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January 19, 2018

Ms. Cynthia T. Brown
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Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

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

Dear Ms. Brown:

Enclosed for filing under seal in the above-referenced proceeding is the Highly Confidential Opening Brief of the National Railroad Passenger Corporation ("Amtrak").

Also enclosed for filing on the public record in this proceeding is a Public version of Amtrak's Opening Brief, which has been redacted in accordance with the applicable protective order.

If you have any questions about this filing, please contact me.

Respectfully submitted,

Edward Fishman
Counsel for National Railroad
Passenger Corporation

cc: David Hirsh, Dentons US LLP

PUBLIC VERSION - REDACTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35743

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

OPENING BRIEF OF NATIONAL RAILROAD PASSENGER CORPORATION

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I. INTRODUCTION

This proceeding was initiated because Amtrak and CN were unable to agree on the terms for renewing their Operating Agreement. The two key issues in dispute both involve compensation. The first involves how much base compensation Amtrak should be required to pay CN for Amtrak's use of CN's facilities, and CN's provision of services to Amtrak, in connection with the operation of Amtrak trains on CN's tracks. The second involves the incentive and penalty system in the Operating Agreement, under which Amtrak compensates CN (or CN incurs a penalty) based on the quality of service that CN provides in handling Amtrak's trains. With respect to both issues, CN's proposal is, in essence, that Amtrak should pay CN more – orders of magnitude more – than Amtrak currently pays to operate its trains over CN's tracks.

Amtrak has not proposed any change to the base compensation paid under the current contract, while CN's proposal would require Amtrak pay over \$3 million more per year in base compensation, plus an estimated \$377 million to \$534 million in order to fund capacity improvements on CN's tracks, in order to compensate CN for what it calls the "practicably

quantifiable” and “practicably unquantifiable” costs of “delay and interference” to CN’s freight trains. CN’s proposed additional base compensation does not consist of the kinds of costs that Amtrak has always paid as “incremental costs” under the Operating Agreement, such as the additional maintenance of way costs incurred by CN as a result of Amtrak’s use of its tracks. Rather, CN is seeking to create an entirely new theory for what constitutes “incremental” costs, founded on CN’s belief that the base compensation scheme mandated by Congress is not sufficiently “economically efficient.” As Amtrak will discuss, CN’s proposal goes far beyond the “incremental costs” authorized by statute but instead seeks to charge Amtrak the equivalent of market pricing for access to CN’s tracks – a concept which Congress expressly rejected. For CN, it is as if the “public bargain” by which Amtrak was created in order to relieve the railroads of their money-losing passenger operations and to preserve and improve intercity passenger rail service, and all that flows from that bargain – Amtrak’s statutory access rights for incremental cost, preference rights, and public policy goals to promote fast and efficient Amtrak service – never existed.

With respect to the incentive/penalty provisions, Amtrak’s proposal was developed because the current system has not, on the one hand, incentivized CN to improve on-time performance, but has, on the other hand, rewarded CN and its shareholders with substantial incentive payments for poor performance. For example, in fiscal year 2016, CN was Amtrak’s worst-performing host railroad but was paid [REDACTED] incentives. Far from incentivizing CN to improve that performance, in the first two quarters of fiscal year 2017 CN’s performance got even worse. CN claims that the current incentive/penalty system “works” because the method of calculating incentives and penalties results in high incentive payments. But that is just the problem – the current incentive system does not align CN’s incentive payments (and

penalties) with the actual impact of CN's performance on Amtrak's passengers. Amtrak's proposal redesigns the incentive/penalty system, to create a better alignment between performance and payment, with the intention of motivating CN to provide better service to Amtrak trains.

CN's incentive/penalty proposal takes the most flawed features of the current system and makes them even worse. In essence, CN proposes mechanisms that would relieve CN from responsibility for even more of the delays that CN causes to Amtrak trains, by padding the target arrival times even more than they already are, and by excusing more CN-caused delays even when they occur against the more lenient benchmarks of the existing system. CN also asks the Board to order significantly lengthened public schedules for one of the Amtrak services which operates over CN – making CN's performance look better while providing diminished service to Amtrak passengers – and to mandate binding schedule reviews so that more schedules can be lengthened in the future.

Congress created Amtrak and the Amtrak-host relationship through what has been referred to as the “public bargain,” with specific public policy goals and objectives in mind. It relieved host railroads of their legal obligation to operate intercity passenger rail service, in return for granting Amtrak access to host railroad facilities and services, for which Amtrak pays incremental costs. The public policy goals Congress expected to be achieved as part of that bargain included efficient and effective intercity passenger rail service, with Amtrak trains operated, to the maximum extent feasible, to all station stops within 15 minutes of the time set forth in published schedules. Amtrak makes the base compensation and quality of service payments contemplated by the bargain to CN, and is proposing terms that would incentivize CN to provide an acceptable level of performance in return.

* * *

In this brief, Amtrak will first present a statutory overview of the regulatory framework and public policy goals that govern both the base compensation and incentive/penalty issues in this matter. In the next section, Amtrak will examine the incentive/penalty provisions in the current Operating Agreement, and show how Amtrak's proposal solves, and CN's proposal exacerbates, the flaws that keep the existing provisions from correlating the actual impact of CN's performance on Amtrak's passengers with incentive payments and penalties. Third, Amtrak will show why CN's proposal to vastly expand its base compensation to include so-called "delay and interference costs" and payments for new infrastructure is contrary to the statute, in conflict with the explicit public policy goals and missions laid out by Congress, and unreasonable. Finally, Amtrak will address the other elements of the proposed terms and compensation submitted by each party.

II. THE STATUTORY FRAMEWORK AND THE "PUBLIC BARGAIN"

A. The Governing Statute – 49 U.S.C. § 24308(a)

This proceeding is governed by 49 U.S.C. § 24308(a). With respect to the matters at issue here, that section provides:

§ 24308. Use of facilities and providing services to Amtrak

(a) General authority.

(1) Amtrak may make an agreement with a rail carrier ... to use the facilities of, and have services provided by, the carrier ... under terms on which the parties agree. The terms shall include a penalty for untimely performance.

(2) (A) If the parties cannot agree and if the [Board] finds it necessary to carry out this part [49 U.S.C. §§ 24101 *et seq.*], the Board shall –

(i) order that the facilities be made available and the services provided to Amtrak; and

(ii) prescribe reasonable terms and compensation for using the facilities and providing the services.

(B) When prescribing reasonable compensation under subparagraph (A) of this paragraph, the Board shall consider quality of service as a major factor when determining whether, and the extent to which, the amount of compensation shall be greater than the incremental costs of using the facilities and providing the services.

Thus, whereas here the parties fail to reach agreement and the Board is called upon under § 24308(a)(2)(A), the following principles apply:

- CN must make its facilities available, and provide services, to Amtrak.
- The terms and compensation prescribed by the Board must be for Amtrak's use of those facilities and CN's provision of services to Amtrak.
- The overall terms and compensation prescribed by the Board for Amtrak's use of those facilities and services must be "reasonable."
- The basis for payment is "incremental cost."
- Incremental cost is awarded only in connection with Amtrak's use of the facilities and services provided by CN.
- There is no requirement that any payments above incremental cost be awarded, but to the extent the Board determines that it is "reasonable" to do so, "quality of service" must be a major factor in whether to order such payments and the amount of such payments.
- The Board's award must be consistent with its mission to "carry out" the precepts of 49 U.S.C. §§ 24101 *et seq.*, which include certain Congressional findings, missions and goals such as Amtrak's statutory mission:
 - o To "provide efficient and effective intercity passenger rail mobility consisting of high quality service that is trip-time competitive with other intercity travel options" (§ 24101(b));
 - o To "improve its contracts with operating rail carriers" (§ 24101(c)(1)(D));
 - o To "operate Amtrak trains, to the maximum extent feasible, to all station stops within 15 minutes of the time established in public timetables" (§24101(c)(4)); and
 - o To "encourage rail carriers to assist in improving intercity rail passenger transportation" (§ 24101(c)(7)).

B. The “Public Bargain” That Gave Rise To The Amtrak-CN Relationship Provides Additional Context for Determining “Reasonable” Terms and Compensation

Within the clear parameters laid out in Section 24308(a) and cited above, the Board retains discretion to determine what constitutes “reasonable” terms and compensation for Amtrak’s use of CN’s facilities and services. For example, while the statute makes it clear that base compensation cannot exceed the incremental cost to CN of Amtrak’s use of CN’s facilities and CN’s provision of services to Amtrak, discretion is granted to the Board to determine “whether, and to what extent,” amounts above incremental cost may be awarded after considering the “quality of service” provided by CN as a “major factor.” In applying its discretion, the Board should consider not only the statutory goals and missions cited above, but also the historical context in which the Amtrak-CN relationship was created, and the ends and purposes Congress intended to be served. That is, the Amtrak-CN relationship is not an arms-length market relationship – and concepts like “incremental cost” cannot be judged as though it were – but is instead a relationship created by Congress, and governed by clear statutory boundaries, to serve very particular public purposes.

1. Congress Created Amtrak to Preserve and Upgrade Intercity Passenger Rail Service While Saving Freight Railroads From Deteriorating Financial Results

In 1970, Congress enacted the Rail Passenger Service Act of 1970 (“RPSA”), which created Amtrak, in order to prevent the complete abandonment of intercity passenger rail service in the United States.¹ The legislative history of the RPSA illustrates the precipitous decline in the number of intercity passenger trains operated the railroads, and the degraded quality of

¹ The RPSA enabled the railroads to relinquish their intercity passenger service obligations and transfer those obligations to Amtrak in order to “avert the threatened extinction of passenger trains in the United States.” *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 383 (1995).

service and performance, leading up to the creation of Amtrak.² When it became clear that railroads were moving toward discontinuing all intercity passenger rail service, Congress acted, finding “that railroad passenger service is an essential mode of transportation, that the passenger train is in imminent danger of disappearing, and, therefore, that the Federal Government must take immediate action to preserve and upgrade passenger travel by railroad.”³

In enacting the RPSA, Congress hoped that relieving railroads of the obligation to operate passenger service would give these railroads a chance to recover from their deteriorating financial circumstances.⁴ Thus, the railroads were offered the option of relinquishing their ongoing passenger rail service obligations if they decided to “join” Amtrak.⁵

2. The Nature of The Public Bargain

Railroads would not be permitted to slough off the ongoing responsibilities and costs of operating passenger service without something in return. Rather, Congress imposed obligations

² In 1929, approximately 20,000 passenger trains operated in the United States. Upon the enactment of the RPSA in 1970, only 500 intercity passenger trains offered service to the public and over 100 of those trains were subject to a pending discontinuance proceeding before the Interstate Commerce Commission (“ICC”). H.R. REP. NO. 91-1580, at 4736-37 (1970). The legislative history of the RPSA also reflects the view of Congress that the railroads had intentionally downgraded passenger rail service in order to discourage patronage. For example, Senator Church entered into the Congressional record a newspaper editorial which concluded that “the railroads have done such a good job of discouraging passengers that no one wants to ride the trains anyway.” 116 Cong. Rec. S14166-67 (daily ed. May 5, 1970)(statement of Sen. Church). *See also* S. REP. NO. 91-795, at 226-227 (1970) (“the railroad industry is apparently unwilling or unable to spend the necessary funds to provide the kind of service that would be competitive with other modes.”)

³ S. REP. NO. 91-795, at 224 (1970).

⁴ Senator Prouty concluded that “[a]s fewer and fewer people were able to ride the trains..., railroads found themselves losing more and more money.” 116 CONG REC. 14173 (1970)(Statement of Sen. Winston Prouty).

⁵ The RPSA gave the railroads the option of joining Amtrak in order to relinquish their intercity passenger rail obligations. H.R. REP. NO. 91-1580, at 4739-40 (1970). Participating railroads that elected to join Amtrak were required to make a financial contribution and Amtrak had the choice to receive payment from the railroads in the form of cash, equipment, or future service. In exchange for joining Amtrak, the railroads received the right to discontinue passenger rail operations. *Id.* CN’s predecessor railroads (the Illinois Central and the Grand Trunk Western) both elected to participate in the formation of Amtrak.

on the railroads in the RPSA, both immediate and ongoing. As the ICC noted, the transfer of passenger service obligations to, and the responsibilities imposed on, the railroads as embodied in the RPSA represented a “public bargain that was struck with the nation’s freight railroads, whereby the freight railroads were relieved of any duty to provide passenger service in exchange for making their tracks available to Amtrak at incremental costs.”⁶

The RPSA itself gives further guidance as to the nature of this “public bargain.” It includes a Congressional Findings and Declaration of Purpose section which provides:

A modern, efficient, intercity railroad passenger service is a necessary part of a balanced transportation system; that the public convenience and necessity require the continuance and improvement of such service to provide fast and comfortable transportation between crowded urban areas and in other areas of the country; that rail passenger service can help to end the congestion on our highways and the overcrowding of airways and airports; that the traveler in America should to the maximum extent feasible have freedom to choose the mode of travel most convenient to his needs.⁷

In support of the stated intent of ensuring “fast and comfortable” passenger transportation, Congress also enacted a number of missions and goals. In acknowledgement of the fact that passenger service would continue to run over freight railroad tracks operated and maintained by profit-motivated freight railroads – which might not, if left to their own devices, find Congress’s intent and purposes to be congruent with their own – many of those missions and goals required the participation and cooperation of the freight railroads.

Some examples of freight railroad participation are explicit; for example, “encourag[ing] rail carriers to assist in improving intercity rail passenger transportation,” (§ 24101(c)(7)) and “improving its contracts with operating rail carriers” (§ 24101(c)(1)(D)). Others simply cannot

⁶ Interstate Commerce Commission, Study of Interstate Commerce Commission Regulatory Responsibilities, Oct. 25, 1994, p. 62.

⁷ Rail Passenger Service Act Pub. L. No. 91-518, Section 101, 84 Stat. 1328 (1970). The nature of “incremental costs” under the law and as applicable in this matter is discussed more fully in Section IV.D below.

be accomplished without the participation of the host railroad, particularly the goal of “operat[ing] Amtrak trains, to the maximum extent feasible, to all station stops within 15 minutes of the time established in public timetables,” (§24101(c)(4)), as it is largely within the host railroad’s power – by virtue of its complete control over its infrastructure, operations, and dispatching – to make or prevent this goal from being accomplished.

Finally, the public bargain included a requirement by the freight railroads to continue to provide intercity passenger trains with preference over freight traffic in using any line, junction or crossing. Congress had been assured by the railroads that they would continue to provide to Amtrak passenger service the “priority” they had traditionally provided to passenger service they had operated themselves.⁸ But that assurance turned out to be hollow. Almost immediately after passage of the RPSA, the freight railroads began to prioritize freight over passengers, with the average on-time performance of long distance passenger trains plummeting from over 70% in 1972 to 35% in 1973.⁹ In response, Congress enacted what is now 49 U.S.C. § 24308(c) (formerly 45 U.S.C. § 563(e)), **requiring** freight railroads to do what they had earlier promised to do: provide preference to passenger service over freight traffic in using any line, crossing or junction. As was recognized at the time, granting preference to passenger trains was designed to be a “positive step toward the improvement of the passenger rail system that serves the vital

⁸ President John Reed of the Atchison, Topeka and Santa Fe Railway Company testified: “[Santa Fe] traditionally has given passenger train operations preference over freight service and would continue to afford Amtrak trains such priority.” He further stated that “regularly scheduled passenger trains shall continue to be designated as first-class trains and shall continue, except in cases of emergencies or exigencies beyond the reasonable control of the dispatcher, to be afforded preferential dispatch and handling over other classes of train operations.” *Review and Refunding of Rail Passenger Service Act: Before the Subcomm on Transp. and Aeronautics of the H. Comm. on Interstate and Foreign Commerce*, 92nd Cong. 1, H.R. Rep. 92-54, pt. 2 at 670 (Dec. 7, 1971). See also Statement of Roger Lewis (then President of Amtrak): “I have assumed that the railroads in operating would follow a railroad tradition which was to give the passenger trains preference.” *Id.* at 651, 692 (Dec. 7, 1971).

