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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* (Docket No. FD 35743)

Dear Ms. Brown:

This responds to the Board's October 31, 2022 decision directing Illinois Central Railroad Company and Grand Trunk Railroad Company (together, "CN") and National Railroad Passenger Corporation ("Amtrak") to submit certain technical additions and corrections.

Following the numbering of the Board's ordering paragraphs:

1. New version of CN's May 27, 2022 Opening Submission Incorporating June 15, 2022 Errata

Attached are copies of the Public, Confidential, and Highly Confidential versions of the Post-Interim Decision Opening Submission of CN ("Opening Submission") incorporating the errata submitted on June 15, 2022. The Public version of the corrected Opening Submission is submitted for filing on the public docket, and the Confidential and Highly Confidential versions of the Opening Submission are filed under seal in accordance with the protective order in this proceeding. We have also corrected the table of contents.¹

¹ We note that with respect to footnote 4 on page 2 of the Post-Interim Decision Joint Verified Statement of Michael Matteucci and Scott Kuxmann ("VS (PID) Matteucci/Kuxmann") the errata erroneously listed replacement of "Exhibit B" (rather than "Exhibit 2") with "Exhibit 1." The only exhibit referenced in footnote 4 was Exhibit 2, so our revisions necessarily reflect its replacement with "Exhibit 1."

2. New versions of Amtrak Confidential and Highly Confidential Pleadings

Not applicable to CN.

3. Inadvertently Omitted Workpapers and Other Documentation

We have confirmed that CN did not inadvertently omit any workpapers or other documentation that it referenced and relied upon.² We did, however, identify three minor issues regarding references to workpapers.

In the Post-Interim Decision Joint Reply Verified Statement of Michael Matteucci and Scott Kuxmann (filed July 26, 2022):

- Footnote 34 to Table 3 on page 26 is an erroneous footnote reference and should be disregarded. The cited workpaper is not needed and does not exist. Table 3 is drawn entirely from Amtrak's schedules and the Operating Agreement, and footnotes 35 and 36 explain how the calculations within the table were made.
- Footnote 46 on page 37 should be corrected to read "See workpaper: Delay Summary Analysis, COTP-Dec. 2018 to Recent_10k ("Per 10K Train-Miles: Wolverine COTP vs. CN HRD Dec. 2018 to May 2022")."

Page 9 of the Post-Interim Decision Verified Statement of Michael R. Baranowski, included in CN's Opening Submission (filed May 27, 2022), contains an errant reference to a nonexistent footnote 10 that should be disregarded. No footnote is needed because the development of the referenced idle time minutes is covered in text and a breakdown of that figure is shown in Table FTI #2 (Summary of Delay Minutes by Delay Type).

4. Microsoft Word Versions of the Proposed Operating Agreement

As directed, we have emailed the docket team at MILSS@stb.gov Word versions of CN's redline and clean versions of the 2011 Operating Agreement showing CN's proposed changes. This includes the clean and redlined versions included with CN's Opening Submission and the clean and redlined versions included with CN's Post-Interim Decision Reply Submission ("Reply Submission"). The native format for the schedule skeletons in Appendix II is Excel rather than Word. Therefore, we have included the Excel versions of the schedule skeletons.

² Further, we have confirmed with Board staff that they received all workpapers and backup documentation that we submitted.

The redline Operating Agreement that we originally included in the Reply Submission as a pdf had changes in red and blue font representing, respectively, changes proposed in the Opening Submission and new changes proposed by in the Reply Submission. In the Word version, the colors of fonts may vary depending on the computer on which they are viewed.

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 OPENING SUBMISSION OF
ILLINOIS CENTRAL RAILROAD COMPANY
AND GRAND TRUNK WESTERN RAILROAD**

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May 27, 2022

(Refiled 11/30/2022 Incorporating Errata As Per Board)

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Tab A – Maps of CN Lines on Which Amtrak Trains Operate

Tab B –Operating Agreement

Exhibit 1 – CN Redline to 2011 Operating Agreement

Exhibit 2 – CN Clean Revised Operating Agreement

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

Tab D – Verified Statement (Post-Interim Decision) of Michael Baranowski

Tab E – Joint Verified Statement (Post-Interim Decision) of John Summerfield, Craig Zarembka, and My-Thanh Nguyen-Hung

Tab F – Verified Statement (Post-Interim Decision) of Timothy Robinson

Tab G – Verified Statement (Post-Interim Decision) of Simon Lizotte

Tab H – Verified Statement (Post-Interim Decision) of Cathy Whiteman

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

ACRONYMS

ADA	(Passenger Related)
AESS	Auto Engine Start Stop
ASOTP	All-Stations On Time Performance
BNSF	BNSF Railway Company
CAR	(Car Failure)
CBT	Contract Basic Tolerance
CCR	(Cab Car Failure)
CN	Illinois Central Railroad Company and Grand Trunk Western Railroad, U.S. Operating Subsidiaries of the Canadian National Railway Company
CON	(Hold for Connection)
CSX	CSX Transportation, Inc.
CUI	(Customes)
DAI	Delay Avoidance Incentives
DBS	(Debris)
DNC	Do Not Count
eDR	Electronic Delay Reporting
EOTP	Endpoint On Time Performance
ENG	(Locomotive Failure)
FRA	Federal Railroad Administration
FTI	Freight Train Interference (a subset of HRD) (except when referring to FTI Consulting)
G&A	General and Administrative
GTW	Grand Trunk Western Railroad
HPH	Horsepower per hour

HEP	Head End Power
HPT	Horsepower per ton
HRD	Host Responsible Delay
IC	Illinois Central Railroad Company
ICC	Interstate Commerce Commission
INJ	(Injury Delay)
ITI	(Initial Terminal Delay)
KOTP	Contractual On Time Performance
MBO	(Drawbridge Opening)

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 are identified by “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 OPENING 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 Opening Submission, presenting argument and evidence on issues remaining for resolution by the Board in this proceeding under 49 U.S.C. § 24308(a) to set the terms and compensation for the use of CN’s tracks and other facilities by National Railroad Passenger Corporation (“Amtrak”).²

INTRODUCTION AND BACKGROUND

A. CN’s Hosting of Amtrak Trains

1. The Services

Amtrak regularly operates six passenger train services on the CN lines in the United States that are shown on the maps attached as Tab A to this Opening Submission. Four Amtrak services, accounting for approximately 80% of the total route-miles hosted by CN, operate over

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.

² CN does not intend, in this Post-Interim Decision round of evidence and argument, to challenge the interim findings or guidance in the Interim Decision.

the lines of Illinois Central Railroad Company (“IC”), and the remaining two services operate over the lines of Grand Trunk Western Railroad (“GTW”). Amtrak’s regularly scheduled services over IC and GTW include the following 24 daily trains, some of which were suspended during the COVID-19 pandemic:³

- City of New Orleans (Trains 58 and 59), a long-distance service⁴ operating daily in each direction over the IC lines between Chicago, Illinois and New Orleans, Louisiana.
- Illini/Saluki (Trains 390, 391, 392, and 393), a state-supported service operating twice daily in each direction over the IC line between Chicago and Carbondale, Illinois.
- Lincoln (Trains 300, 301, 302, 303, 304, 305, 306, and 307), a state-supported service operating four times a day in each direction over the IC lines between Chicago and Joliet, Illinois. (Amtrak’s Lincoln service trains also operate over lines of other railroads between Joliet, Illinois and St. Louis, Missouri.)
- Texas Eagle (Trains 21 and 22), a long-distance service operating daily in each direction over the IC lines between Chicago and Joliet, Illinois. (Amtrak’s Texas Eagle trains also operate over lines of BNSF Railway (“BNSF”) and Union Pacific Railroad Company (“UP”) between Joliet, Illinois and San Antonio, Texas.)
- Blue Water (Trains 364 and 365), a state-supported service operating daily in each direction over the GTW lines between Battle Creek and Port Huron, Michigan. (Amtrak’s Blue Water trains also operate over lines of Norfolk Southern Railway Company (“NS”) and Michigan Department of Transportation (“MiDOT”)⁵ between Chicago, Illinois and Battle Creek, Michigan.)
- Wolverine (Trains 350, 351, 352, 353, 354, and 355), a state-supported service operating three times a day in each direction between Chicago, Illinois and Pontiac, Michigan, including a 1.2-mile segment over GTW between Gord and Baron (which are interlockings located in Battle Creek, Michigan) and a 26.3-mile segment over GTW between West Detroit and Pontiac, Michigan. (Amtrak’s Wolverine trains also operate over lines of NS, MiDOT, and Amtrak itself between Chicago and Gord and between Baron and West Detroit.)⁶

³ As of the date of this filing, Amtrak has not returned services to full schedules.

⁴ The 15 Amtrak services operating on routes of 750 miles or more in length (including the City of New Orleans and Texas Eagle services) have been designated by Amtrak as “long distance” services. All other Amtrak services (including all other Amtrak services operating on CN lines) are designated as “corridor” or “state-supported” services.

⁵ Although Amtrak reports MiDOT as the “host” of the line, Amtrak itself operates the line.

⁶ VS (PID) Mateucci/Kuxmann at Sec. I.

The CN lines used by these services are marked in green on the maps appended as Tab A to CN's Opening Submission. Key aspects of these services are presented in the following table.⁷

Table 1
Amtrak Services Hosted by IC and GTW

Service & Train Nos.	Service Endpoints	Service Route Miles	CN Segment Endpoints	CN Segment Route Miles	Number of Trains and Frequency of Operation	Number of Railroads Other than CN in Route (including Amtrak)
Blue Water 364-365	Chicago-Port Huron	318.5	Gord-Port Huron	158.7	2 daily	2
City of New Orleans 58-59	Chicago-New Orleans	933.8	Clark Street-Southport Jct.	927.8	2 daily	1
Illini/Saluki, 390-393	Chicago-Carbondale	308.9	Clark Street-Carbondale	306.7	4 daily	1
Lincoln, 300-307	Chicago-St. Louis	284.1	21st Street-Joliet	34.9	8 daily	3
Texas Eagle, 21-22	Chicago-San Antonio	1305.4	21st Street-Joliet	34.9	2 daily	4
Wolverine, 350-355	Chicago-Pontiac	304.1	Pontiac-West Detroit; Gord-Baron	26.3; 1.2	6 daily	3

CN has invested millions of dollars to maintain and improve its lines as required for freight operations for its customers. While Amtrak may benefit indirectly from some of those CN private investments, CMN does not make investments solely for the benefit

⁷ *Id.*.

of Amtrak.⁸ Consequently, the physical characteristics of CN's lines pose special challenges for CN's hosting of Amtrak's services. Most of the CN lines used by Amtrak in the United States are single-track main line with passing sidings. This means that when an Amtrak train operating on a CN single-track line meets a freight train operating in the opposite direction, one of the trains must go into a siding so that both trains may continue to their destinations. This is also true when one Amtrak train meets another Amtrak train which happens every day on IC and GTW.

Because passenger trains typically operate at much higher speeds than freight trains, when an Amtrak train is operating in the same direction as a CN freight train on a CN line, the Amtrak train may overtake the freight train and have to follow the freight train at reduced speed until a siding enables the Amtrak train to pass the freight train. And if a freight train being followed by an Amtrak train in single-track territory meets a second Amtrak train coming in the opposite direction, CN's dispatchers may have to direct a complex "three-way meet" maneuver, in which a siding is used as a passing track for the Amtrak trains, one of which must execute a reverse movement on the main line track in order to enter the siding.⁹

Operations hosting Amtrak's trains are further complicated by the fact that at 10 of its passenger stations on CN's Chicago-to-New Orleans route, Amtrak's trains stop on CN's main line while picking up and discharging passengers, and there is no passing

⁸ If CN were to make infrastructure improvements to its lines that would not be necessary but for the presence of Amtrak's trains, the cost of those improvements would constitute "incremental costs" for which CN would be entitled to reimbursement under 49 U.S.C. § 24308(a)(2)(B), but Amtrak has not agreed to fund such improvements. VS (PID) Matteucci/Kuxmann, Part I.

⁹ VS (PID) Matteucci/Kuxmann at Sec. I.

siding at these stations. These stations include three in Illinois (Kankakee, Champaign, and Effingham), one in Tennessee (Newbern/Dyersburg), five in Mississippi (Marks, Greenwood, Yazoo City, Hazlehurst, and Brookhaven), and one in Louisiana (Hammond). While the Amtrak train is stopped, no freight or passenger trains moving toward the station from either direction can move past the station.¹⁰ And if extraordinary issues arise (such as the need to attend to an injured or sick passenger), requiring the train to hold in the station and block the main line for an extended period, CN's freight operations can be seriously disrupted, as can that of other Amtrak trains.¹¹

Despite the operational challenges CN faces while hosting 24 daily Amtrak trains on CN's mostly single-track network, the performance of those trains on CN's lines, as measured by Amtrak itself, has been good. Amtrak's most recent Host Railroad Report (measuring performance through March 2022) indicates that, of the six Class I railroad hosting Amtrak services, CN had the second-lowest rate of host-responsible delay minutes per 10,000 train-miles during the past 12 months.¹² Furthermore, the City of New Orleans has had the highest All-Stations On-Time Performance ("OTP") (65.0%) and Customer OTP (79.7%) of any Amtrak long-distance service during the same 12-month period.¹³ Further, CN's performance as measured under the existing Operating Agreement has been good, and CN has regularly earned incentive payments based on on-time performance ("OTP") under the Agreement.

¹⁰ *Id.*

¹¹ *Id.*

¹² Amtrak, Host Railroad Report: Amtrak Train Performance on Host Railroads (April 2022) (data through March 2022) at 3, available at <https://www.amtrak.com/about-amtrak/reports-documents.html>.

¹³ *Id.* at 11.

2. The CN/Amtrak Operating Agreement

Effective May 1, 2011, CN entered into an operating agreement with Amtrak under 49 U.S.C. § 24308(a) (the “current Operating Agreement” or the “2011 Operating Agreement”¹⁴) to set terms and compensation under which CN would provide services and facilities, including rail lines, for the Amtrak services described above. After CN and Amtrak initially agreed that the Operating Agreement would have a term of two years, but they subsequently agreed to a series of short-term extensions through August 11, 2013 while attempting to negotiate a new Agreement. By order of the Surface Transportation Board in this proceeding,¹⁵ CN and Amtrak have continued to observe the terms of the Operating Agreement while this proceeding is pending. The Operating Agreement covers all aspects of the CN/Amtrak relationship, including schedules, standards of performance, a requirement that CN maintain its tracks to a certain level of utility, base compensation paid by Amtrak for the incremental costs to CN of hosting Amtrak services, performance payments and penalties for service above or below the base level of service as measured under the Operating Agreement, and provisions for allocating liability between the parties and for dispute resolution. The primary remaining matters in dispute between the parties in this proceeding relate to the base compensation and performance payments and penalties under the Operating Agreement.

The current Operating Agreement includes separate provisions for compensation to CN for hosting Amtrak trains on the IC lines and for hosting trains on the GTW lines. For Amtrak services on CN’s IC lines, CN is paid a base compensation prescribed in the Operating

¹⁴ The term “Operating Agreement” is used herein to refer either to the current Operating Agreement or to the new agreement to be prescribed by the Board, or to incorporate terms prescribed by the Board, in this proceeding.

¹⁵ Decision served Aug. 9, 2013.

Agreement that is intended to return the incremental costs CN incurs in providing a base level of service. On top of that base payment, CN may earn Performance Payments for high quality of service, which is measured by the OTP of Amtrak's trains in light of delays attributable to CN while on CN's network. CN may also incur Performance Penalties for untimely performance. CN understands this system to be the general industry standard, and it is consistent with compensation systems prescribed by the Board and its predecessor agency under 49 U.S.C. § 24308(a) and section 402(a) of the Rail Passenger Service Act of 1970.

On the GTW lines, on the other hand, { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }

CN and Amtrak agree that GTW's { [REDACTED] } compensation system should be discontinued, and that the system of compensation now used for Amtrak services on the IC lines (i.e., base compensation plus Performance Payments and Performance Penalties) should apply across CN's lines (although they may disagree as to the details of that compensation system). Accordingly, CN proposes adoption of the Operating Agreement set out in Tab B of this Opening Submission (in clean and markup versions) with which this statement is being filed. The CN Proposed Operating Agreement applies the compensation system now in place on the IC lines to all Amtrak service on GTW as well, with such modifications to the

existing compensation system as are shown in Exhibit 2 of Tab B and discussed in this statement and elsewhere in this Opening Submission.

B. Procedural Background

Effective May 1, 2011, Illinois Central Railroad Company (“IC”) and Grand Trunk Western Railroad Company (“GTW”) (indirect wholly-owned subsidiaries of Canadian National Railway Company and referred to together as “CN”) entered into an operating agreement with Amtrak under 49 U.S.C. § 24308(a) (the “current Operating Agreement” or the “2011 Operating Agreement”¹⁶) regarding terms and compensation for Amtrak’s use of CN’s facilities, including rail lines, for its intercity passenger rail service. CN and Amtrak initially agreed that the Operating Agreement would have a term of two years, but subsequently agreed to a series of short-term extensions through August 11, 2013 while the parties attempted to negotiate a new Agreement.

Amtrak refused to agree to a further extension beyond that date, and on July 30, 2013 filed its Application in this case, unilaterally declaring negotiations at an impasse and requesting (1) initiation of a proceeding under 49 U.S.C. § 24308(a)(2) to prescribe new terms and terms and compensation for Amtrak’s use of CN’s facilities, to be effective retroactive to August 12, 2013 (i.e., the day after expiration of the Operating Agreement); (2) establishment of a procedural schedule for that proceeding; and (3) issuance of an interim service order directing CN to continue to provide services and facilities to Amtrak under the same terms and compensation as in effect before expiration of the 2011 Operating Agreement.

¹⁶ The term “Operating Agreement” is used herein to refer either to the current Operating Agreement or to the new agreement to be prescribed by the Board, or to incorporate terms prescribed by the Board, in this proceeding.

In response to Amtrak’s Application, the Board issued a decision on August 9, 2013, initiating this proceeding and directing CN to continue to provide service and facilities on an interim basis under the terms of the existing Operating Agreement.¹⁷ The Board stated at that time that its final decision in this proceeding would rule on Amtrak’s request for retroactivity of terms and compensation. The Board subsequently adopted a procedural schedule that originally provided for opening and rebuttal submissions and for opening and reply briefs, in each case to be filed simultaneously by both parties. The schedule was extended several times, primarily in order to accommodate discovery, and was modified to provide for limited surrebuttals, which were filed simultaneously by both parties on October 30, 2017. Briefing was completed with the simultaneous filings of reply briefs on March 2, 2018.]

C. The August 9, 2019 Interim Decision

On August 9, 2019, the Board issued a decision (the “Interim Decision”), setting out issued interim findings and guidance regarding the principal issues raised and argued by the parties in their evidentiary submissions and briefs.

- On-time performance and schedule-related issues. (Interim Decision, § II.A.).

The Board found that “the OTP metric [used to determine performance-based incentive payments and penalties] would ideally include checkpoints at all stations along a route,” and the Board “encourage[d] the parties to negotiate with this interim finding in mind.” Interim Decision at 11. The Board explicitly did “not adopt the delay-based [All-Stations OTP] system proposed by Amtrak at this time,” but it “view[ed] as reasonable the addition of checkpoints at

¹⁷ Accordingly, CN and Amtrak have continued to observe the 2011 Operating Agreement, notwithstanding its expiration under its own terms, and have entered into several amendments to that Agreement while awaiting prescription of a new Agreement by the Board in this proceeding.

each station along a relevant route (generally consistent with the alternative proposed by Amtrak), subject to the other interim findings and guidance in this decision.” *Id.* at 11 n.26. The Board also recognized that “an OTP metric could measure the percentage of passengers that arrive at their destination stations on time, rather than the percentage of trains that arrive at each station on time” and that such a metric “could be consistent with the interim findings and guidance.” *Id.* at 11 n.25. Issues regarding “tolerance” (i.e., the number of minutes after a train’s scheduled arrival time within which a train could arrive at a checkpoint and still be counted as “on time” for purposes of determining OTP) were also left unresolved.

The Board recognized that Amtrak’s schedules 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.” *Id.* at 11. 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.*

- The applicable incentive and penalty system. (Interim Decision, § II.B.).

The Board found 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.” Interim Decision at 14. The Board issued guidance on three aspects of that system: (1) there is “merit to an 80% OTP standard to receive incentive payments;” (2) “the parties should incorporate the degree of lateness into their penalty calculation in some manner, perhaps through a degree-of-lateness multiplier in the penalty provision, or in another manner to which the parties agree” and (3) that “the parties should eliminate the current neutral performance zone where no incentive or penalty is assessed.” *Id.*

- The applicable “lookback” and “reopener” provisions. (Interim Decision, § II.C.).

The Board stated 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.” Interim Decision at 16. The Board also “encourage[d] the parties to include an effective reopener provision in the new operating agreement that w[ould] result in concrete action in order to resolve potential future performance disputes and to prevent sustained poor performance,” *id.* at 17, but also noted “the potential for a completely separate mechanism under [the Passenger Rail Investment and Improvement Act of 2008 (‘PRIIA’)] by which Amtrak could seek relief for sustained periods of poor performance.” *Id.*

- The extent of “incremental costs” under 49 U.S.C. § 24308(a)(2)(B). (Interim Decision, § II.D.).

The Board found that “incremental costs are those costs that CN has actually incurred, and that CN would not have incurred ‘but for’ the presence of Amtrak” and it “reject[ed] Amtrak’s contention that incremental costs are limited to ‘avoidable costs in the short run.’” Interim Decision at 22. The Board did not accept or reject the specific freight delay cost elements proposed by CN. It disagreed with Amtrak that the incremental cost data submitted by CN during the proceeding “should be rejected as a matter of law.” *Id.* at 22-23.

It found that “the ‘but for’ definition of incremental costs means that the new operating agreement could include such costs. However, as a practical matter, whether any proposed costs are included or excluded would depend on whether those costs are specific, verifiable, and quantifiable.” *Id.* The Board found that “freight delay costs need not be treated as a monolithic category,” but to be compensable “CN would have to show that it has actually incurred delays, that those delays were caused by Amtrak, and that it incurred actual costs as a result of the delays

caused by Amtrak.” *Id.* at 23. In a proceeding before the Board, “the burden would be on CN to show that those specific costs could be included in a reasonable manner, consistent with the “but for” standard and the need for specificity, verifiability, and quantifiability.” *Id.* The Board expected the parties to “use the interim findings and guidance provided here to negotiate the specific incremental costs that will be included in their new operating agreement.” *Id.*

- Attribution of delays and use of relief items. (Interim Decision, § II.E(1).).

The Board “encourage[d] 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.” Interim Decision at 24. The Board also “encourage[d] the parties to review their dispute resolution process regarding delay coding and to streamline that process” because it understood “that the conductor delay reports may not provide definitive proof of the cause of Amtrak delays.” *Id.* However, the Board found that “CN has neither adequately explained how a ‘root cause’ approach would work in practice nor shown that such an approach would not be too burdensome and time-consuming to apply.” *Id.*

- Calculation and Application of the “Recovery Time Base” (“RTB”) (Interim Decision, § II.E(2).).

The Board declined to adopt Amtrak’s proposal that recovery time base (“RTB”) be established based on an even split of recovery time. Interim Decision at 25. The Board stated instead that any allocation of RTB “should reflect the real-world operating conditions on a segment and each party’s susceptibility to events resulting in a delay to Amtrak trains.” *Id.* Further, the Board declined to adopt Amtrak’s proposals that additional categories of delay be made subject to the RTB or that the RTB be calculated cumulatively from origin, instead leaving those issues to the parties to negotiate. *Id.*

Additionally, the Board “[did] not find it objectionable that CN can utilize unused portions of Amtrak’s RTB, provided that an Amtrak train otherwise arrives on time.” *Id.* The Board encouraged the parties to negotiate regarding the categories of delays subject to the RTB, and whether the RTB should be calculated cumulatively from the route’s origin, with the ultimate goal being to “establish a system where both parties are incentivized to move trains that are running behind schedule toward being on time.” *Id.* at 26. CN would maintain the status quo regarding the treatment of unused portions of Amtrak’s RTB, the categories of delay subject to the RTB, and the calculation of RTB without cumulating the RTB from the route’s origin.

- Operating Agreement term and confidentiality. (Interim Decision, § II.F(1).).

The Board expressed concerns about each party’s proposed term for the Operating Agreement. It agreed with Amtrak that the three-year term proposed by CN may be too short, but it also agreed with CN that the ten-year term proposed by Amtrak may be too long. It found that a seven-year agreement term would be reasonable. Interim Decision at 27. In addition, it “encourages the parties to include an evergreen renewal clause in their operating agreement, as CN proposes.” *Id.* at 27.

The Board provided freedom for the parties to negotiate the confidentiality of terms of the operating agreement, but noted that “the Board would make public any specific terms it would need to set in a later decision, as the Board disfavors confidential decision making unless absolutely necessary.” *Id.*

- Additional “discrete contract implementation terms” briefed by the parties on which the STB did not issue any findings or guidance. (See, e.g., Interim Decision at 27 n.44).

The Board declined to address “a number of . . . additional discrete contract implementation terms raised by the parties,” such as retroactivity of elements of the Operating

Agreement, removal of certain references to “incremental costs,” and incorporation of the terms of two side letter agreements into the Operating Agreement.

The Interim Decision referred CN and Amtrak to Board-sponsored mediation under 49 C.F.R. § 1109.2(a)(2), to facilitate negotiation aimed at resolution of the issues disputed between them. The Interim Decision directed the parties to report to the Board if they were able to come to a full agreement and to request that it terminate this proceeding. If the parties were unable to reach a full agreement, the Interim Decision directed them to notify the Board of the issues resolved in mediation and to request “a procedural schedule to present focused arguments on any residual issues,” which it expected “would be limited in number and scope.”¹⁸

D. Mediation

As directed by the Board in its Interim Decision, the parties submitted to mediation. The Board contracted with the Federal Mediation and Conciliation Service to name a lead mediator, and then-Chairman Begeman appointed two members of the Board’s staff to serve as members of the mediation team.

Although 49 C.F.R. § 1109(c) ordinarily limits Board-sponsored mediation to a 30-day period, mediation regarding the issues in this case was extended to January 20, 2020 by joint request of the parties. Representatives of CN and Amtrak met with the mediators several times between September 24, 2019 and January 20, 2020. At the end of that period, however, the parties had still not reached agreement on any of the issues dividing them. Accordingly, the

¹⁸ Interim Decision at 29.

Board-appointed mediators informed the Board by letter dated January 21, 2020 that the mediation had come to an end without arriving at any agreement.¹⁹

E. The Present Submission

In response to a joint proposal by CN and Amtrak, the Board served a decision March 3, 2022 adopting a procedural schedule for submission of evidence and argument on the “residual issues” in this proceeding.²⁰ Regrettably, because of the parties’ inability to reach any agreement on any of the outstanding issues, all issues identified as unresolved in the Interim Decision remain unresolved and are appropriate subjects for evidence and argument here.²¹

Relying on the guidance provided in the Interim Decision, CN submits evidence and arguments on the issues addressed specifically in that decision, as well as on various “discrete contract implementation terms” (Interim Decision at 27) which the Interim Decision did not specifically address.

In Part I of this submission, we present CN’s proposals for calculating on-time performance (“OTP”) of Amtrak trains hosted on CN lines, and for use of OTP as basis for calculating incentive payments for quality of service to Amtrak and penalties for unsatisfactory performance (as provided in both cases by 49 U.S.C. § 24308(a)) consistent with the guidance

¹⁹ Since that time, however, in accordance with the Federal Railroad Administration’s (“FRA”) Metrics and Minimum Standards for Intercity Passenger Rail Service, 85 Fed. Reg. 72,971, 72,974-75 (Nov. 16, 2020) (“Metrics and Standards”), CN and Amtrak have agreed to certify that 20 of the 26 regularly scheduled daily Amtrak trains that operate over CN’s lines in the United States are aligned with the customer on-time performance metric prescribed by the Metrics and Standards; see Letter from M. Matteucci to J. Blair at 1 (April 7, 2021) (VS (PID) Matteucci/Kuxmann, Ex. 11.

²⁰ In response to Amtrak’s request for an extension of the procedural schedule, which was supported by CN, the procedural schedule was modified by a stamp decision served by the Board on April 18, 2022.

²¹ It would not be appropriate in this round of submissions to challenge the interim findings or guidance in the Interim Decision.

given in the Interim Decision. These proposals include a “lookback” provision to ensure that CN receives at least its incremental costs of hosting Amtrak service, as well as an effective “reopener” provision to address persistently poor performance, and for adjustments (including provisions for future adjustments) to Amtrak train schedules so that, as the Board stated in its Interim Decision, CN has “a meaningful opportunity to meet its performance obligations” (Interim Decision at 11). In addition, this Part discusses specific provisions for use in determining whether a train is counted as “on time” at a station, so that CN is not penalized for delays it cannot reasonably avoid or control, including proposals regarding attribution of delays and for “relief items,”²² consistent with the Board’s encouragement of 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” (Interim Decision at 24). In connection with those provisions, Part I also discusses the determination of the “recovery time base” or “RTB”²³ which would limit the effect of certain relief items, and CN’s proposals for revisions to the parties’ “dispute resolution process regarding delay coding [in order] to streamline that process” and make it more effective (*id.*), and regarding resolution of other issues relating to billing for compensation due to CN.

²² “Relief items” are provisions of the Operating Agreement identifying delays to Amtrak trains that the parties have agreed should not be attributed to CN and for which adjustments should be made in determining whether the trains are counted as “on time” for purposes of calculating OTP.

²³ “Recovery time” is an amount of time built into train schedules to provide a cushion to allow for reasonably foreseeable contingencies and delays that are an inevitable part of practical railroading, so that the train’s schedule can be met with regularity. The “recovery time base” is a threshold number of minutes that must be exceeded by specified delays before CN may receive relief for those delays. It is included as a limit on relief to take account of the fact that a certain amount of the recovery time in the schedule is already provided for delays not reasonably attributable to CN.

Part II presents CN's proposals for quantifying delays to its freight trains that would not occur but for its hosting Amtrak trains, and for calculating specific, verifiable incremental costs of labor, fuel, and equipment costs that CN incurs as a result of those delays, and for compensating CN for those incremental costs, as CN is entitled under 49 U.S.C. § 24308(a)(2)(B), as interpreted by the Board and its predecessor agency, the Interstate Commerce Commission ("ICC").

In Part III, we discuss CN's proposals for miscellaneous contract provisions, including the renewal term of the new Operating Agreement, confidentiality obligations regarding the new Agreement, and provisions { [REDACTED] [REDACTED] [REDACTED] }.

In addition, as required by the Board's initial scheduling order,²⁴ this submission includes an Appendix containing a markup of the 2011 Operating Agreement (including all amendments to date), showing the specific changes that CN proposes to the text of that agreement.

In support of the arguments made herein, CN submits the following testimony:

- Joint Post-Interim Decision Verified Statement of Michael Matteucci and Scott Kuxmann ("VS (PID) Matteucci/Kuxmann") (discussing the principal changes CN proposes to make in its existing Operating Agreement; providing general description of methodology used by CN to identify and quantify its incremental freight train delay costs incurred as a result of Amtrak's operations; discussing proposed provisions of new Operating Agreement which CN proposes to replace the 2011 Operating Agreement)
- Post-Interim Decision Verified Statement of Michael Baranowski ("VS (PID) Baranowski") (describing in detail and applying methodology used by CN to identify and quantify its incremental freight train delay costs)
- Joint Verified Statement (Post-Interim Decision) of John Summerfield, Craig Zarembka, and My-Thanh Nguyen-Hung ("VS (PID) Summerfield/Zarembka/Nguyen-Hung") (description of CN's Service Reliability System ('SRS') used to identify freight train delays)

²⁴ Decision served Mar. 3, 2022 at 2.

- Verified Statement (Post-Interim Decision) of Timothy Robinson (“VS (PID) Robinson”) (describing study performed to enable reliable estimation of incremental fuel costs incurred when Amtrak causes freight trains to stop and re-start)
- Verified Statement (Post-Interim Decision) of Simon Lizotte (“VS (PID) Lizotte”) (describing Wi-Tronix data used by and addressing incremental fuel costs)
- Post-Interim Decision Verified Statement of Catherine Whiteman (“VS (PID) Whiteman”) (describing payroll data used by CN to identify and quantify incremental labor costs”)
- Post-Interim Decision Verified Statement of Steven Peterson (“VS (PID) Peterson”)

**PART I: PERFORMANCE MEASUREMENT AND INCENTIVES/
PENALTIES (Interim Decision, Sec. II.A-C, E-F)**

As discussed in more detail below, CN is proposing revisions to the existing incentive/penalty system that incorporate all aspects of the Board’s Interim Decision, and provides a uniform, reasonable and easily administered system for measuring CN’s contribution to Amtrak performance. CN’s proposal is based on the essential system that has been used by the parties for many years, making it familiar and easy to administer, but it adopts key features advocated by Amtrak and prescribed by the Board in its interim decision.²⁵ CN’s proposal for measuring OTP and calculating incentives has four major features (1) it calculates OTP based performance at all-stations on CN’s portion of the route, with each station weighted by ridership; (2) it aligns the calculation of incentives and penalties with the parties interests in moving Amtrak trains expeditiously through CN’s network; (3) it maintains the lookback provision,

²⁵ As the various elements of the operating agreement are closely interrelated, and as recognized by the parties and the Board in providing for the filing of a revised operating agreement redline on reply, *see* Jt. Mot. to Establish Procedural Schedule at 3 (filed Jan. 25, 2022; Decision served Mar. 2, 2022, CN must necessarily reserve the right to modify its proposals in light of alternative proposals and changes.

which ensures that, notwithstanding performance penalties assessed against it, CN will recover at least the incremental costs of hosting Amtrak, and adds an effective reopening provision, and (4) it further focuses delay attribution and provision of relief items on the party in the best position to avoid or control delays, while streamlining the process for incorporating relevant information and resolving disputes. Further, in keeping with the position of both parties, the revised provisions would apply equally to trains that operate on the GTW and IC systems.

A. In Accordance with the Board’s Guidance and FRA’s Newly Adopted PRIIA Performance Standard for Amtrak, CN’s Proposal Measures On-Time Performance at All Stations, with Stations Weighted by Number of Disembarking Passengers.

The Board found that “the OTP metric would ideally include checkpoints at all stations along a route.” Interim Decision at 11. The Board also recognized that “an OTP metric could measure the percentage of passengers that arrive at their destination stations on time, rather than the percentage of trains that arrive at each station on time,” and that such a metric “could be consistent with the interim findings and guidance.” *Id.* at 11 n.25.

Following the Interim Decision, FRA, adopted Customer OTP as the PRIIA standard for Amtrak train performance. Customer OTP measures on-time performance for individual trains at each station (using a 15-minute tolerance), and weighs stations by the number of detraining passengers in order to calculate the train’s overall performance. *See Metrics and Minimum Standards for Intercity Passenger Rail Service*, 85 Fed. Reg. 72,971, 72,974-75 (Nov. 16, 2020).

Consistent with the Board’s Interim Decision and the new PRIIA Customer OTP standard, CN’s proposal for the OTP metric includes checkpoints at all stations on CN’s portion of each route. CN’s proposal for the OTP metric would also weight the checkpoint by the ridership of each station, in accordance with the Board’s recognition that such weighting would “allow for greater host railroad operational flexibility and create an incentive structure more

closely tied to the service delivery to the end consumer, the passenger.” Interim Decision at 11 n.25.

Some adjustment to checkpoints and related weighting is required, however, because while Customer OTP and other measures All Station OTP apply to the full routes of individual Amtrak trains, which often includes multiple hosts, the Operating Agreement is focused on the performance of Amtrak trains over the portion of Amtrak’s route that is hosted solely by CN. In order to include complete CN segments where Amtrak does not depart CN’s lines at a station, we have added checkpoints at the ends of such segments. This change is important because with the exception of the southbound Illini/Saluki trains and the eastbound Wolverine and Blue Water trains, the endpoint of the CN segment is not a station. Where the CN portion of the route includes no station at all, such as for the two trains in the Texas Eagle service (trains 21 and 22) and for train 301 on the Lincoln service, the endpoint of the CN segment would serve as the only checkpoint (i.e., run time would be measured from the time the train enters CN’s lines to the endpoint check point). For other services that do not terminate on CN at a station, the additional check points would be used to measure performance between the last station on CN and the endpoint of CN’s segment. Checkpoints are shown in the schedule skeletons included in Appendix II of the CN Proposed Operating Agreement attached (in redline and clean versions) as Tab B to this Opening Submission.

Checkpoint weights would be calculated by dividing the number of riders on a given train that disembark at a given station per year by the total number of riders that disembark at all checkpoints. Weighting stations in accordance with the relative number of disembarking passengers is consistent with the weighting of stations under FRA’s Customer OTP metric. Since FRA’s adoption of the Customer OTP metric, Amtrak has been providing the necessary

information to CN on a monthly basis. Weights at the non-station checkpoints (i.e., those at the end of CN's route) would be calculated using the number of riders at the next station stop in the train's schedule. For example, the weight at the Clark Street checkpoint, which is the end of the CN route for northbound Illini/Saluki and City of New Orleans trains, would be calculated using the number of riders disembarking at Chicago, which is the next scheduled station stop for those trains.²⁶ Of course for the few trains with only a single checkpoint in CN (Texas Eagle Train Nos. 21, 22 and Lincoln service Train No. 301), no weighting is necessary. CN's portion of the Amtrak routes on these services is short and represents a very small percentage of the overall route .

Checkpoint weights would be periodically recalculated. CN proposes that such recalculation be done annually, effective January 1, based on Amtrak's previous fiscal year (which ends September 30). Annual recalculation strikes a good balance between reflecting the relative importance of stations to riders and the administrative time and effort required to recalculate new weights, modify the Operating Agreement, and adjust the calculation of incentives and penalties to reflect any changes. It would also provide ample time for Amtrak to collect and share with CN the ridership data necessary to calculate station weights and for the parties to validate the calculations. CN also suggests that the parties consider avoiding the use of non-representative periods in establishing weights for future application. The COVID period

²⁶ Weighting must be done on a train-specific basis (rather than on a service specific basis or even on a directionally service specific basis) in order to best reflect passenger experience. As indicated by the weights that were calculated using 2019 data, there can be significant disparities in relatively ridership at a station depending on the direction and time of day of a train. For example, { } and { } of the riders on southbound Illini/Saluki trains disembark at Champaign, while only { } and { } of northbound riders do so. Weighting by specific train is consistent with PRIIA's focus on individual trains and their schedules for purposes of measuring Amtrak performance and for potential STB investigation. See 49 U.S.C. § 24308(f).

beginning in 2020, when Amtrak entirely ceased operating some trains and curtailed the operation of others, is an example of such a period. Accordingly, subject to further discussion with Amtrak or direction for the Board, CN has weighted each checkpoint based on fiscal year 2019 data (the last year pre-COVID 19 pandemic) provided by Amtrak. Those weights are shown in the schedule skeletons included in Appendix II of the CN CN Proposed Operating Agreement (attached at Tab B, Exhibit 1 (redline) and Exhibit 2 (clean)).

B. CN's Proposes Revisions to the Incentives and Penalties Provisions of the Operating Agreement in Accordance with the Board's Interim Decision.

The Board's Interim Decision addressed three specific aspects of the incentive/penalty calculation: (1) CN should earn incentives for OTP above 80%, (2) the current neutral zone should be eliminated, and (3) there should be a degree of lateness multiplier on the penalty calculation in order to provide additional incentives to avoid delays to an already delayed train. Interim Decision at 14-15. CN's proposal incorporates each aspect.

1. CN's Proposal Requires an 80% OTP Standard to Receive Incentive Payments And Eliminates the Current Neutral Zone

Under the current agreement, CN earns incentive penalties if more than 80% of the trips of train are on-time at a given checkpoint, and incurs penalties if less than 70% of the trips are on time, creating a "neutral zone" for performance between 70% and 80% where CN neither earns incentives nor incurs penalties. Citing PRIIA, the Board found that there "is merit to an 80% OTP standard to receive incentive payments." Interim Decision at 14. The Board also specifically rejected Amtrak's regression-based proposal, finding it "complicated" and containing unjustified assumptions about relative levels of delay. Interim Decision at 14. In accordance with the Board's conclusion that an 80% OTP standard is reasonable, CN's proposal incorporates this aspect of the Board's decision.

In finding that 80% was a reasonable standard for CN to earn incentives, the Board also suggested “the parties should eliminate the current neutral performance zone.” Interim Decision at 14. CN’s proposal incorporates this finding, keeping 80% as the threshold to earn incentives and eliminating the neutral zone by extending the negative performance rate to the 70.0% - 79.9% range. Consistent with the current agreement, the performance rate for incentives mirrors the performance rate for penalties for performance above 80% and below 70%.

2. CN’s Proposal Incorporates a Degree of Lateness Multiplier

CN’s proposal adopts the lateness multiplier advocated by Amtrak, see Rebuttal VS Vilter/Maga, Exhibit 28 at App. V-11 and suggested by the Board, see Interim Decision at 14 (“the parties should incorporate a degree of lateness into their penalty calculation in some manner, perhaps through a degree-of-lateness multiplier in the penalty provision”). CN would also apply and calculate the lateness multiplier the same way Amtrak proposes.

CN’s proposal also includes a timeliness multiplier that would increase the incentive payments for trains are regularly on time with low minutes of delay. See CN Proposed Operating Agreement, App. V, § B. Amtrak’s filings make clear that it wants to provide incentives to CN to avoid delays to all trains, not just those that are already late. Amtrak Opening at 3 (Amtrak’s proposal designed to “motivate CN to minimize delays to Amtrak trains”). Amtrak believes that the current system “does not reward CN for minimizing” delays “but only for doing ‘good enough’ to arrive at a checkpoint within tolerance.” Amtrak Opening at 8. Likewise, the Board found that a lateness multiplier would provide an incentive to CN to “help deliver a late train more expeditiously and not allow the duration of the delay to increase.” Interim Decision at 14. The same logic applies to CN’s timeliness multiplier, which is intended

to provide CN an incentive to deliver an on-time train expeditiously, and not allow any delay which could occur without making the train late.

CN's timeliness multiplier is intended to provide that incentive and motivation to CN. If CN is able to reduce delays to all trains that operate in a given month, it will receive an extra reward in the form of a multiplier to its regular incentive payment. Notably, CN would have to work hard to achieve a timeliness multiplier, as the average train over the course of a month would have to arrive significantly under tolerance in order for the bonus to apply. One or two significantly late trains could cause CN to lose out, so regardless of the status of the train (i.e., late or on-time), CN has an incentive to avoid as many delays as possible.

C. CN's Proposal Maintains the Lookback Provision and Adds an Effective Reopener Provision (Interim Decision at II.C.).

CN's current Operating Agreement with Amtrak contains a "lookback" provision that limits the amount of performance penalties assessed against CN during a given period to ensure that CN receives at least its contractually agreed-upon incremental costs during that period.²⁷ In its Interim Decision, the Board approved the use of a lookback provision, noting that an Operating 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,"²⁸ which would turn CN's entitlement to incremental costs upside down.²⁹

²⁷ 2011 Operating Agreement, App. V, § D, para. 3.

²⁸ Interim Decision at 16.

²⁹ The "incremental costs" provision of 49 U.S.C. § 24308(a) (and its predecessor, section 402(a) of the Rail Passenger Service Act ("RPSA")) has consistently been understood by Congress, the Board, its predecessor the Interstate Commerce Commission, and Amtrak itself as affirming that Amtrak is obligated to pay hosts, at a minimum, their full incremental costs. See CN Opening Brief at 43-49 and authorities cited therein; CN Reply Brief at 12-15. The legislative history of RPSA makes clear that "incremental costs," understood as "all costs which

The lookback provision is so called because it requires the parties to “look back” at the amount of incentive payments (“Performance Payments”) and penalties for unsatisfactory OTP (“Performance Penalties”) earned by or charged against CN during the preceding 12 calendar months in order to determine the amount of net penalties that may be charged against CN for performance in any given month. Under this provision, if penalties incurred for inadequate OTP during a particular calendar month { [REDACTED] } exceed the incentive payments earned for service to trains { [REDACTED] } during the month,³⁰ then the net penalty is to be deducted from the Base Charges (representing incremental costs, as determined under the Operating Agreement) due to CN for hosting { [REDACTED] } during the month, but the total deductions for that month and the preceding 12 calendar months may not exceed the total of positive net incentive payments earned by CN for { [REDACTED] } during the same 12-month period.³¹

CN proposes that the new Operating Agreement retain this “lookback” provision and extend it to the Wolverine and Blue Water trains, consistent with the extension to the GTW lines of the compensation system used for Amtrak trains operating on the IC lines, so that CN will be reimbursed for at least those incremental costs identified in the Agreement.³²

But while the Board in its Interim Decision endorsed the use of a lookback provision, it also expressed its concern that if CN were guaranteed compensation for its incremental costs

would not be incurred if no passenger service were performed for AMTRAK,” are the “floor” of host compensation. CN Opening Brief at 45-47 (citing H.R. Rep. No. 93-415, at 11 (1973)).

³⁰ { [REDACTED] }

³¹ 2011 Operating Agreement, Appendix V, Section D, para. 3.

³² CN Proposed Operating Agreement, App. V, § D.

during a lengthy period of unsatisfactory performance, without any potential penalty beyond the forfeiture of incentive payments, there might be no effective incentive for CN to take measures to improve that performance. Accordingly, it “encourage[d] the parties to include an effective reopener provision in the new operating agreement that will result in concrete action in order to resolve potential future performance disputes and to prevent sustained poor performance.”³³

CN had explained in its previous filings that such a concern as the Board had expressed was largely hypothetical, given the operating performance history of Amtrak trains under CN’s existing Operating Agreement.³⁴ Nevertheless, CN also anticipated the Board’s concern by proposing that the new Operating Agreement include a reopener provision, providing for consultation and the development of remedial measures to address any sustained period of poor OTP under the Agreement. Consistent with the guidance in the Board’s Interim Decision guidance, CN is now proposing an even more robust reopener provision than the one it proposed in the previous round.³⁵ In considering the reopener provision, a few things should be kept in mind. First, under a properly structured agreement, resort to the reopener should be rare. Sustained poor performance under the Operating Agreement has not been a problem for CN; during each year in which we have been administering that Agreement, CN has earned positive net Performance Payments in { [REDACTED] } under the Agreement.³⁶ Second, the provision is intended to apply to *sustained* periods of poor performance. Given the burdens

³³ Interim Decision at 17.

³⁴ These concern also overlook the likelihood that CN’s base compensation under the Operating Agreement has not covered its incremental costs, and that even if that compensation were enhanced to cover the labor, fuel, and equipment costs detailed in CN’s previous filings (and in this submission), CN would remain uncompensated for many incremental costs that cannot be sufficiently identified, verified, and quantified.

³⁵ See CN Proposed Operating Agreement, App. V, Sec. G.

³⁶ VS (PID) Matteucci/Kuxmann, Part II.C.

imposed on the parties, invoking the reopener provision under a shorter time period would be burdensome and unnecessary. Six months is an appropriate period. Third, to be effective, the reopener provision must first allow the parties to jointly investigate the causes of and solutions to the problem causing the deficient performance. There is no sense requiring one party or the other to take “concrete action” before the scope of the problem has been identified.³⁷

CN’s new reopener proposal reflects these points, and applies the Board’s guidance. It first calls for consultation between the parties, but it also lays out specific steps they must take, by specific deadlines, to identify and remedy the causes of poor performance, and it ultimately provides that if the parties do not agree on concrete remedial measures, { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }.³⁸ The steps required or authorized permitted under CN’s new reopener provision are detailed below.

First, within 60 days after any six-month period in which penalty payments exceed incentive payments, either party may serve a written notice on the other, after which the parties would have 10 days to name a representative to lead a “Remedial Process,” which would begin

³⁷ For example, there is no unilateral “concrete action” that CN could take right now to solve the loss of shunt issue associate with Amtrak trains. CN has suggested a number of ways Amtrak could resolve the issue and increase the performance of the Illini/Saluki service, including adjusting its schedules or using Superliner equipment, but a reopener that required CN, and CN alone, to take “concrete action” to fix the issue would be useless.

³⁸ The arbitrators’ authority to modify the Agreement is limited by a prohibition on altering Section D of Appendix V of the Agreement (relating to calculation and payment of Net Performance Charges) and is subject to CN’s statutory entitlement to compensation for any incremental costs it is required to bear in developing or implementing remedial measures.

with an investigation of the causes of the consistently poor performance.³⁹ This investigation would extend to:

(i) CN's dispatching; (ii) Amtrak's operation of its trains; (iii) rail line infrastructure and capacity issues; (iv) Amtrak's equipment; (v) Amtrak train schedules; (vi) freight schedules; (vii) structural issues with the incentive or penalty provisions of Appendix V [of the Agreement], (viii) issues with the levels of performance payments and penalties provided under Appendix V; (ix) other issues with the terms of the Operating Agreement; or (x) other causes.^{40]}

The investigation would thus consider a wide range of possible causes (and so, implicitly, of possible solutions) for persistently poor performance, and would not start with the presumption that any such poor performance must necessarily be CN's fault, or that solutions may simply take the form of punishing CN more effectively for neglect of its responsibilities. It could, for example, look seriously into possibilities that Amtrak train schedules contain insufficient run time (as CN has argued regarding the Illini/Saluki services) or that the incompatibility of Amtrak equipment with CN's signal system (although conforming to industry standards) may prevent signal shunts from closing properly.

Within 45 days of the initial notice, the parties would be required to meet to discuss the causes they had identified for unsatisfactory performance. Twenty days after that meeting, the parties would be required to "exchange a list of concrete steps intended to reasonably address the specific issues identified as causing Deficient Performance."⁴¹ They would then meet to discuss implementation of steps to address the poor performance and, if applicable, estimate the cost of those steps. To the extent that enhancement of CN's rail infrastructure or equipment would be required, Amtrak would have to agree that CN be compensated for the cost of the enhancement,

³⁹ CN Proposed Operating Agreement, App. V. Sec. G.1.

⁴⁰ CN Proposed Operating Agreement, App. V., Sec. G.1.

⁴¹ CN Proposed Operating Agreement, App. V., Sec. G.2.

Thus, CN's proposed reopener does not simply call for the parties to confer, though that is the starting point of the Remedial Process it provides for. It requires a serious investigation into the possible causes of poor performance, dictates specific matters to be considered and specific deadlines, and requires supervision by senior management. It provides that, if the parties cannot agree on voluntary measures to remedy sub-standard performance, { [REDACTED] [REDACTED] [REDACTED] }. This is a provision for a robust process intended to "result in concrete action in order to resolve potential future performance disputes and to prevent sustained poor performance." The Board should adopt it along with the lookback.

D. CN's Proposal Regarding Performance Measurement, Attribution of Delays, and Use of Relief Items Follows the Board's Interim Decision (Interim Decision at II.E.)

1. Although FRA adopted a 15 minute basic tolerance for its Customer OTP metric, CN would reduce maximum tolerances to { [REDACTED] }, and accept Amtrak's proposed { [REDACTED] } tolerance for other services.

In order to measure on-time performance, whether for general reporting purposes or for OTP under the Operating Agreement, one must decide how to define what is "on time." "Tolerance" is a key aspect of this definition. It is an established number of minutes added to scheduled arrival time to establish the time by which a train must arrive in order to be treated as "on time." In establishing its Customer OTP PRIIA performance standard in November 2020, for example, FRA adopted a 15-minute tolerance applicable to each checkpoint.⁴²

⁴² See 49 C.F.R. § 273.5(a)(1) ("The customer on-time performance metric is 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, reported by train and by route.").

For purposes of the Operating Agreement, some reduction in tolerance is appropriate because under the agreement tolerance it is not being used to strictly define “on-time arrival,” but rather to measure CN performance, a measurement that includes potential relief for some delays. In addition, under the existing operating agreement tolerance could be customized for the length and nature of movements, and the permissible run time. Accordingly, the current Operating Agreement provides a specific number of basic tolerance minutes for each train, which ranges from { [REDACTED] }⁴³

Earlier in this proceeding, Amtrak proposed replacing the agreed-upon tolerances with a flat { [REDACTED] } at each checkpoint, in order to “simplify the Checkpoint calculations.”⁴⁴ It further sought to justify its arbitrary one-size-fits-all choice by noting that it may be thought of as allocating { [REDACTED] } to CN and { [REDACTED] } to others.⁴⁵

Amtrak has presented no evidence to demonstrate that the differing tolerances found in the current Agreement for different checkpoints create a problem, or to support its proposal { [REDACTED] } The roles of hosts and Amtrak for Amtrak train operations are not the same, and the proportion of delays historically attributed to each are not proportionate, as Amtrak’s { [REDACTED] } would suggest. Hosts are treated as responsible for a much larger portion of delays – a fact Amtrak emphasizes in other contexts. Moreover, as Matteucci/Kuxmann point out, Amtrak’s

⁴³ See 2011 Operating Agreement, App. V, Table 1 (“Contract Basic Tolerance”).

⁴⁴ Vilter/Maga RVS at 40.

⁴⁵ *Id.* at 40 n.104.

assignment of even greater responsibility for delays to CN rather than Amtrak would argue for assigning a greater proportion of tolerance, not less, to CN.

