. 4), dispatching feed (Supplemental Issue No. 8), and audits (Supplemental Issue No. 15).

In briefing only a fraction of the unresolved issues, with significant (but not total) overlap, each party has indicated that there are issues for which it would rather that the Board *not* act. As but one illustration, Metra has stressed the importance of holding each of the parties accountable in cases where a party triggers a serious CUS service disruption (which, historically has resulted from Amtrak mistakes and mishandling of service-disruptive events). Amtrak would like to avoid being held accountable for such service disruptions. Hence, Metra’s supplemental briefing on a service disruption accountability term (Supplemental Issue No. 10),³ and Amtrak’s avoidance of the subject. Moreover, Metra is willing to accept certain terms contained in the 2019 Proposed Agreement⁴ to reduce the scope of disputed issues.⁵ Metra has

¹ Metra SIB, 3.

² Amtrak’s position is unclear about what it believes that the Board should do where neither party has requested Board prescription of a contract term that remains in dispute.

³ Metra SIB, 14-15.

⁴ Amtrak Petition, 6-7.

⁵ Metra SIB at 17 (accepting Amtrak’s original demands for what had become Supplemental Issues No. 14 and 16).

learned, however, that Amtrak has rescinded its original contract terms proposal, and is insisting upon different terms.

Finally, on January 29, 2021, Amtrak filed a Sur-reply in an attempt to revisit (and re-cast) an awkward matter for Amtrak discussed in Metra's June 24, 2020 Reply Brief – a discrete issue on spatial apportionment bearing on station operations and maintenance ("SOM") cost allocation. SOM cost allocation was among the subjects of the initial round of briefing in this proceeding that closed in the summer of 2020. Amtrak did not seek leave from the Board to file its Sur-reply (which is not permitted under the Board's procedural orders in this case or the Board's general rules of procedure), and Metra promptly moved to have the Board strike the impertinent and prejudicial filing, asking the Board to grant Metra an opportunity to respond in kind in the interest of a complete and balanced record if the Board were to allow the Sur-reply. A Board ruling on whether to strike Amtrak's Sur-reply is pending.

ARGUMENT

I. THE SUPPLEMENTAL BRIEFS CONFIRM THE WISDOM OF CONTINUED NEGOTIATION AND LIMITED BOARD INTERVENTION.

If the initial round of supplemental briefing reveals anything, it is that Metra has correctly assessed that the Supplemental Issues List items are capable of resolution through renewed negotiation. This is evident from the fact that each party selectively has briefed a subset of preferred issues, reflecting the potential for give-and-take and reasonable compromise. The briefing reinforces the need for limited Board intervention and for guidance on how the parties may achieve appropriate balance in reaching an accord on problematic terms, rather than outright terms prescription. Metra acknowledges that the Board may construe its prescriptive authority under Section 24903(c) in a more limited fashion than the parties previously had posited,

consistent with the agency's general policy preference against delving into contract minutiae.⁶

Board guidance may impel the parties to reach terms that the Board cannot or will not prescribe.

II. AMTRAK'S INSISTENCE UPON CONTROL, RATHER THAN A COMMITMENT TO BALANCING PUBLIC INTERESTS, IS THE CHIEF OBSTACLE TO AGREEMENT ON THE UNRESOLVED NON-COMPENSATION TERMS.

Where Metra has adhered to the Congressional policy favoring the balancing of competing public interests (Metra's commitment to reliable, efficient and cost-effective regional commuter rail service and Amtrak's corresponding commitment to intercity rail service) underlying the Board's Section 24903(c) mandate and the 3-R Act generally,⁷ Amtrak assumes a much different stance. As Metra has observed,⁸ Amtrak overlooks interest-balancing. It favors the principle that, because Amtrak "owns" CUS (and because it is Amtrak), its interests are superior, and Amtrak thus is entitled to the prerogative in asserting "control" over CUS operations, never mind that Metra historically has been the predominant user of CUS, and that Metra would, as a result, shoulder a larger share of station common costs. It is no wonder, then, that the parties have struggled to reach an accord on all contract terms.

Focusing on Amtrak's claim that ownership equals contract prerogative, Metra questions whether Amtrak lawfully owns the CUS facilities. The facts and applicable law indicate that – (a) Chicago Union Station Company ("CUSCo"), one of multiple Amtrak rail common carrier holdings, long had owned CUS; (b) CUSCo was, and the facilities it owned are, subject to the Board's jurisdiction; and (c) Amtrak unlawfully merged CUSCo into Amtrak in an

⁶ *Atchison, T. & S.F. Ry. Co. – Operating Agreement – Southern Pac. Transp. Co.*, 331 ICC 367, 383-84 (1967) (*Santa Fe I*).

⁷ Metra SIB, 4.

⁸ *Id.*

apparent attempt to remove CUS facilities from the scope of the Board's jurisdiction, as Metra set forth in its petition in *Commuter Rail Division of the Regional Transportation Authority and the Northeast Illinois Regional Commuter Railroad Corporation – Petition for Declaratory Order – Status of Chicago Union Station*, FD 36171 (STB served Aug. 22, 2018). While the Board deemed an order on the status of CUSCo and the CUS facilities to be premature at the time of that proceeding, the Board was very clear that, “should this matter be presented to the Board in the future, Amtrak would need to show that the statutory language exempting it from much of the Interstate Commerce Act specifically enables it to take actions that cause **another regulated carrier's facilities to be removed from the Board's jurisdiction without any agency review or approval.**”⁹ In any event, Amtrak's sense of primacy as putative owner of CUS does not comport with the concepts enunciated in the agreement that currently governs Metra's use of CUS, or with provisions Amtrak has agreed to where Amtrak is non-owner station user, as will be discussed below and as is reflected elsewhere in this record. It would be well, under the circumstances, for the Board to help Amtrak to recalibrate its expectations.