⁹ Hearings on H.R. 8351 before the Subcomm. On Transp. And Aeronautics of the House Comm. On Interstate and Foreign Commerce, 93rd Cong., 1st Sess., at 29-32 (June 12, 1973).

transportation needs of our Nation’s citizens” and to “help Amtrak solve many of the problems that have plagued it during its first 3 years *without increasing the Federal expenditure that is required.*”¹⁰

III. AMTRAK’S PROPOSED DELAY-BASED SYSTEM IS A REASONABLY DESIGNED SYSTEM THAT WILL PROVIDE CN WITH THE MOTIVATION NECESSARY TO PROVIDE BETTER SERVICE FOR AMTRAK’S PASSENGERS AND IS CONSISTENT WITH THE STATUTORY FRAMEWORK

The current incentive and penalty system has failed in its one and only purpose: to incentivize CN to minimize delays to Amtrak trains.¹¹ CN’s high levels of Host Responsible Delays (“HRD”)¹² – consistently the highest of all Class I railroads hosting Amtrak trains – have resulted in extremely poor performance for Amtrak’s passengers.¹³ However, since the current system enables CN to either mask or excuse away so many delays that it causes, CN is able to reap substantial incentive payments even when Amtrak passengers are experiencing long and chronic delays on CN routes.¹⁴ For example, in FY 2015 all-stations on-time performance on the *City of New Orleans* service, which runs almost exclusively over CN, was a dismal 53.5%.¹⁵ This means that almost half of the time, *City of New Orleans* trains arrived 15 or more minutes later than scheduled arrival time at stations along the route – equating to an average of more than

¹⁰ Statement of Congressman Harvey, Congressional Record – House, Conference Report on S. 2016 Amtrak Improvement Act of 1973, October 17, 1973 at 34480 (emphasis added).

¹¹ Vilter VS, 2-3. We refer herein to verified statements that were submitted into the record by the name of the sponsoring witnesses along with the following abbreviations: “VS” for Verified Statement, “RVS” for Rebuttal Verified Statement, and “SVS” for Surrebuttal Verified Statement.

¹² All delays to Amtrak trains are measured in minutes and assigned a cause, which can either be a Host Responsible Delay (“HRD”), Amtrak Delay or Third Party Delay. Vilter VS, 2. There are seven categories of HRD which are relevant to this proceeding, [REDACTED]

¹³ Vilter VS, 7; Vilter/Maga RVS, Exh. 2.

¹⁴ Vilter VS, 4; Vilter/Maga RVS, Exh. 2.

¹⁵ Vilter/Maga RVS, Exh.2.

100 minutes of delay to each *City of New Orleans* train caused by CN. Yet under the current incentive system, each of those trains earned CN on average more [REDACTED]

[REDACTED]

This incongruity between performance and payment is not an isolated result. **Table 1** below, covering the last three years, illustrates the lack of congruence between (1) the actual on-time performance results experienced by Amtrak passengers, as measured by both minutes of CN delay (“CN HRD”) and arrival time at all stations on a route against the published schedule (“All Stations OTP” or “ASOTP”)¹⁷, (2) the “performance” as calculated according to the current contract on-time performance (“KOTP”)¹⁸ incentive/penalty system, and (3) the amount of incentive payments made by Amtrak to CN.

¹⁶ Vilter VS, 4; Vilter/Maga RVS, Exh. 2.

¹⁷ All-Stations On-Time Performance or “ASOTP” calculates the percentage of station arrivals (or departures, in the case of the origin station) for an Amtrak train that occurs within 15 minutes of the time established in public timetables. Vilter VS, 1.

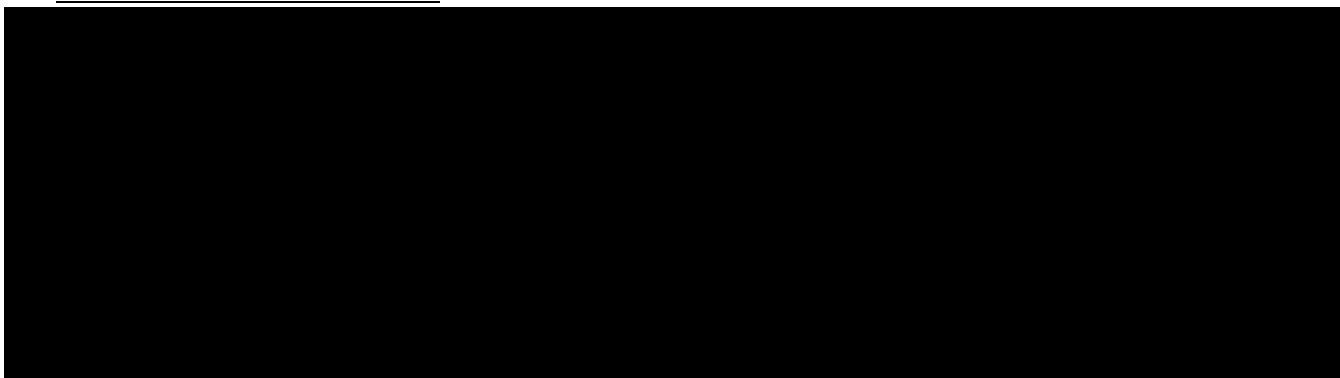
¹⁸ The term “KOTP” is used herein to refer to the system of checkpoints, benchmarks, recovery time, relief items, and other aspects used for determining incentives and penalties in the current Operating Agreement between Amtrak and CN, which is described further in Section III.B below.

Table 1¹⁹

Fiscal Year 2015			
Service	CN HRDs per 10K TM	All Stations OTP	
<i>City of New Orleans</i>	1183	53.5%	
<i>Illini/Saluki</i>	1738	33.9%	
<i>Lincoln Service</i>	1769	63.3%	
<i>Texas Eagle</i>	2359	27.3%	
Total:			

Fiscal Year 2016			
Service	CN HRDs per 10K TM	All Stations OTP	
<i>City of New Orleans</i>	1028	62.6%	
<i>Illini/Saluki</i>	1669	38.2%	
<i>Lincoln Service</i>	1292	72.5%	
<i>Texas Eagle</i>	1817	41.4%	
Total:			

Fiscal Year 2017 through May 2017			
Service	CN HRDs per 10K TM	All Stations OTP	
<i>City of New Orleans</i>	1466	45.3%	
<i>Illini/Saluki</i>	1919	34.0%	
<i>Lincoln Service</i>	1081	77.7%	
<i>Texas Eagle</i>	1600	53.5%	
Total:			



Any system that measures “performance” at [REDACTED] for the purpose of earning incentive payments – when the train and its passengers actually arrived within 15 minutes of scheduled arrival time at each station a woeful 53.5% of the time – is a broken system.²¹ There is no valid reason why that system, which has cost Amtrak so much and gained Amtrak passengers so little, should continue into the future. Amtrak has proposed a delay-based incentive system that corrects the flaws in the current system, resulting in a closer and more direct correlation between the impact of CN’s performance on Amtrak’s passengers, and the incentives earned (or penalties paid) by CN. Amtrak’s proposed system is reasonable, aligned with the statutory mandate that any compensation above incremental cost depend on “quality of service,” includes an effective penalty system, and furthers the public policy goals of promoting “fast and efficient” Amtrak service that is “trip-time competitive with other intercity travel options,” as required by the RPSA. In contrast, CN’s proposal maintains all the worst aspects of the current system and exacerbates them, widening the existing gap between the actual CN performance that Amtrak passengers experience, and “performance” as it is calculated under the contract for purposes of incentive payments and penalties.

A. The Governing Statute Requires That Any Quality Payment and Penalty System Prescribed By The Board Must Be Reasonable and Based Upon The Host Railroad’s Quality of Service In Handling Amtrak’s Trains

When prescribing “reasonable terms and compensation” for CN’s provision of facilities and services to Amtrak, the “Board shall consider quality of service as a major factor when determining *whether, and the extent to which*, the amount of compensation shall be greater than the incremental costs of using the facilities and providing the services.” 49 U.S.C.

²¹ These figures reflect the corresponding KOTP and ASOTP for the *City of New Orleans* service in FY 2015. The column in **Table 1** showing CN HRDs per 10,000 train miles illustrates that CN was responsible for the vast majority of total delays for this service, which runs almost exclusively over CN.

§ 24308(a)(2)(B). Thus, the “quality of service” must be a “major factor” considered by the Board in its determination of both **whether** any compensation above incremental cost should be awarded, and **the extent to which** any such compensation should be awarded.

The plain language of Section 24308(a)(2)(B) is confirmed by the legislative history of the Amtrak Improvement Act of 1973 (“AIA”), which enacted the language quoted above, in which “quality of service” was equated with “on-time performance.”²² Similarly, in cases decided after enactment of the AIA where the ICC and the STB have discussed or awarded compensation above incremental costs, they have pegged those “quality of service” payments to improved on-time performance,²³ providing host railroads with the opportunity to earn compensation above incremental costs through incentive payments for meeting specified levels of on-time performance in handling Amtrak trains.²⁴

²² The conference committee report to the AIA states that the committee “expects the Commission, in resolving a compensation dispute between Amtrak and a railroad, to establish incentives both for performance and cost reductions.” However, the committee made it clear that improved performance would be the overall basis for incentives and incentives for cost reductions were only to be available when costs could be reduced without impairing performance. H.R. REP. NO. 93-587, at 16 (1973) (“The costs of achieving improved performance shall not be excessive; and if costs can be reduced without impairing performance, incentives for achieving such reductions should be provided.”). In explaining the concerns within Congress about the poor on-time performance provided by the host railroads since the creation of Amtrak, Congressman Harvey explained that “[a]nother basic question which has caused considerable concern and debate here in Congress and within the industry deals with the quality of service which Amtrak has been receiving from the railroads.” He further stated that “[o]n-time performance and smoothness of the ride depend on the railroads.” 119 CONG. REC. 28746 (daily ed. Sept. 6, 1973).

²³ Unless otherwise specified using more specific terms such as All Stations On-Time Performance (“ASOTP”), any reference herein to the term “on-time performance” is meant to refer to the actual delivery of an Amtrak train to each station in accordance with the published timetable for the relevant service, and is not intended to refer to the manner in which the existing Operating Agreement calculates CN benchmarks for purposes of the contract or “KOTP” incentive/penalty system.

²⁴ See e.g., *Nat’l R.R. Passenger Corp. and Union Pac. R.R. Co., Use of Tracks and Facilities and Establishment of Just Compensation*, 348 I.C.C. 926, 950 (Apr. 14, 1977) (“In order to determine compensation in excess of incremental costs for the provision of services, it is first necessary to adopt an objective standard of performance. We believe that on-time performance is the only practical means of setting such a standard.”).

Whereas the governing statute makes “quality of service” payments discretionary when the Board is called upon to determine compensation, it explicitly *requires* that negotiated Amtrak-host railroad operating agreements include a “penalty for untimely performance.”²⁵ While not explicitly mandated by the statute as part of a “quality of service” system ordered by the Board, in the only two Section 24308(a)(2) proceedings since the 1981 amendment where the ICC/STB discussed the penalty provision of the statute, the agency has prescribed penalty payments for untimely performance as part of an incentive/penalty system.²⁶

Finally, there is the overarching requirement that any incentive/penalty system adopted by the Board be “reasonable.” As discussed more fully below, a “quality of service” provision is reasonable when it is a rationally designed to achieve the purpose of incentivizing and rewarding better performance by host railroads; disincentivizing poor performance; and ensuring that incentive payments are aligned to, and reflective of, the actual quality of service provided by the host railroad.

B. Amtrak’s Proposal Corrects The Flaws In the Current System

In simple terms, the current KOTP system works as follows: CN’s performance is measured at checkpoints along a route. Each month, CN is paid an incentive payment for every checkpoint where 80% or more arrivals were “within tolerance,” and is assessed a penalty for every checkpoint where 70% or fewer arrivals were “within tolerance.” A train is “within tolerance” at a checkpoint if the total travel time between its origin on CN, and its arrival at the

²⁵ 49 USC § 24308(a)(1). Congress added this clause provision in 1981, in response to ongoing concerns about poor performance by host railroads that handle Amtrak trains over their networks. *Omnibus Budget Reconciliation Act of 1981* P.L. 97-35, § 1181, 95 Stat. 693 (1981).

²⁶ *Application Of The Nat’l R.R. Passenger Corp. Under 49 U.S.C. 24309(A) – Springfield Terminal R.Y. Co., Boston And Maine Corp., And Portland Terminal Co. (“Guilford”)*, 3 S.T.B. 157, 1998 WL 1799020 at *6 (May 29, 1998); *Metro. Transp. Auth. v. ICC*, 792 F.2d 287, 291 (2d Cir. 1986); see Willig VS, 7 (“The statute requires any scheme of compensation to include penalties”).

checkpoint, is less than a threshold number of minutes specified in the agreement for the checkpoint segment, which is composed of various items including an arrival time defined in the agreement; plus a basic checkpoint tolerance [REDACTED] minutes as specified in the agreement;²⁷ plus “relief” allowances based on the number of minutes the train is late arriving to CN and other circumstances; plus dwell time; plus additional minutes of recovery and miscellaneous time that are added for other possible delays, all of which collectively “pad” the threshold number of minutes that qualify an Amtrak train as arriving “within tolerance” for purposes of the incentive/penalty system.²⁸ The number of trips of a train “within tolerance” is divided by the number of total trips that Amtrak train operated in that month, expressed as a percentage.²⁹ Percentages above 80% earn incentives, and percentages below 70% incur penalties.³⁰ The “lookback” provision, however, allows CN to erase any obligation to pay the penalties incurred to the extent such penalties on any given service exceed incentives paid to CN on that service over the prior 12 months.³¹

²⁸ Sacks VS, 12-13; Vilter VS, 5.

²⁹ There also are provisions in the existing Operating Agreement for Amtrak trains that Do Not Count in the denominator of this calculation for various reasons.

³⁰ Vilter VS, 5. The current KOTP system described above applies to Amtrak trains in the *City of New Orleans*, *Illini/Saluki*, *Lincoln* and *Texas Eagle* services that operate over CN’s Illinois Central (“IC”) lines. Amtrak trains in the *Wolverine* and *Blue Water* services that operate over CN’s Grand Trunk Western (“GTW”) lines are subject to a different incentive/penalty system [REDACTED]. Under Amtrak’s proposal, all of the Amtrak services referenced above would be subject to the delay-based system.

³¹ Vilter VS, 2 (“no matter how poorly CN performs, the worst it can do is lose its incentive payments. During periods of sustained poor performance, no incentives are paid and thus no penalties are charged, **just when assessing penalties would make the most logical sense**”)(emphasis added); see Vilter VS, 10 n. 19.

CN argues that the KOTP system “works” because CN has been paid substantial incentives.³² As is evident from the performance figures in **Table 1**, this is a system that “works” for CN and its shareholders but not for Amtrak or its passengers. With limited exceptions, ASOTP has been poor across all of the Amtrak services operating on CN³³ and CN has been the worst-performing Class I railroad for several years.³⁴ In fact, the level of Freight Train Interference (“FTI”) caused by CN on the *City of New Orleans* service is now at its highest level of delay in nearly 10 years, and Amtrak trains experience roughly 4 times more HRD on CN than on Canadian Pacific, the best-performing host railroad.³⁵ CN’s actual performance demonstrates that the KOTP system needs to be replaced because it does not adequately motivate CN to provide quality service to Amtrak and its passengers and unjustly rewards CN for poor quality service.

CN is able to obtain high incentive payments for poor performance because the existing KOTP system contains numerous mechanisms that unjustly excuse CN from responsibility for causing delays to Amtrak trains.³⁶ Some of these flaws are obvious; others less so. They include:

³² Ladue/Kuxmann VS, 27; *see also* Ladue/Kuxmann VS, 9 (“strong host performance”), 27-E (“CN’s strong performance under the terms of the Existing Operating Agreement”), 34-E (“CN’s performance as a host has been strong”), 44-E (“CN’s excellent KOTP”), 48-E (“CN’s superior performance”); Ladue/Kuxmann RVS, 1 (“CN’s history of strong performance”). The “E” designation is used to signify a page that was the subject of an errata submission.

³³ Maga/Vilter RVS, Ex. 2.

³⁴ *See, e.g.*, Host Railroad Reports attached as Exhibit 3 to the Maga SVS.