Nevertheless, in an effort to compromise, CN agrees with Amtrak that { [REDACTED] } of tolerance would be appropriate for relatively short segments { [REDACTED] } [REDACTED] }. For longer movements, however (on the City of New Orleans, Illini/Saluki, and Blue Water trains), especially in light of the recent adoption of a 15-minute tolerance by FRA for Customer OTP, there is no basis for reducing the present agreed upon tolerance below { [REDACTED] } { [REDACTED] } [REDACTED] [REDACTED] }

In addition to the basic tolerance provided by the current Operating Agreement for each train, the Agreement provides { [REDACTED] }

[REDACTED] .⁴⁶

[REDACTED]

[REDACTED]

[REDACTED] }⁴⁷ While Amtrak's OTH delay code

arguably addresses a situation where a train takes longer to reach a checkpoint because it is

operating with additional equipment,⁴⁸ the relief item Amtrak has proposed for delays coded as

⁴⁶ 2011 Operating Agreement, App. V, § A.1.f. The number of locomotives and cars in the Basic Consist is set forth in Table 3 of Appendix V, and the numbers of minutes of additional tolerance for each additional unit of equipment is set forth in Table 4 of Appendix V.

⁴⁷ VS (PID) Matteucci/Kuxmann at Sec. II.D.1.

⁴⁸ See VS (PID) Matteucci/Kuxmann, Ex. 1 (selections from Amtrak Service Standards for Train Service & On-Board Service Employees, Manual No. 6) at 7-60 (explaining that { [REDACTED]

[REDACTED] }

OTH does not make redundant the additional tolerance { [REDACTED] }
[REDACTED] } The current provision affording { [REDACTED] }
[REDACTED] }, indicating that they did not regard the delays it addresses as adequately provided for by the recovery time built into the train schedules. To push such delays into an item, such as Amtrak proposes, subject to the RTB and covering delays coded or that should be coded as OTH, would be to deprive CN of bargained-for protection against being penalized on OTP because of Amtrak's decision { [REDACTED] }

CN proposes to maintain this provision, extend it to trains operating on GTW (in accordance with the position of both parties that the IC compensation system should apply to GTW's lines), and simplify it, so as to require { [REDACTED] }

[REDACTED]
[REDACTED] }⁴⁹

2. CN's proposed relief items are based on which party is in a position to avoid or control the delay and are necessary to fill in gaps and clarify delay coding.

Successive versions of the Operating Agreements governing Amtrak's operations on CN's lines have included relief items identifying delays that the parties have recognized as falling outside the host's ability to avoid and control, and therefore as not fairly counted against CN in calculating OTP.⁵⁰ The Board should begin with a presumption that relief items that were included in the 2011 Operating Agreement, reflecting the experience and agreement of the parties, were appropriately included in that version and should be carried forward into any new

⁴⁹ CN Proposed Operating Agreement, App. V, § A.1.f; *id.*, App. V, Tbl. 2. The additional tolerance would apply at all checkpoints, except for Trains 351, 353, and 355, for which the additional tolerance would apply at West Detroit, and Trains 350, 352, and 354, for which it would apply at Pontiac.

⁵⁰ VS (PID) Matteucci/Kuxmann at II.D.2.

Agreement dictated by the Board. This should not be an irrebuttable presumption. For example, certain relief items can be omitted as redundant if CN is given relief for delays that are or should be coded as Amtrak-responsible or third-party-responsible. But Amtrak should bear the burden of showing the Board why any relief items included in the previous Operating Agreement (in either the section regarding compensation for service on the IC Lines or the corresponding section regarding the GTW Lines) should be dropped from the Agreement going forward.

As CN's earlier filings showed, and as discussed below, even if Amtrak's delay codes are used as an initial screen, many of the relief items found in the 2011 Operating Agreement continue to be necessary.⁵¹ The Board's Interim Decision "encourage[d] 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" and to acknowledge that "conductor delay reports may not provide definitive proof of the cause of Amtrak delays."⁵² The relief items in CN's Proposed Operating Agreement follow this guidance, by providing that delays which CN is not in a position to avoid or control do not count against it in calculating incentives and penalties. CN's proposal omits some relief items contained in the 2011 Agreement, retains others, and includes certain additional items that are necessary to ensure that CN is not penalized for causes outside its control.

- a. Amtrak's delay codes are useful, but they are inaccurate and incomplete, and they must be supplemented.

Under Amtrak's delay coding system, when the trip of an Amtrak train is delayed on any segment of its route, causing the train to take more time to traverse that segment than the pure

⁵¹ See, e.g., VS (PID) Matteucci/Kuxmann, Part II.D.2.a (pp. 30-34) (examples of Amtrak incorrectly coding SYS delays (an Amtrak-responsible code) as RTE or DCS (host responsible codes)).

⁵² Interim Decision at 24.

run time (“PRT”) provided in the train’s schedule, the train’s conductor creates a record of the delay which, based on information immediately available to the conductor, attributes that delay to one of 26 causes, each represented by a three-letter code.⁵³ The delays represented by these codes are categorized as “host responsible delays” (“HRD”), “Amtrak responsible delays,” or “third party delays.”⁵⁴ In their previous filings, CN and Amtrak appeared to agree that Amtrak’s delay codes might at least be used as an initial screen for delays that should not be attributed to CN, that some additional relief items are appropriate, and that some relief items could be removed as redundant, provided the codes were applied appropriately.⁵⁵

As in its earlier filings, CN proposes to use these broad categories as an initial screen, so that CN would receive relief for any delays coded as “Amtrak responsible” or “third party delays.”⁵⁶ But it would be overreliance on those codes if they were made the sole determinants of whether CN gets relief for a given delay, as Amtrak has proposed.⁵⁷ First of all, while HRD purports to be limited to delays that are the responsibility of the host railroad, Amtrak’s use of broad codes sweeps in many delays that CN is not in a position to avoid or control. For example, when Amtrak trains are delayed at interlockings controlled by non-CN railroads, Amtrak typically codes the delay as Freight Train Interference (“FTI”), which is classified as HRD, even

⁵³ Vilter VS at 2, 15-16. Amtrak’s delay codes are listed in Appendix XI of CN’s Proposed Operating Agreement. In addition to the 26 codes used on CN’s lines, Amtrak has 14 delay codes that it uses exclusively on its Northeast Corridor lines, and which CN has included for completeness’ sake in its proposed Appendix XI, but with a note that they are not to be used for Amtrak’s trains operating on CN’s lines.

⁵⁴ Vilter VS at 2, 16.

⁵⁵ The calculation and proper use of a recovery time base with respect to relief items is discussed in Section I.D.3., below.

⁵⁶ CN Proposed Operating Agreement, App. V, Sec. A.1.b, c, d, p(1); RVS Vilter/Maga, Ex. 28 (VS (PID) Matteucci/Kuxmann) (“Amtrak Redline”), App. V, Sec. B.1.b(2).

⁵⁷ See Amtrak Redline, App. V, Sec. B.1.b(2).

though the delay in these instances is clearly caused by a third party, and although CN has no control over the signals at such interlockings and so cannot avoid or control interference by traffic on the crossing rail line.⁵⁸

A second reason Amtrak's delay codes cannot be the last word in determining whether CN should receive relief for a delay is that Amtrak frequently assigns its codes incorrectly. For example, as CN has shown previously, instead of using the SYS code ("System") when Amtrak stops its train so that its engineer can copy track authorities, or when it participates in Joint Uniform Efficiency Testing, it frequently, and improperly, codes the delay as RTE ("Routing") or DCS ("Signal Delays"), which are classified as HRD.⁵⁹

So while use of Amtrak delay codes may to some extent simplify the administration of the Operating Agreement and permit removing certain relief items included in the 2011 Agreement as redundant, specific relief items continue to be needed to deal with line or service specific issues, reduce errant coding and fill in its gaps, and help address instances where CN would otherwise be held responsible for delays it cannot reasonably be expected to avoid or control. Further, the Operating Agreement must provide that CN is entitled to relief, not only when Amtrak actually assigns delay codes are categorized as "Amtrak responsible" or as "third party responsible," but also when, under its established practice, it *should* assign such codes.⁶⁰

⁵⁸ See VS (PID) Matteucci/Kuxmann at Sec. II.D.2.a.

⁵⁹ See VS (PID) Matteucci/Kuxmann at Sec. II.D.2.a; SRVS Ladue/Kuxmann at 29-30; CN Opening Br. 77.

⁶⁰ This requires that a robust procedure be provided for CN to challenge incorrect delay codes to ensure that CN is not penalized for actions properly attributed to other parties. We describe such a procedure in Section I.D.5, below.

b. Relief for Amtrak responsible delays when not operating on CN's lines

The parties have long agreed that in situations where CN has not prevented a train from entering its line or leaving a station, CN should not be held responsible for Amtrak's delays. CN proposes including the two specific items in the 2011 Operating Agreement covering such delays. These are not en route delays, and therefore are not accounted for by recovery time and should not be subject to the RTB. Separately stating these items from general Amtrak en route delays makes that clear.

i. Delayed arrivals to CN or Late Departures from An Origin Point on CN

Amtrak agrees that CN should have relief for trains that, through no fault of CN, cannot depart on time from an origin point on CN's lines.⁶¹ CN proposes to keep the relief item as found in the 2011 Operating Agreement and in Amtrak's proposal, with an additional clarification that the relief item covers { [REDACTED] } CN Proposed Operating Agreement, App. V, Sec. A.1.b. [Such delays are distinct from excess dwell time (discussed next), inasmuch as the train has not yet begun its operations. { [REDACTED] } is categorized as an "Amtrak-responsible" delay, so this clarification should not be controversial.⁶²

⁶¹ See Amtrak Redline, Sec. B.1.b(1). The actual language of Amtrak's proposal, which is identical to that in the 2011 Operating Agreement, is "The amount of time a trip of a train departs late from its origin point on CN." This origin point is identical to the point at which Amtrak trains enter CN's lines from those of another carrier, except in the case of northbound Illini/Saluki trains.

⁶² Amtrak's proposal, in addition to including a relief item for { [REDACTED] }.
Amtrak Redline, App. V, Sec. B.1.b(1), (2).

ii Excess Dwell Time

A certain amount of “dwell time”—that is, time at which an Amtrak train is stopped at the station to take on and discharge passengers and perform other services—is built into Amtrak’s train schedules.⁶³ The parties agree and the 2011 Operating Agreement has appropriately provided that if Amtrak’s actual dwell time in a segment exceeds the scheduled dwell time (which may occur for any number of reasons, such as unanticipated delays moving a disabled or injured passenger on or off the train), the excess dwell time should not count against CN for purposes of incentives and penalties.

CN has proposed maintaining this relief item, with the clarification that it includes

{ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] } CN Proposed
Operating Agreement, App. V, Sec. A.1.c. This clarification should not be controversial, as all the listed codes are ones identified by Amtrak as “Amtrak responsible.”

In its previous proposal, Amtrak proposed to { [REDACTED]
[REDACTED]
[REDACTED] }. Amtrak’s proposal, however, would make no provision for delays that should have been assigned these codes, but which were instead improperly coded as some kind of host-responsible delay, and would thus deny CN the opportunity of obtaining relief by demonstrating that delays were assigned an incorrect code. Moreover, Amtrak has failed to distinguish dwell time so that it would not be subject to the RTB. Subjecting dwell time to the

⁶³ VS (PID) Matteucci/Kuxmann at Sec. II.D.2.b.ii.

RTB would be inconsistent with the past practice of CN and Amtrak, which have consistently excluded excess dwell time from the RTB offset, and is nonsensical since excess dwell time is not an en route delay for which recovery time is provided.

- c. Use of other Amtrak and third-party delay codes as a general relief item allowing for the elimination of many other individual relief items
{ [REDACTED] }

As noted above, CN proposes including in the operating agreement a screen for Amtrak and third-party responsible delays for which both parties agree CN should receive relief (subject to the RTB), but which are not specifically covered by other relief items. CN Proposed Operating Agreement, App. V, Sec A.1.e(1). The relief item would cover { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }.⁶⁴

Including this relief item, in combination with the other relief items discussed in this Part I.D.2, allows for the deletion of many other relief items previously found in Appendix V and/or VI of the 2011 Operating Agreement. The deleted items include the following:

⁶⁴ *Id.* Amtrak has proposed a relief item similar to the one proposed by CN, for delays to which non-HRD codes are assigned, but it fails to account for ambiguities and gaps in its coding that CN addresses through its clarifications to Amtrak's codes (see Appendix XI, notes, discussed below) or through added relief items. Amtrak Redline, App. V., Sec. B.1.b(2). In addition, as with its other relief proposals that rely solely on its coding, Amtrak fails to cover delays "that should be coded" with non-HRD codes. CN has proposed a procedure for challenging and correcting incorrect delay codes and for resolving other disputes that affect billing. See CN Proposed Operating Agreement, App. V, Sec. G.

- { [REDACTED] }⁶⁵
- { [REDACTED] }⁶⁶
- { [REDACTED] },⁶⁷
- { [REDACTED] }⁶⁸
- { [REDACTED] },⁶⁹
- { [REDACTED] },⁷⁰
- { [REDACTED] }⁷¹ and
- { [REDACTED] }⁷².

⁶⁵ 2011 Operating Agreement, App. V, Sec. A.1.e(1).

⁶⁶ 2011 Operating Agreement, App. V, Sec. A.1.e(2).

⁶⁷ 2011 Operating Agreement, App. V, Sec. A.1.e(5).

⁶⁸ 2011 Operating Agreement, App. V, Sec. A.1.e(10).

⁶⁹ 2011 Operating Agreement, App. V, Sec. A.1.e(11).

⁷⁰ 2011 Operating Agreement, App. VI, Sec. D.4.

⁷¹ 2011 Operating Agreement, App. VI, Sec. D.7.

⁷² 2011 Operating Agreement, App. VI, Sec. D.11.

- { [REDACTED] }⁷³
- { [REDACTED] }⁷⁴

In other areas, Amtrak's codes may be technically adequate, so long as there is a clear understanding or clarification of what they cover. Therefore, rather than leave in place the additional relief items noted below, which arguably overlap Amtrak's codes, CN has added clarifying notes to the end of Appendix XI (Definitions of Delay Codes) of its proposed operating agreement. These make clear that Amtrak's non-host responsible codes apply in given situations, thus minimizing the risk of miscoding and ensuring that Amtrak's representations in this proceeding as to the coverage of its codes are matched by its future actions in administering those codes.

The clarifying notes added to Appendix XI correspond to, and allow for the omission from the Operating Agreement, of the following current or previously proposed relief items:⁷⁵

- { [REDACTED] }⁷⁶

⁷³ 2011 Operating Agreement, App. V, Sec. A.1.e(4).

⁷⁴ 2011 Operating Agreement, App. V, Sec. A.1.e(8).

⁷⁵ In addition to the relief items and notes to Appendix XI discussed below, CN has added a note clarifying that Amtrak's OTH code not only covers a failure to maintain maximum permitted track speed, but also maximum feasible speed through crossovers between tracks. CN has proposed this clarification in lieu of { [REDACTED] }, as proposed earlier in this proceeding. SRVS Ladue Kuxmann, Ex. 1 at App. V-2 (proposed App. V, § A.1.g).

⁷⁶ VS Ladue/Kuxmann, Ex. 15 at 4 (App. V, Sec. A.1.e(10)); SRVS Ladue/Kuxmann, Ex. 1 at V-5 (App. V, Sec. A.1.l(8)).

Amtrak has previously argued that { [REDACTED] }⁷⁷ Amtrak’s assurances, do not match CN’s experience. For example, Amtrak has repeatedly refused to give a WTR code to delays resulting from high winds or flooding that cause power outages or otherwise affect wayside signals.⁷⁸ Delays of this kind are clearly ones that CN cannot avoid or control, and CN appreciates Amtrak’s assertion that they should be coded as WTR or SYS, which implicitly acknowledges that they should not be counted against CN. CN therefore has included a clarification to that effect in Appendix XI.

- { [REDACTED] }⁷⁹

According to Amtrak, { [REDACTED] }
[REDACTED]
[REDACTED]
[REDACTED]⁸⁰ But, as CN has explained, Amtrak frequently improperly assigns delays from { [REDACTED] } to codes classified as “host-responsible,”⁸¹ making it essential that the Operating Agreement clarify

⁷⁷ RVS Vilter/Maga, Ex. 31 at 4.

⁷⁸ VS (PID) Matteucci/Kuxmann at Sec. II.D.2.c.

⁷⁹ Ladue Kuxmann VS, Ex. 15 at 3 (proposed App. V, Sec. A.1.e(4)); SRVS Ladue/Kuxmann, Ex. 1 at V-4 (proposed App. V, Sec. A.1.l(4)); *cf.* 2011 Operating Agreement, App. V, Sec. A.1.e(6).

⁸⁰ RVS Vilter/Maga, Ex. 31 at 3.

⁸¹ *See* VS (PID) Matteucci/Kuxmann at Sec. II.D.2.c.; SRVS Ladue/Kuxmann at 29.

that delays described by this item either are covered by the SYS code, or that no HRD code is applicable. CN's proposal therefore includes a clarification to that effect in Appendix XI.

- { [REDACTED] }⁸²

CN's added note clarifies that these delays are covered by Amtrak's TRS (Trespasser Incidents) code. According to Amtrak's Service Standards Manual, TRS delays include "crossing accidents, trespasser or animal strikes, vehicle on track ahead; 'near-miss' delays; bridge strikes by vehicle or boat."⁸³

d. Areas where existing relief items remain necessary and should be retained or clarified.

i Delay by operator at North UD Tower outside of Joliet

The Operating Agreement currently provides relief for { [REDACTED] }
[REDACTED] } Absent a proposed change in the checkpoint for the Texas Eagle and Lincoln services, which both parties appear to agree upon, this item has been and for now remains necessary to avoid errant delay coding by Amtrak.

Joliet is presently designated as a checkpoint for Amtrak's Texas Eagle and Lincoln service Trains under the current Operating Agreement, and arrivals and departures at that checkpoint { [REDACTED] }

[REDACTED] }⁸⁴ CN's track ownership, however, ends outside of Joliet at North UD Tower, which is dispatched by Union Pacific Railroad Company

⁸² 2011 Operating Agreement, App. VI, Sec. D.3.

⁸³ VS (PID) Matteucci/Kuxmann Ex. 1 (Amtrak Service Standards for Train Service & On-Board Service Employees, Manual No. 6) at 7-60.

⁸⁴ 2011 Operating Agreement, App. V, Table 1.

(“UP”). Thus, UP controls operations between North UD Tower (north of Jackson Street, at approximately Milepost 36.3) and Joliet (at approximately Milepost 37.3, where Amtrak’s passenger station is located).⁸⁵ CN therefore has no ability to avoid or control delays to westbound Amtrak trains that occur when the UP-controlled signal restrains westward movement onto the UP.⁸⁶ Amtrak and CN agree that delays for westbound Amtrak trains due to the signal at UD Tower should not be coded against CN, but because of the misalignment of the checkpoint with actual operations errant coding of these delays regularly occurs.⁸⁷

A relief item addressing this issue will be unnecessary if the schedules for the westbound Texas Eagle (No. 21) and Lincoln trains (Nos. 301, 303, 305, and 307) are modified by inserting { [REDACTED] } as the appropriate checkpoint. The necessary changes are indicated in redline in the schedules included at Appendix II of the CN Proposed Operating Agreement.⁸⁸ As Amtrak previously suggested this change,⁸⁹ and CN has proposed this change to Amtrak, CN expects this schedule change will be adopted. If, however, for some reason that change is not adopted, this relief item remains necessary. The only change CN has made to the existing relief item, is to { [REDACTED] }.⁹⁰

⁸⁵ VS (PID) Matteucci/Kuxmann at Sec. II.D.2.d.i.

⁸⁶ *Id.*

⁸⁷ VS (PID) Matteucci/Kuxmann at Sec. II.D.2.d.i.

⁸⁸ CN Proposed Operating Agreement, App. II (schedules for Train Nos. 21, 22, 300, 301, 302, 303, 304, 305, 306, 307). CN is also proposing to { [REDACTED] }, but that would not affect the problem addressed by the relief item at issue.

⁸⁹ *See, e.g.*, VS Vilter/Maga at 60-61.

⁹⁰ CN Proposed Operating Agreement, App. V, Sec. A.1.d.

ii Wayside detectors

The current Operating Agreement contains a relief item for { [REDACTED]

[REDACTED]

[REDACTED]⁹¹ According to Amtrak, { [REDACTED]

[REDACTED]⁹² The description of Amtrak’s delay codes found in its Service Standards Manual, however, suggests the contrary, stating that delays from { [REDACTED]

[REDACTED]}, which is classified as HRD.⁹³ In order to ensure that, as Amtrak claims, such delays will not be counted against CN, CN proposes to maintain a separate relief item (subject to the RTB) covering them,⁹⁴ rather than attempting a “clarification” in Appendix XI that would contradict the explanation Amtrak has provided, outside of litigation, for its delay codes.

iii Uniform Efficiency Testing

The 2011 Operating Agreement includes a relief item for “{ [REDACTED]

[REDACTED]}”⁹⁵ While this relief item covers joint testing, which would now be covered by Amtrak’s SYS code, the SYS

⁹¹ 2011 Operating Agreement, App. V, Sec. A.1.e(3).

⁹² RVS Vilter/Maga, Ex. 31 at 3.

⁹³ RVS Vilter/Maga, Ex. 29 at 7-104.

⁹⁴ CN Proposed Operating Agreement, App. V, Sec. A.1.p(2).

⁹⁵ 2011 Operating Agreement, App. V, Sec. A.1.e(8).

code does not cover Uniform Efficiency Testing conducted by CN alone.⁹⁶ CN has therefore proposed including a relief item that covers such testing.

There are times when Amtrak officers are unavailable, yet Amtrak crews must be tested on their knowledge of and compliance with rules regarding safe operation of the train. In those instances, CN personnel must conduct the necessary testing by themselves.⁹⁷ Absent a relief item, Amtrak would code { [REDACTED] }⁹⁸ as a host responsible DCS (Signal Delays) delay. CN should not be penalized or given a disincentive for conducting tests that are necessary to ensure the safe operation of Amtrak's trains. Accordingly, CN proposes inclusion of a relief item (subject to the RTB) for delay resulting from "CN testing performed in accordance with FRA rules, provided that CN gives advance notification to Amtrak for testing performed by CN."

iv Delays at interlockings not controlled by CN

As noted above, a significant type of delay that CN is in no "position to avoid or control," but which Amtrak typically considers "host responsible," is delays at interlockings that are automatic (i.e., first-come, first-served) or are controlled by the foreign (i.e., non-CN) crossing carrier. For automatic interlockings, such as where CN's line is crossed by Union Pacific at Kinmundy, the signal system automatically provides a red signal to Amtrak if a crossing Union Pacific train reaches the approach circuit first. CN cannot do anything to prevent this.⁹⁹

⁹⁶ The SYS (System) delay code covers delays caused by { [REDACTED] } RVS Vilter/Maga, Ex. 29 (Amtrak Service Standards for Train Service & On-Board Service Employees, Manual No. 10) at 7-105.

⁹⁷ VS (PID) Matteucci/Kuxmann at Sec. II.D.2.d.iii.

⁹⁸ RVS Vilter/Maga, Ex. 29 (Amtrak Service Standards for Train Service & On-Board Service Employees, Manual No. 10) at 7-104.

⁹⁹ VS (PID) Matteucci/Kuxmann at Sec. II.D.2.d.iv.

Likewise, at interlockings that are controlled by a foreign carrier, although CN can (and does) notify the foreign railroad's dispatcher of an approaching Amtrak train, there is nothing that CN can do to change the signal at an interlocking controlled by a foreign carrier.¹⁰⁰ Yet Amtrak routinely records these delays as "host responsible" Freight Train Interference (FTI).

Amtrak has dismissed CN's objection to classifying such delays as host-responsible by asserting: "It is the host railroad (not Amtrak) whose operating relationship with the other railroad governs the operations of the crossing. It is the host railroad whose dispatcher needs to notify the other railroad what trains are approaching the crossing and in what order, which track each train will occupy, and which 'electronic indicators' are for which trains."¹⁰¹ Amtrak fails to recognize that the arrangements for control of interlockings in many cases long predate CN's relationship with Amtrak,¹⁰² and that, regardless of how communicative CN is with the foreign railroad controlling the interlocking about approaching Amtrak trains, CN has no power to compel that railroad to change the signal traffic to prevent interference with Amtrak.

Because CN cannot avoid or control such delays,¹⁰³ the 2011 Operating Agreement appropriately includes a relief item for { [REDACTED]

[REDACTED]

¹⁰⁰ *Id.*

¹⁰¹ RVS Vilter/Maga at 54.

¹⁰² VS (PID) Matteucci/Kuxmann at Sec. II.D.2.d.iv.

¹⁰³ Not only is relief justified by CN's inability to avoid or control delays at interlockings it does not control, but the specific relief item provided for in the current Operating Agreement is especially warranted because it was added in 2006 in exchange for allowing Amtrak to operate an additional four Lincoln service trains and an additional two Illini/Saluki trains. SRVS Ladue/Kuxmann at 24.

[REDACTED]¹⁰⁴ and this item should be maintained in the new Operating Agreement, as proposed by CN.¹⁰⁵

v Operation of Amtrak Special Trains or detour trains

The 2011 Operating Agreement provides for relief for { [REDACTED]
[REDACTED] }¹⁰⁶ This item is not subject to the RTB. CN proposes to maintain this relief item,¹⁰⁷ and Amtrak has previously proposed inclusion of a largely identical one.¹⁰⁸ Amtrak's proposal, however, would only provide relief { [REDACTED] }. This limitation would penalize CN for accommodating other railroads where necessary to keep their traffic moving when extraordinary circumstances prevent those railroads from using their own lines. Freight railroads should not be deterred by such penalties from making such temporary accommodations for each other, which often arise in times of emergency or natural disaster.¹⁰⁹

vi Delays caused by Amtrak Maintenance-of-Way Trains

Under the 2011 Operating Agreement, a different system is provided for calculating CN's compensation for hosting Amtrak trains on the GTW Lines from that used on the IC Lines. This difference is a historical artifact, dating from the time that IC and GTW were under different

¹⁰⁴ 2011 Operating Agreement, App. V, Sec. A.1.g.

¹⁰⁵ CN Proposed Operating Agreement, App. V, Sec. A.1.g.

¹⁰⁶ 2011 Operating Agreement, App. V, Sec A.1.h.

¹⁰⁷ CN Proposed Operating Agreement, App. V, Sec. A.1.h. Amtrak's proposal would likewise keep this relief item, but would subject it to the RTB, and would specify that the detour trains it refers to must be Amtrak detour trains. See Amtrak Proposed OA, App. V, Sec. B.1.c.

¹⁰⁸ See Amtrak Redline, App. V., Sec. B.1.c.

¹⁰⁹ VS (PID) Matteucci/Kuxmann at Sec. II.D.2.d.v.

ownership and their operating agreements with Amtrak were separately negotiated. Both CN and Amtrak have agreed that the compensation system used on the IC Lines should be extended to the GTW Lines.

Along with the separate compensation systems, the Operating Agreement has included separate sets of relief items for the IC Lines and the GTW Lines. Consistent with the parties' intent to extend the IC compensation system to GTW, CN proposes adoption of a single set of relief items to apply across CN (although the terms of certain relief items will in practice limit their application to the GTW lines or to certain locations on those lines).

The first of these is the existing relief item for delays { [REDACTED] [REDACTED] }.¹¹⁰ This item was included in the 2011 Operating Agreement because, from time to time, CN permits Amtrak maintenance-of-way train to use CN's lines to move to or from lines in Indiana and Michigan that Amtrak owns or maintains. The Operating Agreement does not require CN to permit movement of these Amtrak trains, and when CN voluntarily does so, it should not be penalized because of delays caused by CN's accommodation of Amtrak's MW trains. Accordingly, CN proposes that the relief item be maintained in the new Operating Agreement.¹¹¹

vii Delays caused by certain meets between Amtrak trains

Appendix VI of the 2011 Operating Agreement provides for { [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

¹¹⁰ 2011 Operating Agreement, App. VI, Sec. D.19.

¹¹¹ CN Proposed Operating Agreement, App. V, Sec. A.1.i; VS (PID) Matteucci/Kuxmann at Sec. II.D.2.d.vi.

[REDACTED]¹¹² Amtrak changes crews on all trains stopped at Battle Creek Station, occupying one of the CN main tracks between Baron and Gord and increasing the difficulty of operation when other Amtrak trains move through the same territory. Further, CN's line between Pontiac and Moterm (near Detroit), while formally classified as double-track, is operated like a single track, as the second main track is subject to slow orders limiting train speed to 40 miles an hours, and is therefore not used by CN for main line freight operations. Amtrak's Troy station, located on this segment, only has access to the first main track. Amtrak's train schedules are therefore structured to avoid meets on this segment, but if an Amtrak train is very late, it sometimes becomes necessary to hold an Amtrak train at Moterm or Pontiac so that another Amtrak train can finish traversing the segment. Accordingly, CN proposes to maintain this relief item, limited to the GTW lines, in the new Operating Agreement.¹¹³

Recent events have made it even more important that this relief item be retained. CN recently agreed with Amtrak to shorten the schedules on its Michigan services, in connection with the procedures for certifying schedules in connection with FRA's Metrics and Minimum Standards for Intercity Passenger Rail Service.¹¹⁴ When it did so, it relied on the presence of the relief item and the expectation it would remain in place. Finally, because CN's actual experience of such delays is that they typically take 15 minutes, regardless of whether the line is equipped

¹¹² 2011 Operating Agreement, App. VI, Sec. D.2.

¹¹³ CN Proposed Operating Agreement, App. V, Sec. A.1.j.

¹¹⁴ VS (PID) Matteucci/Kuxmann at Sec. D.2.c.viii. (p. 59). The FRA Metrics and Standards are codified at 49 C.F.R. Part 273.

with CTC,¹¹⁵ CN proposes to set the amount of relief time for these delays at { [REDACTED] } across the board.

viii Certain delays at Wesson Street in Pontiac

The 2011 Operating Agreement provides for relief for “{ [REDACTED] }”¹¹⁶ Amtrak has proposed a substantially identical relief item.¹¹⁷ CN similarly proposes that this relief item be carried forward into the new Operating Agreement, with the clarification that CN be given relief for delays “due to” the listed causes as well as delays “reported” as caused by them.¹¹⁸ This item should not be subject to the RTB, as it covers extraordinary delays that are not provided for in recovery time built into Amtrak’s Michigan service train schedules.

e. New relief items that are necessary for proper coding and delay attribution.

i Picking up and setting out substitute locomotives

As noted above, delays incurred { [REDACTED] } are covered by the CAR (Car Failure) and ENG (Engine Failure) codes. But from time to time, CN will provide a locomotive to substitute for one that has been bad-ordered and removed from an Amtrak train. In that event, an Amtrak train may be delayed as it picks up, and later when it drops off, the substitute equipment.¹¹⁹ While Amtrak’s explanation of its CAR and ENG codes indicate that they cover

¹¹⁵ VS (PID) Matteucci/Kuxmann at Sec. D.2.d.vii (p. 50).

¹¹⁶ 2011 Operating Agreement, App. VI, Sec. D.16.

¹¹⁷ See Amtrak Redline, App. V, Sec. B.1(b)(3).

¹¹⁸ CN Proposed Operating Agreement, App. V, Sec. A.1.l.

¹¹⁹ VS (PID) Matteucci/Kuxmann at Sec. II.D.2.e.i.

delay in setting out and picking up defective or repaired equipment,¹²⁰ they do not clearly apply to time picking up or dropping off non-defective equipment that CN provides for Amtrak's benefit, and Amtrak frequently codes these delays as HRD.¹²¹ To ensure that CN is not penalized for making this equipment available to Amtrak, the relief item CN is proposing should be added to the Operating Agreement.

ii Freight train interference following late arrival at entry point to CN line

CN proposes inclusion of a relief item (subject to the RTB) for "[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] }¹²²

CN and other host railroads operate their rail systems so that there are scheduled "slots" during which freight and passenger trains may use CN's various rail lines. If Amtrak or the host of the line from which the Amtrak train is approaching CN's line notifies CN sufficiently in advance of the late arrival, then CN can make a decision whether the best way to minimize conflict between trains will be to let its own train take its scheduled slot (which may put it far enough ahead of the Amtrak train that it will cause minimal delay to Amtrak), or to avoid interference from the CN train altogether by holding it until after the Amtrak train arrives, so that

¹²⁰ VS Ladue/Kuxmann, Ex. 16 (Amtrak Service Standards for Train Service & On-Board Service Employees, Manual No. 6) at 7-59, 7-60.

¹²¹ VS (PID) Matteucci/Kuxmann at Sec. II.D.2.e.i.

¹²² CN Proposed Operating Agreement, App. V, Sec. A.1.p(9).

the faster-moving Amtrak train can proceed onto the relevant CN segment ahead of the CN train.¹²³

But at several entry points onto CN's lines, Amtrak trains regularly arrive late. CN is not privy to Amtrak's operations off its lines, and it cannot tell when the Amtrak train is likely to arrive late at CN's lines. Nor does Amtrak regularly inform CN of when its late trains are likely to arrive, despite its recognition that such communication could reduce delays.¹²⁴ CN regularly holds its freight trains to provide a sizeable window on either side of Amtrak's scheduled arrival time, but this delays the movement of freight traffic and there is a point at which the CN freight train must proceed. If CN is not informed about when to expect the Amtrak train, then it reasonably may decide to allow the freight train to take its previously scheduled slot. Then, if the Amtrak train arrives shortly afterward, it may find itself behind the CN train, especially if the segment is single track (as is true for much of CN's network in the United States) and there may be no nearby available sidings that the CN train can take to allow the Amtrak train to pass in this situation where the Amtrak train is out of slot. In that event, Amtrak will typically code the delay to its train as FTI (freight train interference), but the delay will be one that CN could not reasonably have avoided, and that Amtrak might have avoided by giving CN timely information about the late arrival of the Amtrak train.¹²⁵ For this reason, a relief item for this kind of delay should be included in the Operating Agreement, to ensure that delays CN cannot avoid are not counted against it, and to provide reasonable incentive for Amtrak to notify CN, or make sure that CN is notified, of an Amtrak train's late arrival.

¹²³ VS (PID) Matteucci/Kuxmann at Sec. II.D.2.e.ii.

¹²⁴ See VS Ladue/Kuxmann, Ex. 11 (untitled Amtrak table stating, { [REDACTED] }.”)

¹²⁵ *Id.*

iii Commuter train interference on Joliet Subdivision following late arrival at entry point to CN line

CN proposes that a new relief item be added to the Operating Agreement providing that,

{ [REDACTED]
[REDACTED]
[REDACTED] }¹²⁶ This item

is with minor modifications, identical to one that CN proposed earlier in this proceeding.¹²⁷

Although the schedules for Amtrak's Lincoln and Texas Eagle trains (which operate over CN's Joliet Subdivision) are designed to avoid interference from Metra, when an Amtrak train (especially Lincoln service Train No. 305) arrives late at the entrance point to CN's line, it may get caught behind a Metra train.¹²⁸ Because the Metra commuter train makes many more stops than the Amtrak train, the Amtrak train is likely to be delayed, and its conductor will record the delay as commuter train interference, which Amtrak regards as a host-responsible delay.¹²⁹ CN, however, cannot be expected to delay or hold Metra traffic to wait for a late-arriving Amtrak train, nor is it able to avoid or control Amtrak's late arrival. Under those circumstances, CN should not be penalized for the delays resulting from that late arrival, and because Amtrak does not have a non-HDR code that would extend to such delays, even though caused by Amtrak's late arrival, an additional relief item covering those delays should be included in the Operating Agreement as proposed by CN. Further, this item should not be subject to the RTB, as the

¹²⁶ CN Proposed Operating Agreement, App. V, Sec. A.1.e(6).

¹²⁷ See SRVS Ladue/Kuxmann, Ex. 1 at App. V-3 (Proposed App. V, Sec. A.1.j).

¹²⁸ VS (PID) Matteucci/Kuxmann at Sec. II.D.2.e.iii.

¹²⁹ *Id.*

delays it covers are extraordinary ones not provided for in the recovery time built into the affected Amtrak train schedules.¹³⁰

iv Restrictions for the safe operation of Amtrak equipment

CN proposes inclusion of a relief item (not subject to the RTB) for “{ [REDACTED]

[REDACTED]

[REDACTED] }¹³¹

Consistent with the side letter executed by the parties providing for { [REDACTED]

[REDACTED] }, when Amtrak equipment fails to operate safely on CN, and CN’s tracks and signals are functioning properly and adequately for the safe operation of freight traffic, Amtrak rather than CN should be responsible for resulting delays. If such issues arise, Amtrak should not only be required to pay the incremental costs of addressing them, it should be responsible for resulting delays until the issue is remedied.

3. In accordance with the Interim Decision, CN’s proposal refines the Recovery Time Base (“RTB”) using existing schedules to reflect the real-world operating conditions on segments for individual checkpoints and continues to apply the RTB appropriately.

- a. Refining the RTB for multiple checkpoints in accordance with the Board’s Decision.

Amtrak schedules include so-called “recovery time” to offset delays that occur during the trip of a train and help keep a train on its schedule. Some of those delays occur because of things Amtrak can control, some because of things CN can control, and some are due to third-parties.

The Recovery Time Base (or “RTB”) is the amount of time the Operating Agreement allocates to

¹³⁰ *Id.*

¹³¹ VS Ladue/Kuxmann, Ex. 15 at App. V-4 (Proposed App. V, Sec. A.1.e(12)); *see also* SRVS Ladue/Kuxmann, Ex. 1 at App. V-2 (Proposed App. V, Sec. A.1.h; substantially identical to proposal in initial VS Ladue/Kuxmann).

certain delays caused by Amtrak and Third Parties. For delays subject to the RTB, CN only gets relief for Amtrak and Third Party delays to the extent those delays exceed the RTB in a given segment. The amount of RTB in a segment, which delays it applies to, and how it is applied (e.g., cumulatively or on a segment-by-segment basis) has a major effect on the on time performance calculation.

The Board declined to adopt Amtrak's proposal that RTB be established based on an even split of recovery time. Interim Decision at 25. The Board stated instead that any allocation of RTB "should reflect the real-world operating conditions on a segment and each party's susceptibility to events resulting in a delay to Amtrak trains." *Id.* Further, the Board declined to adopt Amtrak's proposals that additional categories of delay be made subject to the RTB or that the RTB be calculated cumulatively from origin, instead leaving those issues to the parties to negotiate. *Id.*

CN would incorporate this guidance by calculating, for each checkpoint, the percentage of delays that were caused by Amtrak and Third Parties in the immediately preceding segment, and then multiplying that percentage by the number of recovery minutes in the schedule for that segment, rounded to the nearest whole number. For example, if 30% of the delays on a segment were attributable to Amtrak and Third Parties, and there were 9 minutes of recovery time in the segment, the RTB for the segment would be 3.

In order to provide a strong basis for allocating recovery time to develop the RTB, CN utilized for the analysis a full 3-year period of delays for each train from 2017 to 2019. VS (PID) Matteucci/Kuxmann at Sec. II.D.3.a. Using a lengthy period assures that temporary fluctuations to not dramatically alter the RTB. Moreover, in order to avoid the distorting effects

of the COVID pandemic, CN avoided using data influenced by the pandemic beginning in 2020.¹³² *Id.*

In calculating RTB, CN appropriately excluded two types of delays that are not accounted for by schedule recovery time and therefore should not be part of a division of recovery time. First, CN excluded delays coded as NOD (*i.e.*, delays for unused recovery time). NOD is a third-party responsible code that is used to account for a train that arrives early at a station and awaits its departure time. Such delays are not planned for and are not delays experienced by the train en route. They are not true “delays” and are certainly not the types of en route delays intended to be offset by recovery time.

Second, for the Illini/Saluki schedules, CN excluded delays due to the so-called “short shunt” issue – that is, delays due to the slow order imposed for safety by CN in light of the failure of Amtrak’s single-level Horizon/Amfleet equipment to reliably “shunt” an electric circuit that activates crossing signals for at-grade crossings. There has been no adjustment to recovery time (or the schedules more generally) for the Illini/Saluki trains to reflect this type of delay. Further, Amtrak is presently utilizing double-level Superliner equipment that is not subject to the short shunt safety slow order. Amtrak has coded short shunt delays as host-responsible (over CN’s objection and erroneously in CN’s view), which has the effect of excluding these delays from the 2017-2019 data used for the RTB determination is to avoid

¹³² CN does not believe it is necessary or even desirable to recalculate the RTB distribution during the initial term of the revised operating agreement, since the intention is to be representative of delay experience over the long-term, and there is no reason to believe the RTB distribution will greatly vary so long as distorting periods are avoided. After the initial term of the operating agreement, the parties can determine if they wish to recalculate the RTB distribution based on another period. Nonetheless, CN does not see this as a major issue, and it would be willing to discuss with Amtrak use of a different period for determining the RTB.

artificially decreasing the RTB. That result is favorable to Amtrak, as it maintains the RTB as a higher hurdle for CN to receive delay relief.

CN's proposal showing the RTB for each segment under the existing schedules is shown in Appendix II of the CN Redline.

b. Properly Providing For Which Relief Items Should and Should Not Be Subject to the RTB.

The 2011 Operating Agreement rationally treats relief items as subject to the RTB if they cover delays intended to be covered by the recovery/miscellaneous time in schedules, while relief items for other types of delays are not subject to the RTB. *See* 2011 Operating Agreement, App. V, A.1.a.-d., f.-i. (not subject to RTB) & A.e.(1)-(8) (subject to RTB); App. VI, D.1.-19. (not subject to RTB). CN's proposal honors the parties' agreement and determination of which relief items should be subject to the RTB, including with respect to three relief items carried over from Appendix VI, which previously applied solely to GTW.¹³³

¹³³ The GTW relief items that were not and should not be subject to the RTB include relief for delays caused by the following:

(i) {

[REDACTED]

} VS (PID)

Matteucci/Kuxmann at Sec. II.D.3.b.

(ii) {

[REDACTED]

} *Id.*

CN also proposes one new relief item that would not be subject to the RTB. That is relief for { [REDACTED] }.¹³⁴ As this is a forward-looking relief item intended for an atypical set of delays, it obviously is not covered by existing recovery/miscellaneous relief time and should therefore not be subject to the RTB. This treatment is consistent with CN's exclusion of short shunt delays in its allocation of recovery time between the parties, which favors Amtrak and was likewise on the basis that such delays are not covered by existing recovery/miscellaneous time..

4. CN would clarify the provisions for trips that are not to be counted to assure that unusual, lengthy delays do not distort incentives.

The current Operating Agreement specifies a number of situations in which a trip of a train would not be counted for purposes of Performance Payments or Performance Penalties (frequently referred to as "Do Not Count" or "DNCs"). These DNC provisions deal with "unusual circumstances beyond CN's control that can cause major operating disruptions that may not be fully accounted for through ordinary relief items."¹³⁵ Such disruptions may have lengthy and unpredictable delays that increase the difficulty of properly assessing the downstream effects they may have and correctly assigning responsibility for delays caused by those downstream effects. For example, { [REDACTED] } (all of which, under the existing Agreement as well as CN's proposal, may cause the trip of a train not to be counted) may result in delays that are measured

(iii) Certain delays at Wesson Street in Pontiac. As both parties have acknowledged by proposing a relief item at Wesson Street, there are specific conditions there that result in delays that should not be charged to CN. As explained by Messrs. Matteucci and Kuxmann, there is not recovery time built into the schedules to cover these delays. *Id.*

¹³⁴ CN Proposed Operating Agreement, App. V, Sec. A.1.1.

¹³⁵ SRVS Ladue/Kuxmann at 30.

in hours rather than minutes and that will have significant secondary effects causing additional delays at checkpoints further down the train's route.

The difficulty of properly accounting for downstream effects is exacerbated by Amtrak's delay-coding practices, and in particular its typical refusal to look beyond the immediate cause of a particular delay.¹³⁶ Because of those practices, when "lengthy and unpredictable delays" occur, causing cascading operational disruptions leading to additional delays at downstream checkpoints, Amtrak generally disregards the chain of causation leading to those further delays and codes them as host-responsible (i.e., not subject to relief) on the basis of their immediate causes. This can cause trains to be counted as late at subsequent checkpoints, even if the downstream delays were merely in a chain of causation initiated by the initial delay (like a { [REDACTED] }). Under such circumstances, rather than attempt to sort out the potentially multiple causes of delay to determine which one "really" caused the later delay, the more realistic action, as has long been recognized by the Operating Agreement, is to disregard the late trip of the train altogether, as CN proposes.¹³⁷

CN therefore proposes to keep the existing DNC items, with certain minor revisions. modifications as described below.¹³⁸ Most significantly, in response to Amtrak's repeated

¹³⁶ For example, Amtrak has refused to apply the WTR (Weather related) code to delays resulting from { [REDACTED] }. VS (PID) Matteucci/Kuxmann at Sec. II.D.4.

¹³⁷ As previously noted by CN, the designation of each station stop as a checkpoint for determining OTP (including station stops that may be distant from the location of the initial DNC event) will increase the difficulty of assessing those effects. VS (PID) Matteucci/Kuxmann at II.D.4.

¹³⁸ CN Proposed Operating Agreement, App. V, § A.5. In addition to changes discussed in text, CN proposes two other minor modifications to the existing DNC provisions, both of which should be non-controversial:

miscoding of delays caused by significant, localized flooding and/or high winds,¹³⁹ CN proposes

{ [REDACTED] }¹⁴⁰

[REDACTED] }.¹⁴¹ CN's proposed modifications to the DNC provisions are consistent with existing provisions and primarily intended to clarify their application in order to avoid potential disputes and to accommodate a shift to including checkpoints at all stations. We explain those revisions below, together with the reasons the Board should approve them.

Clarify the application of the DNC delay provisions in order to account for multiple checkpoints

The measurement of performance for individual trains under the 2011 Operating Agreement is at only a single endpoint or, for the long-distance City of New Orleans service, at a single midpoint and endpoint. Under that incentive structure, it is sufficient to provide that a late

First, in the provision regarding { [REDACTED] }, CN proposes to strike the reference to omit language referring to Table 1 of Appendix V (identifying checkpoints on each train) and to non-checkpoint stations on segments for which a checkpoint is the endpoint. CN Proposed Operating Agreement, App. V, § A.5.b. This language is unnecessary if all station stops are designated as checkpoints in the schedule skeletons, as CN proposes in Appendix II of the Agreement.

Second, CN proposes to { [REDACTED] } in the introduction to the list of DNC items currently found in Section A.4.c of Appendix V, so that introduction would provide that { [REDACTED] } shall not be counted at such Checkpoint in calculation the train's monthly performance." CN Proposed Operating Agreement, App. V, § A.5.c.

¹³⁹ See, e.g., Ex. 2 (email correspondence regarding { [REDACTED] }); Ex. 3 (email correspondence regarding { [REDACTED] } [REDACTED] }

¹⁴⁰ 2011 Operating Agreement, App. V, § A.4.c.(3).

¹⁴¹ 2011 Operating Agreement, App. V, § A.4.c.(7); cf. CN Proposed Operating Agreement, App. V, § A.5.c(3), (7).

arrival will not count at a checkpoint due to one of the specified events or types of delays, as there is generally no issue with measured on time performance for such a train at any subsequent checkpoint.

The CN Proposed Operating Agreement, however, provides for checkpoints at every station and at the end of the route. CN proposes to clarify the introduction to Section A.5.c. of Appendix V (which lists a series of events that trigger DNC treatment) to deal with the application of the delay-based DNC provisions to such multi-checkpoint routes. First, the changes would clarify that following a disruptive delay that can throw off schedules across the railroad, late arrivals at downstream checkpoints will not count for purposes of monthly performance. As discussed above, the application of individual relief items is inadequate to account for such extreme disruptions. Second, our changes would preserve incentives for CN to try to recover an Amtrak train that is late at an upstream checkpoint by making clear that an on time arrival at a later downstream checkpoint will still count toward the train's monthly performance. This change is in keeping with the emphasis in the Interim Decision in preserving appropriate performance incentives.

{ [REDACTED] }

Because Amtrak has repeatedly—and, in CN's judgment, inappropriately—denied CN's requests for relief for delays caused by significant, localized flooding and/or high winds,¹⁴² CN proposes { [REDACTED]

[REDACTED] }¹⁴³

¹⁴² See VS (PID) Matteucci/Kuxmann at Sec. II.D.4; VS Ladue/Kuxmann, Ex.24 (providing examples of disputes between the parties related to the coding and treatment of delays caused by weather); RVS Ladue/Kuxmann at 43 (same); SRVS Ladue/Kuxmann at 31 (same).

¹⁴³ See CN Proposed Operating Agreement, App. V, Sec. A.5.c(3), (7); cf. 2011 Operating Agreement, App. V, Sec. A.4.c(3), (7).

This change should provide clarity (by detailing with greater specificity the kinds of delays subject to DNC treatment, including, for example, { [REDACTED] } and eliminate unnecessary disputes that recur under the current Agreement because of Amtrak's history of sometimes ignoring the real-world impact of weather events. In order for either { [REDACTED] } to apply, CN would be required to provide specific documentation related to the event it cites as grounds for applying the DNC provision, and CN has proposed changes to both provisions to describe the types of evidence that would be deemed acceptable. The proposed revisions would increase fairness and clarity in the administration of the Agreement and reduce the frequency of disputes over that administration.¹⁴⁴

5. CN would provide a more robust process for resolving billing disputes, including for delay coding and trips not counted.

As noted above (Section I.D.2), one reason that Amtrak's delay codes, while useful as a preliminary screen, cannot finally determine which delays to an Amtrak train should receive relief under the Operating Agreement is that Amtrak frequently misapplies those codes, so that delays properly attributed to "Amtrak responsible" or "third party responsible" delays are coded as HRD. To make the codes assigned by Amtrak the last word would, in effect, give Amtrak the near-absolute discretion to determine whether CN receives relief for a delay. Unless CN can persuade Amtrak to correct errors in its delay attributions, its only remedy is to { [REDACTED] }

¹⁴⁴ The effects of measures taken in anticipation { [REDACTED] } as long as the anticipatory action was reasonable under the conditions known at the time they were taken, it would be unreasonable to make the consequences of that action different, for purposes of determining compensation under the Operating Agreement, depending on events taking place after that action.

[REDACTED], which is too unwieldy and costly a tool to be effective for correction of routine coding errors.

As CN has testified previously, its current efforts to persuade Amtrak to correct delay attributions have been beset with “lengthy delays in Amtrak response time, conflicting decisions from different Amtrak representatives, and refusals by Amtrak to follow or even recognize the value of precedent.”¹⁴⁵ So if the new Operating Agreement is to make greater reliance on Amtrak’s coding, it is essential that CN be provided a robust procedure for challenging and correcting incorrect codes.

CN is therefore proposing that the procedure set forth in the Operating Agreement be revised to provide more expeditious, equitable and efficient consideration and resolution of issues regarding relief items and related invoices. First of all, the proposed procedure would

{ [REDACTED]
[REDACTED]
[REDACTED] }.¹⁴⁶

As CN has testified previously, it “has frequently reached what it believed was agreement with Amtrak’s Director, Contract Operations, on the proper characterization of delays for purposes of billing, only to be informed later that another Amtrak department or group had rejected that resolution.”¹⁴⁷ Putting CN through such a runaround is time-consuming and impairs the efficient administration of the Operating Agreement. Each party instead should be able to deal with a counterpart on the other

¹⁴⁵ VS Ladue/Kuxmann at 62.

¹⁴⁶ CN Proposed Operating Agreement § 5.2.A, para. 2.

¹⁴⁷ VS Ladue/Kuxmann at 64 (footnote omitted).

side who has the authority and the resources to resolve delay coding, relief, and related billing issues.

CN's proposal further provides that { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]}. Finally, { [REDACTED]

[REDACTED]

[REDACTED]}.¹⁴⁸

CN's proposal would also provide that { [REDACTED]

[REDACTED]

[REDACTED]}.¹⁴⁹ Amtrak often eventually resolves disputes over delay coding in CN's favor with respect to the invoice directly at issue, but only with disclaimers that, for example, { [REDACTED]

[REDACTED]

[REDACTED]}.¹⁵⁰ A resolution that is only effective with regard to the immediate invoice, so that CN must argue all over again for the correct delay attribution in similar cases arising the future, as if the issue had not previously been argued and resolved, is a waste of both parties' resources. If the parties go to the time and trouble to examine the cause of a delay in a

¹⁴⁸ CN Proposed Operating Agreement § 5.2.A, para. 2. The specific steps in this procedure are similar to those provided in CN's proposal for consideration and correction of persistently poor performance of Amtrak trains on CN's routes. *See id.*, App. V, Sec. G.

¹⁴⁹ CN Proposed Operating Agreement § 5.2.A, para. 2.

¹⁵⁰ VS (PID) Matteucci/Kuxmann at II.D.5; VS Ladue/Kuxmann at 62 (quoting email correspondence).

certain situation, they should be able to rely on the resolution of that issue when it arises later.

To give precedential effect to resolutions of coding issues is simply to administer the Operating Agreement in a consistent manner. The Agreement should require such consistency.