As discussed in the section following, Amtrak's bias explains, among other things, its insistence upon wasteful, unnecessary, and arbitrary dwell time limits for Metra trains; its expectation that it can leverage Metra's potential interest in increased use of CUS for unrelated concessions; its inexplicable insistence upon depriving Metra of dispatching feed playback, when the parties otherwise agree on this subject; and its avoidance of any accountability provision for when either party's negligence triggers a significant service disruption at CUS. If the Board were to agree with Metra that the parties are better served by

⁹ Id., 5 (emphasis original).

focusing on balancing public interests, then there is no basis for imposing Amtrak-requested terms that derive from an entirely different perspective.

III. THE BOARD SHOULD NOT PRESCRIBE CONTRACT TERMS WHERE APPLICABLE COMMON LAW WOULD FILL THE GAPS.

Beyond whether the Board “can” or “should” prescribe CUS access agreement terms at any point in the proceeding, does the Board need to prescribe terms to ensure a fully-formed agreement at all? At such time as the Board prescribes the compensation that Metra should pay Amtrak for Metra’s use of CUS, that prescription, coupled with contract terms to which the parties have committed, would be enough to form an agreement as a general matter of law. To be sure, the parties can (and arguably should) reach an agreement as to all unresolved issues, as it would appear that each of these terms is of some interest to each of the parties, with some unresolved issues being more important to Metra, and others of greater interest to Amtrak. But the absence of an agreement on any currently-absent term would not render successfully-negotiated terms unenforceable, nor would it mean that applicable common law would not fill incidental gaps resulting from intractable differences¹⁰ – assignment, default, and dispute resolution as prime examples. As such, whether the Board *could* prescribe terms, it does not *need* to do so. Accordingly, as a threshold matter, the Board may consider whether or not its

¹⁰ *Restatement (Second) of Contracts* § 204 (1981): When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court; *Jackson v. PNC Bank, N.A.*, 2014 WL 2931394, at FN 2 (E.D. Mich. June 30, 2014) (“[W]hen a contract is incomplete . . . courts both at common law and under the Restatement may supply constructive conditions or ‘gap fillers’ to avoid failure for indefiniteness”) (quoting *Martlew v. City of Benton Harbor*, No. 311897, 2014 WL 1778378, at *3 (Mich.Ct.App. May 1, 2014); *In re Big V Holding Corp.*, 267 B.R. 71, 106–07 (Bankr. D. Del. 2001) (“Every law student is aware of the tradition of the common law courts to supply missing terms where the essentials of the contract are otherwise present”) (citing to *Restatement (Second) of Contracts* § 204 (1979); E. Farnsworth, *Contracts* § 7.16, at 523 (1982)).

intervention is necessary to resolve an issue of sufficient interest to the agency that resort to a common law default would be inappropriate.

IV. THE PRINCIPLES GUIDING AMTRAK’S PROPOSED CONTRACT TERMS FAVOR AMTRAK’S INTERESTS AT METRA’S EXPENSE.

A. Amtrak’s arbitrary terminal dwell time provision would reduce efficiency and safety, and would subject Metra to unnecessary additional costs. (Supp. Issue No. 1/Amtrak Issue No. 1)

The “1984 Agreement” among Metra and Amtrak – which long has established the parties’ rights and obligations at CUS, and continues to govern per Board order served in this proceeding on July 26, 2019 – does not restrict Metra or Amtrak equipment layovers at CUS platform tracks.¹¹ Nevertheless, in the spirit of accommodation, Metra has proposed a flexible dwell time standard prohibiting it from holding equipment at CUS platform tracks “in such a manner as to interfere with Amtrak Service.”¹² Metra’s proposal accounts for operational need for CUS platform tracks, while avoiding inefficiency and additional costs.

In stark contrast, Amtrak urges strict time standards on Metra’s train dwell times at CUS platforms: 10 minutes during rush hour; 1 hour during off-peak; and 5 hours on weekends and holidays. Amtrak contends that Metra should be expected promptly to remove its trains from CUS, since Metra ostensibly has adequate train storage capacity elsewhere.¹³ Amtrak provides no evidence to support its assumption that Metra could simply remove train sets to another location. As Amtrak should be aware, Metra lacks adequate off-site capacity to shuttle idle trains away from CUS simply for the purpose of keeping platform tracks clear.

¹¹ Amtrak SIB, 6, and V.S. O’Mara, par. 25.

¹² Metra SIB, 6-7.

¹³ Amtrak SIB, 6.

Amtrak also offers no evidence to show that its 10 minute/1 hour/5 hours limits are rooted in operating experience or need – they are not. The time frames are rigid and arbitrary. There are certain platform tracks at CUS that are dedicated predominantly or exclusively to supporting Metra service.¹⁴ Amtrak has not shown any need to deprive Metra of use of such platform tracks, so there is no reason why, in the case of those tracks, Amtrak should care how long a trainset might lay over at CUS. The 1984 Agreement’s terms on this subject remain suitable to this day. Restrictions are unnecessary as a matter of longstanding CUS operating practice.