³⁵ *Id.*

³⁶ Vilter VS, 4-12.

1. Performance for incentive purposes is measured at certain designated checkpoints only, rather than at all stations along a route. For three of the four relevant Amtrak services,³⁷ the only checkpoint is the endpoint on the CN segment, while on the longer *City of New Orleans* train there is one checkpoint in addition to the endpoint.³⁸ Nineteen Amtrak stations located on CN are not checkpoints under the KOTP system. However, as reflected in **Table 2** below, the vast majority of passengers ride to and/or from intermediate stations, not just endpoint to endpoint:

Table 2³⁹

Service	Percentage of Passengers Traveling Endpoint to Endpoint	Percentage of Passengers Traveling To or From Intermediate Stations
<i>Blue Water</i>	8.4%	91.6%
<i>City of New Orleans</i>	7.9%	92.1%
<i>Illini/Saluki</i>	17.8%	82.2%
<i>Lincoln</i>	25.5%	74.5%
<i>Texas Eagle</i>	4.5%	95.5%
<i>Wolverine</i>	2.6%	97.6%

The current system thus ignores the quality of service experienced by the vast majority of passengers travelling on CN's lines. Amtrak's evidentiary submissions include numerous examples of Amtrak trains where most passengers arrived very late to their destinations due primarily to delays caused by CN, but those trains were considered "within tolerance" under the

³⁷ The current KOTP system applies only to the following Amtrak services: the *City of New Orleans*, *Illini/Saluki*, *Lincoln* and *Texas Eagle*.

³⁸ Vilter VS, 6; Vilter/Maga RVS 39, n.100.

³⁹ Vilter/Maga RVS, 39.

agreement for incentive purposes.⁴⁰ Simply put, CN has no incentive under the current system to minimize – and has not minimized – delays to the tens of thousands of Amtrak passengers that are boarding or detraining at these non-checkpoint stations.

2. An Amtrak train is counted as “on-time” if its arrival at a checkpoint is less than a threshold number of minutes, which, as discussed above, includes so much padding with extra time that there is only a tenuous correlation between contract arrival targets and the actual arrival time of the trains as reflected in public schedules.⁴¹

3. The current system does not take into account *how late* trains are – it only rewards or penalizes CN based on how often trains are late. When an Amtrak train is going to miss a checkpoint arrival time on CN for purposes of the incentive system, CN has no financial motivation under the KOTP system to avoid further delays to that train.⁴² In one three-year period, a full 10% of trains on the *City of New Orleans* route experienced 160 minutes (*i.e.*, more than 2.5 hours) of delay.⁴³ This penalizes Amtrak customers, for whom “quality of service” includes not only how often trains are late, but how late they are.⁴⁴

4. The current KOTP system skews results when an Amtrak train runs on multiple hosts. For example, if a train arrives late to the CN segment from another host, KOTP gives CN “relief” for those minutes; that is, it adds those minutes to the target arrival time at subsequent checkpoints to determine if a train is “on time.” A target of 80% KOTP permits each host on a route to make 20% of trains late without penalty. For a two-host route, this means that a full

⁴⁰ Vilter VS, 6-7, Attachment 4.

⁴¹ See **Table 1** above.

⁴² Sacks RVS, 1-2 (KOTP does not account for the extent to which trains are late, and therefore CN has “little or no incentive to minimize delays on trains that will be late.”)

⁴³ Sacks RVS, 2-3, Figure 1.

⁴⁴ Sacks RVS, 2; *see also* Vilter VS, 8-9 and Attachment 5, giving examples of trains with such high HRDs that CN had no financial incentive to avoid further delays.

40% of all Amtrak trains could be late to their stations, without any consequence to their incentive payments.⁴⁵

5. The current system rewards CN for matters beyond its control, by allowing CN to absorb additional minutes of delay before a train is counted as “late” for incentive purposes if Amtrak or other third parties have caused fewer minutes of delay. There is no limit on the proportion of recovery time in the schedule that CN can absorb for the delays that it causes to Amtrak trains. If Amtrak exceeds its share of the pad, CN is granted additional “relief” minutes to the same extent; but if Amtrak does not delay the train for the full number of minutes available to it, CN can delay the train by that “unused” number of additional minutes. This results in inflated CN performance and compensation.⁴⁶

6. Although the KOTP system nominally includes a “penalty” provision, it is largely illusory. CN can cause up to 30 percent of Amtrak trains in a particular service to miss its target arrival time on a monthly basis – even under the lenient recovery/checkpoint tolerance/relief regime – before CN would incur any penalty under the KOTP system.⁴⁷ Even this penalty provision is artificial, however, because the “lookback” provision allows CN to erase any obligation it may have incurred to pay penalties to the extent that such penalties exceed incentive payments paid to CN on that particular service over the prior 12 months under the lenient KOTP incentive calculations.⁴⁸ When Amtrak experiences an extended period of poor service from CN,

⁴⁵ See the discussion in Sacks RVS, 3-6.

⁴⁶ This aspect of the current KOTP system is described in detail in the Sacks RVS, 6-10.

⁴⁷ This results from CN’s ability to avoid penalties unless and until its monthly performance as measured under the KOTP system falls below 70%.

⁴⁸ Vilter VS, 10 n. 19. Thus, the lookback provision guarantees that CN does not have to pay penalties in excess of the incentives it has obtained under the KOTP system no matter how bad the quality of service provided by CN becomes. Conversely, Amtrak must pay incentives to CN **even if** up to 20 percent of the

the lookback provision makes the penalty provision meaningless.⁴⁹ No matter how poorly CN performs, the most severe consequence is that CN earns a net incentive of zero, meaning there is no actual penalty for “untimely performance.”⁵⁰

C. Amtrak’s Quality Payment and Penalty Proposal Meets The Requirements of The Governing Statute And Is Designed To Motivate CN To Reduce Delays to Amtrak Passengers

Amtrak’s proposed delay-based incentive/penalty system is designed to minimize CN HRD minutes on Amtrak trains and thereby improve the on-time performance of Amtrak trains on CN. To do so, it includes three essential elements:

- A “threshold” number of HRD minutes for each CN route for each month, which is the number of HRD minutes that correlates to 80% ASOTP on that route;
- For CN HRD minutes below that “threshold,” CN would receive quality payments calculated based on the cost savings that CN has claimed it realizes by providing poor performance to Amtrak trains; and
- For CN HRD minutes above the “threshold,” CN would pay penalties set at a level 20% greater than CN’s claimed cost savings, without regard to the amount of incentive payments previously made (*i.e.*, with no “lookback” limitation).⁵¹

Amtrak’s proposal is consistent with the statutory mandate that any host railroad compensation above incremental cost must be based on the quality of service, which both

Amtrak trains in a particular service handled by CN are “late” under the lenient recovery/checkpoint tolerance/relief regime during any particular month.

⁴⁹ Frankel RVS, 4 (concluding that “the lookback limitation impairs the effectiveness of economic incentives created by penalties” and eliminates any “contractual deterrent to continued poor CN service and further degradation of Amtrak on-time performance.”)

⁵⁰ Frankel RVS, 17 (“if performance was so poor that CN had incurred little or no incentive payments over the lookback period, penalties incurred in the current period from poor performance could quickly exceed that amount”).

⁵¹ Vilter VS, 11.

Congress and the ICC/STB have equated with incentive payments for improved on-time performance,⁵² and with the requirement that any operating agreement between Amtrak and a host railroad must contain a penalty for untimely performance.⁵³

Amtrak’s proposed system is also a reasonable means of promoting the public policy goals that form an inseparable part of the “public bargain” and the Amtrak-host relationship – that of a “modern, efficient” intercity passenger rail service, which is “a necessary part of a balanced transportation system,” providing “fast and comfortable transportation...”⁵⁴ In 1981, Congress reaffirmed its goal of promoting “fast” and “efficient” Amtrak service by enacting a statutory goal “to operate Amtrak trains, to the maximum extent feasible, to all station stops within 15 minutes of the time established in public timetables.”⁵⁵ This statutory requirement recognizes the importance to the riding public of arriving on time at all Amtrak stations. Amtrak’s proposal to use ASOTP (based on minutes of delay for which CN is responsible) as the quality of service benchmark in its quality payment and penalty system advances these statutory goals.

⁵² See Section III.A above.

⁵³ 49 U.S.C. § 24308(a)(1).

⁵⁴ Congressional Findings and Declaration of Purpose Section of RPSA, P.L. 91-51 (October 30, 1970).

⁵⁵ *Omnibus Budget Reconciliation Act of 1981* P.L. 97-35, § 1172, 95 Stat. 688 (1981)(currently codified as amended at 49 U.S.C. § 24101(c)(4)). The statutory goals enacted by Congress also specify that Amtrak should “implement schedules based on a systemwide average speed of at least 60 miles an hour” and that rail carriers should be encouraged “to assist in improving intercity passenger rail transportation.” See 49 U.S.C. § 24101(c)(6). Although these statutory goals were originally enacted as aspirational, Congress made them mandatory goals in 1994 by changing the operative language from “Congress hereby establishes the following goals for Amtrak” to “Amtrak shall” implement the specified goals. Codification of Certain U.S. Transp. Laws as Title 49, United States Code, 103 Pub. L. 103-265 (codified as amended 49 U.S.C. § 24101(c)).

Amtrak's proposal is also reasonably designed to address the flaws in the current KOTP system so that incentives and penalties are more closely aligned with the actual impact of CN's performance on Amtrak's passengers:

1. Amtrak's proposal measures performance by minutes of delay caused by CN, as correlated to 80% ASOTP on each route. ASOTP is the best measure of CN performance because it reflects quality of service to all Amtrak passengers, including those Amtrak passengers boarding or detraining at intermediate stations which are not included in the KOTP system.

2. Amtrak's delay-based system measures the actual impact of CN's performance on Amtrak's passengers because it accounts *only* for actual minutes of delay caused by CN (*i.e.*, HRD) on a monthly basis. HRD minutes are the primary driver of ASOTP.⁵⁶ The level of HRD minutes is a straightforward measure that does not include padding, tolerances, relief items, or other devices that mask actual performance problems. HRD also measures CN's performance only with regard to delays that CN causes on its segment of the Amtrak route, without regard to delays caused by other hosts or third parties.⁵⁷

3. Unlike the KOTP system, the Amtrak proposal provides incentives for CN to reduce delays on *all* trains, even those that are already late, thereby reducing not just the number of late trains, but also how late trains are. By using HRD as the measure, the amount of incentive or penalty takes into account the amount by which trains are late.⁵⁸

⁵⁶ Vilter VS, 4.

⁵⁷ Sacks RVS, 2 (one of the benefits of Amtrak's system is that it "rewards or penalizes CN based only on CN's minutes of HRD").

⁵⁸ Sacks RVS, 11.

4. Amtrak's proposed system accounts for the reality that other hosts on a route also cause delays. It compares CN's performance to the historical level of performance associated with 80% ASOTP on the entire route. CN earns incentives so long as it is doing its part to achieve 80% ASOTP on that route, even if other hosts or Amtrak are not performing well or otherwise prevent 80% ASOTP from being achieved.⁵⁹

5. Amtrak's proposal does not require CN to eliminate all HRD to Amtrak trains in order to earn an incentive. CN can earn quality payments as long as CN keeps its monthly delays within the level which correlates to 80% ASOTP.

6. The thresholds for earning incentives and penalties were reasonably calculated to incentivize CN to provide better performance. As described more fully in the Sacks VS, Amtrak calculated the proposed quality payment and penalty rates from the level of cost savings that CN itself claims it realized during a period of poor performance in its handling of Amtrak trains.⁶⁰ Although Amtrak has no ability to verify CN's attribution of cost savings during this period, CN's perception that it would save such costs when it provides poor Amtrak service is a reasonable basis for a penalty framework.⁶¹ In order to act as an effective deterrent to CN from providing untimely service, the penalty must be established at a level which removes the cost savings that CN perceives it gains by handling Amtrak trains poorly.⁶² Amtrak's proposed

⁵⁹ Sacks RVS, 12 ("Amtrak's system compares CN's performance (e.g. total minutes of delay attributable to CN in any month) to the historical level of performance associated with 80% ASOTP on a given route. Performance targets are set so that – given the actual historical performance of CN, Amtrak and all other hosts a train runs on – if CN meets its target then it is doing its part to contribute to 80% ASOTP").

⁶⁰ Sacks VS, 12 (describing cost savings that CN reported to Amtrak from a period of poor performance as compared to the period in 2013 when CN made a concerted effort to improve the quality of its performance); *see also* Maga SVS, 24.

⁶¹ Vilter VS, 12 -14

⁶² Frankel RVS, 17 ("Professor Willig and I agree that a penalty will only motivate a host to contribute to timely Amtrak performance if the penalty amount exceeds the costs that would be incurred to avoid the penalty").

penalty rates exceed the corresponding CN-perceived cost savings rate by 20 percent because, in the judgment of Amtrak's expert witness Mr. Sacks, 20 percent is the lowest margin that adequately ensures that the penalty rate will be above the actual CN savings rate.⁶³ Otherwise, CN would not perceive any financial incentive to avoid incurring penalties equivalent to its perceived costs.⁶⁴

7. Amtrak's incentive/penalty system proposal also includes a penalty provision that is designed to actually incentivize better performance and disincentivize poor performance. This is achieved by removing the "lookback" that caps any penalties incurred at the level of prior incentives paid, restoring the intent of a penalty provision to incentivize improved performance.⁶⁵

D. CN's Opposition to Amtrak's Delay-Based System Is Based On Invalid Criticisms Which Obfuscate The Purpose and Structure of Amtrak's Incentive/Penalty System

CN lodges a number of criticisms of Amtrak's delay-based system, but these criticisms are based on inaccurate claims about CN's supposed inability to reduce certain types of host responsible delays and invalid critiques of the statistical and structural basis for Amtrak's proposed delay thresholds and penalty levels.

1. Use of 80% ASOTP Threshold

CN criticizes Amtrak for using 80% ASOTP as the goal of its proposed incentive system because "ASOTP treats on-time performance at every station as equally important without regard

⁶³ Sacks VS, 117.

⁶⁴ Sacks VS, 17.

⁶⁵ Frankel RVS, 4 (concluding that "the lookback limitation impairs the effectiveness of economic incentives created by penalties" and eliminates any "contractual deterrent to continued poor CN service and further degradation of Amtrak on-time performance.").

to ridership.”⁶⁶ That is exactly the point, and consistent with the statutory goal of providing timely Amtrak service to all stations.⁶⁷ CN also fails to explain why Amtrak should not have the discretion to establish the target level of service that Amtrak is willing to reward through the incentive system. Amtrak’s expert witness Benjamin Sacks concluded that one of the benefits of Amtrak’s delay-based proposal is that “it is calibrated to result in at least 80% on-time performance as experienced by passengers, even when trains run across multiple hosts.”⁶⁸

2. Use of Host Responsible Delays To Measure Performance

CN criticizes Amtrak’s proposal for establishing an incentive system based on HRD reduction when, according to CN, Amtrak is principally concerned with CN’s reduction of a subset of HRD involving Freight Train Interference (“FTI”).⁶⁹ This is a mischaracterization of Amtrak’s position. Amtrak seeks to motivate its host railroads to reduce all types of HRD, including non-FTI delays. In its ongoing efforts to improve CN’s performance, Amtrak has focused principally on FTI reduction in communications with CN because it is CN’s largest category of HRD. However, Amtrak also seeks to motivate CN to minimize other types of non-FTI delays. Therefore, it makes perfect sense for Amtrak to establish its incentive/penalty system based on the overall level of HRD on each route.

⁶⁶ Ladue/Kuxmann RVS, 5.

⁶⁷ CN also argues that adhering to 80% ASOTP is “infeasible under current back-loaded schedules in which recovery time is only included after most stations are reached. Ladue/Kuxmann RVS, 5. In February 2017, Amtrak made a proposal to reallocate end-loaded recovery time to earlier segments of the *City of New Orleans* and *Illini/Saluki* routes. However, CN ignored Amtrak’s proposal and used the opportunity to propose adding significant amounts of additional time to the schedules for the *Illini/Saluki* trains without adjusting much of the end-loaded recovery time about which it now complains. Maga SVS, 29-30.

⁶⁸ Sacks RVS, 2.