E. Changes to the Incentive/Penalty System Should Be Prospective in Effect

While CN's proposed changes to the provisions of the Operating Agreement regarding Performance Payments and Performance Penalties would improve the Agreement, as a matter of principle those provisions should only be imposed prospectively, regardless of which party might benefit from the changes.¹⁵¹ Incentives and penalties tied to performance are meant to provide an incentive for future action. Retroactivity would not and could not serve that purpose. A host railroad cannot respond to an "incentive" scheme if it does not know in advance how its performance will be judged and rewarded, and it should not be penalized (or rewarded retroactively) on the basis of rules that were not in place (and for much of this proceeding not even proposed) at the time of the conduct at issue.

The incongruity of applying incentives after the fact is underscored in this proceeding, where Performance Payments and Performance Penalties are likely to be calculated on the basis of OTP measured at all stations rather than, as at present, measured only at end points (or in the case of the long-distance City of New Orleans service, at a single mid-point and an endpoint). It

¹⁵¹ The Board's predecessor agency has recognized that it is appropriate that incentive provisions be applied prospectively. *E.g., Amtrak & Tex. & Pac. Ry., Use of Tracks & Facilities & Establishment of Just Comp.*, 348 I.C.C. 645, 648, 672-73 (1976) (adopting Amtrak proposal for an "incentive system [that] would be applied prospectively, not retroactively"); *see also Application of Nat'l R.R. Passenger Corp. Under 49 U.S.C. 24308(a)—Order to Require Serv. & Set Comp. Terms*, STB Finance Docket No. 32911, 1996 WL 210680 at *2 n.3 (STB served Apr. 30, 1996) ("Amtrak asserts that the ICC has not accorded retroactivity concerning the application of incentive compensation."); *Nat'l R.R. Passenger Corp. & Tex. & Pac. Ry., Use of Tracks & Facilities & Establishing Just Comp.*, 348 I.C.C. 357, 373 (1975) ("*T&P I*") (dicta) ("[incentive] payments could only be prospective rather than retrospective").

would be illogical to penalize a host retroactively for performance to stations where such performance was previously not even measured for purposes of the Agreement. Likewise, it would be illogical to apply post-operation other new penalty elements approved in the Interim Decision and now proposed by CN, such as a lateness multiplier or penalties for performance at what was at the time of operation in the “neutral performance zone” of 70-80% OTP.

Application of incentive and penalty provisions retroactively would not only fail to serve their essential purpose, but would also would impose a major additional cost. Significant resources would need to expended to attempt to apply those provisions retroactively for a period that may approach 10 years. Further, that complex undertaking would likely result in extensive disputes between the parties requiring expenditure by them of substantial additional resources, invocation of dispute resolution under the Agreement, and possible Board intervention.

F. Schedule Issues, Which Have Been Narrowed Since the Interim Decision, Would Be Addressed and Resolved No Later than under the Operating Agreement.

1. Progress on schedules.

In its Interim Decision, the Board encouraged parties “to work together to develop new contract schedules.” Interim Decision at 11. In particular, the Board recognized that if all stations are to be checkpoints, “recovery time would have to be redistributed to give CN a meaningful opportunity to meet its performance obligations.”¹⁵² *Id.* Similarly, in its rule setting Metrics and Standards under Section 207 of PRIIA, FRA has acknowledged that “[h]istorically, Amtrak’s published train schedules have not been designed with a customer OTP metric in

¹⁵² The Board suggested in the Interim Decision that there might also be issues regarding Amtrak’s dwell times at various stations. Interim Decision 11. As the Board surmised might be the case, there are reasons for disparities in dwell times, and this has not been an area of disagreement between the parties.

mind,” and therefore provided a process for Amtrak and its host railroads to negotiate adjustments to their schedules that would align them with FRA’s Customer OTP standards.¹⁵³

The Board’s understanding that proper distribution of recovery time is critical to the functioning of an all-station checkpoint system is consistent with FRA’s decision adopting Customer OTP (which is based on performance at all stations weighted by passengers) as a minimum performance standard under PRIIA. FRA only called upon Amtrak and hosts to update Amtrak schedules in light of the new standard,¹⁵⁴ and it deferred application of its new standard for “disputed” schedules that were not adjusted or updated for the new standard.¹⁵⁵ Further, it provided for non-binding dispute resolution for schedule disputes,¹⁵⁶

CN and Amtrak have agreed on certification of 20 of the 26 regularly scheduled daily Amtrak trains that operate over CN’s lines in the United States.¹⁵⁷ Unfortunately, the parties

¹⁵³ 85 Fed. Reg. at 72,978-72,979.

¹⁵⁴ See Metrics and Minimum Standards Intercity Passenger Rail Service, 85 Fed. Reg. 72,971, 72,977-78 (FRA Nov. 16, 2020) (“Recovery time should, for example, be included across a schedule to protect performance at larger volume stations, locations where passenger trains can wait clear of main tracks, where stations are farther apart, or where trains are more likely to incur operational delays. . . . Where a train’s OTP is measured against the train schedule provided to the public, the train’s schedule should be aligned with the OTP measure used to evaluate the train’s performance.”).

¹⁵⁵ See 49 C.F.R. § 273.5(a)(3).

¹⁵⁶ *Id.* at 273.3 (requiring a party to initiate non-binding dispute resolution for a schedule to be classified as “disputed”). See also, Metrics and Minimum Standards Intercity Passenger Rail Service, 85 Fed. Reg. at 72,980 & n.27; (“While non-binding, the written decision resulting from a non-binding dispute resolution process may facilitate resolution and may also assist the Surface Transportation Board in a 49 U.S.C. 24308(f) investigation.”); *id.* (the “non-binding dispute resolution process will produce a written decision that will inform Amtrak and a host railroad in aligning the schedule with the customer OTP metric”); 49 C.F.R. § 273.3 (stating under the definition of “Disputed schedule” that the “written decision resulting from a non-binding dispute resolution process is admissible in Surface Transportation investigations” under PRIIA).

¹⁵⁷ See Letter from M. Matteucci to J. Blair at 1 (April 7, 2021) (VS (PID) Matteucci/Kuxmann, Ex. 11 (agreeing to certify 20 of the 26 daily Amtrak trains that operate

have not yet agreed on schedules for the four Illini/Saluki trains or the two City of New Orleans trains, but CN's discussions with Amtrak are ongoing. CN on March 23, 2022 proposed to Amtrak that the parties move forward with a redistribution of recovery time.¹⁵⁸ CN proposed using schedules proposed by Amtrak itself in 2020 to redistribute recovery time (which had included some small adjustments to pure run time), and proposed a redistribution of recovery time for the City of New Orleans trains. Amtrak responded on May 3, 2022 with a counter-proposal, and the parties are continuing to discuss possible schedule revisions.¹⁵⁹ The parties have had some discussion concerning schedules since that time and CN remains hopeful that, at a minimum, redistribution of recovery time can be agreed upon for the six trains with uncertified schedules. If not, given that properly allocated recovery time is critical to the proper functioning of a schedule that measures performance at all stations, it may be necessary to defer for the Illini/Saluki and City of New Orleans trains the change from endpoint measurement for performance under the operating agreement to measurement based on all stations.

2. Provisions for the review of schedules and resolution of disputes.

In order to help avoid and to resolve future disputes concerning schedules, CN has proposed a process (CN Proposed Operating Agreement, Sec. 3.2.G.) to ensure that schedules are periodically reviewed as necessary, and clarifying that schedule disputes may be resolved under

over CN's lines in the United States during normal operations). The 20 trains do not include the Adirondack service, which operates over lines of Canadian National Railway Company, the indirect parent of IC and GTW

¹⁵⁸ See Letter from M. Matteucci to J. Blair (Mar. 23, 2022) (VS (PID) Matteucci/Kuxmann, Ex. 12)).

¹⁵⁹ See Letter from J. Blair to M. Matteucci (May 3, 2022) (VS (PID) Matteucci/Kuxmann, Ex. 13).

the binding arbitration provisions of the Agreement.¹⁶⁰ It is in the interests of Amtrak's passengers and the public to assure periodically that Amtrak's schedules are updated and reasonably achievable. The process which CN has proposed is premised on the need to for the Operating Agreement to function appropriately and for passengers to receive the reliable service they deserve. These are goals that Amtrak should share.

CN would retain Section 3.2.D., but it is not a substitute for a regular schedule review process. The new review process is intended to be cooperative and would require that the parties work together to examine, validate, or as necessary modify existing schedules so they are up to date and reflect existing equipment and operating conditions. Rather than requiring a proposed new train schedule at the starting point of the process, as under the existing provision in the operating agreement for proposing a schedule change (Section 3.2.D), the schedule review process CN is proposing to add to the Operating Agreement as Section 3.2.G would culminate in the development of a new schedule, if the facts and circumstances reviewed in that process showed a new schedule to be appropriate. If parties are voluntarily working cooperatively, as the new Section 3.2.D would encourage, they will not need the schedule change provision. If not, the existing schedule change provision would remain available for a party to identify schedule issues by themselves and then initiate the change process by themselves by proposing a full schedule with all proposed modifications, without any requirement that the other party cooperate in that effort.¹⁶¹

The issues the parties have had regarding the validation and establishment of PRT underscores the importance of a cooperative review process versus the unilateral party approach

¹⁶⁰ CN Proposed Operating Agreement § 3.2.G.

¹⁶¹ CN has not proposed to eliminate the existing provision, but its limited utility is underscored by the fact that neither party has sought to invoke it.

under the existing provision (Section 3.2.D). Amtrak, for example, has opposed CN's use of a train performance calculator ("TPC") to determine PRT, and argued in favor of "joint PRT field checks" and claimed that "field verification of PRT through the operation of actual trains over the route is the most effective way to obtain an accurate determination of PRT."¹⁶² More recently, Amtrak has proposed changes in PRT based on a "statistical analysis" that it neither explained nor provided.¹⁶³ The cooperative review process proposed by CN in Section 3.2.G, as opposed to the schedule change proposal process, is consistent with joint efforts and the use of varied approaches to validate schedules.

Specifically, CN proposes that the Operating Agreement require the parties to jointly review schedules for one or more individual Amtrak services on a staggered basis at least once every five years. Such review would be mandatory, unless both parties agree it is unnecessary. Further, although CN should by right be entitled to all incremental costs it incurs related to this process, CN proposes that each party bear its own costs of participating in the review.

The Operating Agreement encompasses six Amtrak services. Two of those services – the Texas Eagle and Lincoln – run over the same IC line, and could be reviewed simultaneously. Therefore, all Amtrak services could be cycled through a review process on a rolling basis every five years. CN proposed that general reviews commence 2 years after the effective date of this Agreement.

In addition to this general review, provision is made for additional reviews in two circumstances. First, under Section 3.2.G.(2)(a), review would take place immediately for the Illini/Saluki and City of New Orleans trains if the parties have not agreed upon a reallocation of

¹⁶² Amtrak Opening Br. at 48.

¹⁶³ See VS (PID) Matteucci/Kuxmann, Ex. 13 at 1.

recovery and miscellaneous time within 3 months following the effective date of the Agreement. CN remains hopeful that such a reallocation will have been done well before that time, but it is critical that the modifications be in place for the proper functioning of any performance measure based on all-stations OTP. Second, under Section 3.2.G.(2)(b), either party would be authorized to initiate a review in particular circumstances where it appears such a review is required.

The party's difficulty in reaching agreement on schedules, which are a part of and a central element of the Operating Agreement, also makes it critical that there be an efficient process under that agreement for resolving schedule disputes. As part of its proposal, CN would make clear that { [REDACTED]
[REDACTED]
[REDACTED] } (see Operating Agreement, § 3.2.D.4.), but it provides little or no guidance as to the duty of the arbitrators or the factors that should guide the arbitrators' decisions. CN's proposed addition at 3.2.G.(4) would do so.

A key aspect of CN's proposal is that scheduling take full advantage of modern modeling techniques to produce achievable, sustainable schedules. Modeling can and should take into account such things as (1) the specific Amtrak consists proposed to operate on the route; (2) the specific infrastructure and capacity constraints that exist on the route; and (3) the level of existing and projected freight and passenger traffic on the route. In addition, the parties may wish to consider seasonal factors, anticipated construction of new railroad capacity, and cyclical maintenance of way work. There is no reason that a similar process should not be employed for the benefit of Amtrak, its passengers, and CN.

PART II: INCREMENTAL COST ISSUES OF DELAYS AMTRAK CAUSES TO CN'S FREIGHT TRAINS (Interim Decision, Sec. II.D. & F.)

Under 49 U.S.C. § 24308(a)(2)(B), CN is entitled to be reimbursed for the “incremental costs of using the facilities and providing the services,” *i.e.*, “those costs that CN has actually incurred, and that CN would not have incurred ‘but for’ the presence of Amtrak.” Interim Decision at 22.¹⁶⁴ Longstanding Board and judicial precedent recognizes that absent such reimbursement, the host railroad would be unfairly compelled to subsidize Amtrak at a loss to itself, and therefore sets full reimbursement of such incremental costs as a minimum floor for compensation in an Amtrak-host operating agreement.¹⁶⁵ As economic expert witness Steven Peterson explains in his verified statement, full incremental cost compensation is less than the economically efficient compensation that would be agreed to in a truly arm’s-length commercial

¹⁶⁴ See, *e.g.*, *Amtrak & Wash. Term. Co., et al., Use of Tracks and Facilities and Establishing Just Comp.*, 348 I.C.C. 86, 103 n.15 (1975) (incremental costs are “all costs which would not be incurred if passenger service were not performed for Amtrak”); *Nat’l R.R. Passenger Corp. & Tex. & Pac. Ry. Co., Use of Tracks & Facilities Establishing Just Comp.*, 348 I.C.C. 357, 373 n.8 (1975) (same); *Nat’l R.R. Passenger Corp. & Terminal R.R. Ass’n of St. Louis, et al., Use of Tracks & Facilities & Establishment of Just Comp.*, 348 I.C.C. 901, 915 (1977) (same); *Nat’l R.R. Passenger Corp. & Consol. Rail Corp.—Application Under Section 402(a) of the Rail Passenger Service Act for an Order Fixing Just Comp.*, 10 I.C.C.2d 863, 863-64 n.3 (1995) (equating “incremental cost” with “track maintenance costs that Conrail would not incur if Amtrak did not operate over its lines”).

¹⁶⁵ See, *e.g.*, *Application of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. 24308(a) – Union Pac. R.R. Co. & S. Pac. Transp. Co.*, 3 S.T.B. 143, 145 (1998) (“49 U.S.C. § 24308(a) permits freight railroads to recover from Amtrak their ‘incremental costs’ – those costs that the carrier incurs as a result of Amtrak’s use of its facilities – and that term is not as limiting as Amtrak may believe”); *id.* at 156 & n.24 (“as a matter of course, we view all costs that a freight carrier would not incur but for the operations of Amtrak as incremental costs”); *Metro. Transp. Auth. v. ICC*, 792 F.2d 287, 297 (2d Cir. 1986) (holding that the statutory incremental cost standard is constitutional because it leaves the host in “the same position monetarily as it would have occupied if the property had not been taken,” which is “precisely the guiding principle of what is just compensation.”); *National Rail Passenger Corp. Application Under Section 402(a) of the Rail Passenger Service Act, FD No. 30426*, 1985 ICC LEXIS 318, at *31 (ICC decided July 5, 1985) (approving a lookback provision proposed by Amtrak 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.”).

contract, but it is nonetheless important to avoid burdening CN and, indirectly, its freight customers, with cross-subsidizing Amtrak, and to ensure that Amtrak internalizes the social costs created by its service demands and any inefficiencies results from its operations, so that Amtrak's incentives will be better aligned with reliable rail service for both passenger and freight customers.¹⁶⁶

A. The Board's Interim Decision Approved Recovery of Freight Delay Costs in Principle, Subject Only to Proof Requirements

In this proceeding, the parties initially contested three main categories of incremental cost compensation claimed by CN:

- (1) freight delay costs, *i.e.*, "costs incurred by CN for the delays to CN trains that would not have been incurred but for Amtrak's presence on CN's lines," including costs for (a) train crews, (b) fuel consumption, and (c) equipment;
- (2) not readily quantified "costs caused by freight rate suppression, capacity costs, and lost opportunity costs"; and
- (3) other currently non-quantifiable costs insofar as they may "'become quantifiable' in the future."

Interim Decision at 18-19.

The Board found that CN had not make a sufficient case for compensation for incremental cost categories (2) and (3), on the basis that CN could not "specifically and verifiably quantify" those costs. *Id.* at 22. Accordingly, and consistent with the parties' agreement to treat the Interim Decision as binding for purposes of the present stage of the proceeding, CN does not pursue its claims within categories (2) and (3) at this stage. CN

¹⁶⁶ See generally VS (PID) Peterson ¶¶ 5, 7.

emphasizes, however, that there are real and significant costs in categories (2) and (3). Scheduling freight service to minimize meets with Amtrak trains and nonetheless incurring 600 or more hours of direct delays to freight trains due to meets with Amtrak trains every month, with knock-on effects on system fluidity, has real and substantial adverse effects on CN, reducing its freight capacity, impairing its freight service, and complicating its railroad scheduling efforts. Insofar as it does not seek compensation for those costs at this stage, CN's proposal is highly conservative – *i.e.*, it seeks compensation for substantially (albeit not readily quantifiably) less than CN's actual incremental costs of hosting Amtrak. If these could be quantified in the future, CN reserves the right to seek recovery from Amtrak.

In contrast to its guidance on the “non-quantifiable” categories (2) and (3), the Board's Interim Decision accepted CN's category (1) – freight delay costs – as compensable in principle: “the ‘but for’ definition of incremental costs means that the new operating agreement could include such costs.” *Id.* at 22-23. The Board expressly rejected Amtrak's argument for a limitation of incremental costs to those that are “avoidable . . . in the short run,” *id.* at 22, and Amtrak's argument that CN's claim for compensation for freight delay costs “should be rejected as a matter of law,” *id.* at 23. Instead, the Board indicated that CN should recover its incremental freight delay costs if and to the extent that CN satisfied “the burden . . . to show that those specific costs could be included in a reasonable manner, consistent with the ‘but for’ standard and the need for specificity, verifiability, and quantifiability as described above.” *Id.*

CN understands that guidance to mean that:

- (i) CN must specifically identify, verify, and quantify delays to CN freight trains that could not have occurred but for Amtrak's presence on CN's lines;

- (ii) CN must specifically identify, reliably verify, and accurately quantify, the additional train crew costs, additional fuel consumption costs, and/or additional equipment costs it incurs because of those delays; and
- (iii) CN must do so “in a reasonable manner” – in other words, consistent with the task the statute assigns the Board of “prescrib[ing] reasonable compensation,” 49 U.S.C. § 24308(a)(2)(B), the Board will apply reasonable, practical standards of proof.

B. CN Has an Improved Freight Delay Cost Methodology that Conservatively Yields Specific, Verifiable and Accurately Quantified Assessments of Incremental Freight Train Delay Costs

CN has prepared its freight delay cost claim and supporting evidence in the attached verified statements accordingly. The Board neither accepted nor rejected the sufficiency of the original evidence CN submitted in support of its freight delay costs almost seven years ago. *See* Interim Decision at 22. CN has significantly strengthened its freight delay cost claims in two main respects, and it seeks payment for incremental costs for Amtrak’s delays to CN freight trains between September 1, 2019 to the present and on a going-forward basis.

First, informed by the Board’s guidance, CN has narrowed its claims to the categories of incremental costs that are most readily quantified. CN is not pursuing at this stage several categories of incremental costs that are currently difficult to prove. For example:

- (1) CN is not currently pursuing claims for lost crew time within a crew’s shift (as opposed to overtime costs incurred because of delays caused by Amtrak), or for fringe benefits or constructive allowances associated with compensation of train crews delayed by Amtrak; and

- (2) CN is not currently pursuing claims for cost of ownership based on return on investment (“ROI”) on CN equipment delayed by Amtrak.¹⁶⁷

Second, as discussed briefly below and at greater length in the attached verified statements, in several respects CN is providing more specific proof of the incremental costs that it is claiming, and employing more conservative assumptions where assumptions are necessary to quantify those costs, than it did in 2015:

- (1) the Board noted that Amtrak had criticized the reliability of CN’s quantification and attribution of delays caused by Amtrak in CN’s Service Reliability Strategy (“SRS”) system. Interim Decision at 23 n.42. While CN does not concede that Amtrak’s criticisms had merit, CN has since done the following:

- (a) has improved its coding system and internal procedures for delay attribution within SRS;¹⁶⁸
- (b) after using SRS as a screen to identify delays to CN freight trains caused by Amtrak, accurately and reliably quantifies those delays by:
 - (i) in most cases, relying on a more direct, automated system used widely throughout the freight rail industry that directly and instantaneously records locomotive movements and speeds – Wi-Tronix;¹⁶⁹ and

¹⁶⁷ CN previously pursued such claims on the basis that ROI is an economically valid and well-recognized element of the costs of equipment ownership. *See* VS Baranowski, Fisher at 22-23. While that remains true, CN is now limiting its claims for the cost of delays to equipment to applicable hourly contractual rates, as described below.

¹⁶⁸ *See* VS (PID) Summerfield *et al.*, pt. III.B; VS (PID) Matteucci, Kuxmann, pt. III.B.

¹⁶⁹ *See generally* VS (PID) Baranowski; VS (PID) Lizotte.

- (ii) in other cases where Wi-Tronix data are unavailable, relying on playbacks which provide automated data on train movements;¹⁷⁰
- (2) CN has now limited its compensation claims to instances in which it has objectively verified through Wi-Tronix or playbacks that the CN train was halted, rather than claiming for delays that might have involved slowing but not an actual stop;¹⁷¹
- (3) when a train is delayed by Amtrak and other causes (“mixed delays”), CN now uses specific, reliable, contemporaneously recorded data, rather than default rules of thumb, to quantify the minutes of delay attributable to Amtrak.¹⁷² CN conservatively assumes in every mixed delay case that, while Amtrak caused the train to incur idling time, Amtrak was not the “but for” cause of the stopping and starting of the train and excludes such stopping and starting time;¹⁷³
- (4) CN now confines its claims for overtime to instances in which it has verified that specific crewmembers were on freight trains delayed by Amtrak before or while incurring overtime, and limits those claims to the lesser of the delay caused by Amtrak or the amount of overtime;
- (5) CN makes no claims for re-crew costs incurred when a crew whose train was delayed by Amtrak “times out” and, therefore, has to be transported and accommodated at an unplanned location along the route;¹⁷⁴

¹⁷⁰ See generally VS (PID) Baranowski; VS (PID) Matteucci, Kuxmann, pt. III.B.

¹⁷¹ See VS (PID) Baranowski, pt. II.B.

¹⁷² See generally VS (PID) Baranowski; VS (PID) Summerfield *et al.*

¹⁷³ See generally VS (PID) Baranowski; VS (PID) Matteucci, Kuxmann.

¹⁷⁴ See VS (PID) Baranowski, pt. III; VS (PID) Matteucci, Kuxmann, pt. III.

- (6) CN has created a study, with specific modeling for 51 distinct scenarios and based on conservative assumptions regarding fuel optimization practices, to determine incremental fuel consumption due to stop-start events for freight trains caused by Amtrak;¹⁷⁵
- (6) instead of using assumed idling times and average fuel consumption rates when a locomotive is in idling mode, CN's calculation of incremental fuel consumption due to idling caused by Amtrak now uses Wi-Tronix data where available (in the vast majority of cases) to determine precise idling time and uses specific information about the particular locomotives involved and objective idling fuel consumption data published by locomotive manufacturers;¹⁷⁶
- (7) CN now uses monthly, rather than quarterly, average fuel prices to determine fuel costs;¹⁷⁷ and
- (8) CN now bases its quantification of the costs of delay to equipment (locomotives and cars) solely on hourly rental rates set by industry-standard contracts between Class I railroads.¹⁷⁸

Individually and collectively, the revisions listed above provide significantly greater assurance than CN's original methodology that the incremental freight delay costs claimed by CN are specific, verifiable, and reliably and conservatively quantified. As Dr. Peterson explains,

¹⁷⁵ See VS (PID) Robinson (describing and providing the results of the special study); VS (PID) Lizotte (explaining the basis for conservative assumptions used in the study); VS (PID) Baranowski (explaining the use of the study to generate specific, verifiable and reliably quantified fuel consumption estimates).

¹⁷⁶ See VS (PID) Baranowski, pt. III.B.

¹⁷⁷ See VS (PID) Baranowski, pt. III; VS (PID) Matteucci, Kuxmann, pt. III.

¹⁷⁸ See VS (PID) Baranowski, pt. III.C; VS (PID) Matteucci, Kuxmann, pt. III.

the conservatism embedded in CN's methodology means that its adoption would lead to CN being significantly under-compensated for its incremental freight delay costs and Amtrak not fully internalizing the costs it imposes on CN and freight moving over CN's network. That outcome is economically inefficient and suboptimal as a matter of public policy relative to full incremental cost compensation. However, as Dr. Peterson further explains, it is a clearly superior outcome – closer to the statutory prescription of full incremental cost compensation and less inefficient – than the complete denial of incremental freight delay cost compensation proposed by Amtrak.¹⁷⁹

The details of CN's revised methodology are fully and transparently explained in the attached verified statements, which are supported by detailed workpapers, and a demonstration of the methodology is illustrated by applying it to nearly 1000 instances of delays to CN freight trains caused by Amtrak, amounting to over 600 hours of delays, in a sample month, December 2019. CN's demonstration and quantification of incremental freight delay costs in that month involves review and analysis of about 1000 SRS delay and train consist records, over 700 Wi-Tronix records, over 100 playbacks, specific information about thousands of individual crewmembers, locomotives and cars delayed on freight trains due to Amtrak, and specific fuel cost and consumption data, including developing 51 stop-start fuel consumption scenarios. The data used are reliable, objective, and auditable, including operational data maintained and used by CN in the ordinary course of business (*e.g.*, SRS data, playbacks, payroll and average fuel cost data), automatically and instantaneously recorded data generated by systems widely used in the industry (*e.g.*, Wi-Tronix data), and manufacturers' data (on fuel consumption rates) and contract rates (on locomotive and railcar leases). Those data provide the specificity and

¹⁷⁹ See generally VS (PID) Peterson.

verifiability in the Board’s Interim Decision, and the multiple elements of conservatism noted above provide the requisite assurance that CN’s quantification of incremental freight delay costs is “reasonable,” Interim Decision at 23, and reliable.

If the Board approves CN’s methodology (with or without modifications), CN can readily apply it to other periods – both to past months for which the Board awards CN since September 1, 2019 freight delay cost compensation and for the term of a new operating agreement going forward. Further, with the methodology established, Amtrak could be given a reasonable opportunity to audit its application and raise specific objections to specific claims to the extent that it has specific bases for claiming that they deviate from the established methodology. In order to ensure that all aspects of the rigorous methodology described in the attached verified statements and used on the December 2019 sample month are equally applied to all months for which a claim is made, CN proposes not to seek recovery of past incremental costs calculated under its new methodology except for the period beginning September 1, 2019.¹⁸⁰

The specificity, verifiability and quantifiability of the various elements of CN’s proof of its incremental freight delay costs is addressed briefly below, and in more detail in the accompanying verified statements. CN’s methodology proceeds in two steps. First, as outlined in Part II.C below, CN specifies, verifies and quantifies individual freight train delays caused by Amtrak. Then, as outlined in Part II.D below, for each of those freight delays, CN specifies, verifies and quantifies several categories of cost it actually incurred because of that delay: overtime costs, fuel costs, and equipment costs.

¹⁸⁰ See Part II, E., below.

C. CN's Quantification of Incremental Freight Delays Is Specific, Verifiable, and Accurate

To quantify delay minutes to CN's freight trains attributable to Amtrak, CN relies on data extracted from three of its operational systems used in the normal course of business: (i) SRS system data¹⁸¹; (ii) Wi-Tronix data¹⁸²; and (iii) dispatching system playbacks. As explained below, each source reliably captures real-time data.

1. SRS is a reliable, albeit underinclusive, source of CN freight train delay data.

The SRS system is CN's primary tool for generating data regarding train events and performance. It tracks the location of trains, locomotives, and cars in CN's network through wayside equipment that uses radio frequency technology to passively detect and identify tags mounted on railroad equipment as that equipment passes a reader, and captures the "story" of each train. As a train moves from its point of origin to destination, the SRS system records detailed aspects of its operations, identifying its route, its arrival and departure times at Train Job Schedule Stations (including Delay Reporting Stations),¹⁸³ its consist at those stations, and a summary of the events that occur on each run.

SRS also tracks the number of minutes it takes to travel between Delay Reporting Stations, and compares that duration of time to the unimpeded segment runtime programmed into the system (the "Segment Runtime"). If the time to travel between Delay Reporting Stations is longer than the associated Segment Runtime, then the SRS system automatically generates a

¹⁸¹ See VS (PID) Summerfield, Nguyen-Hung, Zarembka for a detailed description of the SRS system.

¹⁸² See VS (PID) Lizotte, pt. I for a detailed description of the Wi-Tronix system.

¹⁸³ SRS records event and performance metrics only at Train Job Schedule Stations, which are stations with particular operation importance. See VS (PID) Summerfield, Nguyen-Hung, Zarembka, pt. III.A.

Delay Prompt, which prompts the dispatcher to input delay codes and delay comments to identify and quantify delay events affecting that train on that route segment/at that location. Through that process, the dispatcher creates a Delay Record (or multiple Delay Records if multiple events contributed to the train's being delayed on the segment as indicated by the Delay Prompt). The Delay Record is then subject to review and correction by the dispatcher and authorized supervisors for a few days, at the end of which it is finalized in the SRS system and stored in CN's Data Warehouse ("DW"). Dispatchers use the "FA" code to identify freight train delays caused by Amtrak. CN implemented the uniform use of the "FA" code in July 2017 (subsequent to CN's initial filing of evidence in this case), and it has proven to be a reliable means of internally tracking delays caused by Amtrak.¹⁸⁴

When multiple events contribute to delays between two Delay Reporting Stations, dispatchers use real-time data, including dispatching system playbacks as appropriate, to separate out each contributing delay event so the final Delay Records accurately identify train events along CN's rail network. Where such a delay event involves an Amtrak-caused delay, dispatchers first assign the appropriate number of delay minutes actually caused by Amtrak to the "FA" code.¹⁸⁵ After assigning those delay minutes to the "FA" code, dispatchers then allocate the balance of remaining delay minutes to non-FA codes. Delay coding and comments are then subject to further scrutiny and review by higher-level dispatch personnel responsible for track operations. This quality control process ensures that Delay Records allocating multi-event delay minutes to "FA" are highly reliable. Such Delay Records can also be audited through the use of playbacks.

¹⁸⁴ See VS (PID) Summerfield, Nguyen-Hung, Zarembka, pt. III.B.

¹⁸⁵ See *id.*

SRS does not record all Amtrak-caused freight train delays, so it provides a conservative basis for identifying and quantifying those delays. First, SRS does not generate any delay records for trains that do not have a Train Service Plan (“TSP,” *i.e.*, CN freight train schedule).¹⁸⁶ Second, SRS generates Delay Records only for freight trains that exceed 10-30 minute thresholds.¹⁸⁷ Third, CN’s methodology does not attempt (through SRS or otherwise) to capture the network effect of cascading delays caused by Amtrak; it only captures delays to freight trains directly caused by Amtrak and not down-the-line delays that occur when a train directly delayed by Amtrak is involved in further meets and other events causing delay because the Amtrak delay knocked it off its schedule.¹⁸⁸

2. *Wi-Tronix is a reliable, automated and contemporaneous source of train metrics.*

CN relies on the Wi-Tronix system to monitor and capture locomotive metrics relevant to its operations. Whereas the SRS system records data at Train Job Schedule Stations and focuses on train events, the automated, widely used Wi-Tronix system captures a “snapshot” of locomotive performance metrics every five minutes as well as when certain predefined events (including stopping and starting) occur or when a train reaches certain locations. Wi-Tronix couples advanced telemetry with detailed data gathered instantaneously from locomotive subsystems, enabling CN to monitor and record in detail train location and speed and locomotive and braking operations, performance and conditions.¹⁸⁹

The vast majority of CN-owned locomotives are equipped with Wi-Tronix, and the data generated by the Wi-Tronix system are stored in CN’s Data Warehouse. As a result, Wi-Tronix

¹⁸⁶ See VS (PID), Summerfield, Nguyen-Hung, Zarembka, pt. III.C.

¹⁸⁷ See *id.*

¹⁸⁸ See VS (PID) Matteucci-Kuxmann, pt. III.

¹⁸⁹ See VS (PID) Lizotte, pt. I.

provides an objective and reliable and highly detailed data-set that details, for about 80% of the freight trains running on CN's lines,¹⁹⁰ precisely when they stopped and started and the speeds at which they were travelling before and after they were delayed. That makes Wi-Tronix a highly reliable source of specific and verifiable information to quantify delays Amtrak causes to CN freight trains. CN uses Wi-Tronix for its freight delay costing methodology accordingly.

3. *Playbacks are dynamic images that show historical train movement on CN's network and are saved to CN's PDS Oracle Database in real-time.*

CN dispatchers use on real-time visual representations of train movement on CN's rail network in order to control and direct rail traffic. Those dynamic images show the location and movements of all trains on the CN rail network, and further show how each dispatcher lined the switches. As they are displayed on a dispatcher's monitor, the data are simultaneously saved to CN's PDS Oracle Database as a contemporaneous record of what occurred on its rail lines. Those recordings are referred to as Playbacks. CN regularly reviews and relies upon them to support critical business functions.¹⁹¹

4. *CN's methodology to identify and quantify freight delays due to Amtrak is sound and conservative.*

To identify and quantify delays to freight trains attributable to Amtrak in the sample month of December 2019, in consultation with the appropriate CN personnel with subject matter expertise and CN witness Michael Baranowski from FTI Consulting ("FTI") utilized a three-step methodology, which CN proposes to use to for other months since September 1, 2019 and on a going-forward basis. First, FTI identified the universe of freight train delays partially or wholly

¹⁹⁰ While almost all CN locomotives are equipped with Wi-Tronix and generate Wi-Tronix data, some of the freight trains operating on CN's network are powered by locomotives owned by other railroads, and CN generally does not have access to Wi-Tronix data they generate, if any. See VS (PID) Lizotte, pt. I.

¹⁹¹ See VS (PID) Summerfield *et al.*, pt. III.B; VS (PID) Matteucci, Kuxmann, pt. III.B.

caused by Amtrak. Second, FTI calculated the amount of time a freight train was fully stopped (“Idle Time”). Third, for delays solely attributable to Amtrak, FTI calculated the additional time attributable to the freight train slowing to a stop and then accelerating back to the speed it was traveling before the delay occurred as compared to the time that would have elapsed if the train had continued at a constant speed (the “V-Time”). That process yielded, for each identified delay, a Delay Time that is, as appropriate, either Idle Time only or the sum of Idle Time and V-Time, depending upon whether the delay is attributable solely to Amtrak or to multiple causes including Amtrak.¹⁹²

Because CN has adopted use of the “FA” code, the first step is straightforward. CN extracted from the SRS system all Delay Records coded “FA” and sent those records to FTI. For our sample period of December 2019, there were a total of 1,067 Delay Records coded “FA.”¹⁹³

To calculate Delay Time, FTI relied upon SRS Data, Wi-Tronix Data, and/or Playbacks. The methodology to calculate Delay Time varied depending on whether a delay was attributed solely to Amtrak or to Amtrak and at least one other cause, and also on whether Wi-Tronix data were available. There were three different ways FTI calculated Delay Time:

{

[REDACTED]

[REDACTED]

[REDACTED]

¹⁹² See generally VS (PID) Baranowski.

¹⁹³ CN conducted a manual review of December 2019 Delay Records, and found 44 Delay Records that should have been coded “FA” but were coded under a different delay code. However, for purposes of calculating incremental costs, and in order to adhere to a methodology that is simple and transparent, with minimal manual review, and conservative in its results, CN excluded those non-“FA” coded Delay Records. See VS (PID) Summerfield *et al.*, pt. IV.

[illegible]

[illegible]

[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]

}

4) *Total Delay Minutes for December 2019*

In total, Amtrak caused CN freight trains to be delayed by 40,829 minutes (680.48 hours) in December 2019.

D. CN's Assessment of Incremental Costs Is Specific, Verifiable, and Accurately and Conservatively Quantified

1. Incremental labor costs.

CN's freight trains have a two-person crew. By definition, when the train on which they serve is delayed by Amtrak, they are delayed in becoming available to perform their next task, or, if the delay causes their current assignment to extend beyond the end of their regular shift, CN will incur overtime payments to them. If (as occurred in December 2019) CN incurs over 600 hours of train delay due to Amtrak in a month, Amtrak is depriving it of over 1200 crew-hours per month.

Guided by the Board's direction that claimed costs must specific, verifiable and quantifiable, CN proposes a conservative assessment of incremental labor costs. CN proposes that Amtrak reimburse it only for overtime costs that Amtrak causes it to incur by delaying specific, individually identified crewmembers such that they over-run their scheduled shift time on a particular day. CN's claim is verified by delay and overtime records associated with individual crewmembers. And it is quantified in a simple, reliable and conservative way. The relevant time is the lesser of the following: (1) number of minutes of delay Amtrak caused the

²⁰³ See VS (PID) Baranowski, pt. II.B.

crewmember, or (2) the number of minutes of overtime the crewmember went on to incur at the end of that shift. That number of minutes is then multiplied by the applicable contractual overtime rate, as actually paid to or on account of that individual crewmember, including pro rata payroll tax, to generate the precise incremental cost of overtime attributable to the Amtrak-caused delay.

That yields a conservative assessment of incremental overtime labor costs caused by Amtrak. It does not include any allocation of fringe benefits and constructive allowances, which represent a substantial percentage of CN's labor costs, and it also does not include the costs of re-crewing (providing transportation to and accommodation at a hotel for a crew who, because of delays on the line, have to be relieved from duty at an unplanned location, and providing transportation to and payment for a replacement crew).

As detailed in the verified statement of Michael Baranowski, CN's claim for incremental overtime costs for December 2019 amounts to \$58,255.

2. Incremental fuel costs.

When a CN train is delayed by an Amtrak train, it consumes additional fuel, both because its locomotives are running in idle mode while it is stationary and because (insofar as attributable to Amtrak) in the process of stopping and starting, locomotives consume more fuel than when they are moving on the track. CN's methodology conservatively captures this incremental fuel consumption and then determines its cost using CN's basic monthly average fuel cost per gallon.

CN's claim for incremental fuel costs for idle time (*i.e.*, time when a freight train is stationary) is limited to cases in which CN has specific and verifiable proof (as outlined in Part II.C above) that a specific CN freight train was stopped because of a specific Amtrak train. When in idle mode, freight train locomotives consume fuel (albeit at a lower rate than when moving). In each case, using Wi-Tronix data where available, CN identifies the specific

locomotives on the train that were consuming fuel in idle mode while stopped due to Amtrak, and based on reliable, objective and conservative data – the specific locomotive manufacturer’s published assessment of the lowest fuel consumption rate of the specific locomotive when in idle mode, and the number of minutes the train spent in idle mode because of Amtrak – CN calculates the number of gallons burned in idle mode due to Amtrak.²⁰⁴

In addition, in many cases when Amtrak delays a CN train, Amtrak causes that train to stop and start (a “stop-start event”), which results in additional fuel consumption since trains consumer more fuel when accelerating from a stop than when moving on the track. To be conservative, CN assumes that a train idling in a yard or a train that was delayed by other causes in addition to Amtrak did not incur a stop-start event due to Amtrak. There are undoubtedly instances when a stop-start event is properly attributable to Amtrak even for a train that has also been delayed by another cause,²⁰⁵ but in order to keep its methodology simple and conservative and to assure that each stop-start event can be reliably verified as due to Amtrak, CN has not excluded those instances. As explained in the verified statements of Michael Baranowski and Timothy Robinson, CN conducted a study, taking into account specific train characteristics, train speeds and other circumstances, and applying a sophisticated train performance calculator to 51 categories of stop-start scenario identified from the December 2019 data, to quantify incremental

²⁰⁴ See generally VS (PID) Baranowski, pt. III.

²⁰⁵ For example, there will be instances when a freight train must stop in a siding because of a passing Amtrak train, and it then remains stopped in the siding for additional minutes to let another train pass after the Amtrak train, but it would not have needed to wait for the second train had it not originally been delayed by the Amtrak train.

fuel consumption in various categories, and then applied the results to each individual instance of a stop-start event caused by Amtrak.²⁰⁶

Having reliably and conservatively quantified its incremental fuel consumption in idling mode and in stop-start events due to Amtrak, CN derives the costs of that incremental fuel consumption by applying its average fuel cost – just the direct cost of the fuel, including tax – essentially the same cost measure approved by the Board for fuel surcharge and other regulatory cost filings, but with extra (month, rather than quarter) specificity as to date.²⁰⁷

As detailed in the verified statement of Michael Baranowski, CN's claim for incremental fuel costs for December 2019 amounts to \$\$[REDACTED].

3. Incremental equipment costs.

Like the crew, the locomotives and railcars on a freight train are, by definition, delayed when the train is delayed by Amtrak. For equipment CN owns, that means that it is unavailable for its next productive assignment on CN and unavailable to be used by another railroad; for equipment owned by other railroads, that means that CN's ability to return the equipment and end its obligations in respect of it is delayed.

CN's methodology specifically identifies every locomotive and car on a delayed train in order to determine what this costs CN. CN assumes that delays to private cars are without cost to CN, notwithstanding that such delays obviously lead to customer dissatisfaction. For other locomotives and cars – whether CN's own equipment or equipment from other railroads – CN uses an objective measure of the cost per minute of delay. Locomotives and railroad-owned cars must be used efficiently and have an hourly expense, as reflected by bilateral agreements

²⁰⁶ See generally VS (PID) Robinson; VS (PID) Baranowski; see also VS (PID) Lizotte (describing basis for a conservative assumption in the methodology).

²⁰⁷ See VS (PID) Baranowski, pt. III.B; VS (PID) Matteucci, Kuxmann, pt. III.

between the freight railroads. CN's methodology applies the hourly rate applicable to the specific locomotive or railroad-owned car to determine the incremental cost of delays caused by Amtrak. Those rates are the result of arm's-length transactions, and they are fully documented in the workpapers supporting the verified statement of Michael Baranowski.

As detailed in the verified statement of Michael Baranowski, CN's claim for incremental equipment costs for December 2019 amounts to \$140,109.

E. Incremental Cost Compensation for Past Freight Train Delays

Since expiration of the current Agreement by its own terms on August 11, 2013, the parties have been complying with its provisions (with modest, agreed amendments) on an interim basis, as ordered by the Board in its initial order served August 9, 2013, pending a final decision by the Board. When it issues that final decision, the Board would be fully authorized and it would be consistent with past precedent for its prescription of compensation for incremental costs incurred since August 12, 2013. Nonetheless, as discussed below, CN is limiting its claim for incremental cost compensation to the period beginning September 1, 2019.

There is no a basis for excusing Amtrak's payment of such costs. Whatever costs Amtrak is ultimately required to pay, it will be only a small portion of the actual costs CN incurs due to Amtrak. The costs claimed by CN do not even fully cover the full incremental costs of freight delays due to Amtrak (e.g., regular crew wages), much less the many other incremental costs outlined by previously by CN that are not quantified (e.g., costs due to Amtrak's general consumption of line capacity).

CN is nonetheless limiting its request for past incremental cost compensation to the period beginning September 1, 2019. That date was the beginning of the first calendar month following issuance of the Board's Interim Decision, which put the parties on notice of the

agency's interpretation of "incremental costs," as used in 49 U.S.C. § 24308(a)(2)(B), and that Amtrak could be required to reimburse hosts for expenses that host railroads would not incur but for the presence of Amtrak on their lines, provided those expenses were specific, verifiable, and quantifiable. The fact that CN is only looking for compensation from that date forward means CN is dropping its claim for incremental delay costs for the entire period prior to that date, including its { [REDACTED] } claim for the period August 2013 to January 2015, detailed in CN's previous submissions.²⁰⁸

F. Summary

Using specific and reliable data, CN has developed and implemented a methodology that reliably, verifiably, and very conservatively identifies and quantifies incremental freight train delay costs CN incurs due to Amtrak's presence on its rail lines. CN has demonstrated the application of that methodology across almost 1000 delays in the sample month of December 2019, resulting in a conservative assessment of incremental freight delay costs in that month of \$219,691.

The Board should approve CN's incremental freight delay costing methodology, and award CN its incremental freight delay costs consistent with that methodology for the period since September 1, 2019 and as compensation to be included in the operative agreement going forward.

²⁰⁸ VS Baranowski/Fisher at 26.

PART III: Other Contract Issues (Interim Decision, Sec. 11.F.)

A. Evergreen Renewal

In the Interim Decision the Board found “that a seven-year operating agreement term would be reasonable and balance the concerns of both parties.” Interim Decision at 27. The Board also “encourage[d] the parties term to include an evergreen renewal clause.”

For purposes of this round of pleadings, CN understands the Board to have resolved the initial term issue.²⁰⁹ Therefore, CN has included a seven-year term in its proposed operating agreement.²¹⁰ CN does not know Amtrak’s position on inclusion of an evergreen renewal clause, but given the Board’s encouragement to the parties to include such a clause, CN has once again included it in its proposal. CN continues to believe the default under the Operating Agreement should be for extension rather than termination.

B. Confidentiality

The current Operating Agreement does not contain a confidentiality provision, nor is there any external confidentiality agreement requiring the parties to treat it as confidential. Nevertheless, CN and Amtrak have been treating it as confidential in this proceeding. This is appropriate with regard to a limited portion of the Agreement. As in other agreements filed with the Board or subject to litigation before it, the only confidential portions of the Operating Agreement are the specific numbers reflecting costs and charges. Disclosure of the portions containing those costs and charges (and in specific, Appendix IV, which includes several per-unit cost items and therefore can provide information about CN’s internal costing, Appendix V,

²⁰⁹ If the Board does not allow the Operating Agreement to make provision for future incremental costs that become specifically and verifiably quantifiable with advances in technology and thus meet the Board’s standards for compensation, it is particularly important that the initial term of the Agreement not extend longer than seven years.

²¹⁰ CN Proposed Operating Agreement § 8.8.A.

which reveals actual dollar amounts for incentive and penalty payments at various levels of OTP, and Appendix IX, which sets out specific compensation for Amtrak's use of the St. Charles Air Line in downtown Chicago) would reveal CN's commercially sensitive or otherwise proprietary information and therefore should be prohibited.

But most of the Operating Agreement does not merit confidential treatment. This is especially true of the main part of the Agreement (Articles I through VIII), which does not contain specific dollar amounts (other than the threshold for substantiality in the provision for revision of the agreed-upon flat rates in Appendix IV,²¹¹ and the amount of the contract advance paid by Amtrak to CN²¹²) and merely reveals the structure of the relationship between CN and Amtrak. There is no compelling reason to deny the public information about that structure, especially when it is laid out in a new Operating Agreement ordered by the Board, as in this proceeding, in the exercise of its authority to "prescribe reasonable terms and compensation" under 49 U.S.C. § 24308(a)(2)(A)(ii). Such a prescription is a determination by the Board of where the public interest lies, and it is appropriate that such a determination be open to the public as far as possible.²¹³ The Board appears to acknowledge as much in its Interim Decision, which

²¹¹ 2011 Operating Agreement, § 5.2.E.

²¹² *Id.*, § 5.3

²¹³ It should be remembered that the Operating Agreement, like the agreements that Amtrak has with many or most of its host railroad, developed from the "Basic Agreement," an agreement that was worked out between Amtrak and its host railroads and individually executed by them immediately before Amtrak began operations on May 1, 1971. In its basic structure, the Basic Agreement was identical for all host railroads and was open to the public, though the specific compensation terms were individualized to each railroad and were therefore confidential. CN is proposing a similar division between confidential and non-confidential terms in the new Operating Agreement.

states that “the Board would make public any specific terms it would need to set in a later decision, as the Board disfavors confidential decision making unless absolutely necessary.”²¹⁴

Accordingly, CN is proposing an addition to the Operating Agreement that would require that the rates and costs in Appendices IV, V, and IX, but no other portions of the Agreement, to be treated as confidential.²¹⁵

C. Incorporation of Letters Regarding PTC Costs and Incremental Safety Appliance Costs, as Agreed by the Parties In Those Letters.

When the parties executed the Operating Agreement, they also executed { [REDACTED]

[REDACTED]

[REDACTED] }²¹⁶ As discussed below, { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }²¹⁷

{ [REDACTED]

[REDACTED]

[REDACTED]

²¹⁴ Interim Decision at 28.

²¹⁵ It should be remembered that the Operating Agreement, like the agreements that Amtrak has with many or most of its host railroad, developed from the “Basic Agreement,” an agreement that was worked out between Amtrak and its host railroads and individually executed by them immediately before Amtrak began operations on May 1, 1971. In its basic structure, the Basic Agreement was identical for all host railroads and was open to the public, though the specific compensation terms were individualized to each railroad and were therefore confidential. CN is proposing a similar division between confidential and non-confidential terms in the new Operating Agreement.

²¹⁶ Attached as Exhibits 15 and 16.

²¹⁷ CN Proposed Operating Agreement, App. IV, Table 1, Items 26, 27; *id.*, App. IV, § III, Items 26, 27.

the Board should { [REDACTED] }
[REDACTED]

D. Increase in Monetary Threshold for Required Amtrak Consent for { [REDACTED] }
[REDACTED]

Item 4(a) of Appendix IV of the Operating Agreement obligates Amtrak to pay CN { [REDACTED] }
[REDACTED]
[REDACTED]
[REDACTED] but provides that { [REDACTED] }
[REDACTED]
[REDACTED] } To reflect the effects of inflation, and the fact that \${ [REDACTED] } is now a trivial amount for a { [REDACTED] }, CN proposes to raise the threshold from \${ [REDACTED] } to \${ [REDACTED] }, which is still quite low but would relieve CN of the administrative inconvenience and expense of seeking approval for the most trivial expenses.

E. Snow Removal

Item 4(b) of Appendix IV of the Operating Agreement { [REDACTED] }
[REDACTED]
[REDACTED]
[REDACTED] } In reality, however, such snow removal, whether arranged by Amtrak or CN, is done through contractors. If Amtrak is having difficulty locating a contractor, CN simply provides Amtrak with information regarding additional contractors. Since CN is no better position than Amtrak to hire station snow removal contractors, it makes no sense to treat CN as a fall back snow removal alternative. Accordingly, CN proposes to strike all but the first sentence of Item 4(b).

CONCLUSION

For the reasons set forth above, the Board should order the parties to execute a new Operating Agreement in accordance with CN's proposed changes to the current Operating Agreement (as shown in the CN Proposed Operating Agreement in Tab B). Changes to the provisions of the Operating Agreement regarding Performance Payments and Performance Penalties (as defined in the Operating Agreement) should be made prospective, given their purpose of incentivizing future conduct, and that CN should be entitled to compensation for incremental costs of past freight train delays from September 1, 2019.