Lacking evidence of genuine need to justify its dwell time restrictions, Amtrak baldly alleges that Metra has failed to move its equipment to accommodate vaguely-articulated Amtrak needs, and it creates baseless concerns to justify its proposal. Amtrak’s Assistant Vice President of Transportation, Paul O’Mara, avers that strict dwell time limits would facilitate capital project work or limit the impacts of a service disruption, while Amtrak separately speculates (without support from Mr. O’Mara) that dwell time restrictions promote safety.¹⁵ But Metra has proven conclusively that dwell time conflicts do not exist at CUS.¹⁶

Worse yet, Amtrak’s arbitrary proposal is counter-intuitive and counter-productive. Amtrak would have the Board require Metra to undertake additional train movements simply to honor the clock. Divorced from demonstrated operating need, Amtrak’s dwell time demand is inefficient, unsafe, and costly, all at once. It is inefficient, because it would require unnecessary train movements at CUS, leaving certain platform tracks unoccupied “just because,” and it would require Metra needlessly to expand its terminal track capacity

¹⁴ Metra Reply, V.S. Oppenheim, 9-11.

¹⁵ See id., 5, and Second V.S. O’ Mara, ¶¶ 26-28.

¹⁶ Metra SIB, 6 (citing V.S. Oppenheim, 7, 9-11).

outside of CUS.¹⁷ It is unsafe in that it would add train movements unnecessarily, increasing the chances of an accident. And it is costly, because, it would compel Metra to consume additional man-hours and fuel (generating more emissions), necessitate the otherwise-unnecessary expansion of terminal storage beyond CUS, and increase the amounts that Metra would likely have to pay for the use of CUS under mutually-agreed compensation methodologies.

This cost consideration merits attention. Metra and Amtrak agree that Metra's allocation of CUS costs will be shaped by a Usage Factor that is determined by an amalgam of the relative percentages of Metra train movements to Amtrak train movements at CUS, and the relative percentage of Metra passengers boarding and alighting at CUS to those of Amtrak.¹⁸ Metra acknowledges that, going forward, the relative share of Metra and Amtrak train movements at CUS will inform the allocation of CUS costs that Metra must bear. Although Amtrak may not have intended to generate additional Metra train movements just to shift a proportionately larger share of costs on Metra, the end result of the rigid enforcement of its proposed contract term would do just that.

Additionally, Amtrak's contract term may be problematic for the Board. It sets forth detailed terms – minutiae¹⁹ – on railroad operations about which the Board may lack expertise. For these reasons, the Board should not endorse Amtrak's strict and arbitrary

¹⁷ Amtrak's proposal frustrates the 3-R Act's advancement of "the movement of passengers . . . in the most efficient manner consistent with safe operation, including the requirements of commuter and intercity passenger service." 45 U.S.C. § 716(a)(7). It is also nonreciprocal, in that Amtrak does not appear to hold its own trains to the same platform dwell time restrictions.

¹⁸ Joint Stipulation of May 18, 2020, 4-5.

¹⁹ *Santa Fe I* at 383-84.

proposal, but should accept Metra's alternative or counsel the parties in keeping with concepts embodied in Metra's proposed term.

B. Amtrak's schedule adjustment proposal would elevate Amtrak's insistence upon "control" as putative owner of CUS over a balancing of public interests. (Amtrak Issue No. 2/Joint Issue No. 3)

The 1984 Agreement protects Metra's rush hour service by limiting Amtrak's discretion to alter rush hour platform track assignments,²⁰ which is critically important to Metra. Moreover, pursuant to that agreement, Metra's and Amtrak's needs are to be accorded equal importance and priority under CUSCo's Operating Rules,²¹ affording neither railroad strict scheduling priority. The 1984 Agreement does not extend to Amtrak the right to adjust Metra's rush hour schedules as Amtrak sees fit, or accord Amtrak scheduling preference.

Again in the interest of mutual accommodation, Metra proposes that Amtrak may require Metra to adjust its non-rush train schedules to avoid Amtrak service conflicts upon 60 days' notice.²² Metra also would protect its interest in rush service by limiting Amtrak's ability to eliminate peak period trains or to alter peak period schedules absent Metra's consent consistent with current practice.²³ Metra's proposal reflects past experience, accommodates Amtrak's interest in adjusting schedules upon reasonable advance notice, and protects Metra's interest in avoiding adverse impacts to its morning and evening rush hour services.

Amtrak, on the other hand, is driven by its desire to exert unilateral control over scheduling and potential scheduling conflicts. Amtrak's scheduling proposal provides that, if an

²⁰ Amtrak Petition, Exhibit A (1984 Agreement), 4.

²¹ Id, 1.

²² Metra SIB, 10.

²³ Id.

otherwise-unresolvable scheduling conflict were to arise as a result of an Amtrak service change forcing a revision to Metra service (peak period or otherwise), then Amtrak may compel the Metra service change on 60 days written notice. Amtrak states that, “ultimately, a single party must have final say over scheduling.”²⁴ Beyond the self-serving prerogative driving Amtrak’s proposal, Amtrak offers nothing to support its asserted need for unilateral control of CUS scheduling to accommodate Metra’s and Amtrak’s service parameters. Where Metra has espoused a careful and circumstance-driven approach to train schedule modification, Amtrak’s counterpart is, at heart, an unnecessary and imbalanced proposition.