⁶⁹ Ladue/Kuxmann RVS, 4, 8.

CN also claims that it cannot reduce non-FTI categories of delay CN.⁷⁰ This assertion is controverted by the evidence of CN's historical performance and conflicts with operational realities. First, CN has demonstrated by its performance during a six-month period in 2013 that it can reduce all categories of HRD when it makes the effort to do so.⁷¹ Second, CN has failed to explain why it should not be held accountable under the incentive/penalty system for reducing other HRD categories – including Temporary Slow Orders (“TSO”). CN is solely responsible for managing and maintaining the facilities over which Amtrak operates, and has the ability to determine unilaterally when and how to conduct track repairs needed to remove slow orders, and when and how to conduct preventive maintenance needed to avoid imposing slow orders in the first place. Amtrak trains are often delayed by slow orders imposed by CN, and one important purpose of the incentive/penalty system is to motivate CN to reduce or avoid such slow order delays in order to improve ASOTP for Amtrak and its passengers. The same holds true for the other non-FTI categories of HRD. CN has demonstrated that it can reduce such non-FTI categories of HRD when it makes the effort to do so. Therefore, CN's criticism of Amtrak's delay-based proposal for incorporating all categories of HRD is invalid and inconsistent with the objective of the incentive system – which is to motivate CN to reduce all categories of delays

⁷⁰ Willig RVS, 20; Ladue/Kuxmann RVS, 6, 30, 43.

⁷¹ See Maga SVS, 24 (explaining that CN made a concerted effort to improve its host performance in the first six months of 2013, which was reflected in lower HRD and higher ASOTP on the Amtrak routes over CN during this period). CN's claim that non-FTI delays are constant (Ladue/Kuxmann RVS, 30) also is contradicted by the evidence. See, e.g., Host Railroad Reports attached as Exhibit 3 to the Maga SVS (showing variation in non-FTI delays across all host railroads including CN). Even assuming (despite the irrefutable evidence to the contrary) that CN has no ability to reduce non-FTI delays, CN fails to explain why it would be reasonable for Amtrak (and not CN) to bear the financial burden under the incentive/penalty system associated with such non-FTI delays.

that it is responsible for in order to contribute to improved on-time performance for Amtrak passengers.⁷²

3. Proposed Penalty For Untimely Performance

CN asserts that Amtrak's penalty proposal provides no basis for reaching what Professor Willig deems the "socially optimal level of performance."⁷³ However, Professor Willig's self-serving suggestion that CN should have the discretion to make the "socially optimal decision" about the level of host performance to provide Amtrak based on unspecified "economic efficiencies"⁷⁴ conflicts with the purpose of Amtrak's incentive system, which is to motivate CN to provide quality service, and ignores the recognition of Congress that fast and convenient Amtrak service to all stations is in the public interest.⁷⁵

a) CN's Critiques of Amtrak's Methodology for Establishing Penalty Levels

CN makes a number of flawed complaints about the manner in which the penalties in Amtrak's delay-based incentive system were developed. *First*, CN claims that there is a mismatch between calculating HRD Thresholds based on ASOTP across the entire Amtrak route and assessing penalties only on the CN portion of the route.⁷⁶ As explained in Section III.C above, CN's criticism is misplaced because CN's performance *does* impact ASOTP across the

⁷² CN also asserts that very poor CN performance on a limited number of Amtrak trains could overwhelm the HRD-based measure of its monthly performance under Amtrak's delay-based system. Ladue/Kuxmann RVS, 45. However, CN provides no specific reason why it should not be held accountable under the incentive/penalty system for very poor performance handling Amtrak trains, which would result in a greater negative impact on Amtrak's passengers.

⁷³ Willig RVS, 23.

⁷⁴ Willig RVS, 19.

⁷⁵ Frankel RVS, 11 (concluding that Professor Willig's opinions regarding the optimal amount and quality of passenger service cannot be reconciled with the RPSA, which reflects the determination of Congress that "intercity railroad passenger service is a necessary part of a balanced transportation system").

⁷⁶ Dubin RVS, 6.

entire route, and because the HRD Thresholds would be applied only to CN's own HRD.⁷⁷

Therefore, the methodology used by Amtrak is entirely appropriate. CN also claims that applying the same HRD Thresholds to every host on each Amtrak route would be ineffective because different levels of performance effort may be required to meet the HRD Threshold.⁷⁸ CN's complaint about the impact of Amtrak's proposal on other hosts is irrelevant because applying the same delay-based system on other hosts is not even under consideration in this proceeding, which only involves Amtrak and CN.

Second, CN criticizes Amtrak's use of what CN refers to as its "perceived costs" of providing better host performance, and CN now claims that those costs which it reported to Amtrak in 2013 only related to FTI avoidance and not HRD avoidance (which CN asserts would require an increase in the costs it would incur to provide better service).⁷⁹ [REDACTED]

[REDACTED]

[REDACTED] it is reasonable to assume that the "costs" [REDACTED] by CN represented CN's actual view (whether accurate or not) of how much money CN could save by providing poor service to Amtrak. To be effective, any penalty system must include penalties that exceed the amount CN thinks (rightly or wrongly) it would save by providing poor service. To the extent that CN is correct in its claim that such "costs" (as previously reported by CN to Amtrak) did not reflect CN's perceived additional costs of non-FTI avoidance, this would mean

⁷⁷ Sacks RVS, 2 (concluding that two of the benefits of Amtrak's delay-based system are the fact that "it is calibrated to result in at least 80% on-time performance as experienced by passengers, even when trains run on multiple hosts" and because "it rewards/penalizes CN based only on CN's minutes of HRD.")

⁷⁸ Dubin RVS, 6.

⁷⁹ Dubin RVS, 8.

⁸⁰ Sacks VS, 15, Appendix G.

there should be ***larger*** penalty levels.⁸¹ CN has not demonstrated how it might be harmed by Amtrak's decision to establish the penalty levels based on the cost savings that CN previously reported to Amtrak and therefore its criticism of Amtrak's methodology for establishing the penalty levels based on what it calls CN's "perceived costs" should be disregarded.⁸²

Third, CN argues that using CN's costs as the basis for establishing penalty levels does not give CN the appropriate "price signals" about the benefits of the improved host service it is being asked to provide so that CN can compare those benefits to its costs.⁸³ This criticism undercuts the goals of the penalty system, which is to motivate CN to provide improved performance through penalty avoidance. CN's claim that it should be entitled to determine the relative costs and benefits of providing quality Amtrak service also conflicts with the statutory framework and relegates Amtrak to the status of another CN freight customer. The Rail Passenger Service Act was enacted to preserve and promote intercity passenger rail service by giving Amtrak preferential access rights to the facilities and services of its host railroads. Congress recognized the importance of promoting fast, reliable and convenient intercity passenger rail service upon creating Amtrak in 1971.⁸⁴ Subsequent Congressional concerns about persistent host railroad delays to Amtrak trains resulted in the enactment of the statutory amendment which requires Amtrak to impose a penalty on host railroads for untimely

⁸¹ Sacks VS, 15 n. 18.

⁸² Professor Willig asserts that the CN cost data used by Amtrak to establish the penalty levels does not include "less quantifiable costs and broader capacity costs associated with the loss of freight service quality and operational flexibility." Willig RVS, 25 n. 54. However, Professor Willig does not provide any explanation of how he would propose to incorporate such "less quantifiable" costs (assuming they even exist) into the penalty level determination.

⁸³ Willig RVS, 21-22; Ladue/Kuxmann RVS, 46.

⁸⁴ See Section II.B.2 above.

performance.⁸⁵ Under this statutory framework, CN does not and should not have the sole discretion to decide what level of Amtrak service might be in the public interest based on CN's weighing of its costs of providing Amtrak with the facilities and services required by federal law.

Lastly, CN argues that Amtrak's proposal is asymmetrical in favor of penalties.⁸⁶ Any perceived asymmetry in Amtrak's penalty system is derived from the establishment of the target performance level at 80% ASOTP, as it results in a penalty performance curve (from 80 to 0% ASOTP) that is not equidistant from the incentive performance curve (from 80 to 100% ASOTP). This same asymmetry exists in the KOTP incentive system, is not inconsistent with the statutory framework (which requires a penalty for untimely performance and allows payment above base compensation *only* if CN provides quality service), and pales in comparison to the asymmetry created by the lookback provision (which insulates CN from incurring penalties for untimely performance).

b) CN's Advocacy For the Lookback Provision

CN relies on the testimony of Professor Willig to defend its advocacy for the lookback provision. Professor Willig claims that it "would contravene economic principles" if a penalty could reduce a host railroad's base compensation below its incremental costs.⁸⁷ However, as Dr. Frankel observed, Professor Willig fails to explain "what those [essential economic] principles are, why they are essential, or why they would be violated."⁸⁸ Moreover, according to Dr.

⁸⁵ *Id.*

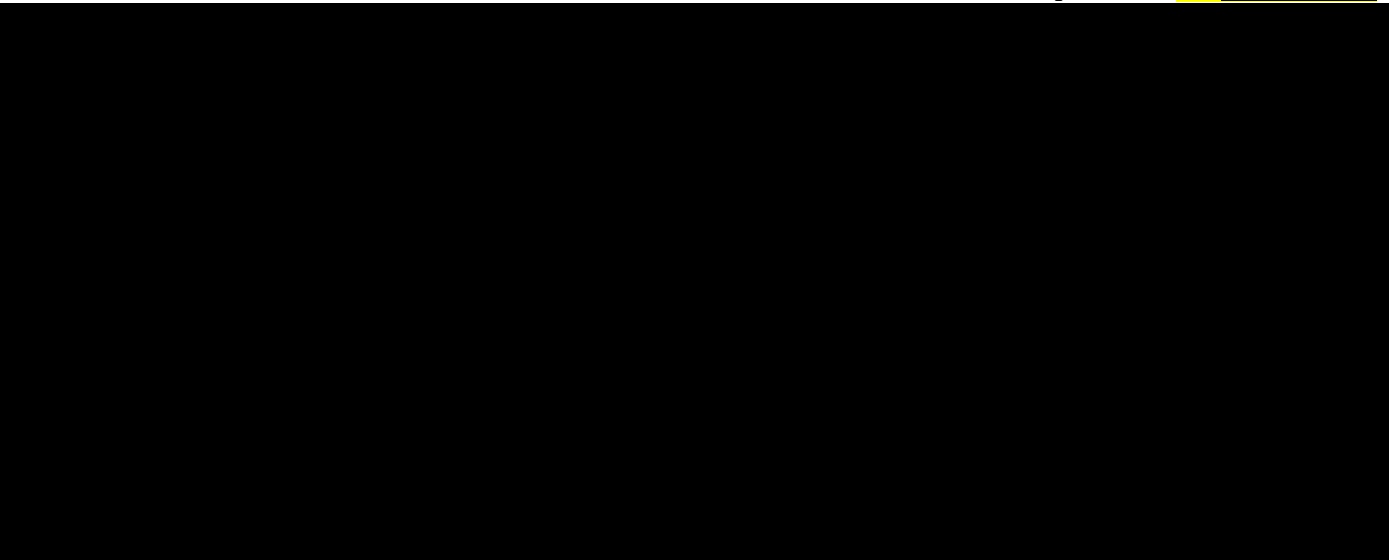
⁸⁶ Ladue/Kuxmann RVS, 48; Willig RVS, 26.

⁸⁷ Willig VS, 7. Professor Willig's view is based on his expansive perception of the host's incremental costs, which as explained in Section IV.D.2 below is contrary to the statutory framework.

⁸⁸ Frankel RVS, 16. Professor Willig's entire paradigm for what he views as an appropriate compensation system for host railroads is based on vague notions of "economic efficiency" which contravene the statutory framework established in the Rail Passenger Service Act for Amtrak's

Frankel, conditioning payment of penalties on CN's earning of incentive payments could "eliminate motivation to CN to provide on-time performance."⁸⁹ Dr. Frankel concludes that "without an effective penalty for untimely performance, the base compensation amount would be guaranteed to the host railroad. And, with the guarantee in place, a host railroad would have an incentive to provide poor service to Amtrak if doing so raised the railroad's profits."⁹⁰

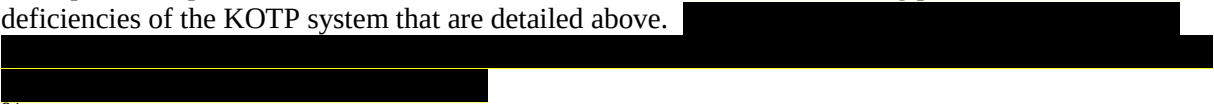
CN claims that Amtrak need not worry about the lack of any effective penalty for lengthy periods of poor CN performance because CN has proposed a so-called "reopener" provision which CN claims would address Amtrak's concerns about the lookback provision.⁹¹



preferential access to host railroad facilities and the promotion of fast and convenient Amtrak service. Frankel RVS, 16-18.

⁸⁹ Frankel RVS, 17.

⁹⁰ Frankel RVS, 18. Professor Willig also asserts that the lookback provision "has rarely been invoked because CN's past performance *as measured under the Agreement* has generally been within the positive or neutral performance range." Willig VS, 7 (emphasis added). This observation reflects the fact that CN's poor host performance has nonetheless resulted in incentives exceeding penalties as a result of the deficiencies of the KOTP system that are detailed above.



⁹¹ Ladue/Kuxmann SVS, 36-37.

⁹² See Section 8.13 of CN Operating Agreement Proposal, attached as Exhibit 1 to the Ladue/Kuxmann SVS.

⁹³ Ladue/Kuxmann SVS, Exh. 1, Section 8.13.

4. Amtrak's Statistical Analysis for Determining the HRD Thresholds

CN raises a number of technical criticisms about the regression analysis used by Amtrak to calculate the HRD Thresholds that are incorporated into Amtrak's delay-based system. CN's assertion that Amtrak should have incorporated more complexity into its regression analysis in order to seek greater mathematical certainty about the correlation between HRD and ASOTP⁹⁵ misses the point of Amtrak's analysis, which was to establish a system which establishes a reasonably congruent relationship between CN performance and incentives/penalties. Notwithstanding CN's technical suggestions, Amtrak's delay-based proposal (including its HRD Thresholds) reflects a reasonable, effective and implementable incentive system which aligns CN's performance to its impact on Amtrak's passengers.

Moreover, CN's technical objections to Amtrak's regression analysis are either unfounded or would create unnecessary complexity. CN's contention⁹⁶ that Mr. Sacks should have conducted a non-linear (rather than linear)⁹⁷ regression analysis to estimate the relationship between HRD (the independent variable) and ASOTP (the dependent variable) is misguided. The linear regression conducted by Mr. Sacks was appropriate because the relevant data is actually linear and the probability values for the relevant dependent variable (ASOTP%) are not

⁹⁴ CN also claims that the denial of incentive payments itself is a sufficient motivator for CN during periods of lengthy poor performance. Ladue/Kuxmann SVS, 37. CN's historically poor host performance has proven that the opportunity for incentive payments alone (even under the KOTP system) is insufficient motivation. As Dr. Frankel concluded, "penalties are the only remedy if, notwithstanding the availability of incentive payments, CN fails to provide adequate on-time performance." Frankel RVS, 17.

⁹⁵ Dubin RVS, 24-25.

⁹⁶ Dubin RVS, 20-27.

⁹⁷ In very general terms, a linear relationship reflects a straight line relationship between the dependent and independent variables.

near 0 or 1.⁹⁸ Moreover, it was appropriate for Mr. Sacks to extrapolate from his linear regression analysis to estimate HRD at 80% ASOTP.⁹⁹

CN also argues that Amtrak's regression analysis does not sufficiently reflect the complexity of the potential relationships between HRD and ASOTP.¹⁰⁰ Although the factors identified by CN are potentially relevant to the relationship between HRD and ASOTP in any particular situation, the point of the regression analysis performed by Amtrak is to identify key relationships from complex environments so that reasonable predictions about anticipated impacts from certain behavior can be made. There is a very strong, obvious, and common sense linear relationship between HRD and ASOTP which Amtrak has incorporated into a straightforward, easily understood linear regression model.¹⁰¹ Accounting for all of the additional factors identified by CN would require an unnecessarily complex regression model

⁹⁸ The ASOTP percentages for the relevant Amtrak services that operate over CN during the time period analyzed by Mr. Sacks generally range between 30 and 80%. Sacks VS, 8, B-1, B-2, B-4, B-6, and B-8. As Dr. Dubin noted, the typical problem with probability data is that the data curve often bends at the extreme ends of the probability values (near 0 and 1), resulting in a curve that resembles an "S" shape, which is non-linear, as opposed to a straight line, which is linear. Dubin RVS, 24. However, a linear model is entirely proper when the range of probability data being regressed is between "0.2 and 0.8" and the predicted probability is nearly linear. See, e.g., J. SCOTT LONG, REGRESSION MODELS FOR CATEGORICAL AND LIMITED DEPENDENT VARIABLES 64 (1997).