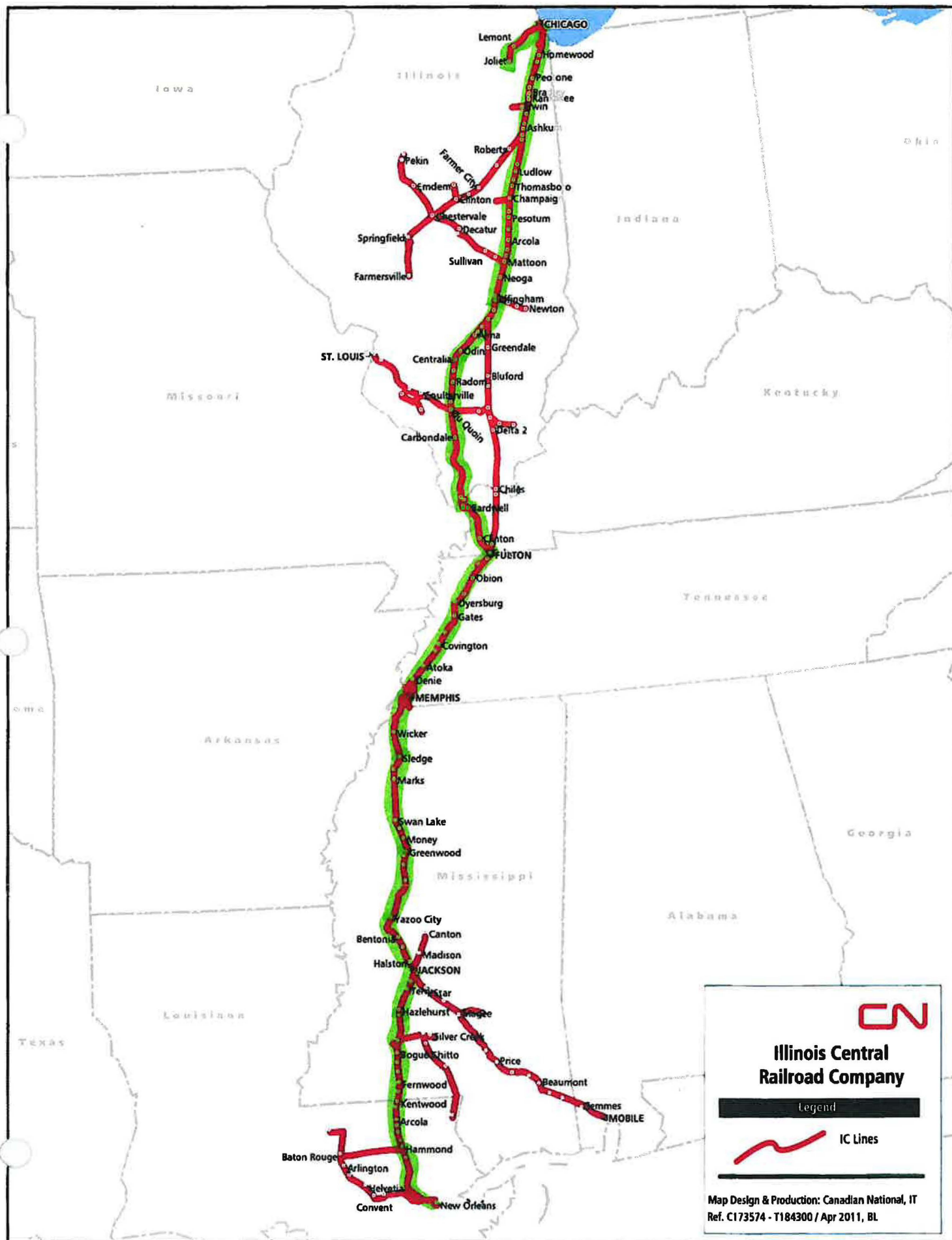
Respectfully submitted,

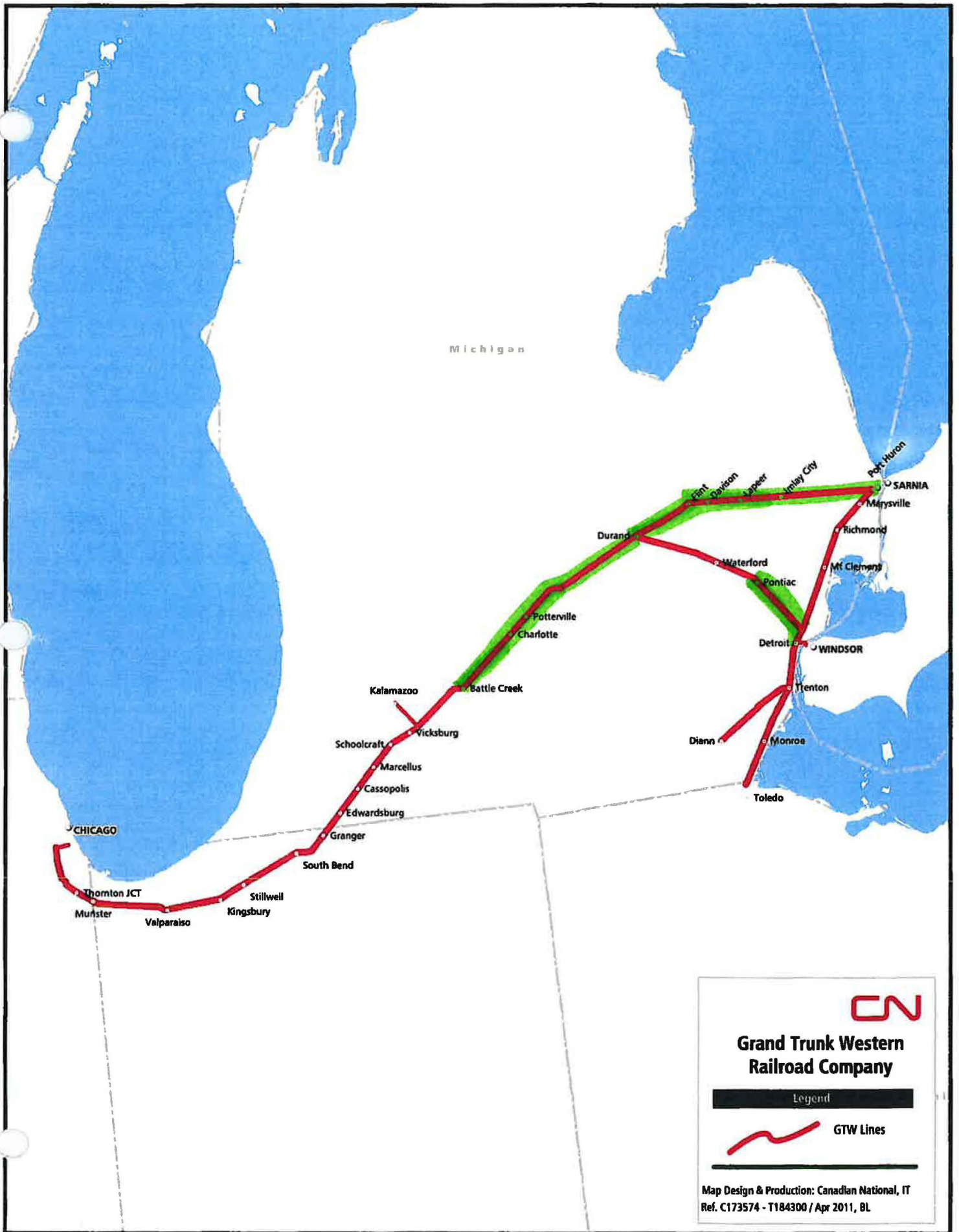
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May 27, 2022

TAB A





TAB B

REDACTED

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 VERIFIED STATEMENT OF
MICHAEL MATTEUCCI AND SCOTT KUXMANN**

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My name is Michael Matteucci. I am Senior Director – Interline Services at CN.¹ I have held this position since April 2016. From September 2010 to April 2016, I was Regulatory and Contract Counsel at CN. Between 2009 and 2010, I was Assistant Chief Counsel at the Illinois Department of Transportation. I hold a Bachelor of Arts (BA) degree from DePauw University and a Doctor of Law (JD) degree from Loyola University Chicago School of Law. I have responsibility for negotiation and administration (including monitoring contract compliance) of all joint facility, interline, and operating agreements for freight operations and with freight railroads on CN lines in the United States and Canada, and all passenger agreements for CN lines in the United States and Canada.

My name is Scott Kuxmann. I am Manager of Passenger Operations, working in the Contracts department of CN's Eastern Region, which includes the United States. I am also the designated NRPC Officer² for CN. I have held this position since August 2012. My previous positions at CN include Senior Manager Operations, Regional Manager Crew Management, Chief Dispatcher, and Train Dispatcher. I have 21 years of experience working in the railroad industry. I began my career with Union Pacific Railroad Company ("UP") in August 1998, before joining Wisconsin Central Ltd. ("WCL") in September of 1999. I joined CN in 2001, with the acquisition of WCL by Canadian National Railway Company. I graduated from the University of Wisconsin-Green Bay in 1992 with a bachelor's degree in business.

¹ In this Verified Statement, we use "CN" primarily to refer jointly to two indirect wholly-owned subsidiaries of Canadian National Railway Company, Illinois Central Railroad Company ("IC") and Grand Trunk Western Railroad Company ("GTW"). IC and GTW are parties to an Operating Agreement, discussed in this statement, with the National Railroad Passenger Corporation ("Amtrak") setting terms and compensation for Amtrak's operation of passenger trains over their lines. Upon expiration of that Agreement in 2013, Amtrak filed its Application in this proceeding, seeking prescription by the Board of terms and conditions to govern Amtrak's use of those subsidiaries' lines following expiration of the prior Agreement.

² "NRPC" refers to National Railroad Passenger Corporation, or "Amtrak."

In my current position, I am responsible for handling all passenger-related issues on CN's United States lines,³ which involves overseeing CN's relationship with various Amtrak departments such as the Host Railroad Group, Operations, Accounting, Information Technology, Consolidated National Operations Center, Engineering, Mechanical, Charter and Special Moves. I am familiar with all of Amtrak's services on CN and oversee the administration of the current Operating Agreement. Moreover, through my previous experience as a Train Dispatcher and Chief Dispatcher, I have first-hand knowledge of the relationship between passenger and freight needs in a given corridor, and my background in the intermodal industry provides insight into the customer perspective on rail traffic and transportation of time-sensitive materials.

In this verified statement, we discuss the principal changes which CN proposes to make in its existing Operating Agreement with Amtrak,⁴ including, most especially, CN's proposal to implement the Board's determination in August 2019 that CN should be compensated for specific, verifiable, and quantifiable costs it incurs as the result of delay to its freight trains by Amtrak's intercity passenger trains and that would not have occurred but for the presence of Amtrak's trains.

³ The Eastern Region includes all CN lines in the United States, with the exception of certain lines near the Canadian border in Minnesota.

⁴ 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 comparison submitted as Exhibit 1 of Tab B of this Opening Submission.

Part I of our statement provides a general background, describing the Amtrak services that make use of IC and GTW's lines, as well as the current Operating Agreement setting the terms and compensation for that use.

In Part II of our statement, we discuss the changes we are proposing to the Operating Plan's provisions regarding calculation of on-time performance ("OTP") and of incentives and penalties based on OTP, in order to conform to the Board's August 9, 2019 Decision ("Interim Decision").

In Part III, we discuss CN's proposal for amending the Operating Agreement to provide for CN to recover from Amtrak, as part of its incremental costs of hosting Amtrak, CN's incremental freight train delay costs caused by Amtrak. The Board's Interim Decision approved in principle recovery of the incremental labor, fuel and equipment costs CN incurs when freight trains on CN's network are delayed by Amtrak trains, subject to proof that those costs are "specific, verifiable and quantifiable." Interim Decision at 22 & n.41. We briefly outline the basis for CN's incremental freight delay cost claims and certain evidence proffered in support of them. More details regarding the supporting evidence and CN's methodology for identifying and quantifying its incremental freight delay costs are provided in the separate statements of Michael Baranowski (describing in detail and applying the methodology), John Summerfield et al. (describing the Service Reliability System ("SRS") data and Playbacks CN uses), Simon Lizotte (describing the Wi-Tronix data CN uses and addressing incremental fuel costs), Catherine Whiteman (describing the payroll data CN uses to identify and quantify incremental labor costs), and Timothy Robinson (describing a study performed to enable the reliable estimation of incremental fuel costs CN incurs when Amtrak causes freight trains to stop and re-start). We then outline the findings reached by applying that methodology to a sample month, December

2019, and state CN’s proposal for providing for incremental freight delay cost recovery both under the next Operating Agreement and from September 1, 2019 (following the Board’s Interim Decision).

Finally, in Part IV, we address miscellaneous contract issues, including incorporation of the terms of two side letters, regarding incremental costs for { [REDACTED] }, into the Operating Agreement { [REDACTED] }, and implementation of a regular process for review and revision of Amtrak train schedules to ensure that they continue to be reasonably attainable and capable of supporting OTP at a high level.

I. CN’S HOSTING OF AMTRAK TRAINS.

Amtrak regularly operates six passenger train services on CN lines in the United States shown on the maps attached as Tab A to CN’s Opening Submission. Amtrak trains receive the highest dispatching priority of all trains on CN. Four Amtrak services, accounting for approximately 80% of the total route-miles hosted by CN, operate over the lines of Illinois Central Railroad Company (“IC”), and the remaining two services operate over the lines of Grand Trunk Western Railroad (“GTW”). Amtrak’s regularly scheduled services over IC and GTW include the following 24 daily trains, some of which were suspended during the Covid-19 pandemic:⁵

- City of New Orleans (Trains 58 and 59), a long-distance service⁶ operating daily in each direction over the IC lines between Chicago, Illinois and New Orleans, Louisiana.

⁵ As of the date of this filing, Amtrak has not yet returned services to full schedules.

⁶ The 15 Amtrak services operating on routes of 750 miles or more in length (including the City of New Orleans and Texas Eagle services) have been designated by Amtrak as “long distance” services. All other Amtrak services (including all other Amtrak services operating on CN lines) are designated as “corridor” or “state-supported” services.

- Illini/Saluki (Trains 390, 391, 392, and 393), a state-supported service operating twice daily in each direction over the IC line between Chicago and Carbondale, Illinois.
- Lincoln (Trains 300, 301, 302, 303, 304,⁷ 305, 306, and 307), a state-supported service operating four times a day in each direction over the IC lines between Chicago and Joliet, Illinois. (Amtrak’s Lincoln service trains also operate over lines of other railroads between Joliet, Illinois and St. Louis, Missouri.)
- Texas Eagle (Trains 21 and 22), a long-distance service operating daily in each direction over the IC lines between Chicago and Joliet, Illinois. (Amtrak’s Texas Eagle trains also operate over lines of BNSF Railway (“BNSF”) and Union Pacific Railroad Company (“UP”) between Joliet, Illinois and San Antonio, Texas.)
- Blue Water (Trains 364 and 365), a state-supported service operating daily in each direction over the GTW lines between Battle Creek and Port Huron, Michigan. (Amtrak’s Blue Water trains also operate over lines of Norfolk Southern Railway Company (“NS”) and Michigan Department of Transportation (“MiDOT”)⁸ between Chicago and Battle Creek.)
- Wolverine (Trains 350, 351, 352, 353, 354, and 355), a state-supported service operating three times a day in each direction between Chicago, Illinois and Pontiac, Michigan, including a 1.2-mile segment over GTW between Gord and Baron (which are interlockings located in Battle Creek, Michigan) and a 26.3-mile segment over GTW between West Detroit and Pontiac, Michigan. (Amtrak’s Wolverine trains also operate over lines of NS, MiDOT, and Amtrak itself between Chicago and Gord and between Baron and West Detroit.)

The CN lines used by these services are marked in green on the maps appended as Tab A to CN’s Opening Submission. Key aspects of these services are presented in the following table.

⁷ Effective May 23, 2022, Amtrak changed the numbers of Trains 303 and 304 to Trains 319 and 318, respectively. To avoid confusion, we refer to these two trains by their former numbers.

⁸ Although Amtrak reports MiDOT as the “host” of the line, Amtrak itself operates the line.

Table 1
Amtrak Services Hosted by IC and GTW

Service & Train Nos.	Service Endpoints	Service Route Miles	CN Segment Endpoints	CN Segment Route Miles	Number of Trains and Frequency of Operation	Number of Railroads Other than CN in Route (including Amtrak)
Blue Water 364-365	Chicago-Port Huron	318.5	Gord-Port Huron	158.7	2 daily	2
City of New Orleans 58-59	Chicago-New Orleans	933.8	Clark Street-Southport Jct.	927.8	2 daily	1
Illini/Saluki, 390-393	Chicago-Carbondale	308.9	Clark Street-Carbondale	306.7	4 daily	1
Lincoln, 300-307	Chicago-St. Louis	284.1	21st Street-Joliet	34.9	8 daily	3
Texas Eagle, 21-22	Chicago-San Antonio	1305.4	21st Street-Joliet	34.9	2 daily	4
Wolverine, 350-355	Chicago-Pontiac	304.1	Pontiac-West Detroit; Gord-Baron	26.3; 1.2	6 daily	3

CN has invested millions of dollars to maintain and improve its lines as required for its freight operations for its customers. But those lines are not optimized for passenger service, and consequently the physical characteristics of those lines pose special challenges for CN's hosting of Amtrak's services. Most of the CN lines used by Amtrak are single-tracked. This means that when an Amtrak train operating on a CN single-track line meets a freight train operating in the opposite direction, one of the trains must go into a siding so that both trains may continue to their destinations. While Amtrak may benefit indirectly from some of those CN private investments,

CN does not make investments solely for the benefit of Amtrak. Consequently, the physical characteristics of CN's lines pose special challenges for CN's hosting of Amtrak's services. Most of the CN lines used by Amtrak in the United States are single-track main line with passing sidings. This means that when an Amtrak train operating on a CN single-track line meets a freight train operating in the opposite direction, one of the trains must go into a siding so that both trains may continue to their destinations. This is also true when one Amtrak train meets another Amtrak train which happens every day on IC and GTW.

Because passenger trains typically operate at much higher speeds than freight trains, when an Amtrak train is operating in the same direction as a CN freight train on a CN line, the Amtrak train may overtake the freight train and have to follow the freight train at reduced speed until a siding enables the Amtrak train to pass the freight train. And if a freight train being followed by an Amtrak train in single-track territory meets a second Amtrak train coming in the opposite direction, CN's dispatchers may have to direct a complex "three-way meet" maneuver, in which a siding is used as a passing track for the Amtrak trains, one of which must execute a reverse movement on the main line track in order to enter the siding.

Operations hosting Amtrak's trains are further complicated by the fact that at 10 of its passenger stations on CN's Chicago-to-New Orleans route, Amtrak's trains stop on CN's main line while picking up and discharging passengers, and there is no passing siding at these stations. These stations include three in Illinois (Kankakee, Champaign, and Effingham), one in Tennessee (Newbern/Dyersburg), five in Mississippi (Marks, Greenwood, Yazoo City, Hazlehurst, and Brookhaven), and one in Louisiana (Hammond). While the train is stopped, no freight or passenger trains moving toward the station from either direction can move past the station. And if extraordinary issues arise (such as the need to attend to an injured or sick

passenger), requiring the train to hold in the station and block the main line for an extended period, CN's freight operations can be seriously disrupted, as can those of other Amtrak trains.

Despite the operational challenges CN faces while hosting 24 daily Amtrak trains, on CN's mostly single-track network, the performance of those trains on CN's lines, as measured by Amtrak itself, has been good. Amtrak's most recent Host Railroad Report (measuring performance through March 2022) indicates that, of the six Class I railroad hosting Amtrak services, CN had the second-lowest rate of host-responsible delay minutes per 10,000 train-miles during the past 12 months.⁹ Furthermore, the City of New Orleans has had the highest All-Stations OTP (65.0%) and Customer OTP (79.7%) of any Amtrak long-distance service during the same 12-month period.¹⁰

CN's provision of services and facilities to Amtrak for intercity rail passenger operations is governed by the current Operating Agreement, which took effect on May 1, 2011 and expired by its own terms on August 11, 2013. By order of the Surface Transportation Board in this proceeding,¹¹ CN and Amtrak have continued to observe the terms of the Operating Agreement while this proceeding is pending. The Operating Agreement covers all aspects of the CN/Amtrak relationship, including schedules, standards of performance, a requirement that CN maintain its tracks to a certain level of utility, base compensation paid by Amtrak for the incremental costs to CN of hosting Amtrak services, performance payments and penalties for service above or below the base level of service as measured under the Operating Agreement,

⁹ Amtrak, Host Railroad Report: Amtrak Train Performance on Host Railroads (April 2022) (data through March 2022) at 3, available at <https://www.amtrak.com/about-amtrak/reports-documents.html>.

¹⁰ *Id.* at 11.

¹¹ Decision served Aug. 9, 2013.

and provisions for allocating liability between the parties and for dispute resolution. The primary remaining matters in dispute between the parties in this proceeding relate to the base compensation and performance payments and penalties under the Operating Agreement.

The current Operating Agreement includes separate provisions for compensation to CN for hosting Amtrak trains on the IC lines and for hosting trains on the GTW lines. For Amtrak services on CN's IC lines, CN is paid a base compensation prescribed in the Operating Agreement that is intended to return the incremental costs CN incurs in providing a base level of service. On top of that base payment, CN may earn Performance Payments for high quality of service, which is measured by the on-time performance of Amtrak's trains in light of delays attributable to CN while on CN's network. CN may also incur Performance Penalties for untimely performance. CN understands this system to be the general industry standard, and it is consistent with compensation systems prescribed by the Board and its predecessor agency under 49 U.S.C. § 24308(a) and section 402(a) of the Rail Passenger Service Act of 1970.

On the GTW lines, on the other hand, { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }.

CN and Amtrak agree that GTW's { [REDACTED] } compensation system should be discontinued, and that the system of compensation now used for Amtrak services on

the IC lines (i.e., base compensation plus Performance Payments and Performance Penalties) should apply across CN's lines (although they may disagree as to the details of that compensation system). Accordingly, CN proposes adoption of the Operating Agreement set out (in clean and markup versions) in Tab B of this Opening Submission. The CN Proposed Operating Agreement applies the compensation system now in place on the IC lines to all Amtrak service on GTW, as well, with such modifications to the existing compensation system as are shown in Exhibit 1 of Tab B and discussed in this statement and elsewhere in this Opening Submission.

II. PROPOSED CHANGES TO OPERATING AGREEMENT PROVISIONS REGARDING PERFORMANCE MEASUREMENTS AND INCENTIVES/PENALTIES.

In addition to providing for recovery of certain identified and quantified incremental costs incurred by CN in hosting Amtrak's trains on its IC lines,¹² the current Operating Agreement provides (in Appendix V) a system of Performance Payments and Penalties. This system provides CN an opportunity to earn payments above the base level of incremental costs for good on-time performance ("OTP") at designated checkpoints, calculated in accordance with the Agreement,¹³ by Amtrak trains on CN's lines, and for penalties for untimely performance on

¹² As noted above, a different compensation system is provided in Appendix VI of the current Operating Agreement for hosting Amtrak trains on CN's GTW lines, and the CN Proposed Operating Agreement proposes to apply the system currently used on the IC lines, with certain modifications as described here, on the GTW lines as well

¹³ The Agreement provides that, in determining whether a train has arrived on time at a checkpoint, the train's arrival time is adjusted so that certain delays which the parties have determined are not CN's responsibility should not be counted against CN (that is, that CN will be granted "relief" from those delays; the provisions listing the kinds of delays not to be counted against CN are therefore called "relief items"), as well as to reflect a basic "tolerance" (or cushion within scheduled arrival time) at each checkpoint. In addition, the Agreement provides that trains affected by certain especially disruptive delays will either not be counted at all or will not be counted at affected checkpoints. (We refer to the Agreement's provisions stating the

those lines. Thus, for any given Amtrak service, CN earns a performance payment if 80% or more of Amtrak trains in that service arrive on time at the checkpoints during a given month, and incurs a penalty if 70% or fewer of Amtrak trains in that service arrive on time during that month.

In its submissions earlier in this proceeding, CN proposed certain changes to relief items and DNC items in the Agreement, as well as to require that the “root causes” of delays be considered rather than merely the immediate cause in attributing responsibility for a particular delay, but did not propose fundamental changes to the structure of the performance payments/penalties system.

In its Interim Decision, the Board indicated that further restructuring of that system would be appropriate, stating that:

- “the OTP metric would ideally include checkpoints at all stations along a route”;¹⁴
- “an OTP metric could measure the percentage of passengers that arrive at their destination stations on time, rather than the percentage of trains that arrive at each station on time”; such a metric “could—in some circumstances—allow for greater host railroad operational flexibility and create an incentive structure more closely tied to the service delivery to the end consumer, the passenger”;¹⁵
- “the parties should incorporate the degree of lateness into their penalty calculation in some manner, perhaps through a degree-of-lateness multiplier in the penalty provision”;¹⁶

circumstances under which the trip of a train will not be counted at all as “Do Not Count” or “DNC” items.)

¹⁴ Interim Decision at 11.

¹⁵ *Id.* In its rules setting metrics and standards for measuring the performance and service quality of intercity passenger train operations, in accordance with section 207 of the Passenger Rail Infrastructure and Investment Act (“PRIIA”), the Federal Railroad Administration (“FRA”) adopted a “Customer OTP” standard, “defined 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.” Metrics and Minimum Standards for Intercity Passenger Rail Service, 85 Fed. Reg. 72,971, 72,974 (2020) (adopting final rule codified at 49 C.F.R. Part 273).

¹⁶ Interim Decision at 14.

- “the parties should eliminate the current neutral performance zone [i.e., OTP between 70% and 80%] where no incentive or penalty is assessed”;¹⁷ and
- “there is merit to an 80% OTP standard to receive incentive payments.”¹⁸

CN’s current proposal therefore revises the Operating Agreement to incorporate each point of guidance by the Board.¹⁹

A. In Accordance With The Board’s Interim Decision And FRA’s Newly Adopted PRIIA Performance Standard For Amtrak, CN’s Proposal Measures On-Time Performance At All Stations, With Stations Weighted By Number Of Disembarking Passengers.

In accordance with the Board’s interim decision, and consistent with the Federal Railroad Administration’s (“FRA”) Customer OTP standard, CN proposes that the Operating Agreement be revised to set checkpoints at each station on CN’s portion of Amtrak’s routes. CN also proposes to weight the checkpoints by the ridership of each station, in accordance with the Board’s recognition that such weighting would “allow for greater host railroad operational flexibility and create an incentive structure more closely tied to the service delivery to the end consumer, the passenger.”²⁰

Some adjustment to checkpoints and related weighting is required, however, because while Customer OTP and other measures of All-Station OTP apply to the full routes of individual Amtrak trains, which often include multiple hosts, the Operating Agreement is focused on the performance of Amtrak trains over the portions of Amtrak’s routes that are hosted solely by CN. In order to include complete CN segments on routes where Amtrak’s use of CN’s

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ A comparison showing changes from the current Operating Agreement to CN’s Proposed Operating Agreement is attached as Exhibit 1 to Tab B of this Opening Submission. A clean copy of CN’s Proposed Operating Agreement is attached as Exhibit 2 to that Tab B.

²⁰ Interim Decision at 11 n.25.

lines does not end at a station, we have added checkpoints at the ends of those segments. Where the CN route does not include any stations at all, as is the case with Train Nos. 21 and 22 in Amtrak's Texas Eagle service, and for Train No. 301 in Amtrak's Lincoln service, CN has proposed that the endpoint of the CN segment serve as the checkpoint. (That is, run time would be measured from the time the train enters CN's lines to the time it reaches the endpoint checkpoint.) For other services that do not terminate on CN at a station, the additional checkpoints would be used to measure performance between the last station on CN and the endpoint of CN's segment. Checkpoints are indicated in the schedule skeletons included in Appendix II of CN's Proposed Operating Agreement.

Checkpoint weights would be calculated by dividing the number of riders on a given train that disembark at a given station in a year by the total number of riders that disembark at all checkpoints. Weighting stations in accordance with the relative number of disembarking passengers is consistent with the weighting of stations under FRA's Customer OTP metric, and Amtrak has been providing the necessary information to CN since FRA's adoption of its Metrics and Minimum Standards for Intercity Passenger Rail Service.²¹ Weights at the non-station checkpoints (i.e., those at the end of CN's route, if the endpoint is not a station) would be calculated using the number of riders at the next station stop in the train's schedule. For example, the weight at the Clark Street checkpoint, which is the end of the CN route for northbound Illini/Saluki and City of New Orleans trains, would be calculated using the number of riders disembarking at Chicago, which is the next scheduled station stop for those trains.²² Of

²¹ 85 Fed. Reg. 78,971 ("Metrics and Standards") (codified at 49 C.F.R. Part 273).

²² Weighting must be done on a train-specific basis (rather than on a service-specific basis or even on a directionally service-specific basis) in order to best reflect passenger experience. As indicated by the weights that were calculated using 2019 data, there can be significant disparities in relative ridership at a station depending on the direction and time of day

course, for the few trains with only a single checkpoint on CN (Texas Eagle Service Trains 21, 22, and Lincoln Service Train 301), no weighting is necessary. CN's portion of the Amtrak routes on these services is short and represents a very small percentage of the overall route (e.g., for Texas Eagle, just 2.7% of the total route miles).

Checkpoint weights would be periodically recalculated. CN proposes that such recalculation be done annually, effective January 1, based on Amtrak's previous fiscal year (which ends September 30). Annual recalculation strikes a good balance between reflecting the relative importance of stations to riders and the administrative time and effort required to recalculate new weights, modify the Operating Agreement, and adjust the calculation of incentives and penalties to reflect any changes. It would also provide ample time for Amtrak to collect and share with CN the ridership data necessary to calculate station weights and for the parties to validate the calculations. CN also suggests that the parties consider avoiding the use of non-representative periods in establishing weights for future application. The Covid period beginning in 2020, when Amtrak entirely ceased operating some trains and curtailed the operation of others, is an example of such a period. Accordingly, subject to further discussion with Amtrak or direction for the Board, CN has weighted each checkpoint based on fiscal year 2019 data (the last year pre-Covid 19 pandemic) provided by Amtrak. Those weights are shown in the schedule skeletons included in Appendix II of the CN Proposed Operating Agreement (attached at Opening Submission, Tab B, Exh. 1 (redline), Exh. 2 (clean)).

of a train. For example, { } and { } of the riders on southbound Illini/Saluki trains disembark at Champaign, while only { } and { } of northbound riders do so. See CN Proposed Operating Agreement, App. II, Train 390, 391, 392, 393 Schedules.

B. CN Has Revised Its Proposed Modifications to the Agreement's Provisions for Performance Payments and Performance Penalties So as to Reflect the Board's Interim Decision.

The Board's interim findings and guidance addressed three specific aspects of the incentive/penalty calculation: (1) CN should earn incentives for OTP above 80%, (2) the current "neutral zone" (where no incentive payment is earned or penalty assessed) should be eliminated, and (3) there should be a degree of lateness multiplier on the penalty calculation in order to provide additional incentives to avoid delays to an already delayed train.²³ CN's proposal incorporates each of these points.

CN's proposal requires an 80% OTP standard to receive incentive payments and eliminates the current neutral zone.

Under the current Operating Agreement, CN earns incentive payments if more than 80% of the trips of a train are on time at a given checkpoint, and incurs penalties if less than 70% of the trips are on time, creating a "neutral zone" for performance between 70% and 80% where CN neither earns incentives nor incurs penalties.²⁴ Citing PRIIA, the Board found that "there is merit to an 80% OTP standard to receive incentive payments."²⁵ The Board also specifically rejected Amtrak's regression-based proposal, finding it "complicated" and containing unjustified assumptions about relative levels of delay.²⁶ CN agrees with the Board's analysis that an 80% OTP standard is reasonable, and CN's proposal incorporates this aspect of the Board's decision.

In finding that 80% was a reasonable standard for CN to earn incentives, the Board also suggested "the parties should eliminate the current neutral performance zone where no incentive

²³ Interim Decision at 14-15.

²⁴ 2011 Operating Agreement, App. V, intro. para.

²⁵ Interim Decision at 14.

²⁶ Interim Decision at 14.

or penalty is assessed.”²⁷ CN’s proposal incorporates this guidance, keeping 80% as the threshold to earn incentives and eliminating the neutral zone by extending the negative performance rate to the 70.0%-79.9% range. Consistent with the current agreement, the performance rate for incentives mirrors the performance rate for penalties for performance above 80% and below 70%.

CN’s proposal incorporates a degree of lateness multiplier

CN’s proposal adopts the lateness multiplier advocated by Amtrak,²⁸ and suggested by the Board.²⁹ CN would also apply and calculate the lateness multiplier the same way Amtrak proposes.

CN’s proposal also includes a timeliness multiplier that would increase the incentive payments for trains that are regularly on time with low minutes of delay.³⁰ Amtrak’s filings make clear that it wants to provide incentives to CN to avoid delays to all trains, not just those that are already late.³¹ Amtrak believes that the current system “does not reward CN for minimizing” delays “but only for doing ‘good enough’ to arrive at a checkpoint within tolerance.”³² Likewise, the Board found that a lateness multiplier would provide an incentive to

²⁷ Interim Decision at 14.

²⁸ See Amtrak’s Proposed Changes to Appendix V of the Current Agreement If The Board Orders A Checkpoint System (RVS Vilter/Maga, Ex. 28 at App. V-11) (attached as Exhibit 4 hereto). The version of Appendix V of the Operating Agreement proposed by Amtrak in Exhibit 28 of the Joint Rebuttal Verified Statement of Paul Vilter and Jason Maga and reprinted as Exhibit 4 to this statement will be cited herein as “Amtrak Redline.”

²⁹ See Interim Decision at 14 (“the parties should incorporate a degree of lateness into their penal-ty calculation in some manner, perhaps through a degree-of-lateness multiplier in the penalty provision”).

³⁰ See CN Proposed Operating Agreement, App. V, § B.

³¹ Amtrak Opening Statement at 3 (Amtrak’s proposal designed to “motivate CN to minimize delays to Amtrak trains”).

³² Amtrak Opening Statement at 8.

CN to “help deliver a late train more expeditiously and not allow the duration of the delay to increase.”³³ The same logic applies to CN’s timeliness multiplier, which is intended to provide CN an incentive to deliver an on-time train expeditiously, and not allow any delay which could occur without making the train late.

CN’s timeliness multiplier is intended to provide that incentive and motivation to CN. If CN is able to reduce delays to all trains that operate in a given month, it will receive an extra reward in the form of a multiplier to its regular incentive payment. Notably, CN would have to work hard to achieve a timeliness multiplier, as the average train over the course of a month would have to arrive significantly under tolerance in order for the bonus to apply. One or two significantly late trains could cause CN to lose out, so regardless of the status of the train (i.e., late or on time) CN has an incentive to avoid as many delays as possible.

C. CN’s Proposal Maintains the Lookback Provision and Adds an Effective Reopener Provision (Interim Decision at II.C).

CN’s current Operating Agreement with Amtrak contains a “lookback” provision that limits the amount of performance penalties assessed against CN during a given period to ensure that CN receives at least its contractually agreed-upon incremental costs during that period.³⁴ In its Interim Decision, the Board approved the use of a lookback provision, noting that an Operating 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,”³⁵ which would turn CN’s entitlement to incremental costs upside down.

³³ Interim Decision at 14.

³⁴ 2011 Operating Agreement, App. V, § D, para. 3.

³⁵ Interim Decision at 16 (footnote omitted).

The lookback provision is so called because it requires the parties to “look back” at the amount of incentive payments (“Performance Payments”) and penalties for unsatisfactory OTP (“Performance Penalties”) earned by or charged against CN during the preceding 12 calendar months in order to determine the amount of net penalties that may be charged against CN for performance in any given month. Under this provision, if penalties incurred for inadequate OTP during a particular calendar month { [REDACTED] } exceed the incentive payments earned for service to trains { [REDACTED] } during the month,³⁶ then the net penalty is to be deducted from the Base Charges (representing incremental costs, as determined under the Operating Agreement) due to CN for hosting { [REDACTED] } during the month, but the total deductions for that month and the preceding 12 calendar months may not exceed the total of positive net incentive payments earned by CN for { [REDACTED] } during the same 12-month period.³⁷ This is important and ensures CN isn’t paying Amtrak for hosting Amtrak’s services.

CN proposes that the new Operating Agreement retain this “lookback” provision and extend it to the Wolverine and Blue Water trains, consistent with the extension to the GTW lines of the compensation system used for Amtrak trains operating on the IC lines, so that CN will be reimbursed for at least those incremental costs identified in the Agreement.³⁸

But while the Board in its Interim Decision endorsed the use of a lookback provision, it also expressed its concern that if CN were guaranteed compensation for its incremental costs

³⁶ { [REDACTED] }

³⁷ 2011 Operating Agreement, App. V, § D.

³⁸ CN Proposed Operating Agreement, App. V, § D.

during a lengthy period of unsatisfactory performance, without any potential penalty beyond the forfeiture of incentive payments, there might be no effective incentive for CN to take measures to improve that performance. Accordingly, it “encourage[d] the parties to include an effective reopener provision in the new operating agreement that will result in concrete action in order to resolve potential future performance disputes and to prevent poor performance.”³⁹

CN had explained in its previous filings that such a concern as the Board had expressed was largely hypothetical, given the operating performance history of Amtrak trains under CN’s existing Operating Agreement.⁴⁰ Nevertheless, CN also anticipated the Board’s concern by proposing that the new Operating Agreement include a reopener provision, providing for consultation and the development of remedial measures to address any sustained period of poor OTP under the Agreement. Consistent with that guidance, CN is now proposing an even more robust reopener provision than the one it earlier proposed. In considering the reopener provision, at least three points should be kept in mind. First, under a properly structured agreement, resort to the reopener should be rare. Other than for the short-shunt issue described below (see Part II., F.1., below), CN has never been a position where it failed to earn incentives in any six-month period. Second, while Amtrak previously has asserted that six months is too long for an effective reopener, the provision is intended to apply to *sustained* periods of poor performance. Given the burdens imposed on the parties, invoking the reopener provision under a shorter time period would be burdensome and unnecessary. Six months is an appropriate period. Third, to be

³⁹ Interim Decision at 17.

⁴⁰ These concerns also overlook the likelihood that CN’s base compensation under the Operating Agreement has not covered its incremental costs, and that even if that compensation were enhanced to cover the labor, fuel, and equipment costs detailed in this submission, CN would remain uncompensated for many other incremental costs, including those that cannot be sufficiently identified, verified, and quantified.

effective, the reopener provision must first allow the parties to jointly investigate the causes of and solutions to the problem causing the deficient performance. There is no sense requiring one party or the other to be required to take “concrete action” before the scope of the problem has been identified.

CN’s new reopener proposal takes these points and applies the Board’s guidance. It first calls for consultation between the parties, but it also lays out specific steps they must take, by specific deadlines, to identify and remedy the causes of poor performance, and it ultimately provides that if the parties do not agree on concrete remedial measures, either party may refer the issue to mandatory and binding arbitration under the dispute resolution provisions of the Agreement. The arbitrator or arbitrators are authorized to take far-reaching steps to obtain information bearing on the issue, and to modify the Agreement to the extent they find necessary to remedy the poor performance.⁴¹ The steps required or authorized under CN’s new reopener provision are detailed below.

First, within 60 days after any six-month period in which incentive penalty payments exceed incentive payments, either party may serve a written notice on the other, after which the parties would have 10 days to name a representative to lead a “Remedial Process,” which would begin with an investigation of the causes of the consistently poor performance.⁴² This investigation would extend to

(i) CN’s dispatching; (ii) Amtrak’s operation of its trains; (iii) rail line infrastructure and capacity issues; (iv) Amtrak’s equipment; (v) Amtrak train schedules; (vi) freight schedules; (vii) structural issues with the incentive or penalty provisions of Appendix V [of the Agreement], (viii) issues with the levels

⁴¹ { [REDACTED] } is limited by a prohibition on altering Section D of Appendix V of the Agreement (relating to calculation and payment of Net Performance Charges) and is subject to CN’s statutory entitlement to compensation for any incremental costs it is required to bear in developing or implementing remedial measures.

⁴² CN Proposed Operating Agreement, App. V, § G.1.

of performance payments and penalties provided under Appendix V; (ix) other issues with the terms of the Operating Agreement; or (x) other causes.^[43]

The investigation would thus consider a wide range of possible causes (and so, implicitly, of possible solutions) for persistently poor performance, and would not start with the presumption that any such poor performance must necessarily be CN's fault, or that solutions may simply take the form of punishing CN more effectively for neglect of its responsibilities. It could, for example, look seriously into possibilities that Amtrak train schedules contain insufficient run time (as CN has argued regarding the Illini/Saluki service) or that the incompatibility of Amtrak equipment with CN's signal system (which meets or exceeds industry and FRA standards) may prevent signal shunts from closing properly.

Within 45 days of the initial notice, the parties would be required to meet to discuss the causes they had identified for unsatisfactory performance. Twenty days after that meeting, the parties would be required to "exchange a list of concrete steps intended to reasonably address the specific issues identified as causing Deficient Performance."⁴⁴ They would then meet to discuss implementation of steps to address the poor performance and, if applicable, estimate the cost of those steps. To the extent that enhancement of CN's rail infrastructure or equipment would be required, Amtrak would have to agree that CN be compensated for the cost of the enhancement, consistent with the principle that CN is entitled to compensation for all expenses it would not incur but for its hosting of Amtrak. But the parties could also consider funding measures such as seeking third-party funding, or increasing the level of incentive payments, on the condition that increased payments be dedicated to those enhancements. To ensure an appropriate level of attention from { [REDACTED]

⁴³ CN Proposed Operating Agreement, App. V, § G.1.

⁴⁴ CN Proposed Operating Agreement, App. V, § G.2.

[REDACTED]

[REDACTED] }.

Implementing a suggestion made by the Board in its Interim Decision (at 17), the Proposed Agreement provides that if, 30 days after exchanging their proposals for concrete steps to remedy poor performance, the parties are unable to reach agreement on such steps, then either party may submit the issue to the Board’s Rail Customer and Public Assistance (“RCPA”) office for informal assistance.

Finally, if the parties are unable to reach agreement even after receiving RCPA’s assistance, the Proposed Agreement provides that { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } Thus, CN’s proposed reopener does not

simply call for the parties to confer, though that is the starting point of the Remedial Process it provides for. It requires a serious investigation into the possible causes of poor performance, dictates specific matters to be considered and specific deadlines, and requires supervision by senior management. It provides that, if the parties cannot agree on voluntary measures to remedy sub-standard performance, a{ [REDACTED]

[REDACTED]

[REDACTED] } This is a provision for a robust process intended to “result in concrete action in order to resolve potential future performance disputes and to prevent sustained poor performance.”

D. CN’s Proposals for Performance Measurement and Delay Attribution Is in Accordance with the Board’s Interim Decision.

1. **Although FRA adopted a 15 minute basic tolerance for its Customer OTP metric, CN would reduce maximum tolerances to 10 minutes, and accept Amtrak’s proposed 8 minute tolerance for other relatively short services.**

In order to measure on-time performance, whether for general reporting purposes or for OTP under the Operating Agreement, one must decide how to define what is “on time.” “Tolerance” is a key aspect of this definition. It is an established number of minutes added to scheduled arrival time to establish the time by which a train must arrive in order to be treated as “on time.” In establishing its Customer OTP PRIIA performance standard in November 2020, for example, FRA adopted a 15-minute tolerance applicable to each checkpoint.⁴⁵

For purposes of the Operating Agreement, some reduction in tolerance is appropriate because under the agreement tolerance it is not being used to strictly define “on-time arrival,” but rather to measure CN performance, a measurement that includes potential relief for some delays. In addition, under the existing operating agreement tolerance could be customized for the length and nature of movements, and the permissible run time. Accordingly, the current Operating Agreement provides a specific number of basic tolerance minutes for each train, which ranges

⁴⁵ See 49 C.F.R. § 273.5(a)(1) (“The customer on-time performance metric is 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, reported by train and by route.”).

from { [REDACTED] }
[REDACTED] }⁴⁶

Earlier in this proceeding, Amtrak proposed replacing the agreed-upon tolerances with a flat { [REDACTED] } tolerance at each checkpoint, in order to “simplify the Checkpoint calculations.”⁴⁷ It further sought to justify its arbitrary one-size-fits-all choice by noting that it may be thought of as allocating { [REDACTED] } to CN and { [REDACTED] } to others.⁴⁸

Amtrak has presented no evidence to demonstrate that the differing tolerances found in the current Agreement for different checkpoints create a problem, or to support its proposal { [REDACTED] } [REDACTED] }. The roles of hosts and Amtrak for Amtrak train operations are not the same, and the proportion of delays historically attributed to each are not proportionate, as Amtrak’s { [REDACTED] } would suggest. Hosts are treated as responsible for a much larger portion of delays – a fact Amtrak emphasizes in other contexts. Moreover, as Matteucci/Kuxmann point out, Amtrak’s assignment of even greater responsibility for delays to CN rather than Amtrak would argue for assigning a greater proportion of tolerance, not less, to CN.

Nevertheless, in an effort to compromise, CN agrees with Amtrak that { [REDACTED] } of tolerance would be appropriate for relatively short segments { [REDACTED] } [REDACTED] }. For longer movements, however (on the City of New Orleans, Illini/Saluki, and Blue Water trains), especially in light of the recent

⁴⁶ See 2011 Operating Agreement, App. V, Table 1 (“Contract Basic Tolerance”) & App. VI, Table 1. The unusually high Blue Water tolerance likely reflects both the length of movement and the unusual “all or nothing” compensation system currently applicable to GTW trains.

⁴⁷ Vilter/Maga RVS at 40.

⁴⁸ *Id.* at 40 n.104.

against being penalized on OTP because of Amtrak's business decision { [REDACTED] }.

CN proposes to maintain this provision, extend it to trains operating on GTW (in accordance with the position of both parties that the IC compensation system should apply across GTW's lines), and simplify it, so as to require { [REDACTED] }.

[REDACTED]

[REDACTED] }.⁵¹

2. CN's proposed relief items are based on which party is in a position to avoid or control the delay and are necessary to fill in gaps and clarify Amtrak's delay coding.

The Performance Payments and Penalties under the current Operating Agreement are appropriately, albeit imperfectly, focused on CN's contribution to Amtrak running on time in accordance with its schedule. In order to determine if CN's performance should be rewarded or penalized, the Operating Agreement measures the quality of CN's performance by attempting to distinguish those aspects of Amtrak's performance that CN can and cannot reasonably control. CN cannot, for example, control delays occurring on other railroads, or delays occurring on CN's lines but caused by Amtrak, other railroads, or other third parties, so such delays are rightly excluded in measuring and rewarding or penalizing CN's performance. It would be contrary to the purpose of the Performance Payment and Penalty provision if CN's compensation were not tied to CN's own performance, without penalty for matters beyond CN's control, such as delays caused by Amtrak or third parties.

⁵¹ CN Proposed Operating Agreement, App. V, § A.1.f; *id.*, App. V, Table 2. The additional tolerance would apply at all checkpoints, except for Trains 351, 353, and 355, for which the additional tolerance would apply at West Detroit, and Trains 350, 352, and 354, for which it would apply at Pontiac.

The Operating Agreement generally achieves this end by use of so-called “relief items” that provide for compensatory run time for delays to Amtrak’s trains that are outside of CN’s ability to avoid or control.⁵² This includes delays due to such things as { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } The relief

items are intended to ensure that if a train would have been within its contract run time but for delays beyond CN’s control, it will still be counted as “on time” for purposes of OTP under the Agreement.⁵³

Along with the separate compensation systems, the Operating Agreement has included separate sets of relief items for the IC lines and the GTW lines, which were under different ownership at the time those systems were adopted). Currently, some relief items apply only to IC services, some only to GTW services, and some apply to both. All of these relief items, however, address circumstances where a delay is caused by factors outside of CN’s reasonable control. Therefore, consistent with the parties’ intent to extend the IC compensation system to

⁵² Having relief items for delays beyond the control of the host railroad is a common aspect of Amtrak’s Operating Agreements. *See, e.g.,* <https://www.amtrakoig.gov/sites/default/files/reports/Audit4062005CSXOTP3302010.pdf> (“Specifically, in determining whether a train arrived on time, Amtrak agreed to allow tolerances for specific delays that were not caused by or were generally beyond the control of the host railroad.”).

⁵³ As noted above, in addition to relief items, the current Operating Agreement provides that certain trains operated on IC will not be counted for purposes of the Performance Payments and Penalty provision of the Operating Agreement. 2011 Operating Agreement, App. V, Sec. A.4. These “Do Not Count” or “DNC” items generally include trains annulled, terminated, or detoured by Amtrak for reasons not related to the conditions of CN’s rail lines and trains that suffer severe disruptions due to such things as severe weather, force majeure conditions, or emergencies.

GTW, CN has, as appropriate, added relief items from the GTW set to the IC set, limiting their application where appropriate, and eliminating overlapping items and those rendered unnecessary as a result of CN's proposed adoption of various Amtrak non-HRD codes as a relief item (discussed in Section I.D.2.c., below).

- a. CN proposes to use Amtrak's delay codes as an initial screen to identify delays CN cannot avoid or control, but because those codes are inaccurate and incomplete, and they must be supplemented.**

Under Amtrak's delay coding system, when the trip of an Amtrak train is delayed on any segment of its route, causing the train to take more time to traverse that segment than the pure run time ("PRT") provided in the train's schedule, the train's conductor creates a record of the delay (the conductor delay report, or "CDR") which, based on information immediately available to the conductor (sometimes referred to as the "windshield view"), attributes that delay to one of 26 causes, each represented by a three-letter code. The delays represented by these codes are categorized as "host responsible delays" ("HRD"), "Amtrak responsible delays," or "third party delays."

The current Operating Agreement relies on Amtrak's conductor delay coding as an initial source of data.⁵⁴ It does not, however, incorporate definitions of Amtrak's codes and does not provide that delays coded by Amtrak as non-HDR will be treated as such for purposes of the Operating Agreement. As a result, relief items are listed in the current Operating Agreement even for types of delays that Amtrak recognizes in its conductor coding are not the responsibility of the host carrier. By specifying Amtrak's conductor delay codes in the Operating Agreement and providing that delays categorized by Amtrak conductors' in accordance with those codes as

⁵⁴ See 2011 Operating Agreement, App. V, Sec. A.3.

non-HDR (i.e., Amtrak or third-party responsible) will be recognized as such under the Operating Agreement, many existing relief items under the Operating Agreement can be eliminated.

In their previous filings, CN and Amtrak appeared to agree that Amtrak's delay codes might at least be used as an initial screen for delays that should not be attributed to CN and that some relief items could be removed as redundant, provided the codes were applied appropriately.

In its Interim Decision, the Board "encourage[d] 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."⁵⁵ Consistent with that guidance, and as in its earlier filings, CN's current proposal would use the broad categories represented by Amtrak's delay codes as an initial screen, so that CN would receive relief for any delays coded as "Amtrak responsible" or "third party delays," and to supplement those codes, where appropriate, with additional information and criteria to identify delays that should not be attributed to CN and which should not count against CN in calculation of OTP.

While Amtrak's delay codes are useful as a preliminary screen to identify delays that should not be attributed to CN, and CN proposes to use them as such, those codes cannot be relied on exclusively to identify the delays for which CN must be given relief. First, while HRD purports to be limited to delays that are the responsibility of the host railroad, Amtrak's use of broad codes sweeps in many delays that CN is not in a position to avoid or control. For example, when Amtrak trains are delayed at interlockings controlled by non-CN railroads, Amtrak typically codes the delay as Freight Train Interference ("FTI"), which is classified as HRD, even though the delay in these instances is clearly caused by a third party, and although CN has no

⁵⁵ Interim Decision at 24.

control over the signals at such interlockings and so cannot avoid or control interference by traffic on the crossing rail line.

Second, Amtrak's delay codes cannot be the last word in determining whether CN should receive relief for a delay is that Amtrak frequently assigns its codes incorrectly. For example, as CN has shown previously, instead of using the SYS code ("System") when Amtrak stops its train so that its engineer can copy track authorities, or when it participates in Joint Uniform Efficiency Testing, it frequently, and improperly, codes the delay as RTE ("Routing") or DCS ("Signal Delays"), which are classified as HRD. The following table from CN's Surrebuttal Submission lists specific examples of this miscoding, as identified by CN in the previous stage of this proceeding.⁵⁶

Train	Origin Date	From	To	Host RR	Type	Dis- puted Mins	Delay Reason
351	5/13/2011	ROY	DET	CC	RTE	9	{ [REDACTED] }
354	6/28/2012	DET	ROY	CC	RTE	9	{ [REDACTED] }
365	7/5/2012	LPE	LPE	CC	RTE	9	{ [REDACTED] }
350	8/19/2011	DET	DET	CC	RTE	8	{ [REDACTED] }
365	6/23/2015	FLN	FLN	CC	RTE	5	{ [REDACTED] }
391	2/19/2014	KKI	GLM	CC	RTE	4	{ [REDACTED] }
391	9/9/2014	CHM	MAT	CC	RTE	4	{ [REDACTED] }

⁵⁶ SRVS Ladue/Kuxmann at 29.

							{ [REDACTED] }
391	5/16/2013	DQN	DQN	CC	RTE	4	{ [REDACTED] }
59	12/15/2103	MCB	HMD	CC	RTE	10	{ [REDACTED] }
58	2/26/2014	XSU	HMD	CC	RTE	10	{ [REDACTED] }
59	11/19/2014	MCB	HMD	CC	RTE	10	{ [REDACTED] }
59	2/14/2011	MCB	HMD	CC	RTE	9	{ [REDACTED] }

More recently, Amtrak has miscoded the following delays, involving the copying of authorities or instructions, as RTE, DSR, or DCS (all host-responsible delays) rather than correctly coding them as SYS:

Train	Origin Date	From	To	Host RR	Type	Mins	Delay Reason
59	2021-11-11	NBN	NBN	CC	RTE	8	{ [REDACTED] }
58	2021-10-19	MKS	MEM	CC	DSR	9	{ [REDACTED] }
391	2021-10-19	GLM	GLM	CC	DMW	1	{ [REDACTED] }
306	2021-08-10	SMT	XTF	CC	DCS	4	{ [REDACTED] }
306	2021-08-10	XUD	SMT	CC	DSR	3	{ [REDACTED] }
365	2021-02-10	LNS	LNS	CC	DSR	2	{ [REDACTED] }

Similarly, although delays caused by Uniform Joint Efficiency Testing should be coded as SYS (System), which is an Amtrak-responsible delay, Amtrak's conductors frequently code such delays as DCS, as in the following examples identified by CN earlier in this proceeding:⁵⁷

Train	Origin Date	From	To	Host RR	Type	Mins	Delay Reason
393	6/29/2011	GLM	GLM	CC	DCS	7	{ [REDACTED] }
351	1/18/2011	HMI	XTF	NS	DCS	11	{ [REDACTED] }
355	2/7/2011	DER	ARB	NS	DCS	15	{ [REDACTED] }
353	3/2/2011	DOA	NLS	AM	DCS	8	{ [REDACTED] }
392	11/16/2011	XCS	CHI	AM	DCS	4	{ [REDACTED] }
391	12/19/2011	MAT	EFG	CC	DCS	8	{ [REDACTED] }

More recently, Amtrak miscoded the following delay for efficiency testing as PTI (though it was later corrected to SYS at CN's request):

Train	Origin Date	From	To	Host RR	Type	Mins	Delay Reason
305	2022-05-03	XTF	SMT	CC	PTI	5	{ [REDACTED] }

And Amtrak conductors routinely fail to assign a WTR code to delays resulting from high winds, flooding, lightning strikes, or other weather-related causes that result in power outages or otherwise affect wayside signals.⁵⁸ For example, in the following recent instances, Amtrak's

⁵⁷ SRVS Ladue/Kuxmann at 30.