Amtrak’s proffered justification for asserting unilateral prerogative on train scheduling makes no sense. Amtrak claims its proposal is intended to protect “preventative and scheduled maintenance and capital work at the station.”²⁵ But Amtrak’s proposal does not account for schedule changes for maintenance and capital work. It provides for Amtrak to change schedules “to the extent reasonably necessary to avoid conflicts with scheduled intercity rail passenger service.”²⁶ As Metra has explained, Amtrak’s contract demand is predicated on a false narrative, specifically that CUS is, and in the recent past has been, severely capacity constrained. Metra has squarely rebutted that proposition.²⁷

Amtrak’s proposal for discretion to adjust trains schedules as it alone sees fit repudiates roughly 40 uneventful years of cooperation, where Amtrak has neither wielded, nor has needed to wield, the controlling prerogative that it now asks the Board to give it. Neither party can adequately balance the public interest in efficient, thoughtfully-scheduled intercity and

²⁴ Amtrak SIB, 8.

²⁵ Id., 7.

²⁶ Id.

²⁷ See Metra SIB, 8-9; Metra Reply Brief, V.S. Oppenheim, 10.

commuter services acting alone. Metra is troubled, for example, that Amtrak would be entitled, in the face Metra's proposals to adjust schedules through dialogue and mutual consent (as has been the process for years), merely to "consider" a Metra proposal on schedule accommodation, and then to reject it.²⁸ Absent a contractual standard restraining Amtrak's discretion over scheduling changes – requiring more than mere "consideration" – commuters cannot count on regular, reliable service protected from Amtrak's pretense or caprice.

C. Amtrak unfairly seeks to leverage potential future Metra schedule expansion into concessions on capital project funding (or to other Amtrak demands) that could be entirely unrelated to train throughput capacity at CUS. (Amtrak Issue No. 3/Joint Issue No. 4)

Sadly, it may be years before Metra and Amtrak ridership and services return to, much less exceed, pre-pandemic volumes. Yet the potential remains that, at some future point, increased demand for commuter rail service would trigger discussion with Amtrak over adding commuter trains beyond the agreed-upon "Standard Schedule."²⁹ On this subject, the 1984 Agreement is itself a model of flexibility, simplicity and balance, providing that if Metra proposes to add trains at CUS, then Amtrak shall not unreasonably withhold its consent.³⁰

Metra proposes to be allowed to increase its daily train movements to and from CUS by 5% over the Standard Schedule. If Metra were to request an increase in train movements over the 5% threshold, then, at Amtrak's request, Metra would undertake Rail Traffic Controller ("RTC") traffic modeling (at Metra's expense) using existing traffic levels and reasonable 5-year forecasts of Amtrak's future CUS train volumes as set forth in Amtrak's five-

²⁸ Amtrak SIB, 7.

²⁹ Metra Supplemental Initial Brief, 10.

³⁰ Amtrak Petition, Exhibit A (1984 Agreement), 1, 3-4.

year operations plan. Amtrak would be entitled to review the data and modeling results, and would agree to Metra's traffic increases if RTC modeling indicates no material interference with Amtrak current and 5-year forecasted traffic.³¹ Metra is flexible in the percentage increase threshold and in refinements to the modeling analysis it has proposed.

Amtrak's proposal, on the other hand, although appearing, superficially, to track the concept behind Metra's proposal, is quite different, and not for the better. Specifically, Amtrak proposes that any increase in Metra trains over the Standard Schedule would be permitted only if Metra can show that its request is "compliant with the service levels included in the most recent joint planning effort."³² Amtrak's vague joint planning effort could relate to just about anything, leaving Metra to guess about what such an effort would have to contain, and the circumstances under which Amtrak might (or might not) concur in such an effort. Under Amtrak's provision, if Amtrak were to withhold its consent to a joint planning effort, Metra could not show how its traffic increase is compliant with a (nonexistent) document, even if traffic modeling revealed available capacity. If a joint planning effort is not successful – *for whatever reason* – there could be no Metra schedule expansion.

Metra understands the joint planning effort to refer to a capital contribution scheme that would lock Metra into certain fixed contributions that Amtrak could spend entirely at its discretion, including for projects that unrelated to capacity upkeep or enhancement.³³ As an illustration, Amtrak could seek to include in a "joint effort" funding for a project of particular interest to it, having no material impact on train traffic capacity at CUS, and benefiting Amtrak

³¹ Metra SIB, 11.

³² Amtrak SIB, 8.

³³ See Amtrak Opening Statement, 1st. V.S. Suchy Exhibit 1 (requiring Metra to contribute joint planning funding according to Sections 17 and 12.3).

predominantly (or exclusively). As a condition to successfully concluding a joint planning effort, Amtrak may demand disproportionate contribution from Metra for that project. Metra would know that, unless it capitulated to Amtrak's unfair demand, it would have no chance of increasing its train starts at CUS, even if adequate capacity existed. Amtrak could make train service increases contingent upon Metra's acceptance of just about any requirement that Amtrak could plausibly attempt to include in a joint planning effort. Amtrak's play for leverage in its proposed contract provision, unfortunately, reflects disregard for balancing interests and allocating CUS capacity reasonably and fairly. Amtrak instead expects a discretionary capital projects *quid pro quo*.