⁹⁹ The concern raised by CN (Dubin RVS, 22) about extrapolating beyond the range of data does not apply to three of the relevant Amtrak services (the *City of New Orleans*, the *Lincoln* and the *Blue Water*) because ASOTP was at or near 80% during the period analyzed by Mr. Sacks and thus no extrapolation was required. For the remaining three Amtrak services (the *Illini/Saluki*, the *Texas Eagle*, and the *Wolverine*), it was entirely appropriate for Mr. Sacks to extrapolate from a linear regression analysis to estimate HRD at 80% ASOTP because (i) there is no reason to suspect that the data as it approaches 80% ASOTP for these three Amtrak services would be non-linear, particularly when the recorded data exhibits clear linearity at 80% ASOTP; and (ii) because Mr. Sacks was extrapolating data to estimate HRD up to 80% ASOTP (and not beyond that point), the "bending" that theoretically occurs as the HRD data approaches 100% ASOTP is simply irrelevant.

¹⁰⁰ Specifically, CN states that the impact of HRD on ASOTP may differ by location along the Amtrak route (Dubin RVS at 7); that HRD types may vary in terms of impact on ASOTP and associated costs (Dubin RVS, 7, 19; Ladue/Kuxmann RVS, 37); that Amtrak trains running in opposite directions, at different times and under different schedules may demonstrate different HRD/ASOTP relationships (Dubin RVS at 20); and that reductions in HRD could have different impacts on ASOTP (Willig RVS, 14-17).

¹⁰¹ Sacks VS, 8-10.

dependent on numerous assumptions which the parties likely would be unable to agree upon.¹⁰²

Moreover, the type of complicated regression model being advocated by CN would make it difficult (if not impossible) to achieve reliable estimates because there would be too many parameters in relation to the amount of available data.¹⁰³

CN claims that future schedule changes could change the relationship between HRD and ASOTP, which CN believes could render the model obsolete in the future.¹⁰⁴ Amtrak's delay-based proposal includes a solution to this potential issue. As Amtrak clarified in its Surrebuttal filing, it has committed to recalculate the applicable HRD Thresholds in the event of a material schedule change agreed upon by the parties.¹⁰⁵

CN also claims that the exclusion by Mr. Sacks of certain data from his regression analysis raises robustness concerns.¹⁰⁶ However, Mr. Sacks excluded these data points (from periods when temporary schedules were in place or when a significant amount of temporary track work had been performed) to avoid biased estimates.¹⁰⁷ CN does *not* assert that it was improper to exclude such data points, but instead makes vague references to "robustness." CN

¹⁰² For example, CN complains that Mr. Sacks that did not control for on-time performance at the initial station in his regression analysis, which CN claims results in a biased coefficient estimate. Dubin RVS, 25. As explained above, the regression analysis performed by Mr. Sacks was designed to identify key relationships between HRD and ASOTP from complex environments in order to create reasonable predictions and an implementable incentive system.

¹⁰³ The complex model being espoused by CN would require hundreds of different parameters to reflect each segment of the Amtrak route, the 7 types of HRD categories and various different Amtrak trains running over the Amtrak route at different times of the day and pursuant to different schedules. This requires a vastly higher number of data points than Amtrak's approach, which is based on monthly ASOTP and HRD per 10,000 train miles.

¹⁰⁴ Dubin RVS, 9, 11-13; Ladue/Kuxmann RVS, 11; Willig RVS, 6.

¹⁰⁵ Maga SVS, 41 n. 66. CN also claims that the data used by Amtrak in its regression analysis "raises staleness concerns" (Dubin RVS, 10 n. 8) but provides no evidence to support its suggestion that the data is obsolete, or that the HRD/ASOTP relationship has changed materially since Mr. Sacks performed his regression analysis.

¹⁰⁶ Dubin RVS, 10, 23 n. 23.

¹⁰⁷ See Sacks VS, 11 n. 14, Appendix F, F2-F5.

ignores the fact that Mr. Sacks performed a sensitivity analysis which demonstrates that his results were robust and show a clear linear relationship between HRD and ASOTP.¹⁰⁸

E. CN's Incentive System Proposal Does Not Meet The Requirements of The Governing Statute And Will Exacerbate The Problems With the Current KOTP System, Resulting In Even Higher Incentive Payments For Even Poorer Service to Amtrak Passengers

CN seeks to retain the basic KOTP incentive system, with adjustments that are all designed to make it easier for CN to obtain even higher incentive payments from Amtrak for even worse service for Amtrak and its passengers. The experience of Amtrak and CN under the ineffectual KOTP system proves that such a checkpoint/relief-based system is not consistent with the statutory objective of motivating CN to provide quality service to Amtrak and its passengers. CN's proposal, compounded by CN's proposal to lengthen Amtrak train schedules, would further disassociate the KOTP incentive/penalty system from the actual impact of CN's performance on Amtrak and its passengers.

1. CN's Attempt to Support its KOTP Proposal Based On the Status Quo Conflicts With the Statutory Purpose of 49 U.S.C. § 24308(a)

One theme that is pervasive throughout CN's arguments is the notion that various terms in the existing Operating Agreement were "bargained for" by the parties or represent "tradeoffs" in prior negotiations and therefore should not be altered by the Board in this proceeding. Although Amtrak disputes the accuracy of CN's characterizations of the purported existence, relevance and circumstances relating to these alleged tradeoffs, it is imperative to highlight as a preliminary matter that CN's theory that these alleged tradeoffs must be preserved in any new

¹⁰⁸ Sacks VS, Appendix D. CN also criticizes Mr. Sacks for his inclusion of a non-HRD delay variable in the regression to verify that including all other delays as an additional independent variable does not substantially change the regression results. Dubin RVS, 26. CN's criticism of this verification process is unfounded. For all Amtrak routes except the Illini/Saluki, Mr. Sacks determined that controlling for the non-HRD delay variable demonstrates very similar results. Sacks VS, C-2. For the Illini/Saluki, Mr. Sacks determined that controlling for non-HRD delay yields a lower 80% point, which suggests the 80% point derived from the main model is conservative. *Id.*

Operating Agreement between the parties conflicts with the statutory purpose of 49 U.S.C. § 24308(a). Amtrak is asking the Board to establish reasonable terms and compensation in this proceeding precisely because the KOTP incentive system and certain other provisions of the existing Operating Agreement are defective and the parties were unable to negotiate mutually acceptable terms and compensation for a new Operating Agreement. Amtrak has the statutory right to invoke the Board's jurisdiction to propose new and different terms.

Every provision in a negotiated agreement is to some degree reflective of the tradeoffs that each party may decide to make during negotiations in an effort to reach final compromise. In the absence of an enforceable written agreement between the parties (which does **not** exist in this case) specifying that one contractual provision was exchanged for another contractual provision during negotiations **and** must survive the expiration or termination of the existing agreement, it is arbitrary for CN to select one particular provision of the current Operating Agreement and describe that provision (or an aspect thereof) as a negotiated "tradeoff" between the parties that must be implemented indefinitely.¹⁰⁹ Since CN is seeking a massive increase in the base compensation payment that it obtains from Amtrak and certain other changes to the KOTP system that are only favorable to CN, it is clear that CN only seeks to preserve existing terms and conditions of the current arrangement between the parties when and to the extent it benefits CN.

2. CN's Incentive System Proposal Conflicts With the Statutory Framework

CN's KOTP incentive system proposal would allow CN to obtain additional compensation (above incremental cost) based on factors *other than* on-time performance, in contravention of the governing statute. CN argues that the “the existing KOTP-based incentive/penalty scheme is directly based on the same schedule that passengers see and on what passengers care about – whether Amtrak’s trains are on time (or, on multi-host routes, whether the train traverses CN’s segment within the allotted time).”¹¹⁰ This mischaracterizes the KOTP system. Although KOTP’s contractual checkpoint arrival times may use Amtrak’s public schedules as a starting point, CN’s performance is measured against target arrival times established in the contract, which in many cases are later than the arrival times set forth in public schedules. And unlike Amtrak’s public schedules, KOTP does not measure CN’s performance at all of the Amtrak stations on the CN routes. KOTP also does not measure the extent to which CN causes Amtrak trains to be late, but only considers whether an Amtrak train will be a “make” or “miss” under the incentive/penalty system.¹¹¹ CN also has the benefit of extensive relief allowances under the KOTP system that serve to mask the delays it causes to Amtrak trains without negative ramifications under the incentive system.¹¹² Thus, CN incentive payments and are not correlated with CN performance under CN’s proposed system.

CN’s penalty system proposal suffers from the same defect. KOTP penalties are based on the same recovery/checkpoint tolerance/relief system as quality payments and thus not based upon on-time performance. CN’s penalty proposal also includes a “lookback” provision that

¹¹⁰ Ladue/Kuxmann RVS, 11.

¹¹¹ Sacks RVS, 1-2.

¹¹² Sacks RVS, 2 (“When schedule recovery time is not used by Amtrak or by other causes, KOTP offsets CN delays with those minutes, allowing CN to receive an incentive payment or avoid a penalty even if CN performs poorly.”)

caps penalties at the level of quality payments obtained by CN on that Amtrak service over the previous 12 months. When Amtrak experiences an extended period of poor service from CN, the lookback provision effectively nullifies the penalty provision.¹¹³

3. CN's Proposed Adjustments Would Exacerbate the Significant Deficiencies of the KOTP System

CN's proposed adjustments to the KOTP system would magnify the foundational flaws with the existing incentive system, and would require Amtrak to make even higher incentive payments to CN for even worse CN performance handling Amtrak trains, in the following respects:

- CN has introduced various proposals which are all designed to lengthen Amtrak train schedules. The lengthening of any Amtrak schedule would make it even easier for CN to obtain incentive payments (and avoid penalties) under the KOTP system because CN proposes that any schedule extension should be incorporated into the contract run times against which CN's performance is measured under the KOTP system.
- CN proposes to require the parties to attribute responsibility for Amtrak train delays based on overly subjective "root cause" concepts instead of the "direct cause" system used by Amtrak with all of its host railroads.
- CN seeks to expand the relief items available to CN under the existing KOTP system, which would give CN further opportunities to avoid responsibility for causing delays to Amtrak trains.¹¹⁴

¹¹³ Frankel RVS, 17-18.

¹¹⁴ For example, CN seeks to obtain minute-for-minute relief for delays which occur at foreign interlockings. As explained in the Vilter/Maga RVS, CN must be responsible as the host railroad for coordination with other railroads that cross its network. Vilter/Maga RVS, 52.

- CN's proposal would increase the contract run times against which its performance would be measured under the KOTP system, further disassociating the contract run times from the public timetables relied upon by Amtrak's passengers.¹¹⁵

- CN seeks to expand the types of delays that would disqualify Amtrak train trips from counting in the calculation of CN's monthly performance under the KOTP system, which would make it even easier for CN to earn incentives.¹¹⁶

Each of these proposed adjustments are designed to "lower the bar" for CN to obtain even higher incentive payments from Amtrak for even worse performance in handling Amtrak trains.

a) CN's Efforts to Lengthen Amtrak Train Schedules Are Unjustified and Likely Motivated by CN's Desire to Boost Incentive Opportunities

CN's proposal to dramatically lengthen the schedules for Amtrak's *Illini/Saluki* trains was raised for the first time in CN's rebuttal evidentiary submission. It was not a part of the Operating Agreement negotiations that preceded this action; it was not included in CN's list of

issues submitted to the Board at the opening of this case;¹¹⁷ and no schedule proposal was included in CN's initial evidentiary submission. For that reason alone, the Board should not take cognizance of this facet of CN's proposal.

Even if it were to consider CN's proposal, the Board should reject any attempts to coerce Amtrak to lengthen its schedules, in light of the Board's responsibility to ensure the terms and compensation that it prescribes are necessary to carry out the requirements of 49 U.S.C. §§ 24101 *et seq.*¹¹⁸ These requirements include promoting Amtrak's mission of providing "efficient and effective intercity passenger rail mobility consisting of high quality service that is trip-time competitive with other intercity travel options."¹¹⁹ The statutory goals in Chapter 241 also include implementing Amtrak schedules "based on a systemwide average speed of at least 60 miles per hour" and encouraging "rail carriers to assist in improving intercity rail passenger transportation." CN's efforts to increase the length of Amtrak's schedules without supporting evidence conflict with all of these statutory goals and objectives.¹²⁰

¹¹⁷ See Statement of Illinois Central Railroad Company and Grand Trunk Western Railroad Company Identifying Disputed Issues, STB Finance Docket FD 35743 (Oct. 24, 2013).

¹¹⁸ 49 U.S.C. § 24308(a)(2)(A)(ii) provides that the Board shall prescribe such reasonable terms and compensation as it "finds it necessary to carry out this part" of the U.S. code, referring to Part C of Title 49 which includes Chapter 241.

¹¹⁹ 49 U.S.C. § 24101(b).

¹²⁰ In the two prior proceedings where Amtrak schedule adjustments were at issue, the ICC determined that Amtrak schedules should be *shortened* as part of the quality of service incentive systems established in those proceedings. See *Amtrak and The Texas & Pacific R'way Use of Tracks and Facilities and Establishment of Just Compensation*, 348 I.C.C. 645, 672-73 (1976); *National Railroad Passenger Corporation and Union Pacific R.R. Co. Use of Tracks and Facilities and Establishment of Just Compensation*, 348 I.C.C. 926, 950 (1977). There is no precedent for CN's request to dramatically lengthen Amtrak's Illini/Saluki schedules, particularly in light of the statutory goals and objectives described above.

(i) **CN's *Illini/Saluki* Schedule Adjustment Proposal Would Needlessly Lengthen Amtrak's Schedules With No Assurance from CN of Improved Performance**

The current *Illini/Saluki* schedules already contain between 36 and 40 minutes of padding to account for delays. Despite this ample time in the existing schedules, CN has proposed to lengthen the scheduled 5 ½ hour trip of the *Illini/Saluki* trains by an additional 32 and 54 minutes.¹²¹ CN's schedule lengthening proposal is based on numerous flawed assumptions and unnecessary delay allowances (described further below), includes no assurance from CN of any improvement in the woeful on-time performance experienced by Amtrak's passengers on the *Illini/Saluki* route (which operates almost exclusively over CN), and as a result would result in substantial harm to Amtrak, its passengers and the State of Illinois that funds the *Illini/Saluki* service.¹²²

In February of 2017, Amtrak proposed to redistribute recovery and miscellaneous time in the existing *Illini/Saluki* schedules from the endpoints to intermediate segments along the *Illini/Saluki* route.¹²³ Amtrak's proposal to CN was made in response to the Board's recommendation in Ex Parte 726 to consider further alignment of existing schedules with the ASOTP standard adopted by the Board in that proceeding.¹²⁴ Instead of seriously evaluating

¹²¹ Krueger RVS, Exh. 2; Maga SVS, 4.

¹²² Maga SVS, 2-23.

¹²³ Maga SVS, 2-4. Amtrak also made a similar proposal for the *City of New Orleans* service. *Id.*

¹²⁴ *On-Time Performance under Section 213 of the Passenger Rail Investment and Improvement Act of 2008*, STB Docket EP 726, slip op. at 6 (STB served July 28, 2016) (“[A] number of current passenger rail schedules insert a very large share of recovery time between the last stations on the route. To support all-station OTP on such a route could require a reevaluation and **potential reallocation** of recovery time across the entire route”)(emphasis added).