⁵⁸ See, e.g., Email from Richard Hyer to Timothy S. Berg (May 30, 2013 1:09 pm) (email correspondence regarding { [REDACTED] }) (attached as Exhibit 2); Email from Richard Hyer to Timothy S. Berg (June 7, 2013 2:pm) (email correspondence regarding { [REDACTED] }) (attached as Exhibit 3).

conductors assigned HRD codes delays that were caused by adverse weather conditions, and that were only recoded as WTR upon CN's request:

Train	Origin Date	From	To	Host RR	Type	Mins	Delay Reason
58	2022/01/01	MAT	CHM	CC	DCS	25	{ [REDACTED] }
301	2022/02/02	XTF	XUD	CC	DCS	37	{ [REDACTED] }
301	2022/02/02	XTF	XUD	CC	CTI	15	{ [REDACTED] }
59	2021/09/07	CHM	MAT	CC	DCS	31	{ [REDACTED] }
58	2022/01/25	KKI	HMW	CC	FTI	120	{ [REDACTED] }
59	2021/12/05	CDL	CDL	CC	FTI	25	{ [REDACTED] }
59	2021/12/05	MCB	HMD	CC	PTI	60	{ [REDACTED] }
59	2021/12/05	MCB	HMD	CC	DCS	9	{ [REDACTED] }
301	2021/12/11	XTF	XUD	CC	FTI	11	{ [REDACTED] }
58	2021/12/10	FTN	CDL	CC	FTI	70	{ [REDACTED] }
59	2021/12/10	KKI	CHM	CC	FTI	50	{ [REDACTED] }
59	2021/12/10	CHM	MAT	CC	DCS	7	{ [REDACTED] }
59	2021/12/10	CHM	MAT	CC	DCS	5	{ [REDACTED] }
59	2021/12/10	CHM	MAT	CC	FTI	27	{ [REDACTED] }
59	2021/12/10	CDL	FTN	CC	DCS	10	{ [REDACTED] }

59	2021/12/10	CDL	FTN	CC	DCS	15	
59	2021/12/10	CDL	FTN	CC	DCS	29	
59	2021/08/08	XCS	HMW	CC	DCS	16	

So while use of Amtrak delay codes can help simplify the administration of the Operating Agreement and allow the parties to drop certain relief items that are in the current Operating Agreement, additional relief items continue to be needed. Further, the Operating Agreement must provide relief for CN, not only when Amtrak actually assigns delay codes that are categorized as “Amtrak responsible” or as “third party responsible,” but also when, under its established practice, it should assign such codes.

CN therefore proposes revision of the relief items in the Operating Agreement, using Amtrak’s delay codes as a starting point, but supplementing them with additional items to ensure that only delays that CN can avoid or control are attributed to it. The relief items that should be dropped, retained, or clarified are discussed below.

b. Relief for Amtrak responsible delays when not operating on CN’s lines

It is evident, and the parties have long agreed that in situations where CN has not prevented an Amtrak train from entering its line or leaving a station, CN should not be held

responsible for Amtrak's delays. CN proposes including the two specific items in the 2011 Operating Agreement covering such delays. These are not en route delays, and therefore are not accounted for by recovery time and should not be subject to the RTB. Continuing to separately state these items apart from relief items for Amtrak en route delays makes that clear.

**i. Delayed arrivals to CN or Late Departures from
An Origin Point on CN**

Amtrak agrees that CN should have relief for trains that, through no fault of CN, cannot depart on time from an origin point on CN's lines.⁵⁹ Amtrak acknowledges that CN should have relief for these delays.⁶⁰ CN proposes to keep the relief item as found in the 2011 Operating Agreement and in Amtrak's proposal, with an additional clarification that the relief item covers { [REDACTED] }⁶¹ Such delays are distinct from excess dwell time (discussed next), inasmuch as the train has not yet begun its operations. { [REDACTED] }⁶²

⁵⁹ See Amtrak Redline, App. V, Sec. B.1.b(1).

⁶⁰ See Amtrak Redline, App. V, Sec. B.1.b(1). The actual language of Amtrak's proposal, which is identical to that in the 2011 Operating Agreement, is { [REDACTED] } This origin point is identical to the point at which Amtrak trains enter CN's lines from those of another carrier, except in the case of northbound Illini/Saluki trains, which begin their run on CN's lines.

⁶¹ CN Proposed Operating Agreement, App. V, § A.1.b.

⁶² Amtrak's proposal, in addition to including a relief item for { [REDACTED] } provides relief for delays coded as { [REDACTED] }. [Amtrak Redline], App. V, Sec. B.1.b(1), (2).

ii. Excess dwell time

A certain amount of “dwell time”—that is, time “to perform work while a train is stopped at a station, including loading and unloading passengers and bags, changing crews, and/or servicing the locomotive or cabin cars”⁶³—is built into Amtrak’s train schedules. The parties agree and the 2011 Operating Agreement has appropriately provided that if Amtrak’s actual dwell time in a segment exceeds the scheduled dwell time (which may occur for any number of reasons like the excess time for the loading and unloading of passengers and bags, changing crews, servicing the locomotive or cabin cars, and other unanticipated delays such as moving a disabled or injured passenger on or off the train), the excess dwell time should not count against CN for purposes of incentives and penalties.

CN has proposed maintaining this relief item, with the clarification that it includes

{ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] }⁶⁴ This clarification should not be

controversial, as all the listed codes are ones identified by Amtrak as “Amtrak responsible.”

Amtrak proposed to { [REDACTED]
[REDACTED] }.

Amtrak’s proposal, however, would make no provision for delays that should have been assigned these codes, but which were instead improperly coded as some kind of host-responsible delay, and would thus deny CN the opportunity of obtaining relief by demonstrating that delays were

⁶³ VS Ladue/Kuxmann at 32 n.40.

⁶⁴ CN Proposed Operating Agreement, App. V, Sec. A.1.c.

assigned an incorrect code. Moreover, Amtrak has failed to distinguish dwell time so that it would not be subject to the RTB. Subjecting dwell time to the RTB would be inconsistent with the past practice of CN and Amtrak, which have consistently excluded excess dwell time from the RTB offset, and is makes no sense and would be unfair since excess dwell time is not an en route delay for which recovery time is provided.

c. Delays coded (or that should be coded) as {

_____}

As noted above, CN proposes including in the operating agreement a screen for Amtrak and third-party responsible delays for which both parties agree CN should receive relief (subject to the RTB), but which are not specifically covered by other relief items. CN Proposed Operating Agreement, App. V, Sec A.1.e(1). The relief item would cover {

_____ }⁶⁵

Including this relief item, in combination with the other relief items discussed in this Part I.D.2, allows for the deletion of many other relief items previously found in Appendix V and/or VI of the 2011 Operating Agreement, including the following:

- { _____ }

⁶⁵ CN Proposed Operating Agreement, App. V, § A.1.e(1).

- [REDACTED] }⁶⁶
- { [REDACTED] }⁶⁷
 - { [REDACTED] }⁶⁸
 - { [REDACTED] }⁶⁹
 - { [REDACTED] }⁷⁰
 - { [REDACTED] }⁷¹
 - { [REDACTED] }⁷²
 - { [REDACTED]

⁶⁶ 2011 Operating Agreement, App. V, Sec. A.1.e(1).

⁶⁷ 2011 Operating Agreement, App. V, Sec. A.1.e(2).

⁶⁸ 2011 Operating Agreement, App. V, Sec. A.1.e(5).

⁶⁹ 2011 Operating Agreement, App. V, Sec. A.1.e(4). Delays caused by sick or disruptive passengers are generally covered by the HLD (Passenger Related) or INJ (Injury Delays) delay codes. Under the CN Proposed Operating Agreement, if such delays occur at a scheduled station stop, then to the extent that they cause the train to exceed the standard dwell time for that station, then the delays are covered by the relief item described below for excess dwell time.

⁷⁰ 2011 Operating Agreement, App. V, Sec. A.1.e(8). These delays are covered by SYS (System). This code, however, does not cover { [REDACTED] } A separate relief item is therefore necessary to provide that CN receives relief for delays such testing, as provided for in the CN Proposed Operating Agreement as Section A.1.e(4) of Appendix V, described below.

⁷¹ 2011 Operating Agreement, App. V, Sec. A.1.e(10).

⁷² 2011 Operating Agreement, App. V, Sec. A.1.e(11).

- [REDACTED]⁷³
- { [REDACTED] }⁷⁴
- { [REDACTED] }⁷⁵

Earlier in this proceeding, Amtrak proposed a similar relief item for delays to which non-HRD codes are assigned.⁷⁶ The literal language of Amtrak’s proposal, however, only applies to delays that are actually assigned those codes and does not explicitly cover delays “that should be coded” with non-HRD codes. It is essential that the relief item extend to such delays, because Amtrak frequently fails to use non-HDR codes that, under Amtrak’s own standards, apply to particular delays and instead incorrectly assigns HDR codes that penalize CN in calculation of OTP for the affected trains. As CN has noted:

- Amtrak conductors should code delays due to insufficient run time as “OTH,” but in practice they have an incentive to miscode delays due to short PRT as something other than OTH, including HRD, in order to avoid the suggestion that they did not handle the train efficiently.⁷⁷
- Amtrak conductors frequently code time lost due to the Amtrak crew { [REDACTED] }⁷⁸ as RTE (Routing), an HRD code, even though by Amtrak’s own standards such delays fall under SYS (System), an Amtrak-responsible delay code.⁷⁹

⁷³ 2011 Operating Agreement, App. VI, Sec. D.4.

⁷⁴ 2011 Operating Agreement, App. VI, Sec. D.7.

⁷⁵ 2011 Operating Agreement, App. VI, Sec. D.11.

⁷⁶ [Amtrak Redline], App. V., Sec. B.1.b(2).

⁷⁷ RVS Ladue/Kuxmann at 22 n.29. That risk is particularly great insofar as Amtrak denies that PRT is too short, as it does for the Illini/Saluki services.

⁷⁸ 2011 Operating Agreement, App. V, § A.1.e(6)

⁷⁹ SRVS Ladue/Kuxmann at 29.

- Amtrak conductors frequently code delays from { [REDACTED] } as DCS (Signal Delays), an HRD code, rather than as SYS (System), as required by Amtrak's own standards.⁸⁰

Thus, the *correct* codes, not necessarily the ones initially assigned by Amtrak's conductors, must be what determines whether CN is given relief for a given delay, and CN must be given the opportunity to correct misattribution of responsibility for such a delay.⁸¹

In other areas, Amtrak's codes may be technically adequate, so long as there is a clear understanding or clarification of what they cover. Therefore, rather than leave in place the additional relief items noted below, which arguably overlap Amtrak's codes, CN has added clarifying notes to the end of Appendix XI (Definitions of Delay Codes) of its proposed operating agreement. These make clear that Amtrak's non-host responsible codes apply in given situations, thus minimizing the risk of miscoding and ensuring that Amtrak's representations in this proceeding as to the coverage of its codes are matched by its future actions in administering those codes.

The clarifying notes added to Appendix XI correspond to, and allow for the omission from the Operating Agreement of the following current or previously proposed relief items:⁸²

- { [REDACTED] }

⁸⁰ SRVS Ladue/Kuxmann at 30; *see also* Amtrak Service Standards for Train Service & On-Board Employees, Manual No. 10 (attached as Exhibit 5) at 7-105 { [REDACTED] }

⁸¹ CN has proposed a procedure for challenging and correcting incorrect delay codes and for resolving other disputes that affect billing. *See* CN Proposed Operating Agreement, App. V, § G.

⁸² In addition to the relief items and notes to Appendix XI discussed below, CN has added a note clarifying that Amtrak's OTH code not only covers a failure to maintain maximum permitted track speed, but also maximum feasible speed through crossovers between tracks. CN has proposed this clarification in lieu of a limitation of 2 minutes for crossover delays, as proposed earlier in this proceeding. SRVS Ladue/Kuxmann, Ex. 1 at App. V-2 (App. V, Sec. A.1.g.),

[REDACTED]⁸³

Amtrak has previously argued that { [REDACTED]
[REDACTED] }.⁸⁴ Amtrak's assurances, do not match CN's experience. For example, Amtrak has repeatedly refused to give a WTR code to delays resulting from high winds or flooding that cause power outages or otherwise affect wayside signals. Disputes of this kind are clearly ones that CN cannot avoid or control, and CN appreciates Amtrak's assertion that they should be coded as WTR or SYS, which implicitly acknowledges that they should not be counted against CN. CN therefore has included a clarification to that effect in Appendix XI.

- { [REDACTED]
[REDACTED] }⁸⁵

According to Amtrak, { [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] }.⁸⁶ But, as CN has explained, Amtrak frequently improperly assigns delays from copying track authorities to codes

⁸³ VS Ladue/Kuxmann, Ex. 15 at 4 (proposed App. V, Sec. A.1.e(10)); SRVS Ladue/Kuxmann, Ex. 1 at V-5 (proposed App. V, Sec. A.1.l(8)).

⁸⁴ RVS Vilter/Maga, Ex. 31 (attached as Exhibit 6 hereto) at 4.

⁸⁵ Ladue Kuxmann VS, Ex. 15 at 3 (proposed App. V, Sec. A.1.e(4)); SRVS Ladue/Kuxmann, Ex. 1 at V-4 (proposed App. V, Sec. A.1.l(4)); *cf.* 2011 Operating Agreement, App. V, Sec. A.1.e(6).

⁸⁶ RVS Vilter/Maga, Ex. 31 at 3.

classified as “host-responsible,”⁸⁷ making it essential that the Operating Agreement clarify that delays described by this item either are covered by the SYS code, or that no HRD code is applicable. CN’s proposal therefore includes a clarification to that effect in Appendix XI.

- { [REDACTED] }⁸⁸

CN’s added note clarifies that these delays are covered by Amtrak’s TRS (Trespasser Incidents) code. According to Amtrak’s Service Standards Manual, TRS delays include “crossing accidents, trespasser or animal strikes, vehicle on track ahead; ‘near-miss’ delays; bridge strikes by vehicle or boat.”⁸⁹

d. Areas where existing relief items remain necessary and should be retained or modified

While Amtrak’s non-HDR delay codes cover a large portion of the delays to Amtrak trains for which CN should rightly receive relief, additional relief items are required to cover certain additional delays that CN cannot reasonably control.⁹⁰

i. Delay by Operator at UP Tower outside of Joliet

The Operating Agreement currently provides relief for { [REDACTED] }
[REDACTED] } Absent a proposed change in the checkpoint for the Texas Eagle and Lincoln services, which both parties appear to agree upon, this item has been and for now remains necessary to avoid errant delay coding by Amtrak.

⁸⁷ See § II.D.2.a., *supra.*; SRVS Ladue/Kuxmann at 29.

⁸⁸ 2011 Operating Agreement, App. VI, § D.3.

⁸⁹ Ex. 1 at 7-60.

⁹⁰ Amtrak appears to acknowledge that are delays not clearly covered by its non-host responsible codes for which there should be additional relief items. Amtrak Redline, App. V, § B.1.b(3)-(6).

Joliet is presently designated as a checkpoint for Amtrak’s Texas Eagle and Lincoln service Trains under the current Operating Agreement, and arrivals and departures at that checkpoint { [REDACTED] }”⁹¹ CN’s track ownership, however, ends outside of Joliet at North UD Tower, which is dispatched by Union Pacific Railroad Company (“UP”). Thus, UP controls operations between North UD Tower (north of Jackson Street, at approximately Milepost 36.3) and Joliet (at approximately Milepost 37.3, where Amtrak’s passenger station is located). CN therefore has no ability to avoid or control delays to westbound Amtrak trains that occur when the UP-controlled signal restrains westward movement onto the UP.

Amtrak and CN agree that delays for westbound Amtrak trains due to the signal at UD Tower should not be coded against CN, but because of the misalignment of the checkpoint with actual operations errant coding of these delays regularly occurs, as in the example below.

Train	Origin Date	From	To	Host RR	Type	Dis-puted Mins	Delay Reason	Host Railroad Request Comments
21	2022-02-25	XTF	XUD	CC	RTE	2	{ [REDACTED] }	{ [REDACTED] }

In this case, Amtrak denied CN’s request to change the code, responding “CORRECTLY CODED AS-IS.”

⁹¹ 2011 Operating Agreement, App. V, Table 1, n2.

A relief item addressing this issue will be unnecessary if the schedules for the westbound Texas Eagle (No. 21) and Lincoln trains (Nos. 301, 303, 305, and 307) are modified by inserting { [REDACTED] } as the appropriate checkpoint. The necessary changes are indicated in redline in the schedules included at Appendix II of the CN proposed operating agreement.⁹² As Amtrak previously suggested this change,⁹³ and CN has proposed this change to Amtrak, CN expects this schedule change will be adopted. If, however, for some reason that change is not adopted, this relief item remains necessary. The only change CN has made to the existing relief item, is { [REDACTED] }.⁹⁴

ii. Wayside Detectors

The current Operating Agreement contains a relief item for { [REDACTED] }
[REDACTED]
[REDACTED]
[REDACTED]⁹⁵ Amtrak has stated that { [REDACTED] }
[REDACTED]⁹⁶ The descriptions of Amtrak's delay codes found in its Service Standards Manual, however, suggest the contrary, stating that delays from { [REDACTED] }
[REDACTED] } are to be coded as DCS (Signal Delays), which is classified as

⁹² CN Proposed Operating Agreement, App. II (schedules for Train Nos. 21, 22, 300, 301, 302, 303, 304, 305, 306, 307). CN is also proposing to insert XUD-North UD Tower in the schedule for the northbound Texas Eagle Train No. 22, but that would not affect the problem addressed by the relief item at issue.

⁹³ See, e.g., RVS Vilter/Maga at 60-61.

⁹⁴ CN Proposed Operating Agreement, App. V, § A.1.d.

⁹⁵ 2011 Operating Agreement, App. V, § A.1.e(3).

⁹⁶ RVS Vilter/Maga, Ex. 31 at 3.

HRD.⁹⁷ In order to ensure that, as Amtrak claims, such delays will not be counted against CN, CN proposes to maintain a separate relief item (subject to the RTB) covering them, rather than attempting a “clarification” in Appendix XI that would contradict the explanation Amtrak has provided, outside of litigation, for its delay codes.⁹⁸

iii. Uniform efficiency testing

Efficiency testing is required from time to time to confirm that Amtrak’s crews are in possession of all applicable rules, bulletins, and similar directives, and that they know and conform to their requirements. The 2011 Operating Agreement includes a relief item for { [REDACTED] }⁹⁹ While this relief item covers joint testing, which would now be covered by Amtrak’s SYS code, the SYS code does not cover Uniform Efficiency Testing conducted by CN alone.¹⁰⁰ CN has therefore proposed including a relief item that covers such testing.

There are times when Amtrak officers are unavailable, yet Amtrak crews must be tested on their knowledge of and compliance with rules regarding safe operation of the train. In those instances, CN personnel must conduct the necessary testing by themselves. Absent a relief item, Amtrak would code { [REDACTED] } as a host responsible DCS (Signal Delays) delay.¹⁰¹ CN should not be penalized or given a disincentive for conducting tests that are necessary to ensure the safe operation of Amtrak’s trains.

⁹⁷ Ex. 5 at 7-104.

⁹⁸ CN Proposed Operating Agreement, App. V, § A.1.e(2).

⁹⁹ 2011 Operating Agreement, App. V, § A.1.e(8).

¹⁰⁰ The SYS (System) delay code covers delays caused by { [REDACTED] } Ex. 5 at 7-105.

¹⁰¹ *Id.* at 7-104.

Accordingly, CN proposes inclusion of a relief item (subject to the RTB) for delay resulting from

{ [REDACTED] }¹⁰²

iv. Delay at Interlockings Not Controlled by CN

As noted above, a significant types of delay that CN is in no “position to avoid or control,” but which Amtrak typically considers “host responsible,” is delays at interlockings that are automatic (i.e., first-come, first-served) or are controlled by the crossing (i.e., non-CN) carrier. (In many cases, the arrangements for control of interlockings long predate CN’s relationship with Amtrak.) For automatic interlockings, such as where CN’s line is crossed by Union Pacific at Kinmundy, the signal system automatically provides a red signal to Amtrak if a crossing Union Pacific train reaches the approach circuit first. CN cannot do anything to prevent this. Likewise, at interlockings that are controlled by a foreign carrier, although CN can (and does) notify the foreign railroad’s dispatcher of an approaching Amtrak train, there is nothing that CN can do to change the signal at an interlocking controlled by a foreign carrier. Yet under its own coding system, Amtrak routinely records these delays as “host responsible” Freight Train Interference (FTI).

Amtrak has dismissed CN’s objection to classifying such delays as host-responsible by asserting: “It is the host railroad (not Amtrak) whose operating relationship with the other railroad governs the operations of the crossing. It is the host railroad whose dispatcher needs to notify the other railroad what trains are approaching the crossing and in what order, which track each train will occupy, and which ‘electronic indicators’ are for which trains.” Amtrak fails to recognize that the arrangements for control of interlockings in many cases long predate CN’s

¹⁰² CN Proposed Operating Agreement, App. V, § A.1.e(4).

relationship with Amtrak, and that, regardless of how communicative CN is with the foreign railroad controlling the interlocking about approaching Amtrak trains, CN has no power to compel that railroad to change the signal to prevent delays to Amtrak while on CN's lines.

Because CN cannot avoid or control such delays,¹⁰³ the 2011 Operating Agreement appropriately includes a relief item for { [REDACTED] }
[REDACTED]
{ [REDACTED] }¹⁰⁴ and this item should be maintained in the new Operating Agreement, as proposed by CN.¹⁰⁵

v. Operation of Amtrak Special Trains or of Detour Trains

The 2011 Operating Agreement provides for relief (not subject to the RTB) for { [REDACTED] }
[REDACTED]
{ [REDACTED] }¹⁰⁶ CN proposes to maintain this relief item,¹⁰⁷ and Amtrak has proposed inclusion of a largely identical one.¹⁰⁸ Amtrak's proposal, however, would only provide relief { [REDACTED] } This limitation

¹⁰³ Not only is relief justified by CN's inability to avoid or control delays at interlockings it does not control, but the specific relief item provided for in the current Operating Agreement is especially warranted because it was added in 2006 in exchange for allowing Amtrak to operate an additional four Lincoln service trains and an additional two Illini/Saluki trains. SRVS Ladue/Kuxmann at 24.

¹⁰⁴ 2011 Operating Agreement, App. V, § A.1.g.

¹⁰⁵ CN Proposed Operating Agreement, App. V, § A.1.g.

¹⁰⁶ 2011 Operating Agreement, App. V, § A.1.h.

¹⁰⁷ CN Proposed Operating Agreement, App. V, § A.1.h. Amtrak's proposal would likewise keep this relief item, but would subject it to the RTB, and would specify that the detour trains it refers to must be Amtrak detour trains. See Amtrak Proposed OA, App. V, § B.1.c.

¹⁰⁸ See Amtrak Redline, App. V, § B.1.c.

would unfairly penalize CN for accommodating other railroads where necessary to keep their traffic moving when those railroads are unable to use their own lines.

Detouring trains over another railroad's tracks is an extraordinary event, but one that ensures efficient operation of the rail system. It is to the advantage of the national rail system and the public that railroads be encouraged to permit detours on one another's tracks in the event of emergency. Denying full relief for { [REDACTED] }, on the other hand, would tend to deter these important accommodations, which often arise in times of emergency or natural disaster. The Board should therefore maintain the current relief item in its present form.

vi. Delay Caused by Amtrak Maintenance-of-Way Trains

The current Operating Agreement includes a provision providing relief for delays { [REDACTED] }.¹⁰⁹

This item was included in the 2011 Operating Agreement because, from time to time, CN permits Amtrak maintenance-of-way trains to use CN's lines to move to or from lines in Indiana and Michigan that Amtrak owns or maintains. CN is not obligated by its Operating Agreement to permit movement of these Amtrak trains, but when it does so, it should not be penalized because of delays caused by CN's accommodation of Amtrak's MW trains. Accordingly, CN proposes that the relief item be maintained in the new Operating Agreement.¹¹⁰

¹⁰⁹ 2011 Operating Agreement, App. VI, § D.19.

¹¹⁰ CN Proposed Operating Agreement, App. V, § A.1.i.

**vii. Delay Caused by Certain Meets Between Amtrak
Trains on GTW**

Appendix VI of the 2011 Operating Agreement provides for { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹¹¹ Amtrak regularly changes crews on trains stopped at Battle Creek Station, occupying one of the CN main tracks between Baron and Gord and increasing the difficulty of operation when other Amtrak trains move through the same territory. Further, CN's line between Pontiac and Moterm (near Detroit), while formally classified as double-track, is operated like a single track, as the second main track is subject to slow orders limiting train speed to 40 miles an hours, and is therefore not used by CN for main line freight operations. Amtrak's Troy station, located on this segment, only has access to the first main track. Amtrak's train schedules are therefore structured to avoid meets on this segment, but if an Amtrak train is very late, it sometimes becomes necessary to hold an Amtrak train at Moterm or Pontiac so that another Amtrak train can finish traversing the segment. Accordingly, CN proposes to maintain this relief item, limited to the GTW lines, in the new Operating Agreement.¹¹²

Recent events have made it even more important that this relief item be retained. CN recently agreed with Amtrak to shorten the schedules on its Michigan services, in connection with the procedures for certifying schedules in connection with FRA's Metrics and Minimum

¹¹¹ 2011 Operating Agreement, App. VI, § D.2.

¹¹² CN Proposed Operating Agreement, App. V, § A.1.j.

Standards for Intercity Passenger Rail Service.¹¹³ When it did so, it relied on the presence of the relief item and the expectation it would remain in place. Finally, because CN’s actual experience of such delays is that they typically take 15 minutes, regardless of whether the line is equipped with CTC, CN proposes to set the amount of relief time for these delays at { [REDACTED] } across the board.

viii. Delays at Wesson Street in Pontiac

The 2011 Operating Agreement provides for relief for { [REDACTED] }¹¹⁴ Amtrak has proposed a substantially identical relief item.¹¹⁵ CN similarly proposes that this relief item be carried forward into the new Operating Agreement, with the clarification that CN be given relief for delays “due to” the listed causes as well as delays “reported” as caused by them.¹¹⁶ Neither party has suggested any reason for omitting this relief item, which is especially necessary in light of CN’s agreement to shorten the schedules of Amtrak’s Michigan service trains, referred to above, reducing any cushion that may have been provided by those schedules.

e. New relief items that are necessary for proper coding and delay attribution.

i. Picking up and setting out substitute locomotives

As noted above, delays incurred { [REDACTED] }¹¹⁴ are covered by the CAR (Car Failure) and ENG (Engine Failure) codes. But from time to time, CN will provide a substitute

¹¹³ The FRA Metrics and Standards are codified at 49 C.F.R. Part 273.

¹¹⁴ 2011 Operating Agreement, App. VI, § D.16.

¹¹⁵ See Amtrak Redline, App. V, § B.1(b)(3).

¹¹⁶ CN Proposed Operating Agreement, App. V, § A.1.k.

locomotive to substitute for one that has been bad-ordered and removed from an Amtrak train. In that event, an Amtrak train may be delayed as it picks up, and later when it drops off, the substitute equipment. While Amtrak's explanation of its CAR and ENG codes indicate that they cover delay in setting out and picking up defective or repaired equipment,¹¹⁷ they do not clearly apply to time picking up or dropping off non-defective equipment that CN provides for Amtrak's benefit, and in fact Amtrak frequently codes these delays as HRD. For example, in the following recent event, Amtrak coded as FTI a delay incurred dropping off a CN locomotive that had been provided to substitute for one that had been experiencing engine troubles. Amtrak refused CN's request to recode the delay as something other than HRD.

Train	Origin Date	From	To	Host RR	Type	Dis-puted Mins	Delay Reason
59	2021-10-27	NBNq	MEM	CC	FTI	23	{ [REDACTED] }

To ensure that CN is not penalized for making this equipment available to Amtrak, CN proposes that an item be added to the Operating Agreement providing CN relief for { [REDACTED]

[REDACTED]

[REDACTED] }¹¹⁸

ii. Freight train interference following late arrival at entry point to CN line

CN proposes inclusion of a relief item (subject to the RTB) for { [REDACTED]

[REDACTED]

¹¹⁷ Ex. 1 at 7-59, 7-60.

¹¹⁸ CN Proposed Operating Agreement, App. V, § A.1.e(3).

[REDACTED]
[REDACTED]
[REDACTED] }¹¹⁹

CN and other host railroads operate their rail system so that there are scheduled “slots” during which freight and passenger trains may use CN’s various rail lines. If Amtrak or the host of the line from which the Amtrak train is approaching CN’s line notifies CN sufficiently in advance of the late arrival, then CN can make a decision whether the best way to minimize conflict between trains will be to let its own train take its scheduled slot (which may put it far enough ahead of the Amtrak train that it will cause minimal delay to Amtrak), or to avoid interference from the CN train altogether by holding it until after the Amtrak train arrives, so that the faster-moving Amtrak train can proceed onto the relevant CN segment ahead of the CN train.

But at several entry points onto CN’s lines, Amtrak trains regularly arrive late. CN is not privy to Amtrak’s operations off its lines, and it cannot tell when the Amtrak train is likely to arrive late at CN’s lines. Nor does Amtrak regularly inform CN of when its late trains are likely to arrive, despite its recognition that such communication could reduce delays.¹²⁰ CN regularly holds its freight trains to provide a sizeable window on either side of Amtrak’s scheduled arrival time, but this delays the movement of freight traffic and there is a point at which the CN freight train must proceed. If CN is not informed about when to expect the Amtrak train, then it reasonably may decide to allow the freight train to take its previously scheduled slot. Then, if the Amtrak train arrives shortly afterward, it may find itself stuck behind the CN train, especially

¹¹⁹ CN Proposed Operating Agreement, App. V, § A.1.e(7).

¹²⁰ See VS Ladue/Kuxmann, Ex. 11 (attached as Exhibit 7 hereto) { [REDACTED]
[REDACTED] }

if the segment is single track (as is true of much of CN's network in the United States) and there may be no nearby available sidings that the CN train can take to allow the Amtrak train to pass in this situation where the Amtrak train is out of slot. In that event, Amtrak will typically code the delay to its train as FTI (freight train interference), but the delay will be one that CN could not reasonably have avoided, and that Amtrak might have avoided by giving CN timely information about the late arrival of the Amtrak train. Some recent examples of CN being charged with FTI (a host-responsible delay) delaying an Amtrak train that arrived unannounced more than 15 minutes after its scheduled arrival time at the entry point to CN are:

Train	Origin Date	From	To	Host RR	Type	Dis-puted Mins	Delay Reason
353	2022-01-15	XA5	XB0	CC	FTI	10	{ [REDACTED] }
351	2022-01-28	Xa5	Xb0	CC	FTI	15	{ [REDACTED] }

A relief item for this kind of delay should therefore be included in the Operating Agreement, to ensure that delays CN cannot avoid are not unfairly counted against it, and to provide reasonable incentive for Amtrak to notify CN, or make sure that CN is notified, of Amtrak's late arrival.

Amtrak objects to this proposed relief item, arguing that it is CN's responsibility to communicate with contiguous railroads to obtain information about when Amtrak trains will enter CN's lines.¹²¹ CN certainly can, and does, communicate with other host railroads in an effort to learn the status of Amtrak trains as they approach CN's lines. But CN has no power to

¹²¹ RVS Vilter/Maga at 51-53.

compel those railroads to provide timely information, nor are they best position to keep CN informed under these circumstances.

Amtrak, on the other hand, should be so motivated, in order to keep its trains on schedule. Moreover, with GPS technology, Amtrak knows the location of its trains, and it can inform CN directly of late arrivals, if it wishes to do so.¹²² And, as for its prior hosts, Amtrak, not CN, has the relevant contractual relationship with them. Amtrak, not CN, can influence whether an Amtrak train is late before it reaches CN and what information is provided when about that lateness. Amtrak can also contract to have the prior host's dispatchers provide CN with timely information about late trains.

But if it can penalize CN for any delays caused by CN's lack of information (as it can in the absence of this relief item), then Amtrak's incentives to keep CN informed will be weakened. And this will do nothing to increase CN's ability to obtain the information if neither Amtrak nor a connecting railroad provide it in a timely manner. Amtrak has the ability to timely notify CN and should reasonably be required to do so; their failure to do so should allow CN the requested relief.

iii. Commuter train interference on Joliet subdivision following late arrival at entry point to CN line

CN proposes that a new relief item be added to the Operating Agreement providing that,

{ [REDACTED]
[REDACTED]

¹²² In fact, Metra has reduced delays on CN by doing so.

[REDACTED]¹²³ This item is, with minor modifications, identical to one that CN proposed earlier in this proceeding.¹²⁴

Although the schedules for Amtrak's Lincoln and Texas Eagle trains (which operate over CN's Joliet Subdivision) are designed to avoid interference from Metra, when an Amtrak train (especially Lincoln service Train No. 305) arrives late at the entrance point to CN's line, it may get caught behind a Metra train. Because the Metra commuter train makes many more stops than the Amtrak train, the Amtrak train is likely to be delayed, and its conductor will record the delay as commuter train interference, which Amtrak regards as a host-responsible delay.¹²⁵ CN, however, cannot be expected to delay or hold Metra traffic to wait for a late-arriving Amtrak train, nor is it able to avoid or control Amtrak's late arrival. Under those circumstances, CN should not be penalized for the delays resulting from that late arrival, and because Amtrak does not have a non-HDR code that would extend to such delays, even though caused by Amtrak's late arrival, an additional relief item covering those delays should be included in the Operating Agreement as proposed by CN. Further, this item should not be subject to the RTB, as the delays it covers are extraordinary ones not provided for in the recovery time built into the affected Amtrak train schedules.

¹²³ CN Proposed Operating Agreement, App. V, § A.1.e(6).

¹²⁴ See SRVS Ladue/Kuxmann, Ex. 1 at App. V-3 (Proposed App. V, § A.1.j).

¹²⁵ For example, { [REDACTED] } See VS Ladue/Kuxmann, Ex. 20 (attached as Exhibit 8 hereto) (Amtrak conductor delay report ("CDR")). If the train had departed on time, it would have been in front of Metra and would not have incurred that delay.

iv. Restrictions for the safe operation of Amtrak equipment

CN proposes inclusion of a relief item (not subject to the RTB) for { [REDACTED]

[REDACTED]”¹²⁶ Amtrak has suggested that this item is unnecessary because

{ [REDACTED] }¹²⁷ But when

Amtrak equipment cannot be operated safely on CN’s track and signal systems requiring the imposition of operating restrictions, despite the fact that those track and signal systems are working properly and safely for freight traffic and comply with all applicable FRA standards, Amtrak has not agreed to characterize its equipment as failing or such delays as falling within its existing non-host delay codes. The “short shunt” issue is an example of this, although CN does not propose that this provision apply to its past coding dispute. Amtrak codes “short shunt” delays as DCS (signal delays) or DSR (temporary slow order).

Consistent with the side letter executed by the parties providing for { [REDACTED] }, when Amtrak equipment fails to operate safely on CN, and CN’s tracks and signals are functioning properly and adequately for the safe operation of freight traffic, Amtrak rather than CN should be responsible for resulting delays. If such issues arise, Amtrak should not only be required to pay the incremental costs of addressing them, it should be responsible for resulting delays until the issue is remedied

¹²⁶CN Proposed Operating Agreement, App. V, § A.1.1.

¹²⁷ RVS Vilter/Maga, Ex. 31 at 2.

3. In accordance with the Interim Decision, CN's proposal refines the Recovery Time Base using existing schedules to reflect the real-world operating conditions on a segment.

a. Refining the RTB for multiple checkpoints in accordance with the Board's Decision.

Amtrak schedules include so-called “recovery time” to offset delays that occur during the trip of a train and help keep a train on its schedule. Some of those delays occur because of things Amtrak can control, some because of things CN can control, and some are due to third parties. The Recovery Time Base (or “RTB”) is the amount of time the Operating Agreement allocates to certain delays caused by Amtrak third and parties. For delays subject to the RTB, CN only gets relief to the extent those delays exceed the RTB in a given segment. The amount of RTB in a segment, which delays it applies to, and how it is applied (e.g., cumulatively or on a segment-by-segment basis) has a major effect on the on-time performance calculation.

The Board's interim findings and guidance did not propose a specific allocation of RTB, and did not decide which delays it should apply to, instead leaving those issues to the parties to negotiate. Interim Decision at 25. The Board stated, however, that any allocation of RTB “should reflect the real-world operating conditions on a segment and each party's susceptibility to events resulting in a delay to Amtrak trains.” *Id.*

CN proposes to incorporate this guidance by calculating, for each checkpoint, the percentage of delays that were caused by Amtrak and third parties in the immediately preceding segment, and then multiplying that percentage by the number of recovery minutes in the schedule for that segment, rounded to the nearest whole number. For example, if 30% of the delays on a segment were attributable to Amtrak and third parties, and there were 9 minutes of recovery time in the segment, the RTB for the segment would be 3.

In order to provide a strong basis for allocating recovery time to develop the RTB, CN analyzed a full 3-year period of delays for each train from 2017 to 2019. Using such a long period assures that temporary fluctuations do not dramatically alter the RTB. Moreover, in order to avoid the distorting effects of the COVID pandemic, CN avoided using data influenced by the pandemic beginning in 2020.¹²⁸ *Id.*

In calculating RTB, CN appropriately excluded two types of delays that are not accounted for by schedule recovery time and therefore should not be part of a division of recovery time. First, CN excluded delays coded as NOD (i.e., delays for unused recovery time). NOD is a third-party responsible code that is used to account for a train that arrives early at a station and awaits its departure time. Such delays are not planned for and are not delays experienced by the train en route. They are not true “delays” and are certainly not the types of en route delays intended to be offset by recovery time.

Second, for the Illini/Saluki schedules, CN excluded delays due to the so-called “short shunt” issue – that is, delays due to the slow order imposed for safety by CN in light of the failure of Amtrak’s single-level Horizon/Amfleet equipment to reliably “shunt” an electric circuit that activates grade crossing signals. There has been no adjustment to recovery time (or the schedules more generally) for the Illini/Saluki trains to reflect this type of delay. Further, Amtrak is presently using double-level equipment that is not subject to the short shunt safety

¹²⁸ CN does not believe it is necessary or even desirable to recalculate the RTB distribution during the initial term of the new Operating Agreement to be prescribed by the Board in this proceeding, since the intention is to be representative of delay experience over the long term, and there is no reason to believe the RTB distribution will greatly vary, so long as distorting periods (such as during the Covid-19 pandemic) are avoided. After the initial term of the new Operating Agreement, the parties can determine if they wish to recalculate the RTB distribution based on another period. Nonetheless, CN does not see this as a major issue, and it would be willing to discuss with Amtrak use of a different period for determining the RTB.

slow order. Amtrak has coded short shunt delays as host-responsible (over CN's objection), so the effect of excluding these delays from the 2017-2019 data used for the RTB determination is to avoid artificially decreasing the RTB. That result is favorable to Amtrak, as it maintains the RTB as a higher hurdle for CN to receive delay relief.

CN's proposal showing the RTB for each segment under the existing schedules is shown in Appendix II of the CN's Proposed Operating Agreement (Tab B to this Opening Submission).¹²⁹

b. Properly Providing For Which Relief Items Should and Should Not Be Subject to the RTB.

The 2011 Operating Agreement rationally treats relief items as subject to the RTB if they cover delays intended to be covered by the recovery/miscellaneous time built into the train schedules, while relief items for other types of delays are not subject to the RTB. *Compare* 2011 Operating Agreement, App. V, § A.1.a.-d., f.-i. *and id.*, App. VI, § D.1.-19 (not subject to RTB) *with id.*, App. V, § A.e.(1)-(7) (subject to RTB). CN's Proposed Operating Agreement honors the parties' previous agreement and determination of which relief items should be subject to the RTB, including with respect to three relief items carried over from Appendix VI, which previously applied solely to GTW.¹³⁰

¹²⁹ CN's calculations are supported by the following workpapers: Wolverine RTB Analysis; CNO RTB Analysis; Texas Eagle RTB Analysis; Illini-Saluki RTB Analysis; Blue Water RTB Analysis; Lincoln RTB Analysis.

¹³⁰ The GTW relief items that were not and should not be subject to the RTB include relief for delays caused by the following:

(i) {

[REDACTED]

}

CN also proposes one new relief item that would not be subject to the RTB. That is relief for delays due to { [REDACTED] }.¹³¹ As this is a forward looking relief item intended for an atypical set of delays, it obviously is not covered by existing recovery/miscellaneous relief time and should therefore not be subject to the RTB. This treatment is consistent with CN's exclusion of short shunt delays in its allocation of recovery time between the parties, which favors Amtrak and was likewise on the basis that such delays are not covered by existing recovery/miscellaneous time.

In contrast to the reasoned approach followed by CN, Amtrak in the prior phase of this proceeding proposed without any rational basis or explanation to subject all relief items to the RTB. (See Amtrak Redline § B.1.b.). Should Amtrak take a similar position in this stage of the proceedings, CN will further address its position in reply.

4. CN would clarify the Operating Agreement provision regarding trips not counted to assure that outliers do not distort compensation.

The current Operating Agreement specifies a number of situations in which a trip of a train would not be counted for purposes of Performance Payments or Performance Penalties

(ii) { [REDACTED] }

(iii) { [REDACTED] }

¹³¹ CN Proposed Operating Agreement, App. V, § A.1.1.

(frequently referred to as “Do Not Count” or “DNCs”). These DNC provisions deal with “unusual circumstances beyond CN’s control that can cause major operating disruptions that may not be fully accounted for through ordinary relief items.”¹³² Such disruptions may have lengthy and unpredictable delays that increase the difficulty of properly assessing the downstream effects they may have and correctly assigning responsibility for delays caused by those downstream effects. For example, { [REDACTED] } (all of which, under the existing Agreement as well as CN’s proposal, may cause the trip of a train not to be counted) may result in delays that are measured in hours rather than minutes and that will have significant secondary effects causing additional delays at checkpoints further down the train’s route.

The difficulty of properly accounting for downstream effects is exacerbated by Amtrak’s delay-coding practices, and in particular its typical refusal to look beyond the immediate cause of a particular delay (i.e., the windshield view).¹³³ Because of those practices, when “lengthy and unpredictable delays” occur, causing cascading operational disruptions leading to additional delays at downstream checkpoints, Amtrak generally disregards the chain of causation leading to those further delays and codes them as host-responsible (i.e., not subject to relief) on the basis of their immediate causes. This can cause trains to be counted as late at subsequent checkpoints, even if the downstream delays were merely the last step in a chain of causation initiated by the initial delay ({ [REDACTED] }). Under such circumstances, rather than attempt to sort out the potentially multiple causes of delay to determine which one “really”

¹³² 2011 Operating Agreement, Appendix V, § A.4.c.

¹³³ For example, Amtrak has refused to apply the WTR (Weather related) code to delays resulting from { [REDACTED] }.

caused the later delay, the more realistic action, as has been long recognized by the Operating Agreement, is to disregard the late trip of the train altogether, as CN proposes.¹³⁴

CN therefore proposes to keep the existing DNC items, with certain minor revisions. modifications as described below.¹³⁵ Most significantly, in response to Amtrak's repeated miscoding of delays caused by significant, localized flooding and/or high winds,¹³⁶ CN proposes

{ [REDACTED] }
[REDACTED] }¹³⁸ CN's proposed

modifications to the DNC provisions are consistent with existing provisions and primarily

¹³⁴ The designation of each station stop as a checkpoint for determining OTP (including station stops that may be distant from the location of the initial DNC event) will increase the difficulty of assessing those effects.

¹³⁵ CN Proposed Operating Agreement, App. V, § A.5. In addition to changes discussed in text, CN proposes two other minor modifications to the existing DNC provisions, both of which should be non-controversial:

First, in the provision regarding { [REDACTED] }, CN proposes to strike the reference to omit language referring to Table 1 of Appendix V (identifying checkpoints on each train) and to non-checkpoint stations on segments for which a checkpoint is the endpoint. CN Proposed Operating Agreement, App. V, § A.5.b. This language is unnecessary if all station stops are designated as checkpoints in the schedule skeletons, as CN proposes in Appendix II of the Agreement.

Second, CN proposes to { [REDACTED] } in the introduction to the list of DNC items currently found in Section A.4.c of Appendix V, so that introduction would provide that { [REDACTED] } shall not be counted at such Checkpoint in calculation the train's monthly performance." CN Proposed Operating Agreement, App. V, § A.5.c.

¹³⁶ *See, e.g.*, Ex. 2 (email correspondence regarding { [REDACTED] }); Ex. 3 (email correspondence regarding { [REDACTED] }
[REDACTED] }

¹³⁷ 2011 Operating Agreement, App. V, § A.4.c.(3).

¹³⁸ 2011 Operating Agreement, App. V, § A.4.c.(7); *cf.* CN Proposed Operating Agreement, App. V, § A.5.c(3), (7).

intended to clarify their application in order to avoid potential disputes and to accommodate a shift to including checkpoints at all stations. We explain those revisions below, together with the reasons the Board should approve them.

Clarify the application of the DNC delay provisions in order to account for multiple checkpoints

The measurement of performance for individual trains under the 2011 Operating Agreement is at only a single endpoint or, for the long-distance City of New Orleans service, at a single midpoint and endpoint. Under that incentive structure, it is sufficient to provide that a late arrival will not count at a checkpoint due to one of the specified events or types of delays, as there is generally no issue with measured on-time performance for such a train at any subsequent checkpoint.

The CN Proposed Operating Agreement, however, provides for checkpoints at every station and at the end of the route. CN proposes to clarify the introduction to Section A.5.c. of Appendix V (which lists a series of events that trigger DNC treatment) to deal with the application of the delay-based DNC provisions to such multi-checkpoint routes. First, the changes would clarify that following a disruptive delay that can throw off schedules across the railroad, late arrivals at downstream checkpoints will not count for purposes of monthly performance. As discussed above, the application of individual relief items is not adequate to account for such extreme disruptions. Second, our changes would preserve incentives for CN to try to recover an Amtrak train that is late at an upstream checkpoint by making clear that an on-time arrival at a later downstream checkpoint will still count toward the train's monthly performance. This change is in keeping with the emphasis in the Interim Decision in preserving appropriate performance incentives.

{ [REDACTED] }

Because Amtrak has repeatedly—and, in CN’s judgment, inappropriately—denied CN’s requests for relief for delays caused by significant, localized flooding and/or high winds,¹³⁹ CN proposes { [REDACTED]

[REDACTED] }¹⁴⁰

This change should provide clarity (by detailing with greater specificity the kinds of delays subject to DNC treatment, including, for example, { [REDACTED]

[REDACTED] } and eliminate unnecessary

disputes that recur under the current Agreement because of Amtrak’s history of sometimes

ignoring the real-world impact of weather events. In order for either { [REDACTED]

[REDACTED] } to apply, CN would be required to provide specific

documentation related to the event it cites as grounds for applying the DNC provision, and CN

has proposed changes to both provisions to describe the types of evidence that would be deemed

acceptable. The proposed revisions would increase fairness and clarity in the administration of

the Agreement and reduce the frequency of disputes over that administration.¹⁴¹

¹³⁹ See Email from Jim Blair to Paul Ladue (June 7, 2013 5:31 pm) (attached as Exhibit 9) (providing examples of disputes between the parties related to the coding and treatment of delays caused by weather); RVS Ladue/Kuxmann at 43 (same); SRVS Ladue/Kuxmann at 31 (same).

¹⁴⁰ See CN Proposed Operating Agreement, App. V, § A.5.c(3), (7); *cf.* 2011 Operating Agreement, App. V, § A.4.c(3), (7).

¹⁴¹ The effects of measures taken in anticipation { [REDACTED] } as long as the anticipatory action was reasonable under the conditions known at the time they were taken, it would be unreasonable to make the consequences of that action different, for purposes of determining compensation under the Operating Agreement, depending on events taking place after that action.

5. CN would provide a more robust process for resolving billing disputes, including for delay coding and trips not counted.

The current Operating Agreement has only minimal provisions related to the data and procedures for resolution of disputes related to determining responsibility for delays. It provides only that { [REDACTED]

[REDACTED]

[REDACTED] }¹⁴²

This lack of guidance as to data and process has resulted in frustrating inefficiencies for CN in attempting to resolve disputes over relief items and coding with Amtrak.

CN has too often experienced lengthy delays in Amtrak response time, conflicting decisions from different Amtrak representatives, and refusals by Amtrak to follow or even recognize the relevance of precedent, particularly with respect to the consideration and processing of relief items. CN proposes therefore that the Operating Agreement be amended to promote more expeditious, equitable, and efficient consideration and resolution of issues regarding relief items and related invoices.

CN proposes that the Operating Agreement be amended to provide that { [REDACTED]
[REDACTED]
[REDACTED] } CN has frequently found that, when it challenges Amtrak's determination of the cause of delay to one of its trains, as coded by the conductor on the CDR, Amtrak may ultimately agree to change the delay code as requested by CN with respect to the invoice immediately at issue, but conditions its agreement with disclaimers to the effect that { [REDACTED]

¹⁴² 2011 Operating Agreement, App. V, § A.3; see also *id.*, App. VI, § B. (substantively identical provision for services on GTW).

[REDACTED]

[REDACTED] }¹⁴³

By issuing such disclaimers, Amtrak puts CN on notice that if a similar delay should arise in the future and be coded by the conductor with the same attribution of cause as in the first case, CN will be required to challenge the conductor's coding and present its arguments afresh for the correct attribution of cause, as if no such situation had ever previously arisen and been resolved. This is an extremely inefficient use of the parties' resources. If CN and Amtrak go to the trouble of examining the cause of a delay for purposes of billing, they should regard their conclusions as a correct determination of the actual cause of and responsibility of that delay, and they should be able to conclude further that to the extent that a future delay arises out of the same circumstances, the attribution of cause for that delay should also be the same.

CN also proposes that { [REDACTED]

[REDACTED]

[REDACTED] }

In recent years, CN has frequently reached what it believed was agreement with Amtrak's Director, Contract Operations, on the proper characterization of delays for purposes of billing, only to be informed later that another Amtrak department or group had rejected that resolution.¹⁴⁴ This has unnecessarily complicated and lengthened the process of billing and payment. CN should not be required to

¹⁴³ *E.g.*, Email from Albert Walton to Scott Kuxmann (Dec. 9, 2013 1:58 pm) (attached as Exhibit 10); Ex. 2 (confirming that { [REDACTED] }; Ex. 3 (confirming that { [REDACTED] }).

¹⁴⁴ *See, e.g.*, Ex. 9 { [REDACTED]

[REDACTED] }

deal with various Amtrak offices with divided responsibility for billing issues, or with personnel who lack the authority to make necessary decisions regarding billing. Accordingly, CN proposes that { [REDACTED]

[REDACTED] } In addition, CN proposes that the Operating Agreement provide that { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }. Finally, { [REDACTED]

[REDACTED] }.¹⁴⁵

E. The Changes to the Incentive Penalty Provisions of the Operating Agreement Must be Applied Prospectively Only.

The purpose of the incentive and penalty provisions of the Operating Agreement is to motivate CN to dispatch its lines and otherwise manage its railroad so as to bring about a high level of OTP for Amtrak’s trains operating on those lines. As is the case with incentives generally, they are intended to influence future action. Applying changes to those provisions retroactively would not and could not achieve that purpose and would be grossly unfair to CN. A host railroad cannot respond to an “incentive” scheme if it does not know at the time it acts how its performance will be judged and rewarded, and it should not be penalized (or rewarded retroactively) on the basis of rules that were not in place (and for much of this proceeding not even proposed) at the time of the conduct at issue. Accordingly, CN proposes that changes to the incentive and penalty provisions of the Agreement should apply prospectively only.¹⁴⁶

¹⁴⁵ CN Proposed Operating Agreement, § 5.2.A, para. 2.

¹⁴⁶ CN Proposed Operating Agreement, § 8.8.B.

The serious ramifications of retroactively applying the modified incentive and penalty provision is particularly evident in this proceeding, where the Board and parties are contemplating changing from generally single service checkpoints to checkpoints at all stations, and where it is evident that new schedules with reallocated recovery time are required for Amtrak's two largest services on CN to accommodate that change. Thus, applying such new provisions retroactively would be potentially penalizing CN for not adequately helping Amtrak reach checkpoints that were not at the time checkpoints, and for not doing so despite Amtrak operating under schedules not designed for an all-station metric. In addition to these changes, there are myriad other changes to the incentive/penalty provisions of the Agreement that may be adopted, the overall effect of which could neither be understood nor anticipated by CN.

Not only would it be illogical to apply new incentives to past conduct, which can no longer be affected by such incentives, but it would be practically difficult or impossible to do so. Not only would the parties need to retrieve records of train performance for a period that may approach 10 years, but they would then need to expend significant resources to examine arrivals at individual checkpoints in order to determine how to adjust OTP calculations to reflect a new system of relief items, to apply the lateness and incentive multipliers, and to determine whether performance of certain trains should be disregarded under the Agreement's new do-not-count provisions. Determining how to calculate retroactive incentives and penalties would impose major additional costs on both parties. Further, that complex undertaking would likely result in extensive disputes between the parties requiring expenditure by them of substantial additional resources, invocation of dispute resolution under the Agreement, and possible Board intervention.

F. Schedule Issues Have Been Narrowed Since the Interim Decision, and, As a Last Resort, Would Be Addressed and Resolved under the Operating Agreement.