Metra's approach suffers from no such contrivance. It serves the public policy underlying the 3-R Act by focusing on objective capacity analysis, including forecasted Amtrak capacity needs.³⁴ Should Metra propose train increases beyond the Standard Schedule for which empirical data shows capacity improvements would be needed, then Metra will pay for them. But Metra should not be compelled to subsidize Amtrak's unrelated capital spending prerogatives as the cost of increased use of CUS. For these reasons, if the Board were to endorse a specific contract proposal or concept, it should embrace Metra's.

D. Why does Amtrak want to deprive Metra of dispatching feed playback functionality? (Amtrak Issue No. 4/Supp. Issue No. 8)

Meta and Amtrak agree on the critical elements of a dispatching feed contract term *but one*. In exchange for a \$500/month fee for access to the feed – an amount that likely well exceeds Amtrak's actual monthly cost in supplying the feed – Metra expects full feed functionality, including playback, while Amtrak wants to deprive Metra of playback access.

³⁴ Metra SIB, 11.

Metra once had access to playback,³⁵ and there is no good reason to deprive Metra of such functionality, especially given Metra's longstanding support of Amtrak CUS dispatching.

As counter-productive and odd as Amtrak's calculated exclusion is, the absence of any explanation from Amtrak is especially peculiar. Amtrak's handling of this issue and the want of an explanation is troubling, indicative of a lack of essential candor. Withholding playback keeps Metra from reviewing operations at its busiest terminal when it cannot always do so in real time; frustrates Metra's efforts to validate Amtrak charges for Extra Moves; handicaps Metra's ability to participate fully in monthly dispatching review meetings that the parties have agreed to hold; and enables Amtrak to conceal the possible causes of (and solutions for) train delays. What is Amtrak trying to hide? Withholding playback reveals how Amtrak believes that it is entitled to conceal the quality of the services it provides to Metra, and how it insists upon the final say on any contract issue, regardless of how skewed its proposal may be.

E. Amtrak should not be permitted to dictate the deployment of Metra police to areas that Amtrak has committed to police at Metra's expense. (Amtrak Issue No. 5/Supp. Issue No. 7)

Metra is willing to assist Amtrak as Metra's police resources allow and in a manner consistent with the policing and security service Amtrak is to provide, recognizing, however, that "Metra . . . does not police Chicago Union Station."³⁶ To that end, a key passage in Amtrak's proposal falls short by a single word, meriting an edit (consistent with past proposals to Amtrak) as follows: "This ~~shall~~ may include direct assistance by Metra Police Officers for crowd control during service disruptions and major crowd surge events."³⁷ Metra – rather than

³⁵ Id., 12.

³⁶ Amtrak Opening Statement, 8.

³⁷ Amtrak SIB, 11.

Amtrak – should decide when to deploy Metra’s police at CUS, particularly if Metra is to do so at its own cost for the mutual benefit of Metra and Amtrak users. Amtrak’s proposal would create an impermissible cross-subsidy in favor of Amtrak.

With further dialogue, Amtrak should appreciate that Metra seeks to maintain the policing *status quo*.³⁸ Metra opted not brief on this issue, expecting that the parties would resolve the matter without Board intervention. Indeed, Amtrak has stated that it does not intend to obligate Metra, that joint police efforts depend upon mutual agreement, and that Amtrak’s aim is to “allow” (not require) Metra to provide police assistance.³⁹

If Amtrak means what it has said, then it will grasp the imbalance of its contract proposal, and the irony of it. Amtrak believes that it is entitled to call upon Metra police in the event of serious service disruption events, knowing that Amtrak has more often been the cause or contributor to such an event than Metra.⁴⁰ Yet, if Amtrak’s negligence has caused or prolonged a service disruption, Amtrak thinks it should be entitled to call upon Metra (at Metra’s sole expense) to help sort out the mess, pulling police from Metra-owned facilities. Metra is better-positioned to determine when it can render aid, not Amtrak or the Board. It is surprising that Amtrak sees this issue as warranting Board involvement, much less resolution in Amtrak’s favor.

Metra appreciates that Amtrak may need police assistance on occasion, but Amtrak cannot simultaneously insist upon bearing the task of policing CUS (and to charge Metra for this service) while demanding that Metra complement CUS policing at Amtrak’s discretion.⁴¹

³⁸ Amtrak Opening Statement, 46 (“This is consistent with current practice”).

³⁹ Id. (“This proposal simply allows Metra to supplement Amtrak’s efforts as it deems appropriate.”).

⁴⁰ Metra Reply, V.S. Oppenheim.

⁴¹ Amtrak Opening Statement, 8; Amtrak Reply Statement at 10 (“APD officers protect the Station (including all the facilities and areas used by Metra) at all hours from being damaged,

Amtrak has advised that it can flexibly staff CUS, adjusting for changes in station occupancy, pointing to a model that builds in overtime and schedules additional officers for times where there is an increase in CUS use.⁴² The Board should not adopt Amtrak’s inequitable standard requiring Metra to pay for *and* provide policing, nor should the Board prescribe when and how Metra should police an areas in which Amtrak has asserted sole responsibility.