Amtrak's proposal to redistribute existing recovery and miscellaneous time¹²⁵ in accordance with the Board's recommendation, CN used the opportunity to propose significantly longer schedules for the *Illini/Saluki* trains which include **additional** recovery and other time without any supporting justification¹²⁶ (while retaining substantial amounts of endloaded recovery time that benefits only CN).¹²⁷

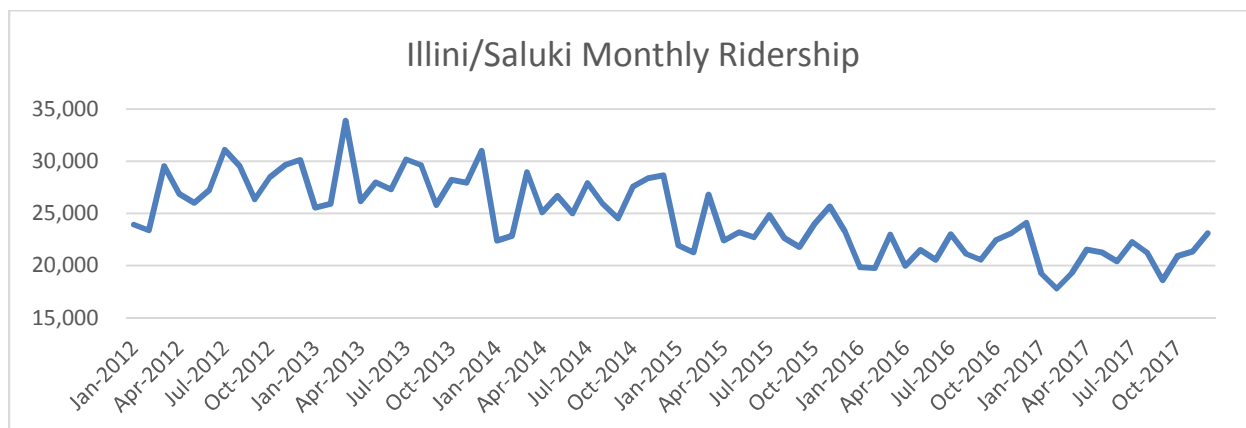
The overall impact of CN's schedule adjustment proposal, which CN has now incorporated into its proposed Operating Agreement that was submitted with its Surrebuttal, would be a dramatic lengthening of the *Illini/Saluki* schedules to the detriment of Amtrak, its passengers and the State of Illinois. The impact of adding over 30 minutes to the *Illini/Saluki* train schedules would be particularly harmful given the challenges that Amtrak has faced in maintaining historical ridership levels in that service coupled with the additional costs that have

¹²⁵ CN incorrectly asserts that "both parties agree that there is insufficient schedule recovery time" in the schedules for the *City of New Orleans* and *Illini/Saluki* trains. Ladue/Kuxmann SVS, 5. This is a blatant mischaracterization of Amtrak's position that existing recovery time in the *City of New Orleans* and *Illini/Saluki* schedules could be redistributed to more intermediate stations. Maga SVS, 2-4. CN is the only party claiming that **additional** recovery time is necessary, as it has proposed in its dramatically lengthened schedule proposals for the *Illini/Saluki* service.

¹²⁶ In fact, CN's performance during the first six months of 2013, when it made a concerted effort to improve its performance, demonstrates that there is sufficient recovery time in the schedules for both relevant services. Maga SVS, 25 ("During this period in 2013 when CN made the effort to perform better, ASOTP on the *City of New Orleans* averaged 81% for the first four months and 76% for the entire six-month period... If recovery time in the *City of New Orleans* schedules had been redistributed to intermediate stations as recommended by the Board and as proposed by Amtrak, ASOTP would have been even higher during this period."); Maga SVS, 26 ("ASOTP for the *Illini/Saluki* service during this six-month period in 2013 averaged 62%, almost double the ASOTP during the January 2016 through May 2017 period analyzed by Mr. Krueger – a period when CN does not appear to have made the effort to perform as well as it did in the initial part of 2013.")

¹²⁷ Maga SVS, 21-22.

been incurred in complying with CN's minimum axle count restrictions.¹²⁸ The graph below shows the challenges that Amtrak has faced in maintaining *Illini/Saluki* ridership¹²⁹:



Despite the adverse impacts on Amtrak and its passengers, there is little doubt that CN's schedule adjustment proposal would give CN the ability to obtain a substantial increase in incentive payments from Amtrak under the KOTP system by measuring CN's performance in handling the *Illini/Saluki* trains against an inflated schedule. CN has not met its evidentiary burden of proving that its proposal to drastically increase the schedules for the *Illini/Saluki* trains is justified by any supporting evidence.

(ii) CN's Unreliable Schedule Modeling Provides No Support For CN's Drastic Schedule Lengthening Proposal

CN attempts to support its proposal for extensive lengthening of the *Illini/Saluki* schedules based on TPC computer simulation modeling performed by CN witness Harald

¹²⁸ See NATIONAL ASSOCIATION OF RAILROAD PASSENGERS, AMTRAK FACT SHEET: ILLINI/SALUKI SERVICE, 23 (2017) ("Fact Sheet") available at <https://www.narprail.org/site/assets/files/1038/trains-1.pdf> (illustrating that Amtrak's *Illini/Saluki* ridership peaked in 2013 and has since declined each following year); [REDACTED]

¹²⁹ The graph below was derived from the information presented in the Fact Sheet referenced above and also includes similar data from 2017.

Krueger.¹³⁰ However, as Mr. Krueger acknowledged, the pure run time (“PRT”) results from CN’s modeling exercises are dependent upon the inputs and assumptions used in the simulation program (including but not limited to assumptions about the relevant Amtrak train consist and applicable operating speeds over the territory in question).¹³¹ The evidence and testimony submitted by Amtrak in this proceeding raises serious questions about the reliability and accuracy of the PRT estimates produced by CN’s TPC modeling.¹³²

CN’s schedule lengthening proposal for the *Illini/Saluki* trains is based on these unreliable PRT estimates from CN’s TPC simulation modeling.¹³³ These flawed estimates of PRT are exacerbated by CN’s use of the wrong Amtrak train consist¹³⁴ and CN’s incorporation of fictitious interlocking stops in the model, which results in an inflated estimate of total trip time.¹³⁵ In addition to using erroneous PRT estimates, CN also incorporated the following unwarranted allowances into the schedule proposals that it developed for the *Illini/Saluki* trains, which allowances all have the effect of adding unnecessary amounts of additional time to the inflated schedules proposed by CN:

¹³⁰ Krueger RVS, 3-13.

¹³¹ Fishman RVS, 4 and Attachment 1 (Krueger Dep. 43:22-45:7).

¹³² Williams/Robert RVS, 71-77 (describing the unreliability of the PRT modeling estimates developed by CN using its proprietary TPC software program); Fishman RVS, 16-17 (raising additional questions about the reliability of CN’s PRT estimates based on discrepancies in the CN workpapers that were submitted in support of those estimates).

¹³³ Maga SVS, 13-14.

¹³⁴ Maga SVS, 13-16 (explaining that any PRT modeling by CN should have used the 1 locomotive and 4 car consist that Amtrak typically would operate in the *Illini/Saluki* service if not for the minimum axle count restrictions imposed by CN as a result of CN grade crossing activation failures which are under investigation by the FRA).

¹³⁵ Williams/Roberts SVS, 6-7.

- An arbitrary “operating allowance” of 5% based on no supporting evidence or empirical analysis;¹³⁶
- An arbitrary allowance of 4% for Temporary Slow Orders (TSO) that CN is responsible for eliminating or minimizing as the host railroad, and which allowance is again based on no supporting evidence or empirical analysis;¹³⁷
- An allowance for Amtrak crossover moves that rarely occur;¹³⁸
- An allowance for Amtrak meets with freight trains that are unilaterally scheduled by CN and that are subject to Amtrak’s statutory preference;¹³⁹
- An allowance for operating speed restrictions unilaterally imposed by CN on the *Illini/Saluki* route based on unsubstantiated allegations about Amtrak’s equipment;¹⁴⁰ and
- An additional arbitrary “OTP adjustment” without any explanation or empirical analysis.

(iii) CN’s Binding Schedule Review Provision Is Unnecessary and Designed To Enable CN To Seek Further Lengthening of Amtrak Schedules During the Term of the Operating Agreement

CN also asks the Board to prescribe a contractual provision which would require the parties to engage in periodic review of each relevant Amtrak train schedule at least once every five years based on CN modeling and test runs.¹⁴¹ CN’s request for a binding schedule review

¹³⁶ Maga SVS, 17.

¹³⁷ *Id.* at 18 (explaining that CN’s proposed addition of between 11 and 12 minutes of additional recovery time for TSO allowances in the *Illini/Saluki* schedules subverts the purpose of the incentive system, which is to motivate CN to reduce TSO and other Host Responsible Delays).

¹³⁸ *Id.* at 18-19.

¹³⁹ *Id.* at 19-20. The *Illini/Saluki* schedule should not assume that the Amtrak trains will be delayed by 14 to 21 minutes for planned meets with freight trains because CN is obligated by federal law to give the Amtrak trains preference over the freight trains.

¹⁴⁰ Maga SVS, 20-21 (illustrating lack of evidence for CN’s erroneous assumption that CN grade crossing activation failures were caused by Amtrak’s equipment and highlighting deficiencies in CN’s proposal to incorporate additional time into the *Illini/Saluki* schedules to account for such grade crossing activation failures); *see also* Amtrak’s December 7, 2017 Reply to CN Motion to Strike or Supplement the Record.

[REDACTED]

process is premised on its assertion that the PRT's in Amtrak's schedules for the *City of New Orleans* and *Illini/Saluki* services are short in relation to the PRT's calculated by CN's TPC modeling.¹⁴² However, CN has failed to provide credible evidentiary support for its claim about the PRT's for these two services.¹⁴³ CN's proposed schedule review process based (in part) on unreliable CN modeling is unnecessary, will invariably lead to disputes between the parties about differences between modeling and test run results, and therefore should be rejected by the Board.¹⁴⁴

In addition, CN's proposed schedule review process is unnecessary because under either party's proposed incentive system, CN would not be prejudiced by any inaccurate PRT in the Amtrak schedules. Under Amtrak's delay-based incentive system, Amtrak measures delay to Amtrak trains against the PRT for the relevant segment of the route, but any delays caused by insufficient PRT are recorded by Amtrak as OTH, which is an Amtrak Responsible Delay and not counted against CN.¹⁴⁵ Similarly, under CN's KOTP proposal, CN's performance is measured only at limited checkpoints against the overall contract schedule run time of the route (which includes PRT, recovery time, miscellaneous time and dwell time along with the additional allowances for which CN is eligible).

[REDACTED]

¹⁴² CN does not claim that there is any problem with the PRT's in the schedules for the other relevant Amtrak services. In fact, the TPC modeling conducted by CN indicates that the PRT's in the schedules for some of these other services may be too long. Fishman RVS, 7, 15. Therefore, there is no basis for CN's request to mandate schedule review for any of those other Amtrak services. Vilter/Maga RVS, 64.

¹⁴³ Williams/Roberts RVS, 70 (detailing flawed assumptions and methodological errors which make CN's PRT modeling unreliable); Vilter/Maga RVS, 66-67 (explaining invalidity of CN's average speed comparisons).

¹⁴⁴ CN's proposal also will lead to disputes between the parties about the appropriate inputs and assumptions that should be used in the TPC simulations.

¹⁴⁵ Vilter Maga RVS, 68.

Moreover, CN has never initiated the mechanism in the existing Operating Agreement that enables the parties to seek schedule adjustments pursuant to defined parameters.¹⁴⁶ Thus, CN's proposal for a binding schedule review process that would require the consideration of CN simulation modeling is unnecessary.¹⁴⁷ Nonetheless, Amtrak continues to be amenable to conducting joint PRT field checks of the Illini/Saluki and City of New Orleans trains with CN.¹⁴⁸ Amtrak continues to believe 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.

b) CN's Proposal to Use The Overly Subjective and Inherently Vague "Root Cause" Concept To Attribute Responsibility for Amtrak Train Delays Would Introduce Unnecessary Subjectivity and Further Complicate Administration of the Incentive/Penalty System

CN proposes to dictate Amtrak's process for coding delays to Amtrak trains. CN's advocacy for a so-called "root cause" approach, instead of the "direct cause" system used for all of Amtrak's operations over host railroad track, would introduce unnecessary subjectivity into the process and would be unmanageable for the following reasons.

First, CN does not define what it means by the phrase "root cause" or how delay attribution under a "root cause" principle would actually function.¹⁴⁹ CN's proposal to use "root cause" would replace the direct cause standard Amtrak uses today – which is based on known and clear standards - with an uncertain, subjective and unworkable concept. When Amtrak

¹⁴⁶ Vilter/Maga RVS, 68-69.

¹⁴⁷ To the extent that the parties are required to engage in any computer simulation modeling of the PRT in the Amtrak schedules, any such modeling must be based on assumptions and objectives that are mutually established by the parties. Williams/Roberts RVS, 71-72 (any modeling of PRT is sensitive to the inputs which are used, including the train consist and horsepower per ton ("HPT") ratios that are assumed to apply to the particular Amtrak train being modeled).

¹⁴⁸ Vilter/Maga RVS, 72-73.

¹⁴⁹ Vilter/Maga RVS, 43.

records a delay to one of its trains in the electronic delay reporting (“eDR”) system, the conductor records the immediate event or condition that actually caused the Amtrak train to slow down or stop. Although there may be a myriad of environmental, operational, decisional and other factors that individually, or together in some unknown proportion, may eventually have contributed to the opportunity for a delay, the “direct cause” of the delay is the reason that the Amtrak train is being slowed or stopped.¹⁵⁰

Second, CN has not demonstrated that Amtrak’s current system of coding delays based on “direct cause” is inadequate.¹⁵¹ The direct cause is reported by Amtrak using a uniform set of written, published coding rules and practices applied across all Amtrak trains on all host railroad lines nationwide.¹⁵² Those rules provide CN with an opportunity to supplement the direct cause delay data with information from other sources, and to receive, review, and request changes to delay data for every run of every Amtrak train before that data becomes final.¹⁵³

¹⁵⁰ Vilter/Maga RVS, 44-45 (explaining how it would be virtually impossible to determine which of a myriad of potential contributing factors caused an Amtrak train to run behind a CN freight train and in what proportion any delay minutes should be allocated to such factors).

¹⁵¹ Vilter/Maga RVS, 50-51. CN incorrectly claims in its Surrebuttal that “both parties recognize the value of considering root cause.” Ladue/Kuxmann SVS, 5. Amtrak’s position on this issue – that direct cause, and not CN’s overly subjective and ill-defined concept of so-called root cause, should continue to be used to allocate responsibility for delays to Amtrak trains – has been clear from the outset. Vilter/Maga RVS, 47. CN appears to base its claim that Amtrak supports the root cause concept on a single coding instruction in Amtrak’s Service Standards Manual (which instruction ironically would benefit CN) and a single e-mail exchange in 2013 between an Amtrak employee and a representative of another host railroad about responsibility for a specific delay which Amtrak agreed to resolve in favor of that railroad (explicitly without establishing a precedent for future situations). Ladue/Kuxmann SVS, 13, 33. Neither of these limited situations represents an admission from Amtrak that it supports CN’s proposal to use root cause to determine responsibility for Amtrak delays.

¹⁵² Vilter/Maga RVS, 45-47.

¹⁵³ See Chapter 7 of the Amtrak Service Standards Manual (Version 10, effective April 30, 2017), attached as Exhibit 29 to the Vilter/Maga RVS. From July 2013 through June 2014, CN submitted change requests to 1.6 percent of host-responsible delay records which accounted for 4.2 percent of host-responsible delay minutes. Amtrak agreed with these requests 85.3 percent of the time. Vilter VS, 17.