1. Progress on schedules.

In its Interim Decision, the Board encouraged parties “to work together to develop new contract schedules.” Interim Decision at 11. In particular, the Board recognized that if all stations are to be checkpoints, “recovery time would have to be redistributed to give CN a meaningful opportunity to meet its performance obligations.”¹⁴⁷ *Id.* Similarly, in its rule setting Metrics and Standards under Section 207 of PRIIA, FRA has acknowledged that “[h]istorically, Amtrak’s published train schedules have not been designed with a customer OTP metric in mind,” and therefore provided a process for Amtrak and its host railroads to negotiate adjustments to their schedules that would align them with FRA’s Customer OTP standards.¹⁴⁸

CN and Amtrak have agreed on the need for redistribution of recovery time, and have agreed on certification of 20 of the 26 regularly scheduled daily Amtrak trains that operate over CN’s lines in the United States.¹⁴⁹ Unfortunately, the parties have not yet agreed on schedules for the four Illini/Saluki trains or the two City of New Orleans trains, but discussions with Amtrak are ongoing. CN on March 23, 2022 proposed to Amtrak that the parties move forward with a redistribution of recovery time.¹⁵⁰ CN proposed using schedules proposed by Amtrak

¹⁴⁷ The Board suggested in the Interim Decision that there might also be issues regarding Amtrak’s dwell times at various stations. Interim Decision 11. As the Board surmised might be the case, there are reasons for disparities in dwell times, and this has not been an area of disagreement between the parties.

¹⁴⁸ 85 Fed. Reg. at 72,978-72,979.

¹⁴⁹ See Letter from M. Matteucci to J. Blair at 1 (April 7, 2021) (attached as Exhibit 11) (agreeing to certify 20 of the 26 daily Amtrak trains that operate over CN’s lines in the United States during normal operations).

¹⁵⁰ See Letter from M. Matteucci to J. Blair (March 23, 2022) (attached as Exhibit 12).

itself in 2020 to redistribute recovery time (which had included some small adjustments to pure run time), and proposed a redistribution of recovery time for the City of New Orleans trains. Amtrak responded on May 3, 2022 with a counter-proposal and the parties are continuing to discuss possible schedule revisions.¹⁵¹ We remain hopeful that we can at least agree promptly on redistribution for the six train schedules with uncertified schedules. Recovery time must be properly allocated for the Illini/Saluki and CNO services before performance is measured based on train arrivals at all stations.

2. Provisions for the review of schedules and resolution of disputes on schedules.

In order to help avoid and to resolve future disputes concerning schedules, CN's Proposed Operating Agreement includes a process to ensure that schedules are periodically reviewed as necessary, and adding detail to the process by which { [REDACTED] }¹⁵² It is in the interest of its passengers and the parties to assure periodically that Amtrak's schedules are reasonably achievable so that the Operating Agreement functions appropriately and passengers receive the reliable service they deserve. These are goals that Amtrak should share.

CN would retain Section 3.2.D., but it is not a substitute for a regular schedule review process. The new review process is intended to be cooperative and would require that the parties work together to examine, validate, or as necessary modify existing schedules so they are up to date and reflect existing equipment and operating conditions. Rather than requiring a proposed new train schedule at the starting point of the process, as under the existing provision in the operating agreement for proposing a schedule change (Section 3.2.D), the schedule review

¹⁵¹ See Letter from J. Blair to M. Matteucci (May 3, 2022) (attached as Exhibit 13).

¹⁵² CN Proposed Operating Agreement, § 3.2.G.

process CN is proposing to add to the Operating Agreement as Section 3.2.G would culminate in the development of a new schedule, if the facts and circumstances reviewed in that process showed a new schedule to be appropriate. If parties are voluntarily working cooperatively, as the new Section 3.2.D would encourage, they will not need the schedule change provision. If not, the existing schedule change provision would remain available for a party to identify schedule issues by themselves and then initiate the change process by themselves by proposing a full schedule with all proposed modifications, without any requirement that the other party cooperate in that effort.¹⁵³

The issues the parties have had regarding the validation and establishment of PRT underscores the importance of a cooperative review process versus the unilateral party approach under the existing provision (Section 3.2.D). Amtrak, for example, has opposed CN's use of a train performance calculator ("TPC") to determine PRT, and argued in favor of "joint PRT field checks" and claimed that "field verification of PRT through the operation of actual trains over the route is the most effective way to obtain an accurate determination of PRT."¹⁵⁴ More recently, Amtrak has proposed changes in PRT based on a "statistical analysis" that it neither explained nor provided.¹⁵⁵ The cooperative review process proposed by CN in Section 3.2.G, as opposed to the schedule change proposal process, is consistent with joint efforts and the use of varied approaches to validate schedules.

Specifically, CN proposes that the Operating Agreement require the parties to jointly review schedules for one or more individual Amtrak services on a staggered basis at least once

¹⁵³ CN has not proposed to eliminate the existing provision, but its limited utility is underscored by the fact that neither party has sought to invoke it.

¹⁵⁴ Amtrak Opening Br. at 48.

¹⁵⁵ See Ex. 13 at 1.

every five years. Such review would be mandatory, unless both parties agree it is unnecessary. Further, although CN should by right be entitled to all incremental costs it incurs related to this process, CN proposes that each party bear its own costs of participating in the review.

The Operating Agreement encompasses six Amtrak services. Two of those services – the Texas Eagle and Lincoln – run over the same IC line, and could be reviewed simultaneously. Therefore, all Amtrak services could be cycled through a review process on a rolling basis every five years. CN proposed that general reviews commence 2 years after the effective date of this Agreement.

In addition to this general review, provision is made for additional reviews in two circumstances. First, under Section 3.2.G.(2)(a), review would take place immediately for the Illini/Saluki and City of New Orleans trains if the parties have not agreed upon a reallocation of recovery and miscellaneous time within 3 months following the effective date of the Agreement. CN remains hopeful that such a reallocation will have been done well before that time, but it is critical that the modifications be in place for the proper functioning of any performance measure based on all-stations OTP. Second, under Section 3.2.G.(2)(b), either party would be authorized to initiate a review in particular circumstances where it appears such a review is required.

The party's difficulty in reaching agreement on schedules, which are a part of and a central element of the Operating Agreement, also makes it critical that there be an efficient process under that agreement for resolving schedule disputes. As part of its proposal, CN would clarify { [REDACTED] } (see [REDACTED] Operating Agreement, § 3.2.D.4.), but it provides little or no guidance as to the duty of the

arbitrators or the factors that should guide the arbitrators' decisions. CN's proposed addition at 3.2.G.(4) would do so.

A key aspect of CN's proposal is that scheduling take full advantage of modern modeling techniques to produce achievable, sustainable schedules. Modeling can and should take into account such things as (1) the specific Amtrak consists proposed to operate on the route; (2) the specific infrastructure and capacity constraints that exist on the route; and (3) the level of existing and projected freight and passenger traffic on the route. In addition, the parties may wish to consider seasonal factors, anticipated construction of new railroad capacity, and cyclical maintenance of way work.

III. COMPENSATION FOR INCREMENTAL COSTS OF FREIGHT TRAIN DELAYS CAUSED BY AMTRAK

In the Board's Interim Decision, it reiterated the well-established legal principle that Amtrak must compensate its freight railroad hosts for incremental costs it causes them to incur. *See* Interim Decision at 22-23. Consistent with that principle, Amtrak's operating agreements with CN have always provided for CN to recover its incremental costs from Amtrak. CN and Amtrak have generally agreed on most elements of incremental cost compensation, typically using simple inflation-adjusted metrics to represent those costs in order to avoid undue administrative costs.

However, the 2011 Operating Agreement affords CN no compensation for the substantial incremental costs it incurs when freight trains on its network are delayed because of Amtrak trains. As discussed in CN's Post-Interim Decision Brief and in the verified statement of economic expert Dr. Steven Peterson, that omission violates the statutory requirement that Amtrak pay for incremental cost CN incurs by hosting Amtrak, incentivizes Amtrak to make unreasonable demands that result in increased costs and delays to freight trains, and leaves CN

subsidizing Amtrak. CN should not be forced to incur costs because of Amtrak for which CN is not compensated, and thus be forced to cross-subsidize Amtrak's operations on CN's network, by doing so.

In the Interim Decision the Board recognized incremental freight delay costs CN incurs when specific CN trains are delayed due to Amtrak trains as properly recoverable, subject to those costs being "specific, verifiable and quantifiable." Interim Decision at 22 & n.41. CN now proposes that the Operating Agreement be amended to implement that guidance, and that the Board approve certain CN's methodology, which Cn has applied to a sample month, to be used to determine specific incremental freight delay costs for compensation both under the next operating agreement and since September 1, 2019.

In this section, we briefly describe the railroading realities that underlie the need for Amtrak to pay for CN's incremental freight delay costs, and the data and methodology that supports CN's implementing reimbursement for incremental freight delay cost, and we then specify what CN proposes in the Operating Agreement. Further support for CN's incremental freight delay cost compensation proposal is provided by the verified statements of:

- Michael Baranowski, regarding CN's methodology for identifying and quantifying incremental freight delay costs, and its application to a sample month, December 2019;
- Dr. Steven Peterson, regarding its economic justification;
- John Summerfield *et al.*, regarding operational data CN uses to identify delays caused by Amtrak and the CN equipment directly affected by them;

- Simon Lizotte, regarding automated operational data CN uses to quantify delays caused by Amtrak, and regarding elements of CN's quantification of its incremental fuel costs;
- Catherine Whiteman, regarding payroll data CN uses to identify and quantify its incremental overtime costs; and
- Timothy Robinson, regarding modeling he conducted to assist in the estimation of one aspect of CN's incremental fuel costs and one aspect of quantifying delays.

A. Incremental Freight Delay Cost Realities

CN has hosted various levels of Amtrak service for over 50 years. The reality is that CN must adjust its freight operations in the United States to accommodate Amtrak's trains given CN's network. For example, CN's freight schedules are designed to allow for a baseline level of delay to CN's trains due to "meets" with other trains, particularly where CN has a mostly single-track mainline, and meets with Amtrak trains contribute disproportionately to such delays to provide preference to Amtrak and the requests Amtrak makes regarding its schedules and services. When the delays caused by Amtrak are relatively brief, they cause incremental costs to CN, as do all delays, but they may either be absorbed within the allowance for delays built into freight schedules, or fall below the delay thresholds (calculated relative to those schedules) set by the SRS system, as described in Part III.A of the verified statement of Summerfield, *et al.*, in which case they are not addressed in CN's proposal for incremental freight train delay cost compensation.

Freight train delays caused by Amtrak, and particularly the longer delays captured in SRS and addressed in CN's proposal, impose multiple costs on CN. Consistent with the guidance in

the Board's Interim Decision, we focus on three categories of that can readily be specified, verified and quantified.

First, when a freight train is delayed, that may result in its crew exceeding their shift time (the standard CN crew shift is fixed at ten hours), in which case CN will pay the crew overtime. In such circumstances, overtime is a direct and immediate out-of-pocket cost for CN (albeit a relatively small component of CN's overall labor costs that are increased by the 600-plus hours of specifically identified delay to two-person crews that Amtrak's trains typically impose on CN's freight trains in a month). Had the crew not been delayed on the freight train by Amtrak, they would have completed their work earlier.

Second, when a freight train has to stop and re-start, it consumes more fuel than when it proceeds at regular speed, and while stopped, locomotives are commonly consuming fuel in idle mode. To the extent that Amtrak causes the freight train to experience a stop-and-start event – and Amtrak causes hundreds of specifically identified stop-and-start events to CN freight trains every month – and to the extent that Amtrak causes CN to incur idle fuel consumption (which it does for hundreds of hours every month), Amtrak's delays to CN freight trains directly increase CN's fuel costs.

Third, when they are delayed by Amtrak on CN's freight trains, locomotives and cars – both those owned by CN and those owned by other (“foreign”) railroads – are delayed in becoming available to be returned to a foreign railroad (for foreign cars), delayed in becoming available to be provided to a foreign railroad for compensation or as in-kind payment, or delayed in becoming available to CN for other trains to move our customers goods and power the United States economy. This also results in direct costs to CN that can be calculated using locomotive run-through and car hire agreements.

CN's claim for compensation focuses on these three types of specific, verifiable and quantifiable costs, which Amtrak causes CN to incur every day.

B. CN's Methodology for Identifying and Quantifying Incremental Freight Train Delay Costs

For a detailed description of CN's methodology for identifying and quantifying incremental freight delay costs, we refer to the verified statement of Michael Baranowski, the expert who was tasked with developing and implementing that methodology in consultation with CN subject matter experts and with demonstrating its application to the sample month of December 2019. Here, however, we briefly outline key elements and the sources of supporting data. Other CN witnesses have submitted verified statements based on their expertise regarding many of those elements and data, but a few are within our particular expertise and we elaborate on those.

1. Incremental Delay Identification and Quantification

Prior to July 1, 2017, CN dispatchers were instructed to code Amtrak-related delays using the "FP" code, which identified freight delays caused by all passenger trains (including Amtrak, and other passenger/commuter services). Because "FP" was used broadly to identify all freight delays caused by passenger services (*e.g.*, Amtrak, VIA, Metra, etc.), there was no automatic way to identify delays caused by Amtrak; a certain amount of manual review was required. To streamline the process, on July 1, 2017, CN activated SRS delay code "FA" to identify all delays to its freight trains that are caused by Amtrak. In anticipation of activating the "FA" delay code, on June 19, 2017, I (Scott Kuxmann) circulated written instructions, along with examples, to all dispatchers regarding the "FA" code and instructed dispatchers that delays previously coded FP must now either be attributed to Amtrak ("FA") or to other passenger services ("FP"). Here are the "FA" coding instructions I (Scott Kuxmann) circulated:

- Beginning July 1st 2017 CN is reactivating delay code “FA” – Freight Train delayed by Amtrak.
- **This delay code is to be used in reference to all delays where a CN train is delayed due to an Amtrak train.**
- The current code of “FP” FP FREIGHT TRAIN DELAYS DUE TO PASSENGER, METROS TRAINS, ETC. will continue to be utilized for delays involving Metra But not Amtrak.
- All delays to Amtrak trains will remain the same AO (Station work, Amtrak meeting Amtrak, Passenger equipment issues, holding for connections, LOS...)

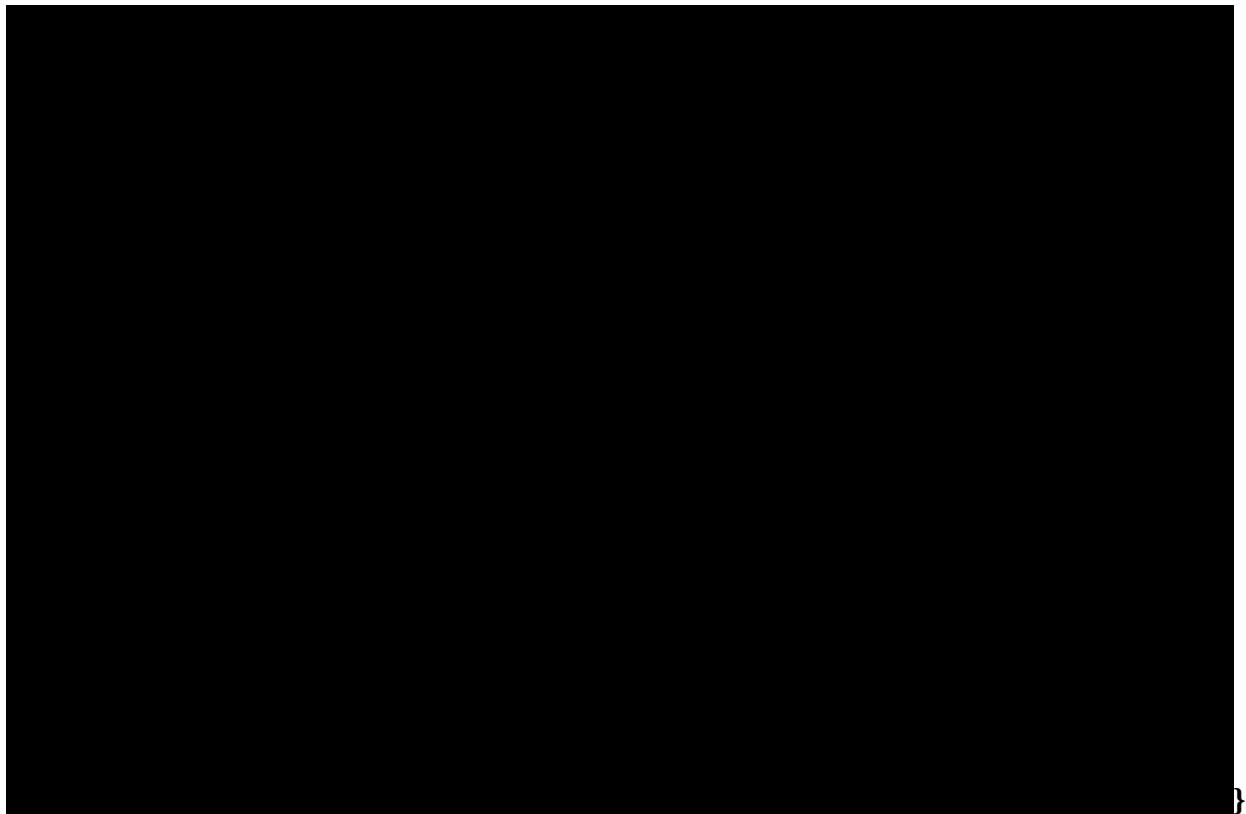
A copy of the June 19, 2017 email is attached as Exhibit 14 (emphasis in original).

After dispatchers enter delay codes and comments, there is a quality control process by which senior dispatching personnel and other managers in the transportation department review and can correct delay codes and comments. That quality control process is subject to a strict “Correction Window” lasting the lesser of 120 hours (5 days) after the train reaches its destination or 264 hours (11 days) after it departs its point of origin. During the Correction Window, the dispatcher, senior dispatching personnel and other managers have the ability to correct any inadvertent errors, and review and adjust coding/comments for any apparent inconsistencies between delay codes and comments. Where appropriate, Playbacks (described below) are reviewed to ensure the delay coding accurately reflects what occurred on a segment. As part of this quality control process, Chiefs and Senior Chiefs provide regular guidance on proper delay reporting, and from time to time, I will contact dispatchers to help assure that various types of delays are properly and consistently coded. In my experience, errors are rare, particularly with respect to application of the “FA” code, which is relatively simple to apply.

In assessing delays, CN dispatchers may rely on their own shift notes, direct conversations with train and yard crews, and also on real-time visual representations of train movement on its rail network. Those dynamic images show the location and movements of all

trains on the CN rail network, and further show how each dispatcher lines the switches. As those dynamic images are displayed on a dispatcher's monitor, the data are simultaneously saved to CN's { [REDACTED] } as a contemporaneous record of what occurred on its rail lines. Those recordings are referred to as Playbacks. Playbacks are accompanied by a detailed script that shows a contemporaneous running clock and each dispatching action taken. It is an automatically generated and detailed visual aid that CN regularly reviews and relies upon to support critical business functions. Among other things, Playbacks are used by dispatchers and senior dispatching personnel to verify delay coding entered by dispatchers.

Below is an enlarged portion of a screenshot of a Playback dated December 14, 2019, which shows freight train { [REDACTED] } was held in a siding to allow Amtrak train { [REDACTED] } to pass. This is one example of a freight train delay that a dispatcher would code "FA" to indicate Amtrak was responsible. {



2. Incremental Costs of Incremental Freight Delays

Overtime

As Mr. Baranowski explains, he identified and quantified overtime costs imposed on CN by Amtrak by using payroll records provided by Catherine Whiteman. As those records reflect, in the ordinary course of business, CN tracks every shift of every crewmember in terms of where they began and where they ended their work (thus identifying the route they traveled), the specific train to which they were assigned, how much they were paid, and how much of that pay was overtime. By pairing those data with another core set of CN operational data, its SRS data (described in detail in the verified statement of Summerfield, *et al.*), which identifies specific trains delayed by Amtrak and where and for how long they were delayed, Mr. Baranowski identified and quantified specific overtime payments caused by freight train delays caused by Amtrak.

Those overtime payments are a highly conservative measure of CN's actual incremental crew costs due to delays caused by Amtrak. When a crew is delayed on its route for an extended period of time, CN incurs re-crew costs, including additional costs to transport the crew to, and accommodate the crew at, a hotel, since the crew has not reached its regular destination. In addition, most of the 1,000-plus hours of crew time delays caused by Amtrak cost CN monthly are hours within the crew's regular 10-hour shift, not overtime hours, and the loss of those hours has substantial and direct costs to CN as it makes the crewmembers unavailable for additional work within their shift to serve CN's freight customers.

Fuel Costs

As Mr. Baranowski explains, with the aid of Mr. Robinson, he identified and quantified the two forms of fuel costs CN incurs due to delays caused by Amtrak: Idle Fuel costs caused while locomotives operate in idle mode while stopped, and Stop-Start Fuel costs caused while

the train decelerates and then re-accelerates from a stop. In doing so, CN's methodology assumes that when Amtrak is identified as one of multiple causes of a delay, the process of stopping and starting, and the Stop-Start Fuel costs that arise from it, are not attributable to Amtrak. Based on our knowledge of how delay events work in practice, that is a highly conservative assumption: in many "multi-attribution" cases, the stop-start event occurs because a freight train must move into a siding and wait for an Amtrak train to pass, and then, only because it is already stationary in the siding due to that delay, it incurs further delay, not attributed to Amtrak, as another train passes.

We defer to Mr. Baranowski for description of the inputs to his identification and quantification of incremental fuel consumption. Mr. Kuxmann supplied Mr. Baranowski with the data reflecting CN's average fuel cost in December 2019, as reflected in the workpapers.¹⁵⁶ Those fuel cost data are part of the fuel cost data CN maintains in the ordinary course of business and uses, among other purposes, as part of its regulatory reporting of fuel costs to the Board. They accurately record CN's average locomotive fuel cost in the United States in December 2019, including tax but not including any add-ons such as the cost of the fueling process.

Equipment Costs

As Mr. Baranowski describes, he determined CN's incremental equipment costs by identifying locomotives and cars affected by freight train delays caused by Amtrak through data in the SRS system that record train consists. We are familiar with those data, which are an

¹⁵⁶ See Baranowski workpaper "2019 System Total Fuel Price CAD per L.xlsx." The source provided to Mr. Baranowski states costs in Canadian dollars per liter, but it quantifies CN's fuel costs within the United States, and Mr. Baranowski converted it to US dollars per gallon, using December 2019 exchange rates, in his calculations.

important component of CN's operational data, and they accurately identify the specific locomotives and cars on a train for each trip segment.

Mr. Kuxmann provided Mr. Baranowski with the locomotive run-through agreements and care hire data (known as { [REDACTED] }) he used to quantify incremental equipment costs, which are included in Mr. Baranowski's workpapers. As Mr. Baranowski describes, those documents reflect bi-lateral arm's-length agreements between freight railroads where they provide to each other the use of their equipment. The run-through agreements and car hire data specify the costs CN actually incurs for each period during which Amtrak delays CN's movement of equipment from foreign railroads. Those agreements also accurately reflect the lost opportunity to CN from its cars or locomotives moving onto the networks of other railroads, which is a more conservative number than the lost opportunity for CN using its equipment and locomotives on its own trains.

C. Quantification of Incremental Delay Costs

As set forth in Mr. Baranowski's statement, he identified and quantified a total of \$219,691 in specific incremental freight train delay costs Amtrak caused CN to incur in December 2019.

D. CN's Proposal

CN should be compensated for its incremental costs, including its incremental costs incurred due to delays to its freight trains caused by Amtrak. CN requests that the Board approve the methodology for determining those costs set forth and applied in Mr. Baranowski's statement and direct that costs calculated in accordance with that methodology shall be included in CN's incremental cost compensation under the operating agreement going forward.

In addition, CN requests that it be awarded its incremental freight train delay costs for December 2019 and, subject to proof in accordance with the methodology set forth and used by Mr. Baranowski, its incremental freight delay costs for other months going back to September 1, 2019 to the present. In principle, compensation for CN's incremental freight train delay costs going back to the expiry of the last operating agreement would be appropriate, but in the spirit of compromise, CN seeks compensation only going back through the period since the Board's Interim Decision.

IV. OTHER CONTRACT ISSUES

A. Confidentiality

The current Operating Agreement does not contain a confidentiality provision, nor is there any external confidentiality agreement requiring the parties to treat it as confidential. Nevertheless, CN and Amtrak have been treating it as confidential in this proceeding. This is appropriate with regard to a limited portion of the Agreement. As in other agreements filed with the Board or subject to litigation before it, the only confidential portions of the Operating Agreement are the specific numbers reflecting costs and charges. Disclosure of the portions containing those costs and charges (and in specific, Appendix IV, which includes several per-unit cost items and therefore can provide information about CN's internal costing, Appendix V, which reveals actual dollar amounts for incentive and penalty payments at various levels of OTP, and Appendix IX, which sets out specific compensation for Amtrak's use of the St. Charles Air Line in downtown Chicago) would reveal CN's commercially sensitive or otherwise proprietary information and therefore should be prohibited.

But CN's view is that most of the Operating Agreement does not merit confidential treatment. This is especially true of the main part of the Agreement (Articles I through VIII),

which does not contain specific dollar amounts and merely reveals the structure of the relationship between CN and Amtrak. The only exceptions are the threshold for substantiality in the provision for revision of the agreed-upon flat rates in Appendix IV,¹⁵⁷ and the amount of the contract advance paid by Amtrak to CN.¹⁵⁸ There is no compelling reason to deny the public information about that structure, especially when it is laid out in a new Operating Agreement ordered by the Board, as in this proceeding, in the exercise of its authority to “prescribe reasonable terms and compensation” under 49 U.S.C. § 24308(a)(2)(A)(ii). It is appropriate that such a prescription by the Board be open to the public insofar as possible.¹⁵⁹ CN is cognizant of the Board’s Initial Decision, which stated that “the Board would make public any specific terms it would need to set in a later decision, as the Board disfavors confidential decision making unless absolutely necessary.”¹⁶⁰

Accordingly, CN is proposing an addition to the Operating Agreement that would require that the rates and costs in Appendices IV, V, and IX, but no other portions of the Agreement, to be treated as confidential.¹⁶¹

¹⁵⁷ 2011 Operating Agreement, § 5.2.E.

¹⁵⁸ *Id.*, § 5.3

¹⁵⁹ It should be remembered that the Operating Agreement, like the agreements that Amtrak has with many or most of its host railroad, developed from the “Basic Agreement,” an agreement that was worked out between Amtrak and its host railroads and individually executed by them immediately before Amtrak began operations on May 1, 1971. In its basic structure, the Basic Agreement was identical for all host railroads and was open to the public, though the specific compensation terms were individualized to each railroad and were therefore confidential. CN is proposing a similar division between confidential and non-confidential terms in the new Operating Agreement.

¹⁶⁰ Interim Decision at 28.

¹⁶¹ CN Proposed Operating Agreement, § 8.14.

B. Incorporation of { [REDACTED] }

When the parties executed the Operating Agreement, they also executed { [REDACTED] }

[REDACTED]

{ [REDACTED] }¹⁶² As discussed below, { [REDACTED] }

[REDACTED]

[REDACTED]

[REDACTED]¹⁶³

{ [REDACTED] }

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁶² Attached as Exhibits 15 and 16.

¹⁶³ CN Proposed Operating Agreement, App. IV, Table 1, Items 26, 27; *id.*, App. IV, § III, Items 26, 27.

¹⁶⁴ Ex. 15 (PTC Letter Agreement) at 2.

¹⁶⁵ *Id.* at 3.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].¹⁶⁶

To date, the parties have not acted to { [REDACTED] }.

The Board should { [REDACTED] }

[REDACTED]

C. Increase in Monetary Threshold for Required Amtrak Consent for Station Maintenance Projects.

Item 4(a) of Appendix IV of the Operating Agreement obligates Amtrak to pay CN { [REDACTED] }

[REDACTED]

[REDACTED]

[REDACTED] } but provides that { [REDACTED] }

[REDACTED]

[REDACTED] }” To reflect the effects of inflation, and the fact that \${ [REDACTED] } is now a trivial amount for a station maintenance project, CN proposes to raise the threshold from \${ [REDACTED] } to \${ [REDACTED] }, which is still quite low but would relieve CN of the administrative inconvenience and expense of seeking approval for the most trivial expenses.

¹⁶⁶ Ex. 16 (Safety Appliance Letter Agreement) at 2, 3.

D. Snow Removal

Item 4(b) of Appendix IV of the Operating Agreement { [REDACTED]

[REDACTED]

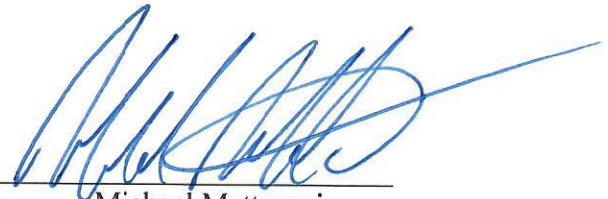
[REDACTED]

[REDACTED]}. In reality, however, such snow removal, whether arranged by Amtrak or CN, is done through contractors. If Amtrak is having difficulty locating a contractor, CN simply provides Amtrak with information regarding additional contractors. Since CN is in no better position than Amtrak to hire station snow removal contractors, it makes no sense to treat CN as a fall back snow removal alternative. Accordingly, CN proposes to strike all but the first sentence of Item 4(b).

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 Verified Statement on behalf of Canadian National Railway Company and its subsidiaries.

Executed on May 27, 2022.



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 Verified Statement on behalf of Canadian National Railway Company and its subsidiaries.

Executed on May 27, 2022.


Scott Kuxmann

LIST OF EXHIBITS

Exhibit 1	Selections from Amtrak Service Standards for Train Service & On-Board Service Employees, Manual No. 6
Exhibit 2	{ [REDACTED] }
Exhibit 3	{ [REDACTED] }
Exhibit 4	{ [REDACTED] }
Exhibit 5	{ [REDACTED] }
Exhibit 6	{ [REDACTED] }
Exhibit 7	{ [REDACTED] }
Exhibit 8	{ [REDACTED] }
Exhibit 9	{ [REDACTED] }
Exhibit 10	{ [REDACTED] }
Exhibit 11	{ [REDACTED] }
Exhibit 12	{ [REDACTED] }
Exhibit 13	{ [REDACTED] }
Exhibit 14	{ [REDACTED] }
Exhibit 15	{ [REDACTED] }
Exhibit 16	{ [REDACTED] }

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EXHIBIT 1

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Service Standards

for

Train Service & On-Board Service Employees

Effective 12:01am, April 30, 2011

Manual No. 6

Transportation – Service Delivery



- a) **Mandatory Data** – All columns in the “Explanation of Delays” section must be filled out in order for the delay to register in Amtrak’s On-Time Performance Reporting System and provide other vital information.
- b) **General Versus Specific** –With delay explanations, avoid being too general. For example, the term “Running Time” should be used only to mean the train is losing time on the run for no apparent reason; otherwise, the term can be used too generally and becomes meaningless. Avoid being too specific or citing operating rule numbers or Timetable Special Instruction numbers without explanation.

11. Categories of Delay

The following category codes may be used:

Code	Title, Reason or Examples
ADA	Passenger-Related delays specifically related to disabled passengers (wheelchair lifts, exercising guide dogs, etc.)
CAR	Car Failure (includes HEP failure, legitimate HBD or DED actuations, set out/pick up defective/repaired cars)
CCR	Cab Car Failure (all en route delays caused by mechanical failure of working cab cars.) A non-working cab car, i.e., one being used simply as another passenger car in the trailing consist of a train, will not be considered a Cab Car for purposes of delay coding. “Cab Car” includes NPCU’s (de-powered F-40’s) and all variations of passenger type Cab Cars.
CON	Hold for Connection (holds for train or bus connections, including en route holds)
CUI	Customs and Immigration delays
CTI	Commuter Train Interference (meets, following, overtakes)
DBS	Debris Strike (emergency braking, damage, set-outs from same also debris blocking track ahead, or removal of debris from train).
DCS	Signal Delays (false wayside detector actuations, defective road crossing protection, restrictive wayside or cab signals from unknown cause or from signal, power-switch or CTC-system failure; efficiency tests of the crew; drawbridge stuck open).
DET	Delays caused by catenary or wayside electric-power-system failure. (Note: This Delay Code is to be used ONLY between XSH and NHV (by Conductors working between NYP and NHV).)
DMW	M of W Work (holding for defect repair or M of W forces to clear; inability to contact M or W Foreman on radio; routed around M of W work).
DSR	Temporary Speed Restrictions (slow orders, slows through M of W site) Exception: heat/cold orders; see “WTR.”
DTR	Detour Delays (all delay or time lost while operating on a detour, regardless of actual cause).

Categories of Delay (*Continued*)

Code	Title, Reason or Examples
ENG	Engine Failure (HEP Failure, legitimate HBD or DED actuations, or any on-board HBD alarm, cab signal failure on engine, set out/pick up defective/repared engines, operating with freight engine, undesired emergency applications, air problems, radio failure on engine)
FTI	Freight Train Interference (meets, following, overtakes, restrictive signals known to be caused by freight trains, holds due to freight train derailments, non-scheduled stop to pick-up/drop-off freight train crew)
HLD	Passenger Related (multiple spots, checked bags, large groups, smoke breaks, EMS, disorderly, other passenger-related delays; except for disabled passengers, see delay code "ADA"; or sick/injured, see "INJ")
INJ	Injury Delays (injured or sick passenger or employee).
ITI	Initial Terminal Delay due to late-arriving inbound train causing late release of equipment or late crew rest, where mechanical-failure delay is NOT involved.
MBO	Drawbridge openings for marine traffic
NOD	Wait for scheduled departure time at stations, kill time to prevent early arrival at stations.
OTH	Miscellaneous Amtrak-responsible delays (unable to make normal speed, heavy train, isolation of engine[s] for fuel conservation, etc. Also, person pulling emergency cord)
POL	Police Related (DEA; police/fire department holds on right-of-way, bomb threat delays).
PTI	Passenger Train Interference (meets, following, etc.—does <i>not</i> include commuter trains)
RTE	Routing (crossover moves, lining manual or spring switch, run via siding, late track bulletins, inability to contact DS, dispatcher-holds). Also includes delays resulting directly from being routed to abnormal track at stations.
SVS	Servicing (fuel, water, toilet/trash dumping, inspections, switching private/office cars or section of train, normal engine changes, loading/ unloading non-carload express).
SYS	System (late crew, unscheduled re-crew, single engineer copying authorities or restroom break, hold due to passenger train derailment; alleged crew rules violation; delayed-in-block after station stop)
TRS	Trespasser Incidents (includes crossing accidents, trespasser or animal strikes, vehicle on track ahead; "near-miss" delays; bridge strikes by vehicle or boat)
WTR	Weather (includes heat/cold orders; storms, floods, fallen trees, washouts, landslides; earthquake-related delays; slippery rail due to leaves; burning leaves caught under truck of car; snow-removal equipment working ahead).

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EXHIBIT 2

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EXHIBIT 3

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EXHIBIT 4

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EXHIBIT 14

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EXHIBIT 15

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EXHIBIT 16

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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
MICHAEL R. BARANOWSKI**

I. Introduction

My name is Michael R. Baranowski. I am a Senior Managing Director at FTI's Economic Consulting practice with offices at 8251 Greensboro Drive, McLean, VA 22102. A statement of my qualifications is set forth in Exhibit FTI-1.

For the sample month December 2019 ("Analysis Period"), I have been asked by CN to (1) quantify the minutes of delay to CN's freight trains that are attributable to Amtrak, based on records from CN's Service, Reliability & Strategy ("SRS") database, from a Wi-Tronix database and from dispatching playback recordings, and (2) calculate the costs to CN associated with those delays – costs that would not be incurred but for the presence of Amtrak. As discussed below, my quantification understates the amount of delays to CN's freight trains caused by Amtrak. In addition, my calculation of CN incremental freight train delay costs due to Amtrak delays is limited to certain direct costs: overtime costs for CN crews, fuel costs, and equipment (locomotive and railcar) costs. Further, the method used for quantifying both delays and costs is conservative in multiple respects, as elaborated below. Consequently, the outcome of my analysis is a highly conservative quantification (under-statement) of CN's incremental costs due to freight train delays caused by Amtrak's presence on CN's lines.

II. CN Freight Train Delays Caused by Amtrak.

To calculate the delay minutes caused by Amtrak, I first identified the universe of delays partially or wholly caused by Amtrak in December 2019. Second, I quantified the delay minutes associated with each of those delays by calculating the amount of time a freight train was fully stopped (“Idle Time”) and, where appropriate, the additional time attributable to the freight train slowing to a stop and then accelerating back to its regular speed as compared to the time that would have elapsed if the train had continued at its regular speed (known as the “V-Time”).

My delay analysis relied principally on data used by CN for its core day-to-day operations: (i) SRS Data¹; (ii) Wi-Tronix Data²; and (iii) playbacks³. As set forth in the relevant verified statements, each source reliably captures real-time operational data and is relied upon by CN in the normal course of business for safe rail operations across its rail network. I will not repeat the detailed description of those systems set forth in the verified statements.

A. Identifying Freight Train Delays Caused by Amtrak

CN provided me with records from the Train Delay Table in its SRS database (“Delay Records”) for the Analysis Period. The Delay Records contain a “Delay Code” that identifies the nature of the cause of each delay. In July 2017, CN implemented use of the “FA” code to identify freight train delays caused by Amtrak.⁴ I used the “FA” code to identify 973 unique

¹ See VS (PID) Summerfield, Nguyen-Hung, Zarembka for a detailed description of the SRS system.

² See VS (PID) Lizotte for a detailed description of the Wi-Tronix system.

³ See VS (PID) Matteucci-Kuxmann, at 78-79, for a detailed description of Playbacks.

⁴ See VS (PID) Summerfield, Nguyen-Hung, Zarembka, at 14.

Delay Records, representing 973 freight train delays that would not have occurred “but for” Amtrak in the month of December 2019.⁵

As set forth in VS (PID) Summerfield, *et al.*, the SRS database does not document all delays experienced by CN’s trains. In order for a Delay Record to be generated by SRS, a train must lose a threshold minimum number of minutes against its schedule. For trains that are operating behind schedule, the threshold for creation of a Delay Record varies by train type, but { [REDACTED] } against its schedule over a given segment, regardless of train type. Given these thresholds, my analysis understates the total amount of delays to freight trains because it does not count the following instances where Amtrak delays CN freight trains: { [REDACTED] } In addition, the SRS system attributes to Amtrak under the “FA” code only delays to freight trains directly caused by Amtrak, not cascading delays that may occur to other freight trains down the line, such as when a freight train that has deviated from its schedule because of a delay directly caused by Amtrak meets other trains that it would not have met on the mainline but for that Amtrak-caused direct delay. My quantifications of delays to CN’s freight trains due to Amtrak and thus their related incremental costs (costs discussed in Section III, below) are in this respect understated.

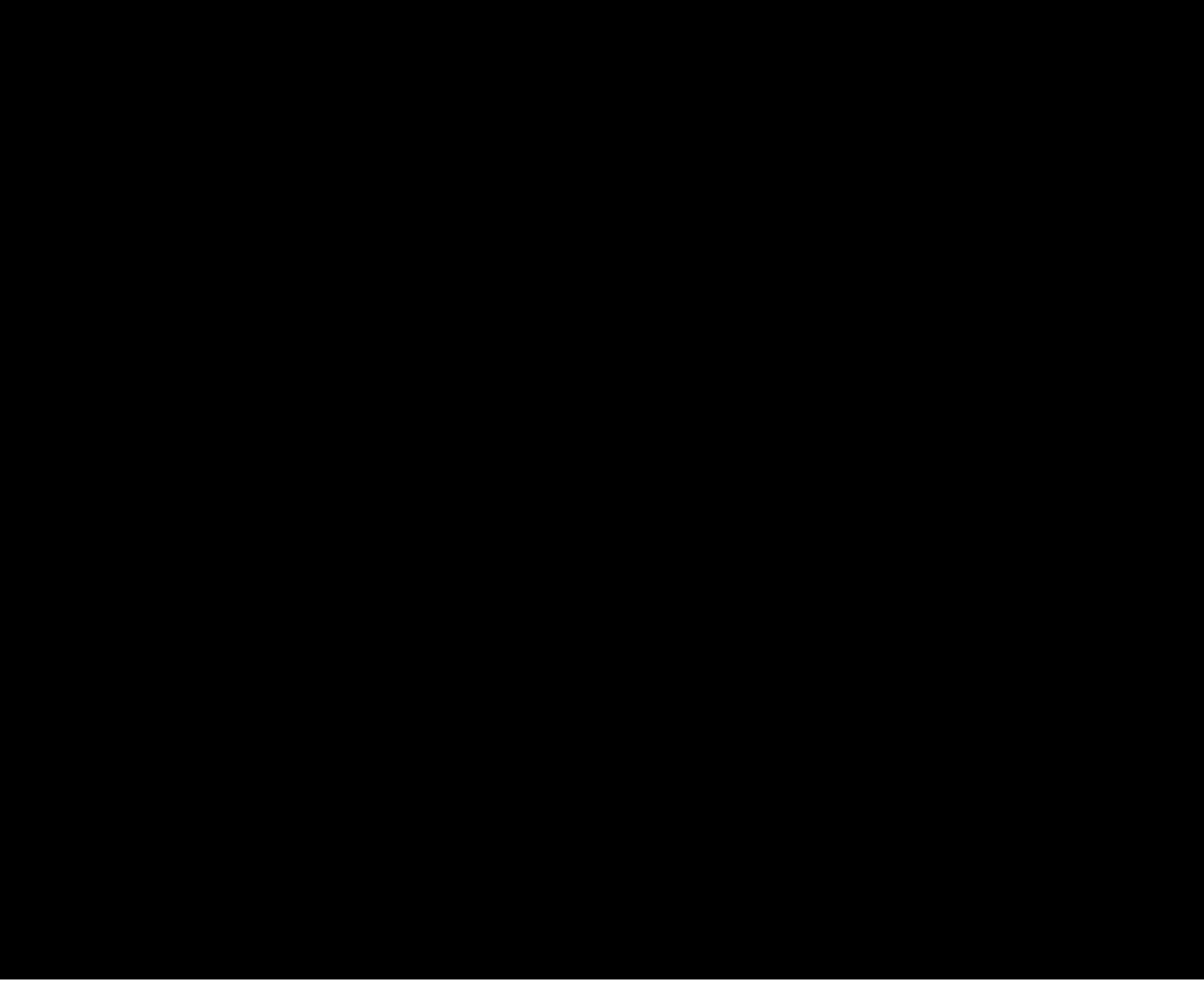
B. Quantifying Freight Train Delays Caused by Amtrak

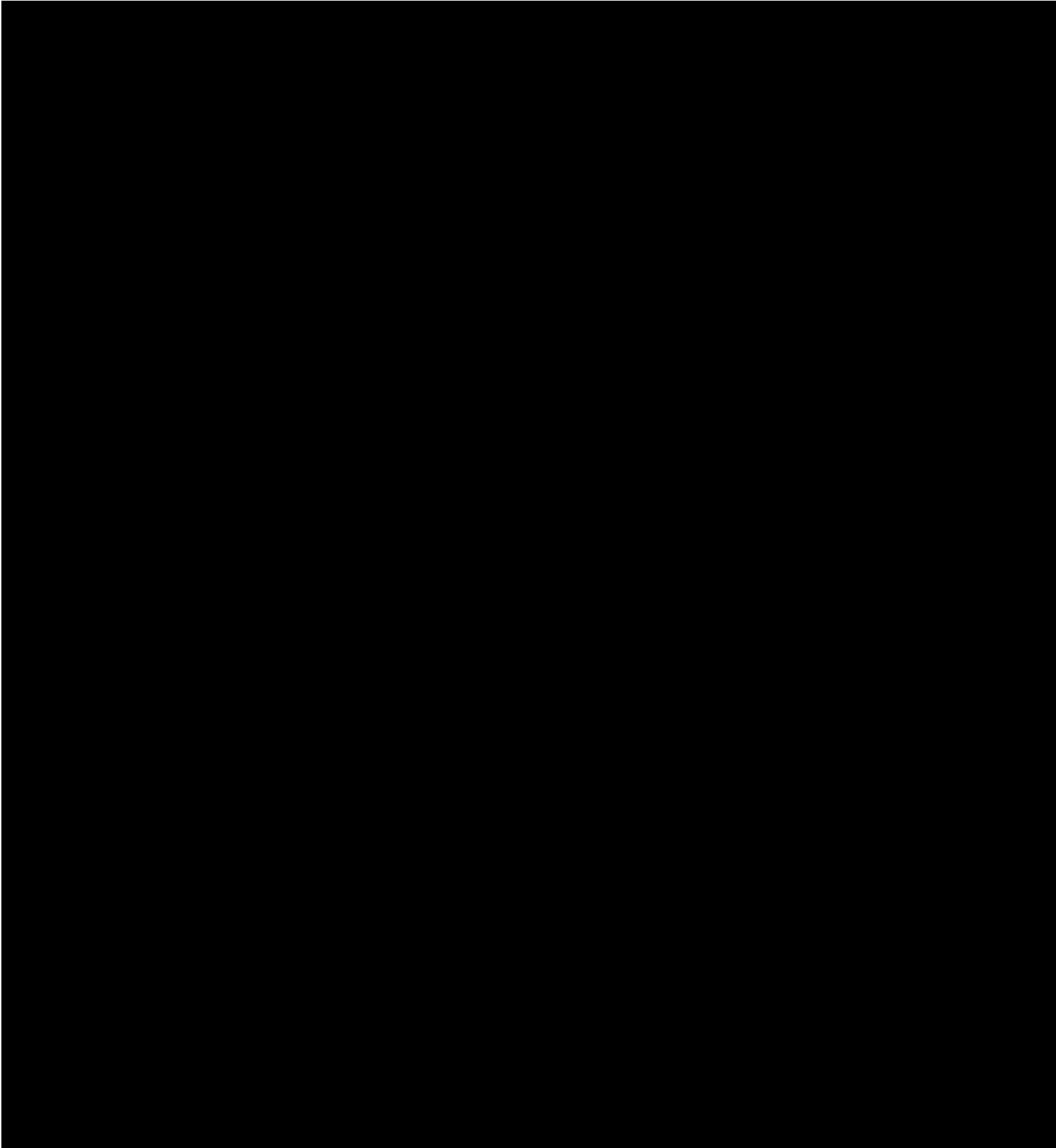
In addition to the Delay Records, CN also sent to me: (i) Train Event Tables for the Analysis Period from its SRS database; (ii) Wi-Tronix Data related to the 973 Delay Records, to the extent available; and (iii) playbacks for the 973 Delay Records. The methodology I utilized

⁵ Delay_SRS_Dec.xlsx identifies the 973 FA delay records from the 1,111 delay records.

to quantify delay minutes depended on whether a delay was attributed to a single event coded “FA” (“single-attribution delays”) or to multiple events where at least one was coded “FA” (“multi-attribution delays”), and whether Wi-Tronix Data was available.