F. The Board does not need to prescribe a material breach provision, much less one that is nonreciprocal and unbalanced. (Amtrak Issue No. 6/Supp. Issue No. 13)

Amtrak has asked the Board to take the unprecedented step of adopting a definition of “material default,” where the parties have thus far not agreed.⁴³ Amtrak would have the Board adjudicate whether or not certain events or circumstances would constitute material default (or “material breach,” to use a term more common in Board jurisprudence),⁴⁴ when there is no need for the Board to do so here, or ever. Applicable common law could fill this gap if ever the need were to arise, and it would do so equitably with due regard for the precise factual context in which a breach is alleged.⁴⁵ Of course, if either party, or both, would rather avoid a common law gap-filler – Amtrak “believes that the New Agreement should still plan for the

looted, or destroyed”); Amtrak Opening Statement First V.S. Patterson ¶ 92-93 (“Based upon my experience as Deputy Chief and working as an officer at Chicago Union Station, I believe the costs described in this statement are appropriate and necessary to safely, effectively, and efficiently patrol and secure Chicago Union Station.”).

⁴² Amtrak Reply, 13 (“Staffing needs are driven in large part by the number of Metra passengers and trains at Chicago Union Station”).

⁴³ Amtrak SIB, 12, Section 17.2 (defining specific occurrences as material default).

⁴⁴ See, e.g., *National R. Passenger Corporation — Conveyance of Boston and Maine Corporation Interests in Connecticut River Line*, 6 ICC 2d. 539, 554 (1990).

⁴⁵ *Window Specialists v. Forney Enterprises*, 106 F. Supp.3d. 64, 88 (D.D.C. 2015) (defining material breach in District of Columbia); *Bisla M.D. Ltd. v. Parvaiz*, 379 Ill. App. 567, 572-73 (2008) (defining material breach in Illinois).

unlikely possibility that one party would materially default”⁴⁶ – then the appropriate course is renewed negotiation, not Board prescription.

Amtrak seems to argue that its default provision is balanced when it is fundamentally unfair and nonreciprocal. Without explaining why, Amtrak focuses exclusively on the possibility of a Metra breach – limiting breach, incidentally, to only one form of contractual non-performance – and what to do about it, never looking inwardly. Amtrak’s contract term seizes upon the exceedingly unlikely scenario of Metra non-payment for services properly rendered. Amtrak assumes that only Metra can commit breach,⁴⁷ and, as in other cases in the contract negotiations, avoids mutual accountability. Even if Amtrak were to allow that it *could* commit breach, Amtrak’s termination costs provisions are patently one-sided, entitling Amtrak to recover its termination costs, but not Metra. The Board should not disturb the protections the law affords each party, nor should it intervene so as to prejudice either party’s rights and obligations. Because intervention is unnecessary and Amtrak’s default proposal is imbalanced, the Board should reject Amtrak’s default proposal.

G. A cost-recalculation provision is unnecessary, and is designed to benefit Amtrak exclusively. (Amtrak Issue No. 7/Supp. Issue No. 11)

Amtrak has proposed a term under which either party could demand the recalculation of the Base CUS Usage Fee (the amount that Metra would pay Amtrak for Metra’s use of CUS facilities and Amtrak’s services at the station) every 7 years, or, if neither party

⁴⁶ Amtrak SIB, 12. Metra notes the phrase “one party,” not “either party,” reflecting Amtrak’s biased take that one party to this agreement would never breach, but the other might.

⁴⁷ It is more likely that Amtrak would fail to honor its various contractual obligations under this agreement to, for example, adequately police CUS, timely and responsibly dispatch train movements, maintain CUS track to agreed-upon conditions, or adhere to exclusive or common area standards of upkeep. Yet Amtrak would limit breach to Metra action or inaction.

invokes its 7-year right, then the Base CUS Usage Fee would be subject to automatic recalculation in 10-year intervals. The supposedly-recalculated Base CUS Usage Fee would then be subject to annual indexing (an issue pending before the agency as part of the compensation component of this proceeding) until the next round of recalculation.⁴⁸ Amtrak's proposal to recalculate base costs is a recent Amtrak invention. It did not exist in the 2019 Proposed Agreement, revealing how negotiation can spur new ideas, although not always good ones. The parties should always strive to find creative solutions for their disputes,⁴⁹ but the Board should not prescribe remedial terms needlessly, as is the case with this new, one-sided proposal that reads like an administrative and cost inputs analysis nightmare.

Amtrak's proposal reveals doubts about the efficacy of its proposed cost index.⁵⁰ Amtrak has stated that, "The purpose of this proceeding is to devise a forward-looking compensation framework that will remain in place for several years into the future, including an inflation index"⁵¹ Metra agrees with that statement, and it has offered an index that it has shown will more effectively and accurately track changes in CUS operating cost inputs than would Amtrak's.⁵² Amtrak implies that its preferred index may not be up to the task, stating that, "inflation adjustments alone are unlikely to adequately adjust base costs over the term of the New Agreement."⁵³ But even if Amtrak's unfounded and unsupported speculation about the

⁴⁸ Amtrak SIB, 14

⁴⁹ *Atchison, T. & S.F. Ry. Co. — Operating Agreement — Southern Pacific Transp. Co.*, 8 I.C.C.2d 297, 299 (1992) ("we view the parties as having the duty in the first instance to seek to negotiate an agreement on this matter").