Third, any determination of “root cause” is entirely subjective and would lead to frequent disputes. As a practical matter it would be difficult, if not impossible, to untangle which of any number of interwoven factors played a part – and to what extent – in the circumstances surrounding each and every delay, and to choose which among them to designate as the “root cause.”¹⁵⁴ Determinations of so-called “root cause” would be entirely subjective, and likely would be the subject of ongoing negotiation and dispute between Amtrak and CN.¹⁵⁵

Fourth, CN would be relieved of its responsibility to avoid or minimize delays to Amtrak trains if delay attribution was determined under the so-called “root cause” concept.¹⁵⁶ CN has control over its tracks and trains operating over those tracks, including the ability to respond to the many events and conditions that such trains encounter every day. It is CN, not Amtrak or any third party, which has the greatest ability to control whether an unplanned event will result in a freight train operating ahead of and delaying an Amtrak train.¹⁵⁷ Coding Amtrak delays based on so-called “root cause” would not give an accurate picture of how or whether CN handles and resolves the events that occur every day on every railroad, by, for example, ameliorating a contributing factor before it contributes to a delay, and dispatching trains so as to avoid freight interference when it is likely to occur for whatever reason.¹⁵⁸

¹⁵⁴ Vilter/Maga RVS, 47 (explaining that in order to determine the “root cause” for each delay to an Amtrak train, “one would have to arbitrarily choose how far back in time to look for contributing factors; how far away in distance to look for contributing factors; whether to include unconnected contributing factors or only those in a direct chain; to what extent the host railroad could have prevented the delay by responding differently to each contributing factor; and how much each contributing factor may have ultimately been related to the delay.”)

¹⁵⁵ Vilter/Maga RVS, 48.

¹⁵⁶ Vilter/Maga RVS, 48-50.

¹⁵⁷ For example, a weather event might be a factor contributing to an unplanned meet between a CN freight train and an Amtrak train; but regardless of why the trains are where they are, it is up to CN to decide which train will be allowed to go first. Vilter/Maga RVS, 49.

¹⁵⁸ Vilter/Maga RVS, 49.

Finally, CN's proposal would enable CN dispatchers to "self-report" on their own performance to the extent that delays (including freight train interference, which is the most prevalent type of delay on CN) are the direct result of their dispatching decisions. Under the current delay reporting system, delays to an Amtrak train are recorded by the conductor of the train, who is in charge of the train and therefore in the best position to determine the direct cause of delays to his or her train and has access to information from multiple sources.¹⁵⁹

c) The Detailed Changes That Would Be Necessary To Make The KOTP Incentive System More Functional and More Consistent With Statutory Requirements Illustrate Its Significant Deficiencies and Unnecessary Complexities

As should be evident from the considerable differences of opinion between the parties on the appropriate number of checkpoints to use in measuring CN's performance under a checkpoint/relief-based incentive system, the potential impact of various relief items that CN seeks to add to the KOTP system, and whether and to what extent certain delay events should be subject to the Recovery Time Base and Do Not Count provisions, any implementation of a checkpoint/relief-based system invariably will lead to additional complexity, protracted negotiations between the parties about the applicability of different types of delay codes, relief items and related allowances, and continuing disputes between the parties about the financial consequences of the foregoing issues under the incentive/penalty system. Amtrak's delay-based proposal avoids these administrative complexities and potential disputes by measuring only the total minutes of delay caused by CN on a monthly basis. Amtrak's proposal obviates the need for the parties to negotiate whether specific train events or trips qualify for relief, tolerance,

¹⁵⁹ Contrary to CN's suggestion that the conductor codes delays based simply on his or her "windshield view" (Ladue/Kuxmann VS, 64-65), the Amtrak conductor uses multiple sources of information, including (1) direct observation, (2) train bulletins, (3) radio traffic, and (4) information relayed by engineers, dispatchers, maintenance of way employees, signal maintainers, and other train crew members. Vilter/Maga RVS, 50.

Recovery Time Base and Do Not Count provisions, and also eliminates differences between scheduled run time and contract run time. For these and other reasons, Amtrak's delay-based proposal provides an administratively simplified approach to determining quality payments and penalties once implemented.

Many of CN's proposed adjustments to the KOTP system would create even more disputes between the parties than under the existing system. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] These and many other complexities are avoided by the implementation of Amtrak's delay-based system.¹⁶³

IV. CN CANNOT CHARGE AMTRAK FOR “FREIGHT SERVICE CAPACITY” ALLEGEDLY LOST DUE TO AMTRAK’S PRESENCE, INCLUDING ANY “DELAY AND INTERFERENCE COSTS” THAT CN ALLEGES, BUT DOES NOT PROVE, THAT IT INCURS AS A RESULT

Relying on principles espoused by their expert Professor Willig, CN asks the Board to require Amtrak to pay CN for – or to curtail its passenger service in order to eliminate – what CN calls the “cost of freight service capacity lost to Amtrak’s presence.” CN estimates the “practicably quantifiable” portion of its alleged lost capacity “costs” (which CN also calls “delay and interference costs”) to have been approximately \$4.7 million over an 18-month period between 2013 and 2015, or approximately \$3 million per year in additional base compensation (over and above the more than [REDACTED] in base compensation that Amtrak pays to CN under

¹⁶² CN also seeks additional tolerance minutes for every car that is added above a specified base consist on each Amtrak train. Ladue/Kuxmann SVS, Appendix V, Table 4. This would give CN another unnecessary allowance for delays, which in the case of the *Illini/Saluki* trains would be in addition to the extra time that CN seeks to add into the schedules for the reduced operating speeds and longer consists that CN requires Amtrak to operate in this service as a result of the CN grade crossing activation failures. Since CN requires Amtrak to run its *Illini/Saluki* trains with at least 7 cars due to the minimum axle requirement imposed by CN, Table 4 of CN’s proposed Appendix V (which establishes the base consist for the *Illini/Saluki* service at 6 cars) would automatically give CN additional tolerance minutes on the *Illini/Saluki* service for the 7th car that is added to each *Illini/Saluki* consist in accordance with CN’s operating restrictions. Ladue/Kuxmann SVS, 13 n. 18, Appendix V, Table 4. CN fails to provide any justification for this additional tolerance which is both duplicative and cumulative to the additional time it seeks to incorporate into the *Illini/Saluki* schedules.

¹⁶³ In the event that Board determines to prescribe some form of a KOTP incentive system despite its substantial flaws, the Board should adopt Amtrak’s proposed adjustments to the KOTP system that are reflected in Exhibit 28 of the Vilter/Maga RVS. A more detailed explanation of the key components of Amtrak’s proposed modifications to the KOTP system, and why such modifications would need to be implemented by the Board instead of the KOTP system changes proposed by CN, is set forth in **Appendix A** attached hereto.

the current Operating Agreement).¹⁶⁴ In addition, CN claims there is a “practicably unquantifiable” category of lost capacity “costs” which Amtrak should reduce by (1) paying for improvements to CN-owned infrastructure in the amount ranging from \$377 million to \$534 million, and/or (2) reducing its use of CN’s lines by lengthening its schedules, reducing the number of passenger trains operated, and/or seeking lower levels of on-time performance. In other words, CN is asking the Board to order Amtrak to choose between (i) paying more than double the current base compensation and spending hundreds of millions of dollars to improve CN’s infrastructure, or (ii) reducing both the amount and timeliness of its passenger service.

In Section IV.C below, Amtrak shows that CN has failed to sustain its burden of proving, as a factual matter, that the amounts it is claiming as additional base compensation were either caused by Amtrak, or incurred by CN. In Section IV.D below, Amtrak shows that CN is not entitled to the additional base compensation it seeks as a matter of law because the amounts sought are neither “incremental costs” nor “reasonable.” However, since the record cannot support CN’s claim to these alleged “costs,” the Board should reject CN’s base compensation proposal without reaching the legal question of whether such costs would be compensable as a matter of law.

A. CN’s Base Compensation Proposal

CN is reimbursed for incremental costs under the current Operating Agreement for the cost categories contained in Appendix IV (relating to the former IC lines) and Appendix IV (relating to the former GTW lines). In Section 5.1.A of the Operating Agreement, CN concedes that:

[REDACTED]

¹⁶⁴ Ladue/Kuxmann RVS, 47.



Now however, in addition to the categories of costs which CN previously acknowledged constitutes all of the incremental costs resulting from Amtrak's operation of trains over its lines, CN is asking the Board to order Amtrak to increase the base compensation paid to CN for what CN terms the "incremental cost of delays and interference to its freight trains caused by Amtrak that are practically quantifiable"¹⁶⁵ - – a theory of "incremental costs" never previously recognized by the parties or the Board. CN proposes to demonstrate the amount of these costs by (1) estimating from CN's freight management database – SRS – the amount of time freight trains were "delayed" against so-called freight train schedules, (2) estimating the amount of those "delays" attributable to the presence of Amtrak trains, and (3) estimating the amount of "costs" incurred by CN as a result of "delays" supposedly attributable to Amtrak trains. CN asks the Board to award these "costs" – estimated to be \$4.7 million over an 18-month "analysis" period – retroactively to August 2013, and to order Amtrak to pay such increased base compensation on a monthly basis going forward. CN also proposes that Amtrak could be ordered by the Board to eliminate incremental costs that are not "practically quantifiable" by paying for capital improvements to CN's infrastructure at an estimated cost of between \$377 million and \$534 million based on modeling performed by CN.¹⁶⁶

B. The Legal Standard and Burden of Proof

Even before the Board reaches the question of whether any of CN's alleged "delay and interference costs" meet the legal standard for incremental costs, CN must meet its burden of proving its delay cost claim with evidence that is specific and reliable enough to permit the

¹⁶⁵ Ladue/Kuxmann VS, 51.

¹⁶⁶ Ladue/Kuxmann VS, 53.

Board to impose these enormous and novel additional costs on Amtrak. This requires proof of three distinct elements:

- First, CN must prove that it actually incurred *delays* to its freight trains.
- Second, CN must prove that any such delays were *caused by Amtrak*.
- Third, CN must prove that it *incurred actual costs* as a result of actual delays to its freight trains caused by Amtrak.

CN has failed to carry its burden of proof as to any of the three elements. CN has not entered into the record a single freight train “schedule” against which delays caused by Amtrak allegedly occurred, or a single document showing that it incurred or paid any actual out-of-pocket expense as a result of any such delays. While the Board in some circumstances may accept simplifying assumptions or other estimation techniques in lieu of direct evidence, CN has failed to justify or even explain its failure to submit any direct evidence of actual delay costs that it claims to have incurred as a result of freight train delays that it attributes to Amtrak. Moreover, the estimation methodologies and simplifying assumptions used by CN to estimate its delay costs are wholly unreliable, opaque, and in some instances tainted by bias.

As a result of CN’s failure to meet its evidentiary burden of proof, the Board should be hesitant to issue what would amount to an advisory opinion on the definition of incremental costs and the legal question of whether CN’s allegations, if proved, would have met that definition. *See, e.g., Cargill, Inc. v. BNSF Railway Co.*, Dkt. No. NOR 42120, slip op. at *6-7 fn. 11 (STB served Aug. 12, 2013) (“Having concluded that Cargill has not shown that BNSF over-recovered its incremental fuel costs, as properly measured by the safe harbor HDF Index, we need not address such issues as the level of over-recovery that would be required to establish an unreasonable practice, the point in time that a rail carrier’s over-recovery of incremental fuel costs becomes an unreasonable practice, and whether an unreasonable practice could be

established by a showing of an over-recovery without a showing that the fuel surcharge lacks a reasonable nexus to fuel consumption.”); *City of Ozark, AK. – Petition for Decl. Order*, Dkt. No. FD 36104, slip op. at *6 fn. 5 (STB served July 28, 2017) (“Because neither the City nor UP presented an alternative location for the crossing, the Board need not address whether preemption would apply to the installation of a crossing at any other location.”). Given the novel nature, and magnitude, of CN’s base compensation proposal, the Board should reject CN’s claimed costs based on CN’s failure to meet its burden of proof alone.

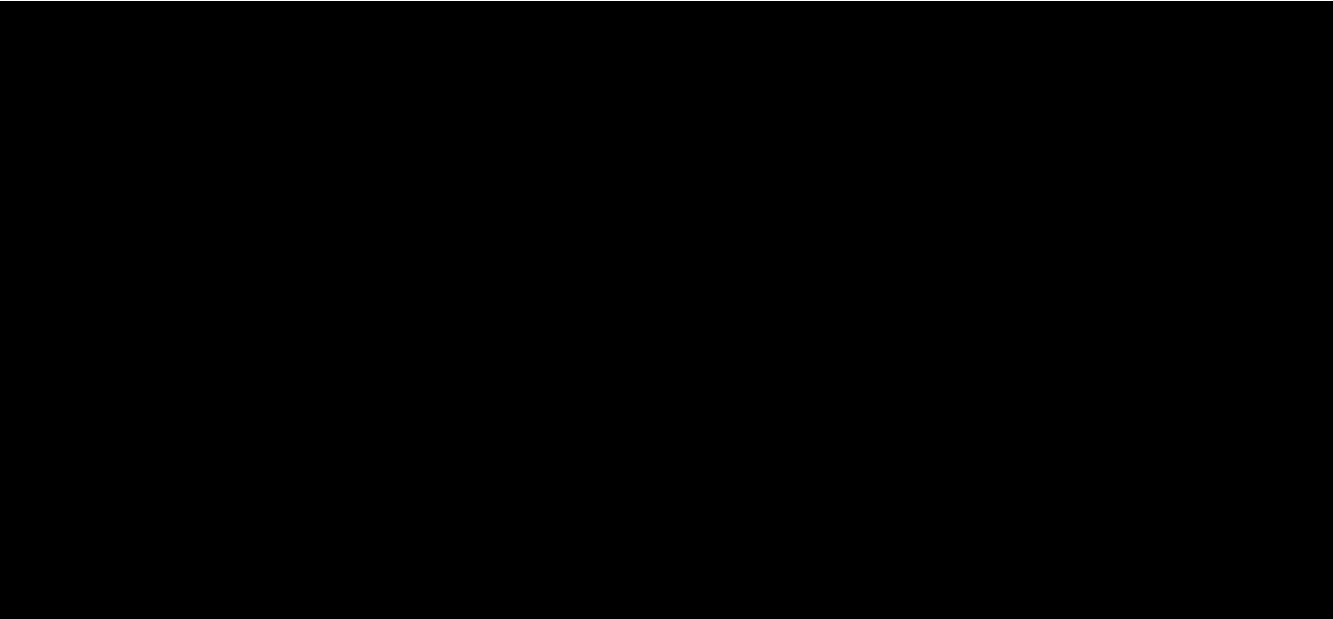
C. CN Has Failed To Meet Its Evidentiary Burden With Respect To Any Element of Its Claim For Additional “Incremental Costs”

1. CN Has Not Demonstrated Any “Delays” Upon Which To Base Its Freight Train Delay Cost Claim Because There Are No Bona Fide Schedules Against Which To Measure Such “Delays”

CN cannot prevail on a claim of increased cost due to delays to and interference with CN’s freight trains unless CN demonstrates that its freight trains did, in fact, experience delays. Amtrak can demonstrate delays to its passenger trains because, among other reasons, it measures performance against published schedules, based on the pure running time for each segment of the applicable route that has been agreed upon by the parties as the basis against which to measure Amtrak delays.¹⁶⁷ In contrast, CN has measured its claimed “delays” against what are essentially phantom schedules created without specified or consistent standards, and without any input from Amtrak. These internal schedules (which are not published or made publicly available by CN) are routinely changed by CN schedulers and field personnel alike, for reasons internal to CN, and then not followed in any event as result of freight train operating delays not caused by Amtrak. It is simply not meaningful to measure “delays” against a “baseline” that is in fact a constantly

moving target; especially when such fluctuating schedules would be used as a basis for imposing enormous costs on a third party.

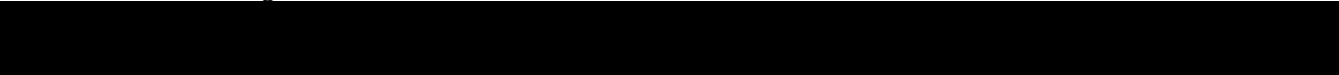
CN schedules are not based on actual run-time or any other disclosed principles. CN designs its own schedules.¹⁶⁸ CN's own witness confirmed that there is "no hard detailed scientific or consistent approach to" creating its freight schedules.¹⁶⁹ CN freight schedules are not built from a base of actual run time,¹⁷⁰ and CN has not provided evidence of any other principles or methodologies that are used to develop schedules that are (initially) adopted for the freight trains that operate over the routes on which Amtrak runs, or any other information that would give the Board reason to believe that these schedules are a reasonable basis against which to measure alleged "delays."