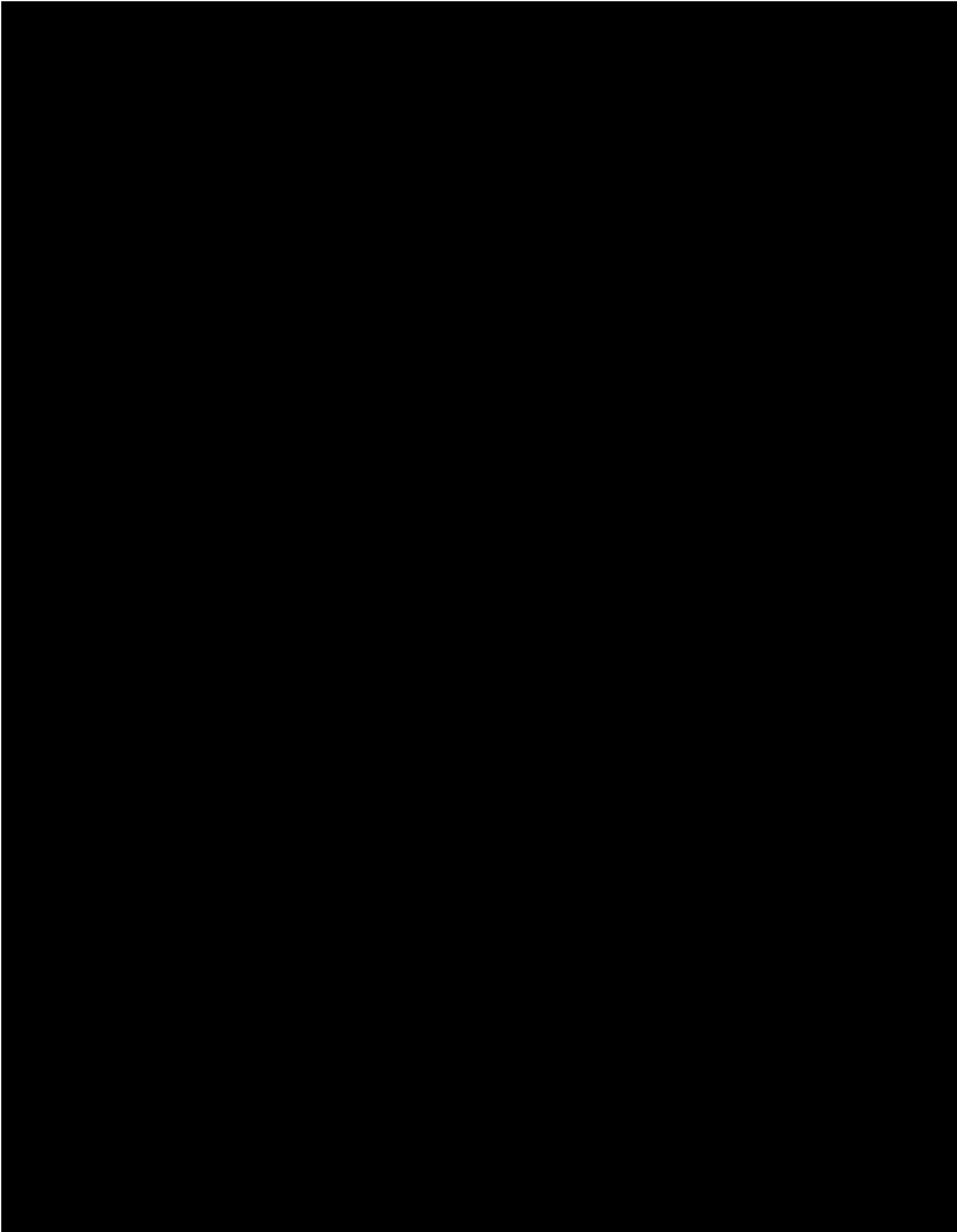
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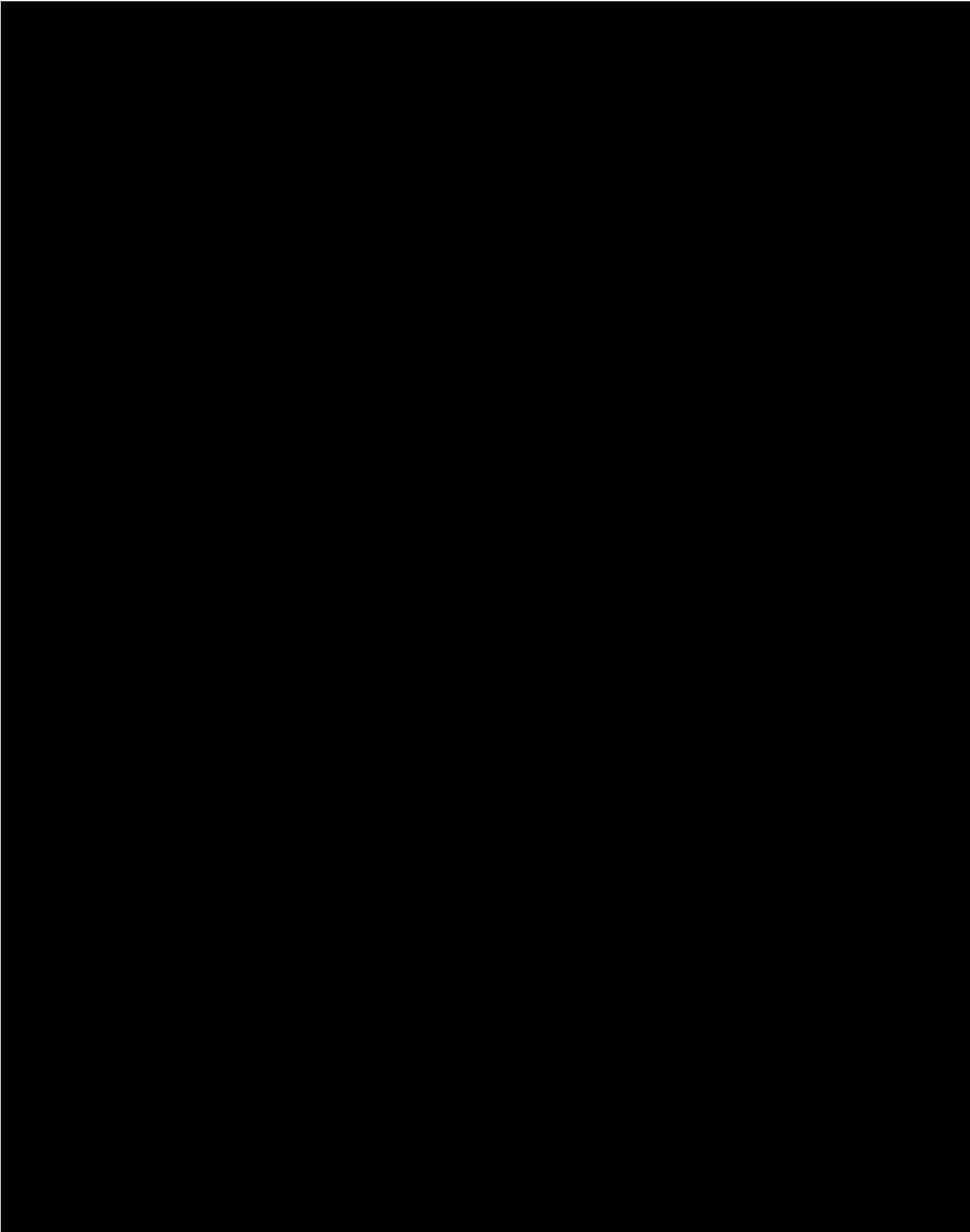


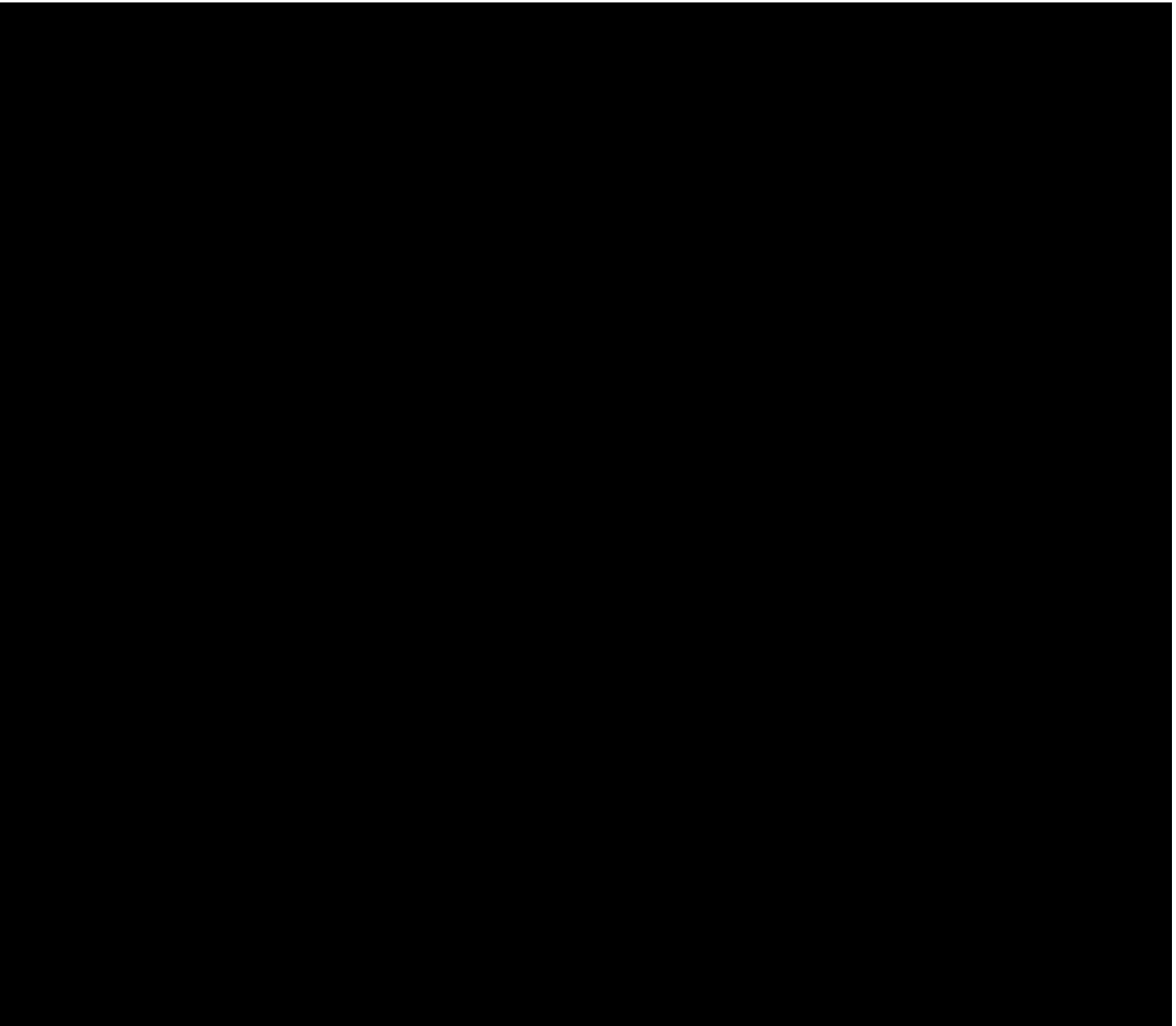


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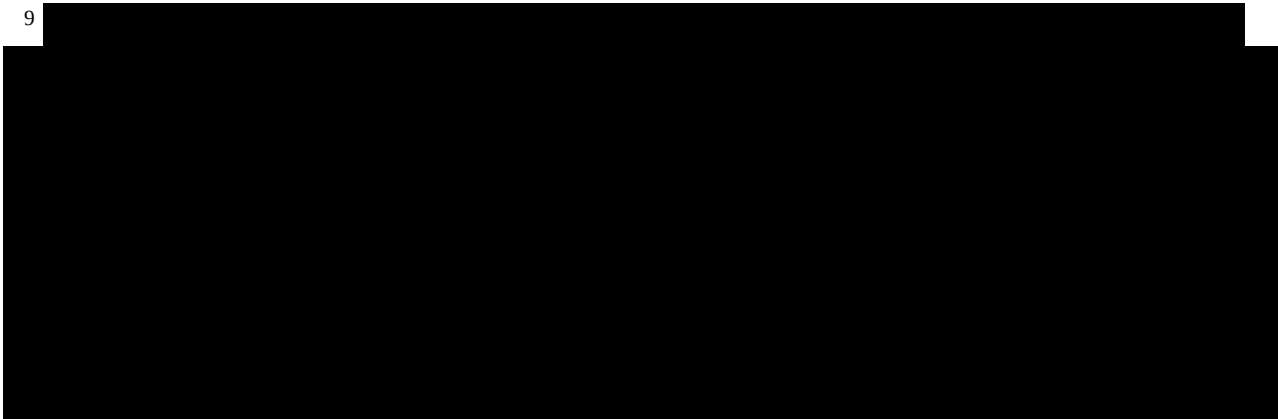


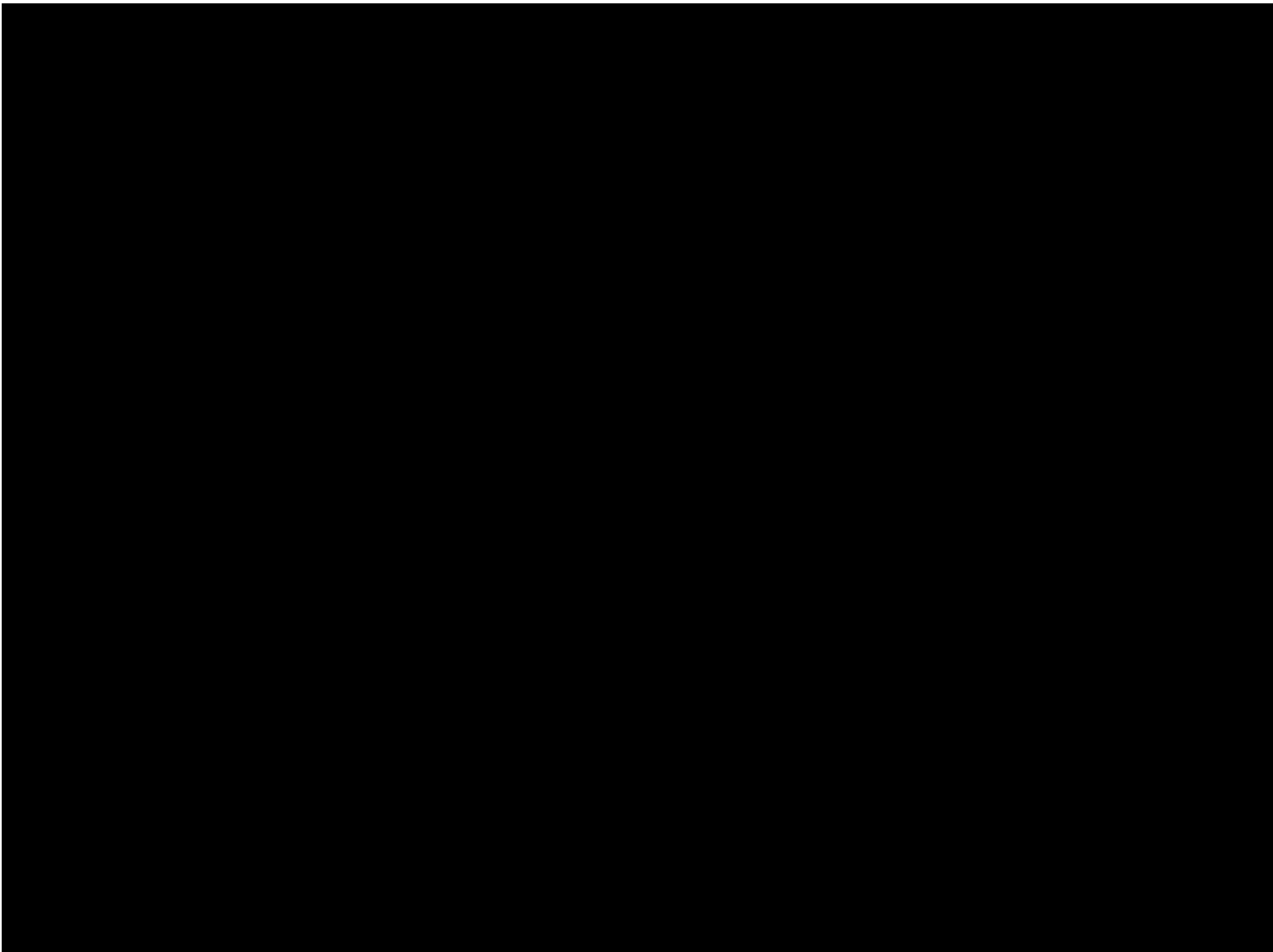


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III. Incremental Costs Due to Freight Train Delays Caused by Amtrak

When CN's freight trains are delayed by Amtrak, CN incurs incremental costs because its train crew, locomotives and railcars are delayed, and because locomotives consume additional fuel when they have to stop and restart, and while idling during the delays. At CN's request, I identified and quantified the following categories of incremental cost caused by the specific Amtrak delays to freight trains that I identified as described in Part II above.

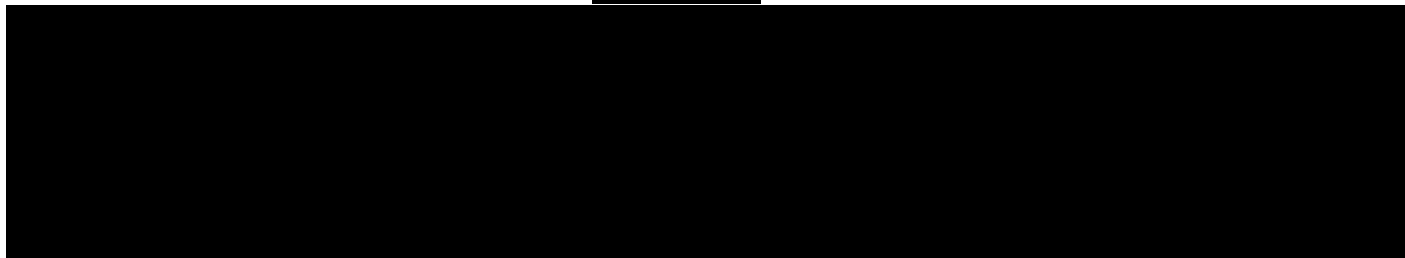
A. Incremental Crew Overtime Costs

CN did not ask me to quantify costs associated with lost crew time during a crew's shift or when CN has to provide transportation and lodging to a crew that, because of a delay, does not reach its destination (known as a "re-crew event"). I therefore confined my analysis to CN's overtime costs for crews, which is another way in which my analysis is conservative.

Using payroll records for December 2019 that CN supplied to me,¹¹ I identified the specific crew members who were assigned to the specific trains that were subject to the Amtrak delay events identified as described in Part II above. CN's payroll records identify crew members by unique employee PIN numbers, and record for each day which train (identified by the same unique train IDs used in the CN records I used to identify delays) the crew member was assigned to work on, where the employee began and ended their work, and what wages the employee earned on that day's shift, including specifically how much if any overtime pay the employee earned.

An extract from those payroll records (including only columns relevant to my analysis) is reproduced in Table FTI #3 below:

{{ [REDACTED]



}}

Table #2 reflects the work and earnings in December 2019 of employee numbers {{ [REDACTED] }} and {{ [REDACTED] }} (identified in the fifth column), who are engineer and conductor (as indicated by the codes "EN" and "CO" in the sixth column) respectively. The first four columns

¹¹ The relevant CN payroll records are reproduced in my workpapers as "Southern Wages and OT-ICGT 2019-12."

indicate where that employee began and ended work on each day; the applicable time slip date is set forth in the seventh column. The eighth column specifies the employee's total earnings on that date, and the ninth column specifies the amount of overtime (if any) included in those earnings. The tenth column specifies the train ID to which the employee was assigned.

Using those data, I matched train IDs, origin and destination, and dates with the specific delays¹² identified as described in Part II above, and then identified employees associated with those train IDs and dates who earned overtime pay on the date in question. I then verified that the employee was still on the train at the time it was delayed by reviewing the first four columns and comparing them to the location and circumstances of the train delay. In cases where the train ID matched *and* train delay occurred while the train was traveling from the employee's point of origin for the day indicated in the first two columns to the employee's destination for the day indicated in the third and fourth columns, and overtime pay was attributed, I concluded that the employee had earned overtime pay at the end of a shift in which a train he was crewing was delayed by Amtrak. Thus, for example, from the extract set out in Table #2, I concluded that employee number {{[REDACTED]}} earned {[REDACTED]} in overtime pay at the end of a shift on train number {{[REDACTED]}} involving a trip from Fulton, KY to Memphis, TN, and by matching the train number and locations with the SRS delay data, I further concluded that he had been on the train when it was delayed at Dyersburg, TN, on the way from Newbern, TN to Halls, TN.

Based on that analysis, I identified 634 instances in December 2019 of crewmembers earning overtime at the end of a shift during which their train was delayed by Amtrak. For each of those instances, I then quantified the overtime attributable to Amtrak by using the lesser of (1) the minutes of delay attributable to Amtrak, calculated as described in Part II above, and (2) the

¹² Crew_Subset_Identification.xlsx

minutes of overtime reflected in the payroll records.¹³ For example, if the crewmember was delayed for 60 minutes due to Amtrak, and thereafter earned 30 minutes of overtime pay, I attributed to Amtrak his full 30 minutes of overtime pay, *i.e.*, the dollar amount in the ninth column. If, however, the crewmember was delayed for 30 minutes due to Amtrak and thereafter earned 60 minutes of overtime pay, I attributed only 30 minutes of overtime pay to Amtrak.

Applying that methodology to each specific pairing of train delay caused by Amtrak and overtime earned by a crewmember that I identified, I concluded that CN incurred a total of \$58,255 in overtime costs due to delays caused by Amtrak in December 2019.¹⁴

B. Incremental Fuel Costs

When a CN train has to stop on the mainline or in a siding, its locomotives consume additional fuel in two ways:

(1) during the V-Time (as it decelerates to a stop and as it re-accelerates to its regular speed), it consumes more fuel than if it proceeded at its regular speed, as described in the Verified Statement of Timothy Robinson. I refer to that increment as “Stop-Start Fuel Burn;”

(2) during the Idle Time (while stationary), it consumes fuel as locomotives continue to run for additional time, albeit in relatively low fuel consumption idle mode, as described in the Verified Statement of Simon Lizotte. I refer to that increment as “Idle Fuel Burn.”

Consistent with the conservative assumption that in a multi-attribution delay event, the train might have stopped (albeit for less time) even in Amtrak’s absence, I only attributed Idle Fuel Burn to Amtrak for multi-delay attribution delay events. However, for single-attribution

¹³ I was able to translate the overtime pay amounts in the ninth column into minutes by developing standard hourly wage and assuming 1.5x standard hourly wage for OT wages and using the OT paid to determine the minutes.

¹⁴ Details of my calculations are set forth in the “Costs” tab of workpaper CN_Delays_Due_To_Amtrak_Dec_2019.xlsx

delay events, where Amtrak caused the stop-start event as well as the delay while the train was stationary, I quantified both the Stop-Start Fuel Burn and the Idle Fuel Burn attributable to Amtrak.

Stop-Start Fuel Burn

The method for calculating Stop-Start Fuel Burn is described in the verified statement of Timothy Robinson. First, for each specific single-attribution delay event, I gathered from CN's SRS data information about the type of train (*e.g.*, intermodal or local); the locomotives and cars included in the train's consist and the length of the train (all as of the time of the delay); and the location of the delay event.¹⁵ I then adjusted those data in one respect (which will tend to reduce the Stop-Start Fuel Burn calculated) based on the advice of Mr. Lizotte, as described in his verified statement. Based on his expertise, and given that the SRS data did not reveal whether every locomotive on the train was active and burning fuel, we capped the number of locomotives deemed to be active and burning fuel at one or two depending on the specifics of the train, as specified in Mr. Lizotte's verified statement. In addition, using Wi-Tronix where available, I determined the speed of the train when it began decelerating to the stop and when it completed its re-acceleration from the stop. Based on those data, I consulted with Mr. Robinson, who, based on his expertise regarding which variables are important to fuel burn rates, we classified those trains into 51 groupings¹⁶. As Mr. Robinson describes, using averages for the specific trains within each grouping, he then conducted a TPC simulation analysis to estimate Stop-Start Fuel Burn for each delay event for single-attribution delays.

¹⁵ Tab "Train_Characteristics_Summary" from AMTK_US_TRN_EVTS_FTI_Calculations.xlsx

¹⁶ 8 additional groupings were derived from simulation analysis as part of FTI assumptions to accommodate missing train groups.

That analysis yielded a total of 6,922 gallons of Stop-Start Fuel Burn attributed to 503 single-attribution delay events.

Idle Fuel Burn

To calculate Idle Fuel Burn, I used for each delay event the Idle Time calculated as described in Part II. To determine whether a locomotive was operating in idle mode (as opposed to shutdown) during the Idle Time, I relied on the Wi-Tronix data specific to that locomotive for that period. For locomotives for which no Wi-Tronix are available, which are generally foreign locomotive units, I did not include any idle fuel consumption costs. Having done so, I was able to determine that the total number of train-minutes spent stationary with one or more locomotives operating in Idle Mode attributable to Amtrak was 26,699 minutes (445 hours); because in some instances multiple locomotives were operating in Idle Mode, the corresponding number of locomotive-minutes was 31,273 (521 hours).

In order to quantify the amount of fuel burned during those locomotive-minutes, I identified from the relevant consist data¹⁷ the specific locomotives I had found to have operated in idle mode due to Amtrak and reviewed the “idle fuel burn” rates published by their manufacturers. Those idle fuel burn rates ranged from { [REDACTED] } gallons per hour.¹⁸ I applied the idle fuel burn rates specific to each model of locomotive as derived from the consist data. From those published rates, I also derived a weighted average (weighted by the distribution of different locomotive models in the December 2019 delay data) idle fuel burn rate of { [REDACTED] } gallons per hour that I applied to locomotives for which no model specific burn rates are

¹⁷ Tab “Locomotives” of workpaper CN_Delays_Due_To_Amtrak_Dec_2019.xlsx
And CN Locomotive Roster.xlsx

¹⁸ Details of my calculations are set forth in the “Fuel_Consumption_Idling” tab of workpaper CN_Delays_Due_To_Amtrak_Dec_2019.xlsx

available.¹⁹ By multiplying the locomotive-minutes of idle fuel burn by the appropriate idle fuel burn rate, I quantified CN's Idle Fuel Burn attributable to Amtrak in December 2019 at {█} gallons.

Fuel Cost

Having calculated CN's total incremental fuel burn attributable to Amtrak in December 2019 {█}, I multiplied it by CN's average cost of fuel in the United States in December 2019, {█}/gallon,²⁰ yielding an incremental fuel cost of {█}. This fuel expense estimate for December 2019 is conservatively below the Energy Information Administration's former "U.S. No. 2 Diesel Retail Sales by All Sellers (Cents per Gallon)," now known as the Highway Diesel Fuel Index (HDF Index), which was \$3.055 for the month of December 2019.

C. Incremental Equipment Costs

Delays caused by Amtrak impose incremental equipment costs on CN. With respect to locomotives and cars that are traveling on CN's freight trains but are owned by other railroads (known as "foreign" equipment),²¹ delays due to Amtrak cause CN to incur additional obligations to those owners that are directly related to the additional time the equipment is on CN's lines.

¹⁹ I understand from Mr. Lizotte that that rate is likely conservative, since manufacturers generally publish minimum idle fuel burn rates and higher fuel burn rates may apply in cold weather or certain other circumstances. See VS (PID) Lizotte at 8.

²⁰ Messrs. Matteucci and Kuxmann supplied that cost to me. I understand that it represents solely the direct cost of fuel, and does not include any costs associated with the process of fueling. See VS (PID) Matteucci, *et al.*, at 81 n.156.

²¹ Cars owned/leased by freight customers are also included in the consists of CN trains delayed by Amtrak. My analysis does not include any cost associated with delays to such private cars.

With respect to its own locomotives and cars, delays cost CN by preventing it from repaying in kind foreign railroads that have loaned CN their equipment, or by preventing CN from providing its equipment to foreign railroads for compensation, or by depriving CN of the productive use of its own equipment for its customers.

CN therefore asked me to quantify the incremental equipment costs of Amtrak's delays to CN freight trains.

Locomotives

I used the detailed data contained in the Locomotive History Table provided by CN to identify the specific locomotive units on CN's freight trains at the time of the delays caused by Amtrak. Those data identify every CN and foreign locomotive – including the locomotive initial and number, horsepower, service class, and model – used to power every CN train on every trip (including where and when locomotives are added or subtracted along the route, as applicable). My analysis identified more than 1,752 different locomotives powering CN's freight trains that were delayed by Amtrak during the Analysis Period.²²

In order to quantify the incremental cost to CN of the Amtrak-caused delays to foreign locomotives, I used locomotive horsepower hour ("HPH") cost formulas used by CN to compensate foreign line carriers for use of their locomotives on CN's lines when CN's own locomotives are not available to offset accumulated horsepower hours. Class I railroads in the US typically enter into run-through agreements that govern the operations – and costs – associated with using another carrier's locomotives. These agreements provide that when a carrier uses foreign power on its own lines, the obligation that the borrowing carrier incurs can be re-paid to the locomotive owner by providing its own locomotives, with the balances tracked

²² Tab "Locomotives" of workpaper CN_Delays_Due_To_Amtrak_Dec_2019.xlsx

in terms of horsepower-hours (“HPH”).²³ In addition to encouraging the exchange of locomotives back and forth to offset the obligations that accrue – known as horsepower equalization – the run-through agreements provide a formula that develops a financial cost per HPH, which a railroad must pay to the extent that it does not completely re-pay the obligation in kind.²⁴ The agreements identify the specific R-1 expense items that are used to calculate the HPH cost, which include locomotive operating, lease rental, and depreciation expenses.

To quantify the cost to CN when foreign locomotives are delayed on CN lines by Amtrak, I applied the HPH cost derived from the applicable run-through agreement (i.e., CN’s run-through agreement with the owner of the locomotive) as of December 2019 on a pro rata basis to the incremental minutes during which the locomotive was delayed by Amtrak on CN’s lines.

I used the same approach to quantify the cost to CN when its own locomotives are delayed by Amtrak. Just as CN pays foreign railroads by the hour when their locomotives are on CN lines, the run-through agreements reciprocally provide for foreign railroads to pay CN when its locomotives are on their lines. Like the foreign railroads, CN’s HPH agreements provide a formula, referencing specific R-1 expense items – in this case, CN’s – from which I was able to derive a cost per hour as of December 2019.²⁵ Using that method to quantify the cost to CN of losing the use of its own locomotives is arguably conservative, since in analyzing costs of ownership it is customary to include costs excluded from the run-through agreement formula.

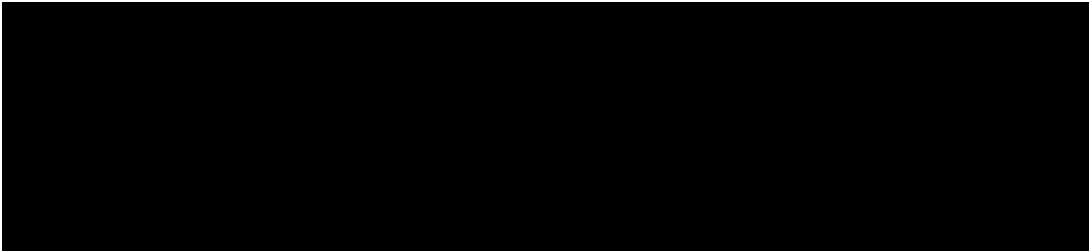
²³ See FTI Workpaper “BNSF Master runthrough.pdf” for an example of such an agreement.

²⁴ See FTI Workpaper HPH Agreements.

²⁵ See FTI Workpaper, 2019 R1 Loco Costs.xlsx

Using the locomotive-specific run-through agreement-based methodology described above, I quantified the incremental costs of delays to locomotives on CN's lines caused by Amtrak in December 2019 as follows:

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Freight Cars

My method for quantifying CN's incremental costs due to Amtrak delays with respect to cars was similar. I used the detailed consist data provided by CN to identify the specific freight cars on CN's trains at the time of the delays caused by Amtrak. As for the locomotives, the consist data details each car travelling on a train in a given segment of its trip. They identify the equipment initial and number, the train on which it was travelling, and timestamps for events at specific locations. Using this information in conjunction with the Delay Records, I identified the specific freight cars affected by each Amtrak-caused delay during the Analysis Period. The results of this analysis showed that there were more than 88,513 different cars on CN's freight trains that were delayed by Amtrak. Of those, 5,242 were owned by foreign railroads and 18,806 owned by CN.²⁶

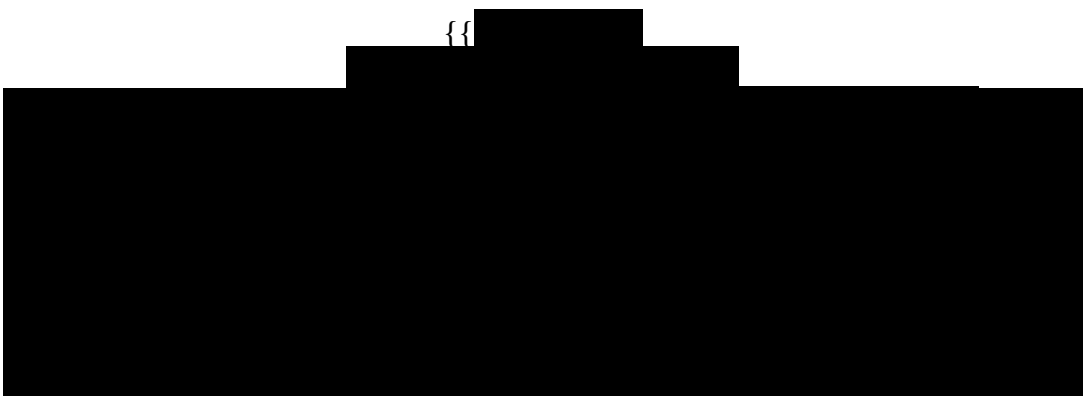
As with the locomotive run-through agreements, Class I railroads regularly hire their cars to each other pursuant to reciprocal agreements that set per-hour rates applicable to particular classes of car (known as "car hire"). I obtained those records, as applicable to December 2019,

²⁶ See FTI Workpaper , Tab "Consist_Charms" of workpaper CN_Delays_Due_To_Amtrak_Dec_2019.xlsx

from CN, and, as with the locomotive run-through agreements, I used the contractual per-hour rate applicable to each car to quantify the hourly cost to CN of delays Amtrak caused to trains that included that car, applied on an incremental minute basis. In doing so, I applied only the per-hour cost set by the car-hire agreements. (They also generally include mileage-based charges, but I assume that Amtrak's delays to CN's freight trains had not significantly affected those charges.)

On that basis, I quantified CN's incremental costs of cars delayed due to Amtrak in December 2019 as follows:

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IV. Conclusion

As detailed above, I used CN's SRS, Wi-Tronix, and Playbacks data, and Mr. Robinson's TPC analysis, to identify and quantify the specific delays to CN trains Amtrak caused in December 2019. I then used CN's payroll records to identify and quantify the specific overtime costs CN incurred as a result of those delays. I used CN's SRS and Wi-Tronix data and the TPC analysis and CN's train consist data, plus locomotive manufacturers' data, and CN's average cost of fuel for the month, to identify and estimate the fuel costs CN incurred as a result of those delays. And I used CN's train consist data and its contracts with other freight railroads to identify and quantify the specific equipment costs it incurred as a result of those delays.

I consider my quantification conservative (under-stated) in several respects. For example, it relies on SRS data, which do not include delays below certain thresholds, to identify relevant delays; it counts only overtime and not other crew costs; it does not include re-crews; it does not attribute Stop-Start Fuel Burn to Amtrak for multi-attribution delays; and it uses contractual rates that may not represent the full cost of CN's ownership of equipment.

The total incremental cost incurred by CN in December 2019 due to delays caused by Amtrak, as quantified by the methodology I have described, is \$219,691.

VERIFICATION

I, Michael Baranowski, 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 May 27, 2022.



Michael Baranowski

EXHIBIT FTI-1

Michael Baranowski

Senior Managing Director
Economic Consulting

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Education

B.S. in Accounting, Fairfield University

Supplemental Finance Studies, Kean College

Mike Baranowski heads FTI's Network Industries Strategies practice and provides strategic, financial, and economic consulting services to the telecommunications and railroad and pipeline transportation industries. He has special expertise in analyzing and developing complex costing and cash flow models, conducting detailed operations analysis, and transportation engineering. Much of his work involves providing oral and written expert testimony before courts, arbitration panels and regulatory bodies.

He is a recognized expert in railroad regulatory economics and has assisted FTI's railroad clients in a broad range of litigation and regulatory engagements involving pricing of services, contract disputes, damage calculations and analyses of the specific effects of pending or proposed changes in policy or regulation.

Some of Mr. Baranowski's representative experience includes:

- Development of strategic litigation analyses for large network industry regulatory rate proceedings based on the theory of Constrained Market Pricing and the Stand-Alone cost test. Theory assumes the existence of a hypothetical, efficient competitor and involves detailed analysis of short and long run operations, expenses, capital expenditures and revenues.
- Analysis of market dynamics effecting pricing and development of a suite of modeling tools to assess the regulatory risk of tariff and contract transportation rates for a mix of commodities and services based on key cost drivers and forecasts.
- Expert testimony related to the determination of damages in a variety of commercial contract disputes in the railroad, telecommunications, pipeline and trucking industries.
- Evaluation of market effects of proposed railroad mergers and identification of merger related efficiencies and quantification of the associated savings.

- Going concern and liquidation value estimates for railroad related assets as the basis for trackage rights and competitive access compensation.
- Develop detailed cost and revenue allocation metrics to assess relative profitability of individual asset groups or segments of complex network industries.

Mr. Baranowski holds a B.S. in Accounting from Fairfield University in Fairfield, Connecticut and has pursued supplemental finance studies at Kean College in Union, New Jersey.

Select Railroad Testimony

Surface Transportation Board

May 10, 2012	Docket No. 42056 Texas Municipal Power Agency v. BNSF Railway Company, BNSF Reply to TMPA Petition to Reopen and Modify Rate Prescription, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
November 30, 2012	Docket No. 42125 E.I. DuPont De Nemours & Company v. Norfolk Southern Railway Company, Reply Evidence of Norfolk Southern Railway Company
December 7, 2012	Docket No. Ex Parte 715, Rate Regulation Reforms, Reply Comments of the Association of American Railroads, Verified Statement of Michael R. Baranowski
January 7, 2013	Docket No. 42130 SunBelt Chlor Alkali Partnership v. Norfolk Southern Railway Company, Reply Evidence of Norfolk Southern Railway Company
March 1, 2013	Ex Parte No. 711 Petition for Rulemaking to Adopt Revised Competitive Switching Rules, Opening Comments of the Association of American Railroads, Verified Statement of Michael R. Baranowski and Richard W. Brown
April 12, 2013	Docket No. 42136 Intermountain Power Agency v. Union Pacific Railroad Company, Reply Evidence of Union Pacific Railroad Company
April 30, 2013	Ex Parte No. 711 Petition for Rulemaking to Adopt Revised Competitive Switching Rules, Reply Comments of the Association of American Railroads, Verified Statement of Michael R. Baranowski and Richard W. Brown
June 20, 2013	Ex Parte No. 431 (Sub-No. 4) Review of the General Purpose Costing System, Comments of the Association of American Railroads, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
September 5, 2013	Ex Parte No. 431 (Sub-No. 4) Review of the General Purpose Costing System, Reply Comments of the Association of American Railroads, Joint Verified Statement of Michael R. Baranowski and Benton V. Fisher
July 21, 2014	Docket No. 42121 Total Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc., Reply Evidence of CSX Transportation, Inc.
September 5, 2014	Ex Parte No. 722 Railroad Revenue Adequacy, Opening Comments of Norfolk Southern Railway Company, Verified Statement of Michael R. Baranowski

November 4, 2014	Ex Parte No. 722 Railroad Revenue Adequacy, Reply Comments of Norfolk Southern Railway Company, Verified Statement of Michael R. Baranowski
September 4, 2015	Docket No. FD 35743 Application of the National Railroad Passenger Corporation Under 49 U.S.C. § 24308(a) - Canadian National Railway Company, Opening Evidence of Illinois Central Railroad Company and Grand Trunk Western Railroad, Joint Verified Statement of Michael Baranowski and Benton Fisher
October 7, 2015	Docket No. 42121 Total Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc., Supplemental and Compliance Evidence of CSX Transportation, Inc.
October 23, 2015	Docket No. FD 33760 (Sub-No. 46) BNSF Railway Company - Terminal Trackage Rights -- Kansas City Southern Railway Company and Union Pacific Railroad Company, BNSF Rebuttal Statement, Verified Statement of Michael R. Baranowski
November 20, 2015	Docket No. 42121 Total Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc., Reply to Supplemental and Compliance Evidence
March 7, 2016	Docket No. 42142 Consumers Energy Company v. CSX Transportation, Inc., Reply Evidence of CSX Transportation, Inc.
July 18, 2016	Docket No. FD 35842 New England Central Railroad, Inc. -- Trackage Rights Order -- Pan Am Southern LLC, Pan Am Southern Reply Evidence, Verified Statement of Michael R. Baranowski
July 26, 2016	Ex Parte No. 704 (Sub-No. 1) Review of Commodity, Boxcar, and TOFC/COFC Exemptions, Comments of the Association of American Railroads, Verified Statement of Michael R. Baranowski and Benton V. Fisher
August 26, 2016	Ex Parte No. 704 (Sub-No. 1) Review of Commodity, Boxcar, and TOFC/COFC Exemptions, Comments of the Association of American Railroads, Verified Statement of Michael R. Baranowski and Benton V. Fisher
October 11, 2016	Ex Parte No. 431 (Sub-No. 4) Review of the General Purpose Costing System, Comment of the Association of American Railroads, Verified Statement of Michael R. Baranowski and Benton V. Fisher
October 26, 2016	Ex Parte No. 711 (Sub-No. 1) Reciprocal Switching, Opening Comments of the Association of American Railroads, Verified Statement of Michael R. Baranowski
November 7, 2016	Ex Parte No. 431 (Sub-No. 4) Review of the General Purpose Costing System, Reply Comments of the Association of American Railroads, Verified Statement of Michael R. Baranowski and Benton V. Fisher
March 6, 2017	Docket No. 42142 Consumers Energy Company v. CSX Transportation, Inc., Supplemental Reply Evidence of CSX Transportation, Inc.
January 12, 2018	Docket No. FD 32760 (Sub-No. 46) BNSF Railway Company - Terminal Trackage Rights -- Kansas City Southern Railway Company and Union Pacific Railroad Company, BNSF Petition to Establish Conditions of Use and Compensation, Verified Statement of Michael R. Baranowski

July 16, 2018 Docket No. FD 32760 (Sub-No. 46) BNSF Railway Company - Terminal Trackage Rights -- Kansas City Southern Railway Company and Union Pacific Railroad Company, BNSF Rebuttal, Verified Statement of Michael R. Baranowski

April 26, 2019 Docket No. 42144 North American Freight Car Association, et al v. Union Pacific Railroad Company, Verified Statement of Michael R. Baranowski

January 26, 2021 Docket No. FD 32760 (Sub-No. 46) BNSF Railway Company - Terminal Trackage Rights -- Kansas City Southern Railway Company and Union Pacific Railroad Company, BNSF Opening Statement on Compensation, Verified Statement of Michael R. Baranowski

January 29, 2021 Ex Parte No. 704 (Sub-No. 1) Review of Commodity, Boxcar, and TOFC/COFC Exemptions, Comments of the Association of American Railroads, Verified Statement of Michael R. Baranowski and Benton V. Fisher

April 12, 2021 Docket No. FD 32760 (Sub-No. 46) BNSF Railway Company - Terminal Trackage Rights -- Kansas City Southern Railway Company and Union Pacific Railroad Company, BNSF Reply Statement on Compensation, Verified Statement of Michael R. Baranowski

May 12, 2021 Docket No. FD 32760 (Sub-No. 46) BNSF Railway Company - Terminal Trackage Rights -- Kansas City Southern Railway Company and Union Pacific Railroad Company, BNSF Rebuttal Statement on Compensation, Verified Statement of Michael R. Baranowski

June 21, 2021 Docket No. FD 36500, Canadian Pacific Ry. – Control – Kansas City Southern, Canadian Pacific Applicants' Response to KCS Reply, Verified Statement of Michael R. Baranowski

October 29, 2021 Docket No. FD 36500, Canadian Pacific Ry. – Control – Kansas City Southern, Railroad Control Application, Verified Statement of Michael R. Baranowski

February 14, 2022 Ex Parte No. 711 (Sub-No. 1), Reciprocal Switching, supplemental Comments of the Association of American Railroads, Verified Statement of Michael R. Baranowski and Nathaniel S. Zebrowski

U.S. District Court for the Northern District of Texas, Fort Worth Division

November 7, 2017 Civil Action No. 4:16-cv-1061-O, BNSF Railway Company v. Panhandle Northern Railroad LLC, Expert Report of Michael R. Baranowski

November 22, 2017 Civil Action No. 4:16-cv-1061-O, BNSF Railway Company v. Panhandle Northern Railroad LLC, Reply Expert Report of Michael R. Baranowski

December 21, 2017 Civil Action No. 4:16-cv-1061-O, BNSF Railway Company v. Panhandle Northern Railroad LLC, Rebuttal Expert Report of Michael R. Baranowski

Arbitrations and Mediations

April 25, 2013 JAMS REF #1340009009, Union Pacific Railroad vs. Canadian Pacific and Dakota, Minnesota & Eastern Railroad Arbitration, Expert Report of Michael R. Baranowski on behalf of Union Pacific Railroad Company

September 6, 2013 IN JAMS ARBITRATION, Case No. 1220044715, Union Pacific Railroad Company v. BNSF Railway Company, Expert Report of Michael R. Baranowski

October 25, 2013	IN JAMS ARBITRATION, Case No. 1220044715, Union Pacific Railroad Company v. BNSF Railway Company, Expert Reply Report of Michael R. Baranowski
January 1, 2014	IN JAMS ARBITRATION, Case No. 1220044715, Union Pacific Railroad Company v. BNSF Railway Company, BNSF Post-Argument Submission, Affidavit of Michael R. Baranowski
April 14, 2017	American Arbitration Association Case No. 01-15-0004-4830 and 01-15-0004-4931, Arbitration Between FirstEnergy Generation LLC and CSX Transportation, Inc. & BNSF Railway Company, Expert Report of Michael R. Baranowski
November 22, 2017	American Arbitration Association Case No. No. 01-16-0003-6208, CSXT Transportation, Inc. v. JEA and Florida Power & Light Co., Expert Report of Michael R. Baranowski
January 26, 2018	American Arbitration Association Case No. No. 01-16-0005-5615, BNSF Railway Company & Norfolk Southern Railway Company v. FirstEnergy Generation, LLC, Expert Report of Michael R. Baranowski
February 16, 2018	American Arbitration Association Case No. 01-16-0005-5615, BNSF Railway Company & Norfolk Southern Railway Company v. FirstEnergy Generation, LLC, Rebuttal Expert Report of Michael R. Baranowski
February 23, 2018	American Arbitration Association Case No. 01-17-0000-0130, J.B. Hunt Transport, Inc. and BNSF Railway Company, Expert Report of Michael R. Baranowski
April 17, 2018	American Arbitration Association Case No. 01-17-0000-0130, J.B. Hunt Transport, Inc. and BNSF Railway Company, Reply Expert Report of Michael R. Baranowski
June 22, 2018	JAMS REF #1100088262, BNSF Railway Company v. Union Pacific Railroad Company, Expert Report of Michael R. Baranowski
March 25, 2019	American Arbitration Association Case No. 01-17-0000-0130, J.B. Hunt Transport, Inc. and BNSF Railway Company, Expert Report of Michael R. Baranowski
April 26, 2019	American Arbitration Association Case No. 01-17-0000-0130, J.B. Hunt Transport, Inc. and BNSF Railway Company, Reply Expert Report of Michael R. Baranowski
January 18, 2021	American Arbitration Association Case No. 01-18-0001-3283, BNSF Railway Company & Norfolk Southern Railway Company, and Dynegy Midwest Generation, LLC, Expert Report of Michael R. Baranowski on Behalf of BNSF & NS
February 5, 2021	American Arbitration Association Case No. 01-18-0001-3283, BNSF Railway Company & Norfolk Southern Railway Company, and Dynegy Midwest Generation, LLC, Expert Reply Report of Michael R. Baranowski on Behalf of BNSF & NS
January 14, 2022	Arbitration between The Port of Vancouver, USA and BNSF Railway Company, Reply Expert Report of Michael R. Baranowski

Select Pipeline Testimony

Federal Energy Regulatory Commission

- November 20, 2019 Docket Nos. OR18-7-002, et al. (Consolidated), Epsilon Trading, et al v. Colonial Pipeline Company, Prepared Answering Testimony of Michael R. Baranowski on behalf of Colonial Pipeline
- March 20, 2020 Docket Nos. OR18-7-002, et al. (Consolidated), Epsilon Trading, et al v. Colonial Pipeline Company, Prepared Answering Testimony to Trial Staff of Michael R. Baranowski on behalf of Colonial Pipeline

TAB E

VERIFICATION

I, John Summerfield, 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 on behalf of Canadian National Railway Company and its subsidiaries.

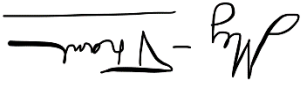
Executed on May 26, 2022.

A handwritten signature in black ink, appearing to read 'John Summerfield', is written above a horizontal line.

John Summerfield

VERIFICATION

I, My-Thanh Nguyen-Hung, 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 on behalf of Canadian National Railway Company and its subsidiaries. Executed on May 26, 2022.



My-Thanh Nguyen-Hung

VERIFICATION

I, Craig Zarembka, 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 on behalf of Canadian National Railway Company and its subsidiaries.

Executed on May 27, 2022.



Craig Zarembka

EXHIBIT 1

EXHIBIT 1

LIST OF PRIMARY SUBDIVISIONS

Bluford*
Cairo
Centralia
Champaign
Chicago
Elsdon
Flint
Freeport
Fulton
Holly
Joliet
McComb
Memphis
Mt. Clemens*
Shelby
Shore Line
South Bend
Strathroy
Yazoo

TAB F

**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
TIMOTHY ROBINSON**

My name is Timothy Robinson. I am Sr Manager, Network Planning & Transportation Engineering, Network Operations for CN. I am located in Edmonton, Alberta, Canada. I am a professional engineer and Vice-Chair of the American Railway Engineering & Maintenance-Of-Way Association Committee on Economics of Railway Engineering & Operations. I have additionally worked in train scheduling, as well as field operations as a Transportation Supervisor and then Transportation Manager progressively in the capacities of Branch line, Mainline and Industrial Support Yard functions over my 8-year career at CN.

In this statement, I describe an analysis I conducted to quantify elements of the incremental amount of fuel consumed, and the incremental delay incurred, by various freight trains with different locomotive and car consists when required to make an unscheduled stop. When an unscheduled stop occurs, incremental fuel consumption and delays occur both (i) during the process of decelerating to and re-accelerating from the stop; and (ii) during the stop. My analysis focuses on the first of these two aspects. It quantifies:

(1) Stop-Start Fuel Burn, *i.e.*, the incremental fuel burn associated with deceleration and re-acceleration (as distinct from Idle Fuel Burn, *i.e.*, the incremental fuel burn associated with idling when the train is stationary, which was separately quantified by Mr. Baranowski as described in his verified statement; and

(2) V-Time, *i.e.*, the extra time consumed by the train while decelerating and re-accelerating (as compared to continuing at its regular speed) (as distinct from Idle Time, *i.e.*, the time when the train is stationary, which was separately quantified by Mr. Baranowski as described in his verified statement).¹

The results of my analysis were provided to Mr. Baranowski for use in quantifying costing associated with certain unscheduled stops by CN freight trains because of Amtrak. My analysis was specific to the data Mr. Baranowski was analyzing, which involve unscheduled stops in December 2019 by freight trains on the lines of Illinois Central Railroad Company (IC) and Grand Trunk Western Railroad Company (GTW) that CN dispatchers have attributed to Amtrak.² Because train consists and other factors vary over time, modest supplementation of the analysis might be required for application to other periods, but subject to reviewing relevant data for different periods, I would expect most of the analysis to remain apt and applicable.

The basic principles underlying my analysis are simple and intuitive. First, when a train is stopped and then re-accelerates back to its regular speed, its locomotives consume more fuel than if the train had maintained a steady speed. (The principle is the same as for an automobile: steady cruising is more fuel efficient than traveling in stop-start traffic, principally because re-accelerating from a stop entails relatively heavy fuel consumption.) This difference in locomotive fuel consumption – Stop-Start Fuel Burn – varies with the circumstances: for example, if additional locomotives are operating, or if they are pulling a greater load, or if the train is traveling at higher speed, Stop-Start Fuel Burn will tend to be higher. Second, and more simply,

¹ Mr. Baranowski uses the quantification of V-Time in his analysis of non-fuel incremental delay costs, as detailed in his verified statement.

² My analysis addresses only quantification of Stop-Start Fuel Burn and V-Time, not attribution of responsibility, and uses the same methods CN would use to ensure accurate quantification regardless of context and attribution.

if instead of traveling at, say, a steady 40 miles per hour over a ten-mile segment, a train gradually slows to zero miles per hour over three miles of that segment and gradually re-accelerates to 40 miles per hour over another three miles of that segment on either side of a stop, its transit time over those ten miles (excluding the stop itself) will increase – that increase in transit time being the V-Time.

Because speeds and many other factors affect the quantification of Stop-Start Fuel Burn and V-Time, reliably quantifying these incremental values requires specific analysis. Because of the many variables involved, Stop-Start Fuel Burn cannot be calculated by applying a simple formula. I understand Mr. Baranowski's dataset of unscheduled freight train stops from December 2019 included observations of approximately 761 specific trains with varying characteristics. Individually analyzing this number of trains per month to determine Stop-Start Fuel Burn is not feasible, but it is feasible to group trains with similar characteristics together and quantify Stop-Start Fuel Burn for each group. As described in Part I below, in consultation with Mr. Baranowski, I took that approach, identifying and analyzing 51 distinct scenarios selected to be representative of the approximately 761 observations and to be sensitive to the variables that I know to be significant based on my experience with this form of analysis. As described in Part II below, I then analyzed each of those scenarios. My analysis yields reliable and specific estimates of Stop-Start Fuel Burn and V-Time that I understand Mr. Baranowski then applied to individual unscheduled stop events as appropriate.

I. Selection of Scenarios

In order to make my Stop-Start Fuel Burn analysis specific and accurate for particular train/unscheduled stop scenarios, we reviewed the observations in the dataset and grouped them into scenarios based on the following important variables:

(1) *operating territory*: different territories have different characteristics in terms of train composition and frequency. This is not only due to the gradients the trains will experience, but also due to the specific commodity mix on freight trains moving over a corridor. Therefore, we created separate groups for the IC lines between Chicago and New Orleans and the GTW lines in Michigan;

(2) *train type*: train type matters because different rolling stock each experience different characteristics inherent to their resistance to motion. Weight, bearing resistance, number of axles, aerodynamic resistance and so forth all interact to make different characteristics to resistance to motion at different speeds, and therefore different amounts of energy (fuel) expenditures related to motion, starting and stopping. For trains composed of different types of assigned rolling stock, their overall characteristics depend on the aggregation of the individual types of equipment, so we created separate categories for intermodal, manifest, loaded unit (for example, coal or auto), empty unit (for example, coal or auto), and local trains;

(3) *number of locomotives*: the number of locomotives matters for the obvious reasons that the more locomotives are in operation consuming fuel, the more fuel will tend to be consumed, although the number of locomotives must be considered in conjunction with the trailing tonnage and train length. We initially grouped trains based on the number of locomotives recorded as being on the train by the consist information contained in CN's Service Reliability System ("SRS") data. However, those data do not identify whether a particular locomotive was

active at a particular time. As explained in the verified statement of Simon Lizotte, whom we consulted on this issue, CN (like other freight railroads) sometimes includes inactive locomotives on trains. Consistent with his advice, and in order to ensure that our Stop-Start Fuel Burn quantification is conservative, we capped the number of locomotives on particular trains that we deemed to be active and burning fuel, as specified in his statement;³

(4) *trailing tonnage*: the greater the trailing tonnage, the more fuel will tend to be consumed. Accordingly, we categorized trains into ranges of trailing tonnage using the specific trailing tonnage applicable to the train;

(5) *train length*: we categorized trains into ranges of train length using the train length data applicable to the train; and

(6) *pre-deceleration and post-acceleration speed*: the greater the speed of the train – particularly the speed to which it must accelerate after its stop – the more fuel will tend to be consumed, and speed also directly affects the calculation of V-Time. Accordingly, we categorized trains into ranges of speed using data (mainly, I understand, derived from Wi-Tronix records) provided by Mr. Baranowski. The speeds were organized in the simulation as the pre-deceleration or “approach speed” and the acceleration after the stop “departure speed.” The speeds modeled for the trains were capped to no faster than “approach speed” prior to the stop and no faster than “departure speed” after the stop.