⁵⁰ Amtrak Opening Statement, 50.

⁵¹ Amtrak Reply, 12.

⁵² Metra Opening Statement, 48.

⁵³ Amtrak SIB, 14.

limits of either proposed indexing mechanism were valid, Amtrak already has an adequate remedy: it may reopen this proceeding. 49 C.F.R. § 1115.4 (permitting the Board to reopen on a party's petition alleging "substantially changed circumstances").

Amtrak's escape plan from its inadequate index is a poor, under-developed substitute for the Board's procedures, which Amtrak seeks to short-circuit. Amtrak does not say who would perform the proposed recalculation. It does not specify the data that would be used to perform the recalculation. It does not contemplate how a party might examine the data and the calculations. And whether Amtrak realized this or not, Metra would be unable to meaningfully review the data, given Amtrak's refusal to permit Metra to audit Amtrak's "fixed" costs.⁵⁴ Beyond that, Amtrak, as the keeper of the cost data, would alone have the wherewithal to trigger its proposed cost recalculation, and it would only invoke the option when it was convinced that it would benefit from the exercise. Given the density of the cost inputs in play and Amtrak's exclusive ability and incentive to manipulate its cost and accounting data (and experience with the same), a recalculation undertaking would be exceedingly costly for Metra. At a minimum, if Amtrak could invoke such an option, it must agree to cover Metra's recalculation costs.

Once again, Metra confronts an Amtrak contract demand of questionable motivation, one that is unnecessary and solely benefits Amtrak. If, after some years, Amtrak believes that the governing inflationary index has failed to keep pace with actual Amtrak costs, then Amtrak may at any time initiate a dialogue with Metra to discuss and resolve the issue. If Metra agrees that adjustments are warranted, then Metra would be amenable to exploring an accord – indeed it would be contrary to Section 24903 to refuse to do so – but the parties need not embrace the cynicism underlying Amtrak's imbalanced and unnecessary contract proposal.

⁵⁴ Section III - I, below.

H. The Board need not, and cannot, impose an alternative dispute resolution provision for purposes of contract formation. (Amtrak Issue No. 8/Joint Issue No. 14)

Amtrak's proposal for alternative dispute resolution (arbitration) reflects a continued progression toward an accord. Metra is unwilling to accept the terms proposed, and does not support Board imposition of the same, recognizing that as a matter of due process and Board policy, the agency cannot compel any party subject to its jurisdiction to arbitrate disputes involuntarily, as Amtrak has recognized elsewhere.⁵⁵ Indeed, because Metra believed that the parties were already close to terms on dispute resolution, and could reach an accord without Board intervention, Metra elected not to brief the issue. Nevertheless, in light of the progress made on this issue during mediation, and the continued progress that Metra sees in Amtrak's proposed terms, Metra advises that it is receptive to reaching an agreement on this subject soon.

Metra was surprised to find that Amtrak was unwilling to agree to Metra's proposal to accept the dispute resolution terms set forth in Amtrak's 2019 Access Agreement, but Metra believes that there is yet room for constructive dialogue, and, ultimately, agreement. But if the parties are unable to reach an agreement, the Board need not prescribe an alternative dispute resolution provision (assuming that the Board had the authority to compel parties to agree to arbitration when one, or both, is otherwise unwilling), as such a provision is non-essential and common law principles would govern dispute resolution, were a dispute to arise.⁵⁶

⁵⁵ *Dispute Resolution Procedures Under the Fixing America's Surface Transportation Act of 2015*, EP 734, (STB served Nov. 29, 2016), 4-5 ("Amtrak states that arbitration is a voluntary alternate dispute mechanism and that nothing in the FAST Act suggests that the Board should impose arbitration on unwilling parties . . . Further, as Amtrak points out, parties have to agree on arbitration as the method to resolve their disputes. Therefore, provisions for binding arbitration will not be included as part of the regulations adopted here").

⁵⁶ See Section II.

I. Amtrak is indifferent to Metra’s genuine need for cost records, and Amtrak’s audit proposal conflicts with the records retention and requirements it expects of others. (Amtrak Issue No. 9/Joint Issue No. 15)

Metra and Amtrak are not very far apart on the details of an audit provision, the key distinctions being that – (1) Metra would require Amtrak to provide records on fixed payment amounts, while Amtrak wants to exclude such data from its records-keeping and audit obligations; and (2) Metra would have Amtrak retain records for a period of 5 years, while Amtrak offers only 3 years of data retention. Metra has pointed out that the more restrictive terms that it had expected Amtrak would advance would severely impair Metra’s ability to provide the Federal Transit Administration (“FTA”) with essential financial data in support of FTA triennial audits, including Metra’s need for “fixed payment amounts” (whatever Amtrak means to exclude by that term).⁵⁷ More generally, if the parties were to revisit CUS base operating costs, how would Amtrak presume to show Metra what its historical fixed costs in operating CUS have been?

Amtrak says that its contract proposal is “fair” and “reasonable” (not explaining how it thinks that it is fair to impair Metra’s ability to comply with FTA audit requirements), adding that the limitations it would have the Board include would protect Amtrak’s proprietary information.⁵⁸ Surely Amtrak knows that there are ways reasonably to protect against the disclosure of proprietary information beyond the blunt instrument of prohibiting access entirely. And should Amtrak profess hardship associated with longer-term records retention (or argue that a 5-year term is overly burdensome), the record reflects that Amtrak requires the owner of St. Paul, Minnesota Union Station to 6 years of records retention (with no fixed costs exclusion),

⁵⁷ Metra SIB, 15-17.