These variables interact in complex ways in determining Stop-Start Fuel Burn, so it was necessary to create categories using each of the variables together in order to achieve accurate and specific Stop-Start Fuel Burn quantification. After the removal of three scenarios (1-unit coal train) which were not modelled due to technical limitations, the various permutations led us to

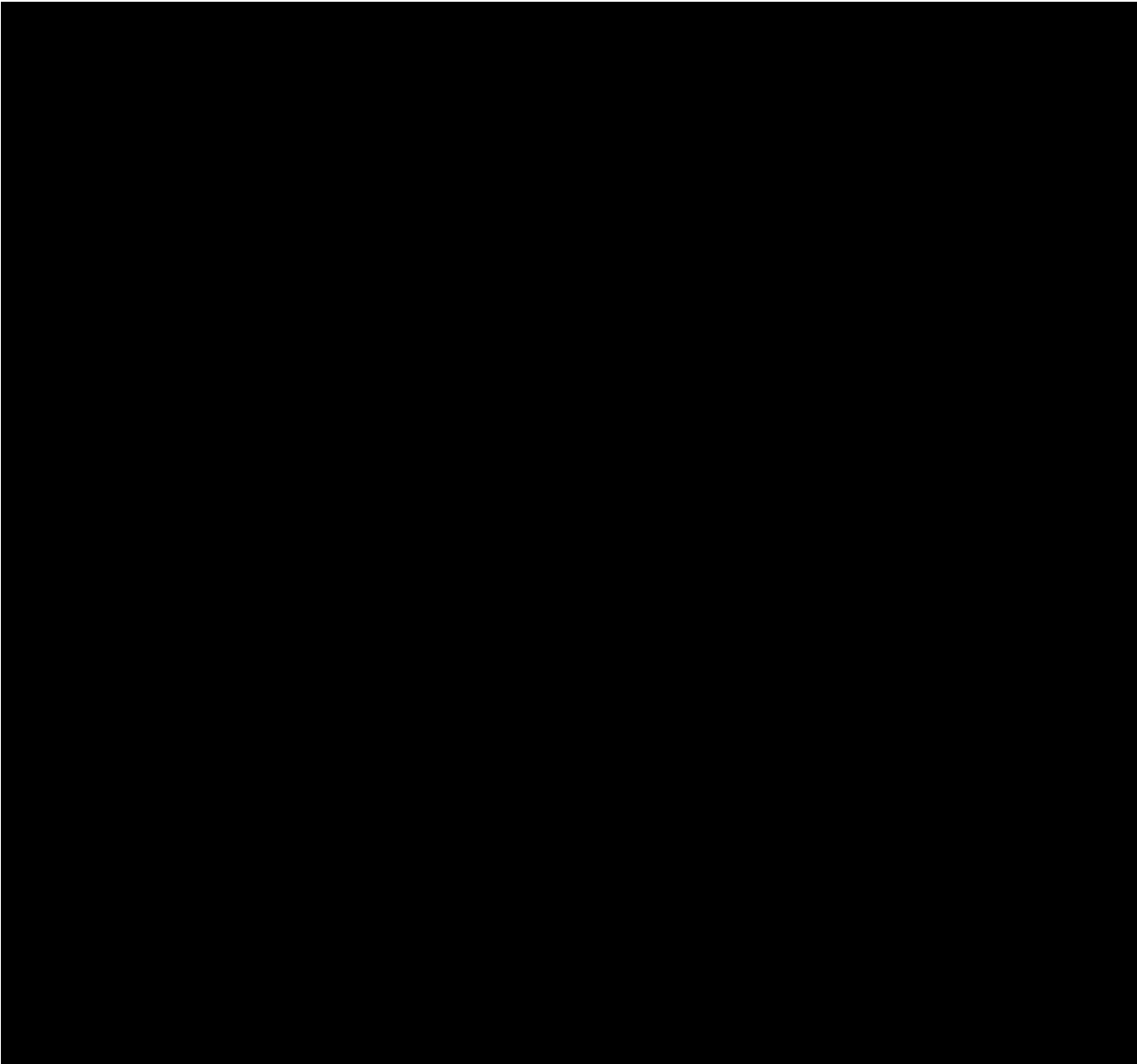
³ See VS (PID) Lizotte, pt. IV.

create 51 distinct scenarios, each of which is representative of several specific trains in the dataset, and which collectively represent 761 individual observations, as detailed in the Table 1 below:

f [REDACTED]

[REDACTED]

[REDACTED]



}

II. Quantification of Stop-Start Fuel Burn and V-Time

To quantify Stop-Start Fuel Burn and V-Time, I used CN's Train Performance Calculator ("TPC").⁴ CN uses its TPC in the course of everyday business, for setting and revising train schedules and for modeling operations and capacity of segments of its network.

⁴ Documents describing the TPC are included in my workpapers "TPC Manual (1987 Eng Principles).pdf," TPC Manual (1987 Reference Material).pdf," and "TPC Manual (notes).pdf."

TPC is a CN mainframe computer program that models the movement of a single train over a piece of track and produces statistics about the train's performance and operation, including the speed, running time, and fuel consumption at any point during that movement.

For each scenario, I ran simulations in TPC. Two types of inputs are required for a TPC simulation: inputs related to the track and speed and inputs related to the train. For the track inputs, I used a generic test bed without curvature or grade. The track input was flat (0% grade), straight (no curves), and 125 miles long. In order to mimic the siding arrangements and operating context indicated by the "approach speed" before deceleration to a stop and "departure speed" acceleration from the stop from the Wi-Tronix, the simulated trains were programmed to start from a Stop, accelerate to a speed no more than the "approach speed" until Mile 25. Mile 25 was used because it provided a generous distance for the train to accelerate up to the "approach speed" (speed limit) or "balance speed" the maximum speed the train could achieve based on its composition of cars and locomotives. At Mile 25, trains were either stopped or sent through, and then all trains carried on for the remainder of their run at a speed no greater than "departure speed." This was completed to be representative of the IC and GTW territories in which Amtrak operates. For the train inputs, I input all the variables specified for the scenario concerned, as described in Part I above.⁵

I ran two simulations for each scenario, one (control) simulation in which the train ran across the test track without stopping at Mile 25, and a second (stop-start) simulation in which the same train ran over the same track, came to a complete stop,⁶ and then re-accelerated back

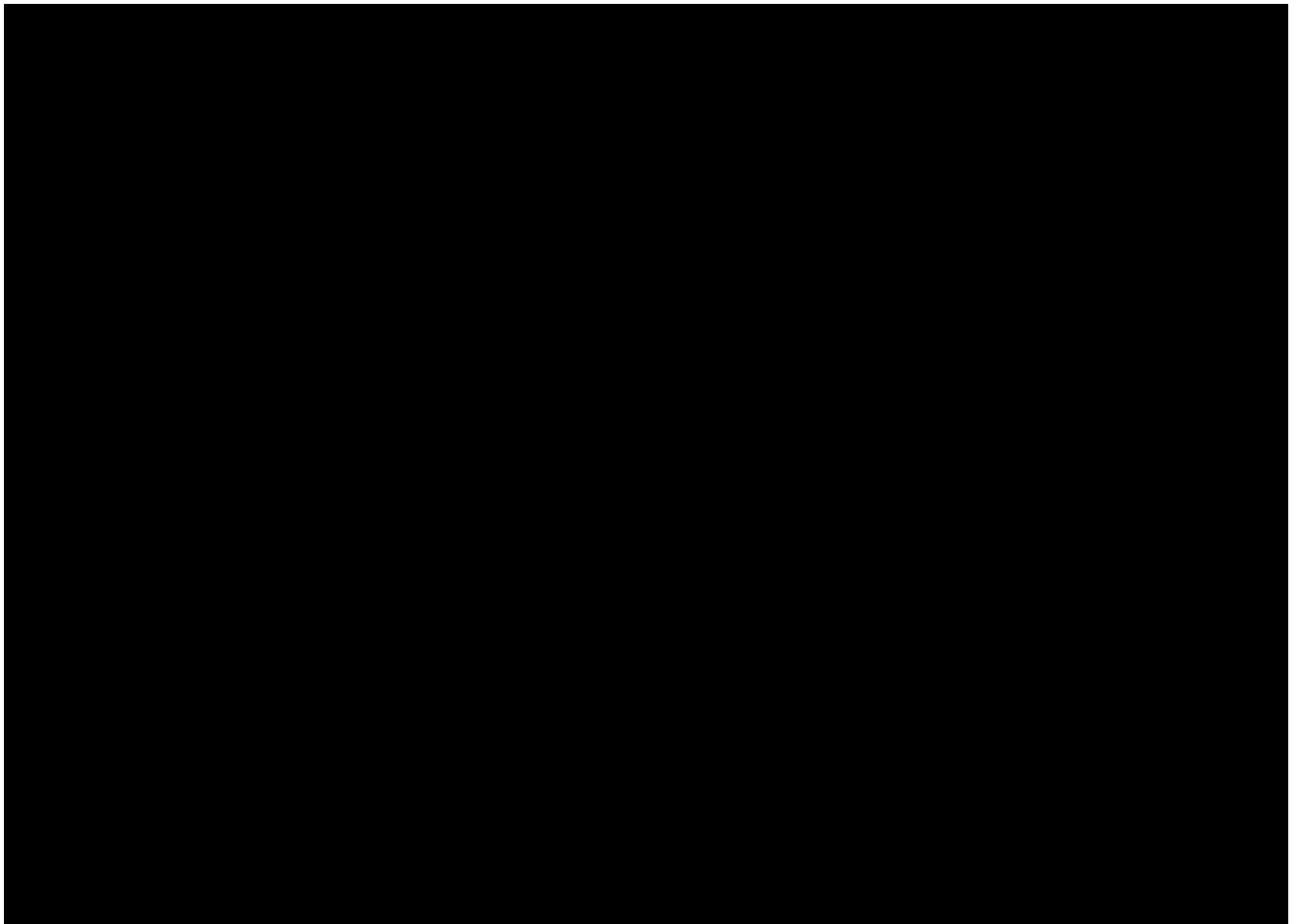
⁵ The train inputs are included in the workpaper "Train_Group_Characteristics_Dec.2019_Excerpt_Summary.xlsx."

⁶ The TPC models stopping on the basis of air brakes, not dynamic braking. Dynamic braking, which uses of the electric traction motors of the locomotive as generators when slowing, requires the operator to use a throttle notch setting higher than idle and thus consumes more fuel than using air brakes alone (in which case the throttle notch would be set to idle). As a result, the TPC in this respect somewhat understates the additional fuel consumed due to an added stop.

up to the speed specified for the scenario for the remainder of the test track. By comparing the differences in total fuel consumption and total transit time (excluding fuel consumed and time elapsed when the train was stationary) between the control and stop-start simulations, I was able to estimate the Stop-Start Fuel Burn and the V-Time for each scenario.⁷

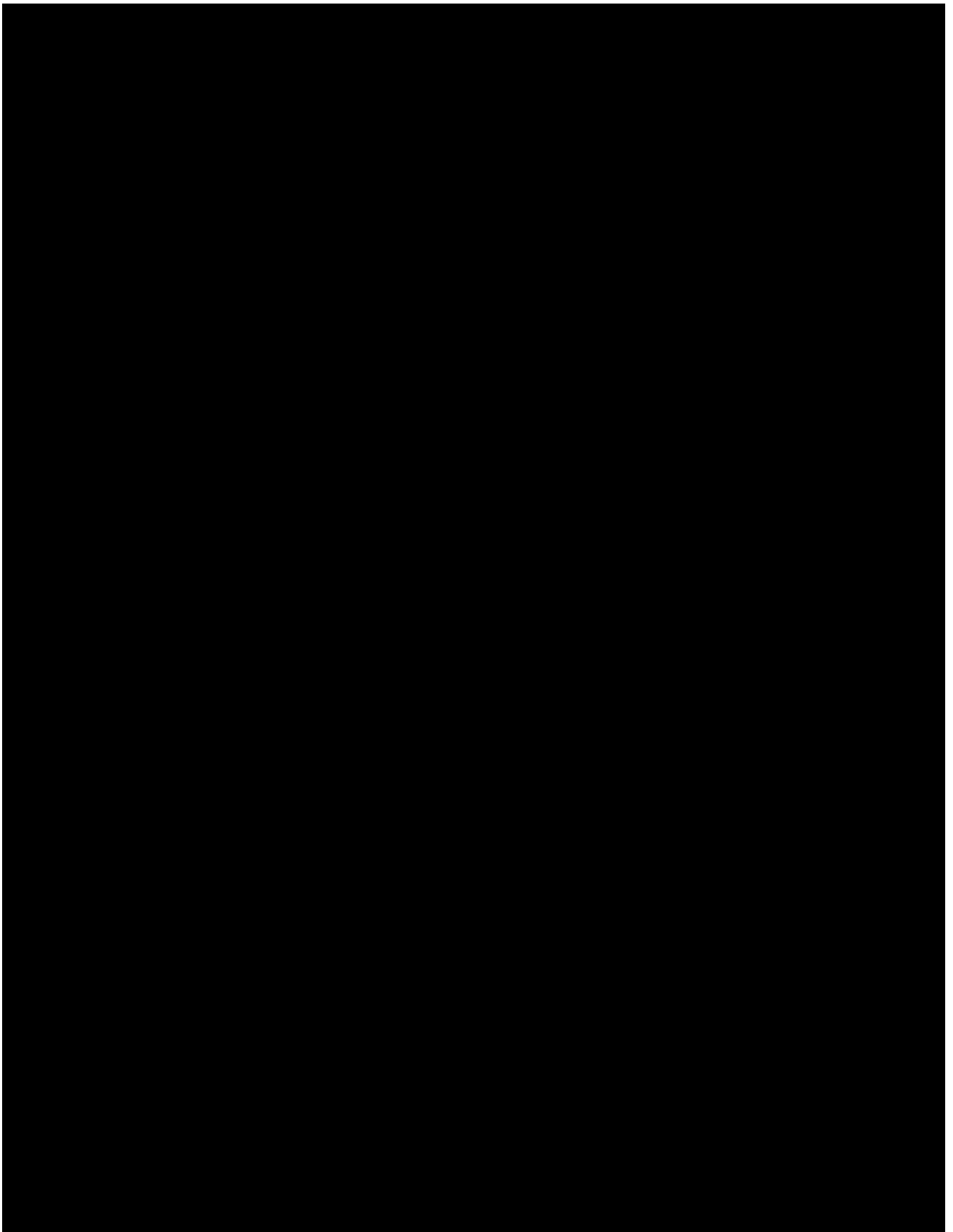
The results of my analysis are summarized in the Table 2 below:⁸

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⁷ The outputs of each simulation are included in my workpapers.

⁸ The results are also included in the tab “Rev 2” of the workpaper “Primary Run Request Details Sheet v2.xlsx”



[REDACTED]

VERIFICATION

I, Timothy Robinson, 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 on behalf of Canadian National Railway Company and its subsidiaries.

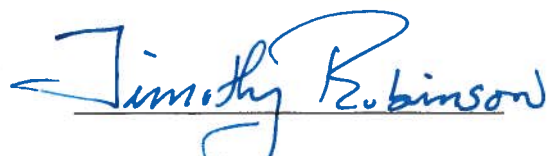
Executed on May __, 2022.

Timothy Robinson

VERIFICATION

I, Timothy Robinson, 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 on behalf of Canadian National Railway Company and its subsidiaries.

Executed on May 27, 2022.



Timothy Robinson

TAB G

**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 SIMON LIZOTTE

My name is Simon Lizotte. I am Senior Manager Locomotive Engineering and Technology for CN in the Fuel Optimization Group. I have held this position since 2019. Since 2014, I have been working in the Fuel Optimization Group to find, implement and measure new ways to save fuel, using a homegrown power optimization system based on horsepower per ton (“HPT”) ratio as well as third party energy management systems. My group uses the Wi-Tronix data system to monitor the efficacy of our fuel optimization efforts, and to monitor other metrics. For several years, I have also acted as CN’s main business contact and subject matter expert for the Wi-Tronix system. Because of my job duties, I have a thorough knowledge of the Wi-Tronix system, its capabilities and its use by CN in connection with freight railroad operations.

I. WI-TRONIX OVERVIEW

Wi-Tronix is a third-party technology widely employed by freight railroads.¹ CN adopted it starting in 2007, and it is CN’s primary system for recording and monitoring real-time locomotive operational data. Using advanced telemetry technology and continuously collecting data from locomotive subsystems, Wi-Tronix allows CN to monitor the location, movement and

¹ Wi-Tronix LLC describes its system at <https://www2.wi-tronix.com/onboard-systems/>.

status of its locomotives in order to ensure efficient operations through its rail network. CN's Operating Department uses Wi-Tronix data continuously to track key operational metrics.

Most CN-owned locomotives are equipped with two pieces of hardware critical to the Wi-Tronix system. The first on-board component is an event recorder connected to various locomotive systems that generate continuous, accurate and detailed information regarding locomotive status, including engine state, throttle notch position, reverser position, brake pressure and current speed (the "Event Recorder").

The second on-board Wi-Tronix component is the Wi-PUTM (Wireless Processing Unit), which utilizes GPS technology to record locomotive position and speed with precise time-stamps based on local time, and integrates time and location records with data collected by the Event Recorder to attach GPS-based, time-stamped records that ensure the Wi-Tronix internal clock is consistent across all records transmitted to CN's back office. The Wi-PUTM is also connected to the fuel sensor, which provides an approximate reading of fuel levels for the locomotive.

The Event Recorder collects operational data continuously. The Wi-PUTM transmits operational data to CN's back office at certain predefined intervals and when certain programmed events occur.² Each locomotive's Wi-Tronix onboard system transmits operational data to CN's back office, by way of the Wi-Tronix hosted solution, as follows:

- (1) every five minutes (on the hour, at five minutes past the hour, *etc.*);
- (2) each time a locomotive crosses over a virtual "trip wire" or into and out of a geofenced area. (CN's Fuel Optimization Group creates virtual trip wires and geofenced areas at locations where CN has determined there is heightened need for operational data. For example, each major CN railyard has a geofenced "approaching radius." When an inbound locomotive

² The Wi-PUTM is briefly described in *Wi-Tronix LLC: Wireless Processing Unit*, Progressive Railroading (Sept. 15, 2015), available at https://www.progressiverailroading.com/rail_product_news/details.aspx?id=45786.

crosses the boundary of an approaching radius, Wi-Tronix automatically transmits current locomotive data, which can be used to alert the upcoming railyard to prepare to address that train's operational needs, such as fuel, inspection or maintenance. Each major railyard is further delineated into discrete areas such as the fuel pad and maintenance pad, so CN can track the activities of its locomotives);

(3) each time a locomotive slows to a stop (*i.e.*, its speed reaches 0 mph) outside a yard, in which case Wi-Tronix will record a "Mainline Stop";

(4) each time a locomotive begins to move after a stop (*i.e.*, its speed increases from 0 mph) outside a yard, in which case Wi-Tronix will record a "Mainline Start"; and

(5) in certain circumstances when the locomotive is operated in a manner that raises concerns (*e.g.*, when there is an emergency stop or the locomotive engineer adjusts the throttle too quickly).

CN monitors Wi-Tronix data on its locomotives continuously. Every night, Wi-Tronix data specific to each CN Wi-Tronix-equipped locomotive are automatically transferred into CN's Data Warehouse ("DW"), CN's central enterprise information repository where the information is retained.

Exhibit 1³ provides an illustrative example of the data generated by Wi-Tronix and stored in DW. It shows that on December 7, 2019, asset number IC 1027 (a CN locomotive), while traveling between Neoga, IL and Humboldt, IL, stopped at Mattoon, IL at 9:32 (Mainline Stop) and resumed traveling at 9:49 (Mainline Start). In other words, the train was stationary for 17 minutes. Before decelerating to that stop, the train had been traveling at as fast as 43.0 miles per hour; after re-accelerating from the stop, it reached 42.0 miles per hour.

³ This is an excerpt of the Wi-Tronix data, limited to those columns of data relevant to the proposed methodology set forth in VS (PID) Baranowski.

The first column of Exhibit 1 (Asset) sets forth the unique ID associated with the CN locomotive for which the record was created. The second column (Time) is a date and time stamp of the moment that particular row of data was generated. The third column (Train #) sets forth the unique ID for the train. The fourth, fifth and sixth columns (Location, MP, Subdivision) identify the locomotive's location relative to city, mile post marker and track subdivision. The seventh, eighth, and ninth columns describe various technical attributes of engine state (more fully, summary of engine state and locomotive isolation switch), reverser position, and throttle position. The tenth column specifies the speed at which the locomotive (and train) was traveling at the moment the data were recorded (*i.e.*, at the time specified in the second column). The last column (Description) provides a brief written description of key events such as, but not limited to, Mainline Stop, Mainline Start, Trip Wire Crossing and Station Enter/Exit times. (In the example provided in Table 1, the only such events were the Mainline Stop and Mainline Start.)

The data provided by the Wi-Tronix system are detailed, specific, and reliable. The GPS and time-stamping systems within Wi-Tronix are precise, and the data the Event Recorder gathers from locomotive subsystems are detailed and instantaneous. Through its Mainline Stop and Mainline Start entries, Wi-Tronix data record precisely how long a locomotive is stationary. In addition, the frequent and regular reporting of data in Wi-Tronix on locomotive location, speed, throttle and/or brake positions provides a detailed and reliable basis for characterizing train acceleration and deceleration, enabling CN to reliably estimate delays and fuel consumption

during the process of decelerating to and accelerating from a stop, as detailed in Mr. Baranowski's statement.⁴

II. WI-TRONIX DATA USED FOR THIS PROCEEDING

Certain Wi-Tronix data were extracted and provided for use in this proceeding. The data were extracted in the same form as they were generated by Wi-Tronix and are maintained in the DW in the ordinary course of business, save only that only specific records were extracted. (Those data are referred to as the "Wi-Tronix Data," and are included in the workpapers submitted with Mr. Baranowski's verified statement.⁵) The records selected correspond to a list of individual train trips made on specific days in December 2019. I understand that the particular train trips and dates selected were identified using CN's Service Reliability System ("SRS") as involving freight trains that were delayed by Amtrak passenger trains operating on CN's network in the United States.

I understand that when Mr. Baranowski reviewed the data pertaining to those train trips, he found that Wi-Tronix data were available for one or more locomotives on the train in approximately 80% of cases. That finding is not surprising. Almost every CN locomotive today (and in 2019) is Wi-Tronix-equipped. However, trains powered by "foreign" locomotives, *i.e.*, locomotives owned by other freight railroads, regularly run on CN's network. Class I railroads vary in the extent to which their locomotive fleets are equipped with Wi-Tronix, and even in instances where a foreign locomotive running on CN's network is Wi-Tronix-equipped, the Wi-

⁴ Wi-Tronix data have two limitations for purposes of CN's efforts to assess the incremental freight delay costs of delays caused by Amtrak. First, Wi-Tronix data are specific to the locomotive and the train it is on, so other sources of data, such as SRS, must be consulted to determine the cause of a delay. Second, although Wi-Tronix data estimate a locomotive's fuel levels, they do so in 10-gallon increments, which is why the process for determining fuel consumption detailed in the verified statements of Mr. Baranowski and Mr. Robinson is more accurate and reliable than relying directly on Wi-Tronix for fuel estimates.

⁵ See Baranowski workpaper "Compiled_WiTronix_Data.xlsx."

Tronix data it generates is not available to CN since Wi-Tronix provides each railroad with access only to the data pertaining to its own locomotives.

III. CN'S PROTOCOLS AND PRACTICES TO ENSURE FUEL OPTIMIZATION

Both as a matter of corporate environmental responsibility and to avoid unnecessary fuel expense, fuel optimization is a high priority for CN. Trains must be adequately powered – have sufficient locomotive horsepower – to operate safely and serve freight customers efficiently given the train consist and weight being pulled, the terrain and planned time between stations. In certain circumstances it is necessary to keep specific locomotives operating in idle mode when a train is stopped on a main line or siding in order to continue the operation of braking and other vital systems. Subject to those constraints, however, CN strives to operate its trains with no more operational horsepower than necessary, in order to optimize fuel consumption.

Optimizing fuel consumption consistent with these principles is an important element of my responsibilities. As a result, I am very familiar with CN's operational practices designed to optimize fuel consumption, including its efforts to ensure that the number and combined horsepower of locomotives operating and consuming substantial fuel on a train are appropriate for the particular type, tonnage, length and route of the train.

IV. APPLICATION OF FUEL OPTIMIZATION PRINCIPLES TO CN'S QUANTIFICATION OF ITS INCREMENTAL STOP-START FUEL CONSUMPTION COSTS

Based on my knowledge of CN's fuel optimization practices, I provided advice on what assumptions should be made regarding locomotive operational status in order to ensure that CN's estimates of incremental fuel costs due to freight delays caused by Amtrak would be accurate and consistent with efficient and fuel optimized freight train operation by CN. After jointly reviewing the territory and types of train involved in CN's fuel consumption analysis with Mr.

Baranowski and Mr. Robinson (who jointly conducted that analysis), we determined that it would be prudent to cap the number of locomotives assumed to be operative and consuming fuel while a train was moving at two for intermodal, manifest and unit trains.⁶

That limitation, which was used in the fuel consumption analysis detailed in the verified statement of Mr. Baranowski and the complementary modeling of fuel consumption during stop-start events performed and described by Mr. Robinson, ensures that fuel costs will not be attributed to Amtrak for a freight locomotive that was not, or should not have been, operating and consuming fuel. In my experience, CN's actual operations adhere closely to CN's fuel optimization principles, so the limitations on the number of locomotives adopted in accordance with my advice will almost always yield an accurate account of what actually happened. There may be rare instances in which CN had in fact operated additional locomotives and thereby consumed more fuel than Mr. Baranowski estimates, but in any such instances it is reasonable to be conservative and not charge Amtrak for the resulting additional fuel costs.

V. REVIEW OF CN'S QUANTIFICATION OF ITS INCREMENTAL IDLE FUEL CONSUMPTION COSTS

Given my familiarity with various aspects of CN's tracking of fuel consumption, I was asked to review one aspect of CN's quantification of incremental fuel consumption when, because of a delay caused by Amtrak, a CN freight train is stationary and locomotives on that train are in idle mode. Specifically, I was asked to comment on the weighted average rate of { [REDACTED] } used in Mr. Baranowski's statement to quantify how much fuel an average locomotive consumes during an hour of idling.

⁶ I did not recommend, and CN's analysis did not use, any limitation on the number of locomotives counted on local trains. Local trains typically have only one or two locomotives, and, since they usually serve many customers, local train composition and power required vary during one "trip."

Mr. Baranowski's statement explains how that average was derived, and I defer to his statement on that. However, I note that the 3.0 GPH average appears both reasonably accurate and moderately conservative based on my own knowledge of locomotive fuel consumption while in idle mode. First, in the ordinary course of business, as it manages and plans its fuel consumption, CN's default assumption is that a locomotive in "low" idle mode consumes fuel at an average of 3.3 GPH – a moderately higher fuel consumption rate than that calculated and used in Mr. Baranowski's analysis. Second, that is the typical "low" idle fuel consumption rate. A given locomotive's idle rate typically varies based on several factors – for example, it typically increases in cold weather and as braking requirement increase. So the average "low" idle fuel consumption rate used in Mr. Baranowski's calculations probably somewhat understates the average idle fuel consumption rate of CN's locomotives, which would introduce an element of conservatism (under-estimation) into CN's quantification of idle fuel consumption costs.

VI. CONCLUSION

The Wi-Tronix system provides automated, specific, and detailed snapshots of locomotive, and therefore, train, location, speed and operating status at least every five minutes and whenever the train stops and starts. That makes it a highly reliable means of quantifying delays to freight trains, and a highly reliable source of detailed data for use in reliably estimating fuel consumption during idling and stop-start events. The quantification of delays and fuel consumption based on Wi-Tronix in Mr. Baranowski's verified statement should therefore be considered reliable.

The limitations on the numbers of locomotives assumed to be operational that I recommended and CN adopted in its fuel consumption analysis provide assurance that that analysis will yield estimates that are both reliable and consistent with fuel efficient operations by

CN, and they introduce an element of conservatism into CN's fuel consumption analysis that provides additional assurance that it will not be over-stated.

VERIFICATION

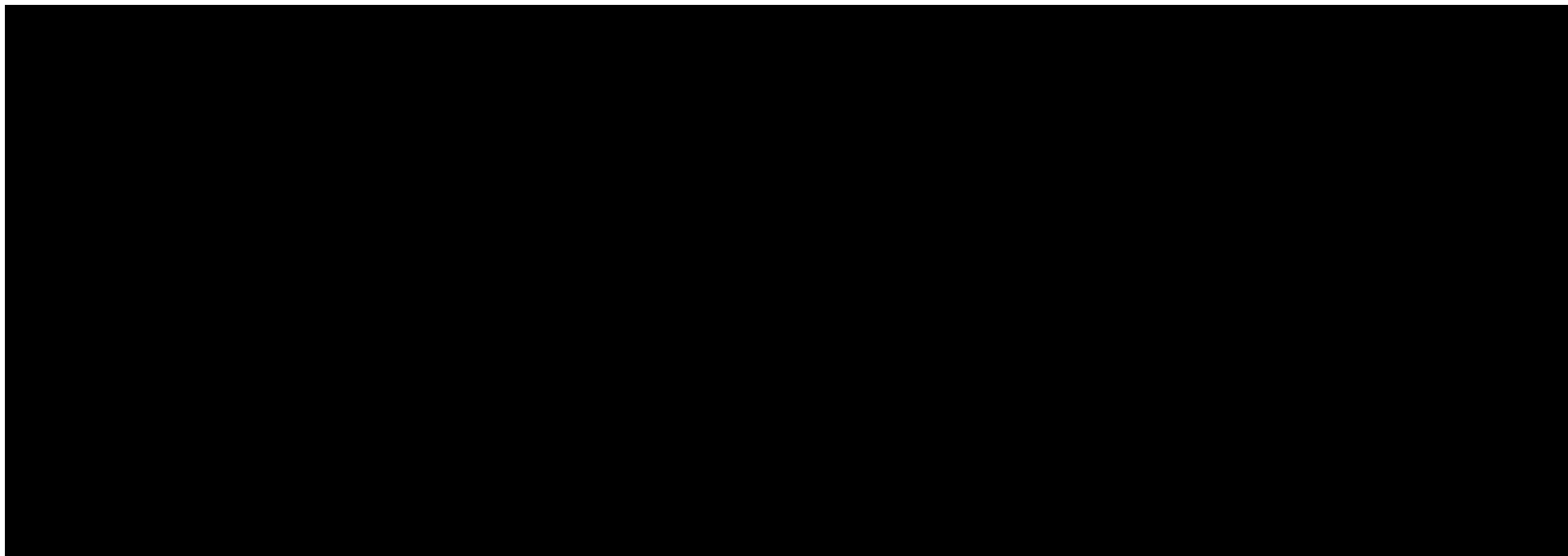
I, Simon Lizotte, declare under penalty of perjury under the laws of the United States that I have read the foregoing Verified Statement, that I know the facts asserted therein, and that the same are true as stated. Further, I certify that I am qualified to and authorized to submit this Verified Statement on behalf of Canadian National Railway Company and its subsidiaries.

Executed on May 27, 2022.



Simon Lizotte

EXHIBIT 1



TAB H

**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 CATHERINE WHITEMAN

My name is Catherine Whiteman. I am Senior Manager, Crew Systems and Planning, for CN, a position I have held since 2007. Prior to my current position, I was Senior Manager, Service Design for 12 years.

In my current position, I am responsible for overseeing and maintaining CN's systems for tracking the work performed by and the pay due to employees of CN and its operating subsidiaries Illinois Central Railroad Company ("IC") and Grand Trunk Western Railroad Company ("GTW"). In the ordinary course of business, I maintain records CN uses to verify, for each individual crewmember and for each day, the hours the crewmember worked, the train to which the crewmember was assigned, where the crewmember went on and off duty, and overtime that the crewmember worked and for which the crewmember was paid, along with other data. These records are contemporaneously updated and rigorously maintained, and form a core element of CN's payroll system.

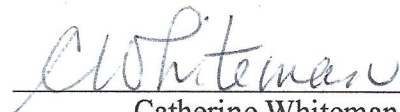
I understand that one issue in the present proceedings involves the determination of crew costs incurred by IC and GTW as a result of delays to IC and GTW trains caused by Amtrak, with a focus on December 2019. To assist in that effort, I provided data encompassing that month extracted from the payroll data records referenced above, in the form of an Excel spreadsheet file denominated "Southern Wages and OT-ICGT 2019-12.xlsx." A true and correct copy of that file,

as maintained by my department in the ordinary course of business, is included in the workpapers supporting the verified statement of Michael Baranowski.

VERIFICATION

I, Catherine Whiteman, 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 on behalf of Canadian National Railway Company and its subsidiaries.

Executed on May 27, 2022.


Catherine Whiteman

TAB I

**BEFORE THE
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Docket No. FD 35743

APPLICATION OF THE NATIONAL RAILROAD PASSENGER CORPORATION UNDER
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Verified Statement of Steven R. Peterson, Ph. D.

I. Introduction and Summary of Conclusions

A. Qualifications

1. My name is Steven R. Peterson. I am an Executive Vice President at Compass Lexecon.

Compass Lexecon is an economics consulting firm that specializes in the economics of competition, finance, and regulation, among other areas. I received my A.B. in economics from the University of California, Davis, in 1987 and my Ph.D. in economics from Harvard University in 1992. While at Harvard, my areas of specialization were economic theory and industrial organization. Industrial organization is the study of the interactions of larger firms that can strategically influence their environments. Industrial organization includes the study of firms' costs and the factors that affect costs. I have also served as an adjunct faculty member in the Department of Economics at Northeastern University where I taught courses on the economics of regulation and public policy.

2. During my career, I have consulted on the economics of antitrust and competition, mergers, estimation of damages, valuation, regulation, and public policy. I have extensive experience with the economics of transportation networks. I performed economic analyses of potential mergers and related transactions in the railroad, airline, and pipeline industries, including

Burlington Northern Industries and Santa Fe Pacific Corporation; Delta Air Lines and Northwest Airlines Corp.; TransCanada Corporation and ANR Group; and TransCanada Corporation and Columbia Pipeline Group. A copy of my curriculum vitae is available at <https://www.compasslexecon.com/wp-content/uploads/2018/04/Steven-Peterson-CV-April-2022.pdf>.

B. Assignment and Documents Considered

3. I have been asked by counsel for CN to analyze the economics of CN's proposal for measuring incremental freight train delay costs that result from CN hosting Amtrak trains. In particular, I address whether the proposed freight train delay costs capture the incremental costs resulting from Amtrak's use of CN's network.

C. Summary of Conclusions

4. Economic efficiency is enhanced when firms internalize the costs of the inputs that they use to provide goods or services. Therefore, it is economically efficient for Amtrak to pay CN the full amount of the incremental costs that result from Amtrak's use of CN's network. Incremental costs are the difference between the total cost that CN incurs when Amtrak uses its network and the total cost CN would incur if Amtrak did not use its network. Insofar as Amtrak is required to pay the incremental cost of its network use, Amtrak will be incentivized to use CN's network and demand CN's services only to the extent that Amtrak's benefit from a particular use or service exceeds the incremental cost to CN. In other words, requiring Amtrak to reimburse CN for its incremental costs of hosting Amtrak will serve to align Amtrak's choices (and the choices of policymakers funding Amtrak) with reliable passenger and freight rail service operating on the same network.

5. Unless Amtrak is required to pay CN the full incremental cost of Amtrak's use of CN's network, CN will be compelled to subsidize Amtrak. If CN were not legally required to host Amtrak, it would not be economically rational for CN to agree to do so unless it was compensated at greater than its full incremental costs. Any arm's-length negotiation of the competitive price for hosting Amtrak trains would be higher than the incremental cost of hosting Amtrak trains.
6. Freight train delay costs are incremental costs that CN bears as the result of delays to freight trains on CN's network that would not occur absent Amtrak. *Incremental* freight train delay costs include the wages, fuel costs, and equipment costs included in CN's proposal as well as other costs CN is not currently seeking to recover.
7. CN has developed a methodology for identifying delays to freight trains that are the direct result of Amtrak's use of CN's rail lines ("Amtrak-related delays"). Each of the elements of incremental freight train delay costs included in CN's proposal is a direct consequence of Amtrak's use of CN's freight lines. Moreover, CN's methodology for identifying delays resulting from hosting Amtrak trains is conservative, in part, because it does not capture each and every delay resulting from Amtrak's use of CN's network or the costly effects of delays to other freight trains that may propagate through CN's network. As a consequence, CN's itemized incremental costs understate the incremental costs that CN incurs because of Amtrak.
8. Estimates of incremental costs that are sufficiently conservative will not result in Amtrak overcompensating CN. When incremental costs are clearly present and greater than zero, conservative estimates of them are preferable to ignoring them completely by treating them as zero. As a matter of economics, requiring Amtrak to pay a portion of the incremental costs

it imposes on CN leads Amtrak to internalize the costs its decisions impose on CN and improves overall efficiency relative to ignoring incremental costs that are actually incurred.

9. The following is a partial list of incremental costs that are the direct result of Amtrak-related delays and should be recognized as freight train delay costs that CN should be allowed to recover under an incremental cost standard.

- a. Incremental crew overtime expenditures are one component (among several) of additional labor costs that CN incurs when crew members are delayed on freight trains because of Amtrak trains.
- b. Incremental fuel expenditures reflect additional fuel consumption by freight trains on CN's networks when they are delayed because of Amtrak trains.
- c. Incremental locomotive and railcar costs are equipment costs that CN incurs when its equipment is delayed in transit because of Amtrak trains.

II. The Economic Framework for Analyzing Incremental Freight Train Delay Costs

A. Incremental-Cost Compensation and Economic Efficiency

10. The Board has provided clear guidance with regard to the definition of incremental costs.

“[I]ncremental costs are those costs that CN has actually incurred, and that CN would not have incurred ‘but for’ the presence of Amtrak.”¹ In addition, the Board rejected the contention that “incremental costs are limited to ‘avoidable costs in the short run.’”² Thus, the Board has defined incremental costs as those costs CN incurs as the result of Amtrak’s

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 “STB Interim Decision”), p. 22.

² *Id.*

use of its network, without limitation to the short run. The Board, however, has indicated that it will limit the incremental costs it will recognize by excluding costs that “CN cannot specifically and verifiably quantify.”³

11. The Board’s definition of CN’s incremental costs of providing network access to Amtrak is consistent with the standard economic definition. The economic definition of CN’s incremental costs of providing network access to Amtrak is the difference between CN’s total costs when providing Amtrak with network access in addition to its own freight business and CN’s total costs if it operated only its own freight business. For concreteness, let F and P equal the quantities of freight and passenger service provided by CN and Amtrak on CN’s network, and let $C(F,P)$ be CN’s total cost when both freight and passenger services are provided. If Amtrak were not present on CN’s network, the quantity of passenger service P would be equal to zero, and CN’s total costs would be $C(F,0)$. The incremental cost of Amtrak’s use of CN’s network is equal to $C(F,P) - C(F,0)$.⁴

12. Both the standard economic definition and the Board’s definition of incremental cost imply that incremental cost should be measured relative to CN’s total cost in the “but for” scenario in which Amtrak does not use CN’s network. Economically, this would entail identifying and quantifying delays to CN trains caused by Amtrak against the baseline of freight train schedules and operations that CN would adopt if it did not have to accommodate Amtrak. But in practice, given that CN has hosted Amtrak trains for decades, such “but for” Amtrak-

³ *Id.*

⁴ See, e.g., William J. Baumol, John C. Panzar, and Robert D. Willig, *Contestable Markets and the Theory of Industry Structure*, Harcourt Brace Jovanovich, Inc., 1982, p. 64; Carlton, Dennis and Jeffrey Perloff, *D, Modern Industrial Organization*, 3rd ed., Addison-Wesley, 2000, p. 51.

free schedules and operations do not exist.⁵ Therefore, CN's incremental freight train delay costing methodology starts with the real-world baseline of CN's actual freight train schedules, which recognize Amtrak's presence and reflect CN's efforts to schedule efficiently around Amtrak's passenger trains.⁶ Because those schedules build in time to account for possible meetings between CN and Amtrak trains,⁷ using them as a baseline for identifying delays caused by Amtrak results in a conservative estimate of the actual delays and incremental costs imposed by Amtrak on CN's freight operations.

13. CN's methodology takes a conservative approach that understates the full actual incremental freight train delay costs Amtrak imposes on CN. Requiring Amtrak to pay even a conservative (*i.e.* low) estimate of the incremental costs it imposes on CN would improve economic efficiency. To the extent that Amtrak must pay CN the incremental cost of its use of CN's rail lines, Amtrak will have efficient incentives when setting its schedules, selecting the number of trains it operates per service, and making decisions regarding how and when to use CN's network. For example, if a small and low-cost change to Amtrak's schedule could eliminate significant freight train delay costs for CN, Amtrak will be incentivized to make that change when it must internalize the cost of the freight train delays that it causes.

14. As mentioned above, the Board's interim decision limits the costs that CN can recover from Amtrak to those that are "specific, verifiable, and quantifiable," while at the same time requiring that proof be provided in a "reasonable" manner.⁸ The Board's recognition that

⁵ See VS (PID) Matteucci, Kuxmann, pt. III.

⁶ See, *e.g.*, VS (PID) Matteucci, Kuxmann, pt. III.

⁷ See VS (PID) Matteucci, Kuxmann, pt. III.

⁸ STB Interim Decision, footnote 41 and p. 23.

proofs should be provided in a “reasonable” manner is important. If the Board were to require CN to provide Amtrak idealized proof and quantification of every element of cost arising from over 1,000 specific delay events per month in order to recognize the cost resulting from individual delays, that would result in excluding many plainly nonzero costs and would thereby run the risk of reaching a highly inaccurate estimate of the incremental costs Amtrak’s presence imposes.⁹ It makes no economic sense to exclude a cost, thereby valuing it at \$0, because of uncertainty as to whether it should be precisely quantified at \$200,000 or \$190,000 or somewhere in between. Instead, a sound economic approach when precision is economically infeasible, a “reasonable” mode of quantification is to include that cost but value it conservatively (*e.g.*, in my last example, at \$190,000) if the risk of overcompensation is a major policy concern.

15. That conservative approach, which CN’s methodology implements, will result in less compensation by Amtrak than an approach that aims to calculate the most accurate cost estimate. It will therefore not incentivize as efficient an allocation of resources as an approach that uses the most accurate estimate of incremental costs without a conservative bias. However, such a conservative approach is economically superior to ignoring certain costs and appears to be consistent with the Board’s interim decision.

⁹ The costs of managing such a system tracking incremental costs, which is itself an incremental cost, would also quickly grow to be inefficiently burdensome.

B. Amtrak Paying the Full Incremental Cost for Its Use of CN's Network Is Economically Efficient

1. CN's Proposal Will Improve Economic Efficiency

16. The economics underlying the efficient sharing of CN's network by Amtrak and CN is nothing more than the standard economic problem of negative externalities in which firms do not pay for the inputs they use and, as a result, overuse the underpriced inputs. Requiring Amtrak to recognize when it imposes a cost on CN from its use of CN's network provides Amtrak efficient incentives to choose whether to adjust its use of the network resources it shares with CN in order to reduce those costs.¹⁰ Therefore, CN's proposal to change from not recognizing certain elements of the incremental freight train delay costs of Amtrak's use of CN's rail lines to recognizing those costs will improve Amtrak's incentives regarding its use of CN's network.
17. The reason Amtrak is the party that internalizes costs imposed on CN rather than the opposite follows directly from the definition of incremental cost. Incremental costs are measured relative to the costs that CN would have incurred "but for" the presence of Amtrak."¹¹
18. An efficient agreement should also incentivize CN to make efficient choices and recognize opportunities for the parties to negotiate to their mutual benefit. Generally, these goals must be achieved by separate mechanisms.¹² The broader structure of the CN-Amtrak operating agreement provides a basic mechanism for doing so by providing incentives and penalties for

¹⁰ See, e.g., Pindyck, Robert and Daniel Rubinfeld, *Microeconomics*, 4th ed., Prentice Hall, 1998, pp. 648-650.

¹¹ See STB Interim Decision, p. 22.

¹² An agreement between two parties that calls for a single payment between them generally can only generate efficient behavior for one party. See, e.g., Cooter, Robert and Thomas Ulen, *Law & Economics*, 6th ed., Addison-Wesley, 2012, pp. 331-334.

CN's efforts to assist Amtrak in pursuing Amtrak's on-time performance goals for passenger trains.¹³ (I have not studied, and express no opinion on, the specifics of the incentives and penalties provisions.) However, when Amtrak internalizes some portion of the costs it imposes on CN, there will generally be opportunities for further negotiations to increase efficiency to the benefit of both parties.

2. Incremental Cost Is Less Than the Market Rate for Amtrak's Network Access

19. The incremental cost of Amtrak's access to CN's network is less than the competitive market price for CN's grant of access to Amtrak. In a competitive arm's-length negotiation, a firm like CN would demand its internal estimates of any anticipated costs of accommodating Amtrak, even if they are not specific, verifiable, and quantifiable. Thus, to the extent Amtrak-related delays are likely to lead to further delays elsewhere on CN's network, reduced customer satisfaction, and/or lost freight business, CN would not rationally agree to provide Amtrak access to its network for a rate that did not fully cover such anticipated costs and yield some additional revenue for its efforts.

20. The arm's-length competitive market price for Amtrak's access to CN's network would result in Amtrak sharing with CN some of the net benefits of its access to CN's network and, therefore, exceed the full incremental cost to CN of Amtrak's access. Such a market price would certainly exceed the partial, conservatively quantified subset of CN's incremental costs included in CN's proposal.

¹³ STB Interim Decision, pp. 7-8.

III. Incremental Freight Train Delay Costs that Result from Amtrak's Use of CN's Network

21. There are many categories of incremental costs that result from Amtrak's use of CN's network. As the Board has noted, some are more difficult to quantify than others,¹⁴ but may still be verifiably greater than zero. CN has developed a method that specifically and verifiably quantifies only incremental freight train delay costs caused by Amtrak, as described in detail in the verified statement of Michael Baranowski.¹⁵ Therefore, CN's proposal for the estimation of incremental costs caused by Amtrak's use of CN's network is necessarily conservative.

22. Below, I briefly describe how CN's quantification of incremental freight train delay costs is consistent with the economic principles guiding such a calculation.

A. Identification of Freight Train Delays Resulting from Amtrak's Use of CN's Network

23. The incremental freight train delay costs that CN quantifies result from delays to freight trains that, as part of their work in the ordinary course of business operating CN's network, CN dispatchers have identified as being caused by Amtrak.¹⁶ CN's method for identifying Amtrak-related delays uses CN's SRS system to conservatively identify Amtrak-related delays to freight trains.¹⁷ I understand that using SRS to identify delays is conservative

¹⁴ STB Interim Decision, p. 22.

¹⁵ *See generally* VS (PID) Baranowski.

¹⁶ *See* VS (PID) Baranowski, pt. II; and VS (PID) Summerfield, *et al.*, pt. III.B.

¹⁷ *See* VS (PID) Summerfield *et al.* for a detailed description of the SRS system.

because it does not identify a delay unless the delay exceeds a certain threshold.¹⁸ As a result, CN's methodology ignores the incremental costs resulting from certain short delays to freight trains caused by Amtrak. I further understand that when SRS identifies a delay above a threshold, the system prompts CN dispatchers to add codes and comments regarding the cause of the delay.¹⁹ This process allows specific and verifiable identification of delays to CN freight trains that are caused by Amtrak.²⁰ CN's methodology then uses additional technologies and systems used in the ordinary course of business, which directly measure the period during which freight trains are stationary, to achieve accurate quantification of those delays.²¹

24. CN directly incurs costs as the result of Amtrak-related freight train delays. CN's methodology for quantifying incremental costs focuses on only three categories of incremental costs resulting from Amtrak-related freight delays: crew, fuel, and equipment.

B. Incremental Crew Costs

25. When an Amtrak train delays a CN train, Amtrak forces CN to use its crews' working hours to wait for Amtrak trains to pass, which can increase CN's labor costs. In principle, those incremental costs may include costs of carrying additional crewmembers to perform the work the delayed crewmembers could have performed during their shift had they not been delayed

¹⁸ Specifically, for trains ahead of schedule, generally no delay record is generated if the total delay on a segment relative to schedule is less than 30 minutes. For trains behind schedule, the delay recording thresholds are 10 minutes for core trains, 15 minutes for bulk trains, and 30 minutes for local trains. *See id.*, pt. III.A.

¹⁹ *See id.*, pt. III.A.

²⁰ *See id.*, pt. III.C.; and VS (PID) Matteucci, Kuxmann, pt. III (describing CN's quality control process and "playback" system for reviewing SRS entries).

²¹ *See* VS (PID) Baranowski, pt. II; and VS (PID) Lizotte, pt. I.

(I understand that Amtrak trains may delay CN trains to the extent of over 1,000 crew-member-hours per month, which would equate to several additional employees), and re-crewing costs (costs of transporting and providing overnight accommodation for crewmembers who, because of delays, do not reach their scheduled destination at the end of their shift). However, I understand that CN has chosen not to include claims for those incremental costs at this time. That exclusion represents a very substantial respect in which CN's methodology for determining incremental crew costs is conservative and will result in less than full incremental cost compensation.

26. CN does, however, assert a claim for overtime pay obligations it incurs when specific train crew members are delayed by Amtrak and then accrue overtime at the end of their shift. For example, suppose the crew of a CN train would have worked for nine hours had it not been delayed by Amtrak. I understand that CN train crew members are paid for a minimum of ten hours even if they complete their productive work in less time; and any work performed beyond ten hours is overtime.²² Thus, in the absence of an Amtrak-related delay, CN incurs ten hours of labor costs per crew member for this train. However, suppose that the Amtrak train causes this CN train to be delayed by two hours. This Amtrak delay causes the train crew to work for eleven hours. As a result, CN must pay one hour of overtime to each train crew member. This one hour of overtime for each train crew member is unambiguously an incremental expenditure due to the Amtrak-related delay.

27. I understand that the overtime costs attributed to the Amtrak-related delay are based on the lesser of the amount of time for which CN paid overtime and the length of the delay caused

²² See VS (PID) Matteucci, Kuxmann, pt. III.

by Amtrak.²³ For example, if a crew is subject to a 30-minute Amtrak-related delay and is paid 45 minutes of overtime, only thirty minutes of overtime per crewmember are captured as incremental freight train delay costs. This approach ensures the specificity of CN's calculation of incremental overtime costs caused by Amtrak.

C. Incremental Fuel Costs

28. When an Amtrak train uses CN's tracks and forces a CN train that would have otherwise continued on its route to be stationary (usually on a siding), Amtrak forces CN to use additional fuel, leading to incremental fuel expenditures. Specifically, to make way for the Amtrak train, a CN train must decelerate, idle, and then, after the Amtrak train has passed, accelerate to its operating speed. This process consumes more fuel than would be consumed had the CN train experienced no Amtrak-related delay.
29. The verified statements of Michael Baranowski, Timothy Robinson and Simon Lizotte collectively explain how CN quantifies the resulting incremental fuel costs. In essence, they have two components.
30. First, for every minute that a CN train is stationary due to an Amtrak train, its locomotives consume fuel, since at least some of them must remain switched on in "idle" mode. CN has supported its estimate of fuel consumption per minute in idle mode with specific evidence.²⁴ Multiplying that estimate by the incremental delay minutes CN has quantified as attributable to Amtrak and CN's average cost of locomotive fuel represents a sound approach to quantifying those incremental fuel costs.

²³ See VS (PID) Baranowski, pt. III.A.

²⁴ See VS (PID) Baranowski, pt. III.B; and VS (PID) Lizotte, pt. V.

31. Second, just as an automobile consumes more fuel in stop-start traffic than when cruising at a steady speed, CN's locomotives consume more fuel when an Amtrak train causes them to stop and start than they would have but for the Amtrak train. I understand that CN quantifies that incremental cost using specific data relating to each stop-start event and a train performance calculator ("TPC") model that identifies the incremental cost by comparing the fuel consumption that occurred when the train decelerated before its idle time and reaccelerated after its idle time to the fuel consumption that would have occurred had the train proceeded normally without stopping.²⁵ I further understand that CN's fuel consumption model also includes conservative assumptions that avoid attributing the stop-start event to Amtrak if there are other causes of delay that might have caused it anyway and by limiting the number of locomotives counted as consuming fuel.²⁶

D. Incremental Expense of Cars and Locomotives Delayed by Amtrak

32. When an Amtrak train delays a CN train, the cars and locomotives on that train are idled due to Amtrak. In effect, the idle use of these cars and locomotives is being dictated by Amtrak's operations on CN's network, leading to incremental costs.

33. These incremental costs fall into two categories. The first category is associated with delayed locomotives and cars that CN uses from other railroads in interchange and under run-through power agreements. I understand that while a "foreign" locomotive or car (*i.e.*, a locomotive or car owned by another freight railroad) is on CN's network, CN incurs liability to pay the

²⁵ See VS (PID) Robinson, pt. II; and VS (PID) Baranowski, pt. II.B.

²⁶ See VS (PID) Baranowski, pt. III.B.

other railroad an hourly rate for that locomotive or car.²⁷ Amtrak-related delays slow the return of equipment to other railroads, and thus increase the payment liability, on a basis that can be calculated minute-by-minute.²⁸

34. To estimate the incremental freight train delay costs incurred as the result of Amtrak-related delays of foreign locomotives and rail cars, CN uses the rates that apply to the specific equipment in accordance with terms railroads have negotiated on a bilateral basis for the use of each other's equipment.²⁹ That is plainly a direct incremental cost incurred by CN. Moreover, the actual rates negotiated in arm's-length market transactions are an appropriate measure of the time-value of delayed equipment.
35. Second, CN's locomotives and rail cars are delayed when Amtrak delays the trains they are on. As a matter of economics, CN-owned and foreign-owned equipment are perfect substitutes for each other and are regularly used interchangeably. Thus, there should be no difference in the treatment of CN-owned and foreign-owned equipment. As with foreign locomotives, a sound and reliable way to quantify the value of a lost hour for a delayed asset is by using the hourly rate applicable to that specific asset under the arm's-length agreements negotiated between the railroads. That is the approach that CN's methodology takes,³⁰ and it is a proper component of incremental cost.

²⁷ In some cases, CN may pay the other railroad back in kind with one of CN's own locomotives, but that does not affect the incremental cost analysis. I also understand that in some cases, the arrangement may require CN to pay based on distance traveled as well as hours on CN's network, but the distance traveled component is excluded from CN's incremental cost calculations because the delay caused by Amtrak will not typically significantly affect the distance traveled.

²⁸ See *e.g.*, VS (PID) Baranowski, pt. III.C.

²⁹ See VS (PID) Baranowski, pt. III.C.

³⁰ See VS (PID) Baranowski, pt. III.C.

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 May 27, 2022.



Steven R. Peterson

CERTIFICATE OF SERVICE

I, Kelsey N. Weyhing, hereby certify that on May 28, 2022, the foregoing Post-Interim Decision Opening Submission of Illinois Central Railroad Company and Grand Trunk Western Railroad Company was served upon all parties of records via electronic mail, as indicated below.

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/s/ Kelsey N. Weyhing
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CERTIFICATE OF SERVICE

I, Jeffrey M. Hanson, hereby certify that I have, on November 30, 2022, caused the foregoing revised version of the Post-Interim Decision Opening Submission of Illinois Central Railroad Company and Grand Trunk Western Railroad (initially filed on May 27, 2022) to be served upon all parties of records via electronic mail, as indicated below.

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