⁵⁸ Amtrak SIB, 18.

where Amtrak is the station user.⁵⁹ As such, Amtrak’s contention that its proposed audit terms are “standard”⁶⁰ rings hollow.

J. It is hard to imagine either party asking the Board for a contract term governing assignment, and harder still to believe that the Board ever would, or should, address such minutiae. (Amtrak Issue No. 10/Joint Issue No. 16)

Amtrak’s assignment proposal reveals what may be its developing perception of such clauses. It evidently has accounted for some of Metra’s ideas on assignment, but additional work remains to be done. CUS ownership and CUSCo’s legal status aside, Metra would like some protection of its valid interests in ensuring that an Amtrak (or CUSCo) successor would be at least as cognizant of its obligations to Metra as Amtrak has been. But it is encouraging that Amtrak would apply a reasonableness standard to any assignment that Metra might propose. The parties are close to agreement (and Metra assumed it had resolved the issue by accepting Amtrak’s assignment terms from the 2019 Access Agreement).⁶¹ But, more generally, Metra questions even asking the Board to prescribe such a term. Contracting parties typically would reach agreement on the subject, and Metra is sure that the parties can do so here with renewed effort. At worst, the parties should remember that, if they were unable to agree on assignment, the absence of such a provision in a future operating agreement would mean that any disagreement on the subject would be resolved under applicable common law.

CONCLUSION

It bears repeating: Board-sponsored mediation has proven invaluable for resolving the parties’ non-compensation terms disputes in this proceeding, leaving a relatively

⁵⁹ Metra Reply Brief, Exhibit I, 35.

⁶⁰ Amtrak SIB, 17.

⁶¹ Metra SIB, 17.

small number of unresolved issues on the table when mediation stopped. The present supplemental briefing confirms that it is at best premature to demand that the Board impose non-compensation contract terms, because the parties can yet resolve these terms through additional negotiation. In at least some instances, in fact, even if the parties were unable to reach terms, applicable common law would fill the gaps, rendering the Board's commitment of resources to adjudicate and prescribe unnecessary.

It is evident that there are meaningful differences in the perception of who, *if anyone*, should have the prerogative when it comes to shaping remaining contract terms. The Board could serve a very useful role in explaining whether, in light of the agency's 3-R Act mandate, it shares Amtrak's perspective, Metra's or has some other view when it comes to the renewed negotiating of terms going forward, assuming, of course, that the Board does not choose to (or cannot) prescribe contract terms upon which the parties have been unable to this point to agree. Suffice here that Metra disagrees with the terms Amtrak has demanded in its Supplemental Initial Brief. Amtrak's contract demands disproportionately (and sometimes irrationally) favor Amtrak, and they do not seek to balance the parties' competing public interest, unlike Metra's proposals. If Amtrak harbors the sense that this dispute is to be won rather than resolved, and if it cannot be disabused of that notion (or its sense that Amtrak interests are superior to Metra's), it will be difficult to reach an accord on terms that parties in other contexts invariably would resolve in balanced, arms-length negotiations.

Again, Metra asks the Board to offer its perspective and its sense of balance and fairness as it may extend to certain of the currently-disputed contract terms. Beyond that, Metra

would appeal to Amtrak to re-start Board-sponsored mediation, recognizing that, under applicable Board rules, the Board cannot order renewed mediation absent mutual consent.⁶²

Respectfully submitted,

By: /s/ *R. A. Wimbish*

Robert A. Wimbish

Thomas J. Litwiler

Thomas J. Healey

Bradon J. Smith

Fletcher & Sippel LLC

29 North Wacker Drive

Suite 800

Chicago, Illinois 60606

(312) 252-1500

**ATTORNEYS FOR COMMUTER RAIL DIVISION
OF THE REGIONAL TRANSPORTATION
AUTHORITY AND NORTHEAST ILLINOIS
REGIONAL COMMUTER RAILROAD
CORPORATION**

Dated: February 19, 2021

⁶² 49 C.F.R. § 1109.3(b).

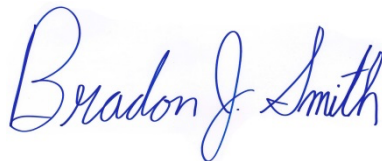
CERTIFICATE OF SERVICE

I hereby certify that on this day, February 19, 2021, in accordance with the requirements of 49 C.F.R. § 1152.60(d), a copy of the foregoing **Supplementary Reply Brief of the Commuter Rail Division of the Regional Transportation Authority and the Northeast Illinois Regional Commuter Railroad Corporation** was served via email on the following persons:

Neil K. Gilman
Hunton Andrews Kurth LLP
2200 Pennsylvania Ave., N.W.
Washington, DC 20037
ngilman@hunton.com

Perie R. Koyama
Hunton Andrews Kurth LLP
2200 Pennsylvania Ave., N.W.
Washington, DC 20037
pkoyama@hunton.com

Thomas R. Waskom
Hunton Andrews Kurth LLP
951 East Byrd St.
Richmond, VA 23219
twaskom@hunton.com



Bradon J. Smith