¹⁶⁸ Vilter/Maga RVS, 13, 26 n. 67.

¹⁶⁹ Vilter/Maga RVS, Exh. 3 (excerpt from Krueger Dep. 299:12-25).

¹⁷⁰ Vilter/Maga RVS, 27; Baranowski/Fisher VS, 3.



¹⁷² Vilter/Maga RVS, 18 and Exh. 12.

¹⁷³ Vilter/Maga RVS, 18, n.47 and Exh. 11.

[REDACTED]

Whatever the “schedules” eventually end up being, they are not followed by CN in any case. CN’s own evidence shows that the concept of a “schedule” against which to measure delays is even less meaningful when one considers the wide disparity between where a freight train is scheduled to be, and where it may actually be at any given time (including when it meets at Amtrak train). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁷⁴ Vilter/Maga RVS, 18 and Exh. 10.

¹⁷⁵ Vilter/Maga RVS 18-19 and Exhs.10, 13.

¹⁷⁶ [REDACTED]

¹⁷⁷ Vilter/Maga RVS, Exh. 14.

¹⁷⁸ Vilter/Maga RVS, 17 n. 43; Baranowski/Fisher VS, 10.

[REDACTED]

In sum, the concept of a “delay” measured against such an ephemeral and arbitrary baseline becomes meaningless, and CN has failed to meet its burden of proving the existence of the “delays” on which its incremental cost claim depends.¹⁸⁰

2. The Record Does Not Support A Finding That Any “Delays” Against Schedule Were Caused By Or Can Be Attributed to Amtrak

Amtrak’s footprint on CN’s lines is fairly small. For example, the *City of New Orleans* service has operated just one northbound and one southbound Amtrak train over the CN corridor between Chicago and New Orleans since Amtrak took over passenger train operations in 1971. On the Chicago-Carbondale route exclusive of the *City of New Orleans* service, Amtrak currently operates two round trips per day, compared to the four round trips per day that Amtrak ran through 1973 on all or some parts of that route. Amtrak passenger train traffic pales in comparison to the growth in freight traffic. Immediately prior to Amtrak’s creation, CN’s predecessors operated 31 passenger trains and 10,746 passenger train miles per day – almost three times the daily train miles that Amtrak operates on CN today. And according to CN’s own evidence, total gross ton miles for freight trains over the CN subdivisions on which Amtrak trains operate have increased by over one-third since 2009.¹⁸¹

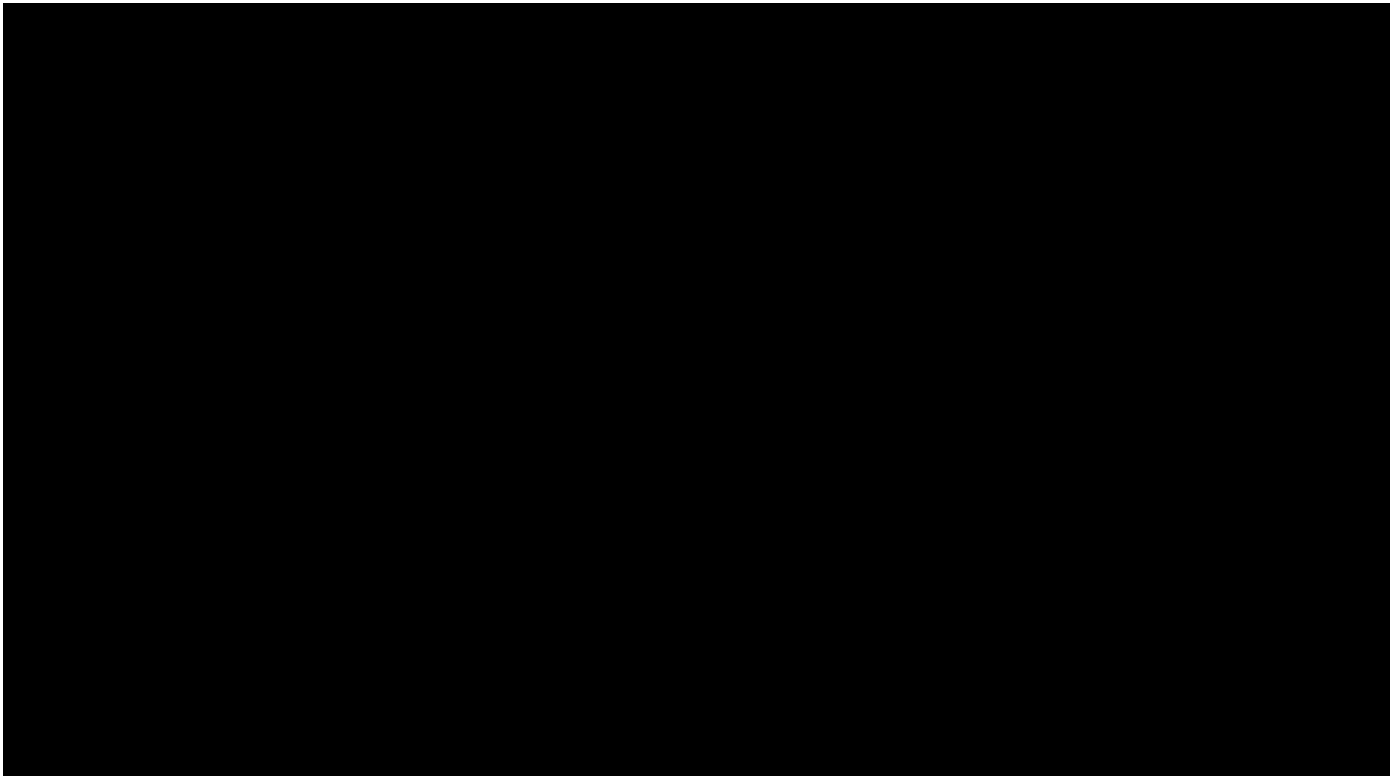
¹⁷⁹ Crowley/Mulholland, 35 and Table 3. [REDACTED]

¹⁸⁰ CN witness Fiona Murray makes vague suggestions that Amtrak-related delays could result in missed deliveries (and mentions one anecdotal situation involving a CN customer which allegedly did not receive freight service on certain days because of delays arising from Amtrak’s operations on the line and the limited freight service windows). Murray VS, 9-14. However, even this anecdotal example does not constitute specific evidence sufficient to support the delay and interference costs claimed by CN.

¹⁸¹ Vilter/Maga RVS, 8; Morehouse VS, 3-4.

It is against this backdrop that CN claims that Amtrak is the cause of delays to its freight trains. But CN has not carried its burden of proving causation. Flaws in the data reporting system used, and in the methodology applied to that data to “estimate” delays caused by Amtrak, make the evidence submitted by CN too unreliable to form the basis for any finding of causation.¹⁸²

a) SRS is an Unreliable System for Attributing Either the Amount or Cause of Delay

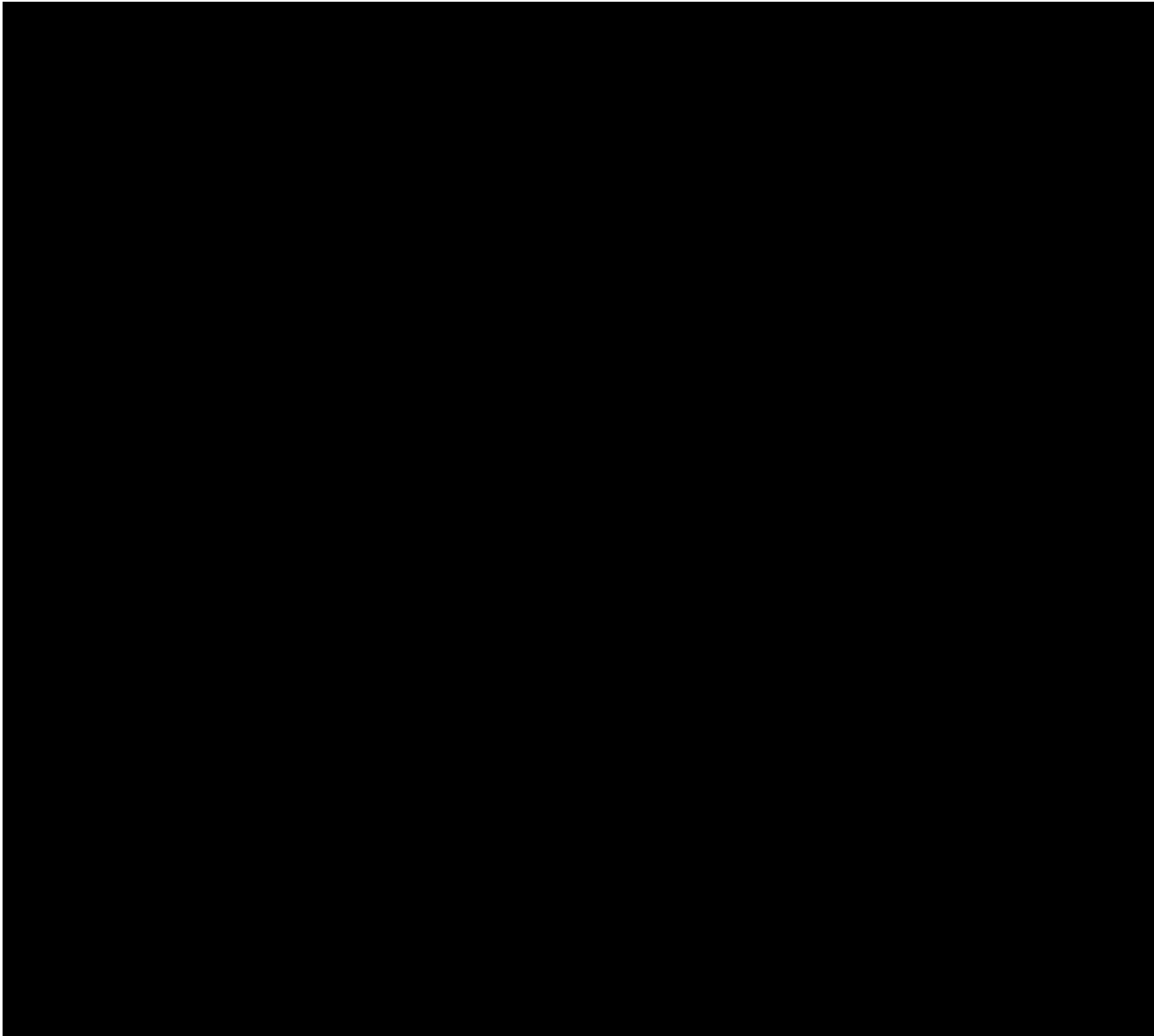


¹⁸² This Section discusses the concept of causation as a matter of proof – that is, assuming that the types of delays alleged by CN *can* as a theoretical matter be attributable to Amtrak, whether CN has provided reliable evidence that they in fact were caused by Amtrak. Amtrak will discuss the many reasons why Amtrak cannot legally be held responsible for any claimed “delay and interference delays” in Section IV.D below.

¹⁸³ Ladue/Kuxmann VS, 51. Amtrak will refer to the SRS database, CN’s business processes for using the database, and the resulting data collectively as the “SRS System.”

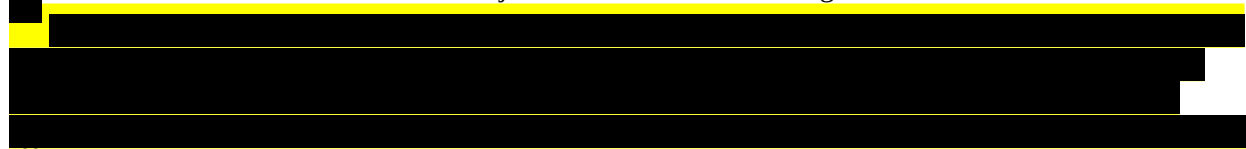
¹⁸⁴ Vilter/Maga RVS, 28-29; Summerfield/Girard/Morehouse VS, 3-4.

¹⁸⁵ Vilter/Maga RVS, 24; Deposition of Paul Ladue (“Ladue Dep.”) 62:6.



¹⁸⁶ Vilter/Maga RVS, 27; Baranowski/Fisher VS, 3.

¹⁸⁷ By contrast, Amtrak’s eDR delay coding system measures delay against pure running time (excluding recovery time and miscellaneous time that is incorporated into the Amtrak schedules) and thus all delays to Amtrak trains are recorded without subjective selection. Vilter/Maga RVS, 27 n. 70.



¹⁸⁹ Morehouse VS, 17.

¹⁹⁰ Vilter/Maga RVS, 29 (explaining that any number of events, acts or omissions arguably could be the “root cause” of a given delay).

b) CN's Methodology for Attributing Freight Train Delay Minutes to Amtrak Is Arbitrary And Unreliable

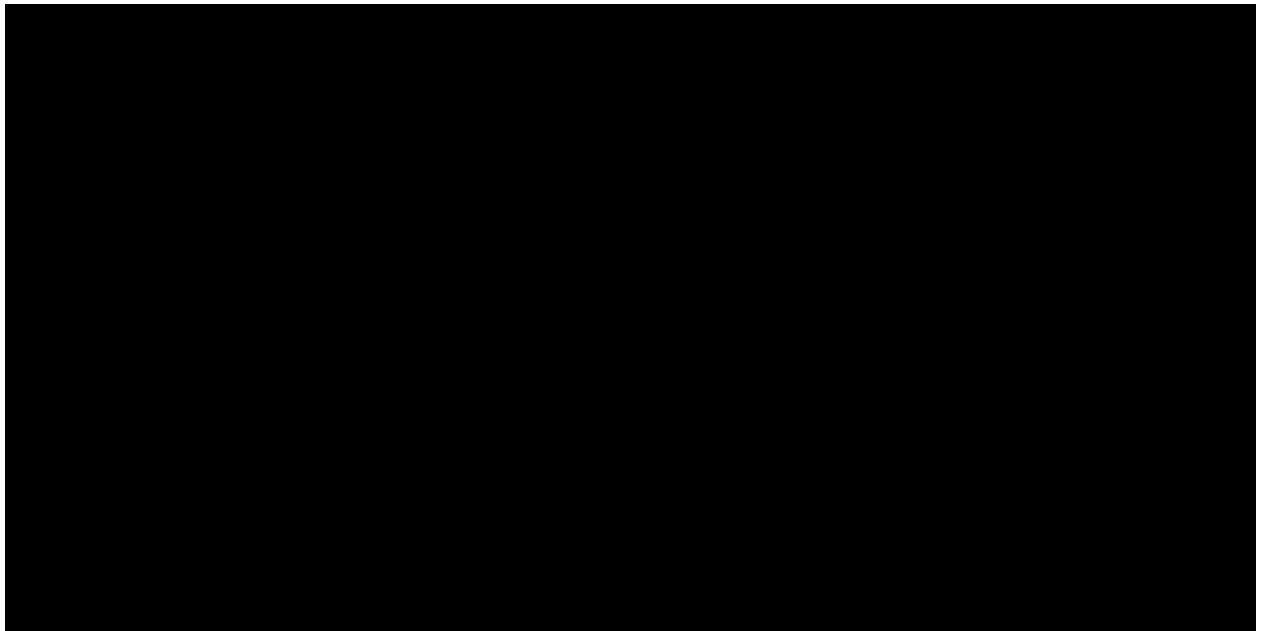
The unreliability of SRS as a system for measuring and attributing responsibility for purported delays to freight trains is exacerbated by the flawed methodologies used by CN's witnesses Baranowski and Fisher to estimate the amount of delay minutes attributable to Amtrak.¹⁹⁴ The defects in CN's methodology resulted in a "[g]ross overstatement of delay minutes ... attributed to Amtrak" due to "selectively ignoring and failing to adequately evaluate

¹⁹³ Vilter/ Maga RVS, Exh. 16, Kuxmann Dep. 56: 12-13.

¹⁹⁴ Baranowski/Fisher attribute 625,020 total delay minutes, associated with 19,346 separate freight train delay events recorded in SRS, to Amtrak during the 18-month Analysis Period between August 2013 and January 2015. Baranowski/Fisher VS, 9, Table FTI-4.

relevant information in the CN train delay records”.¹⁹⁵ Moreover, those analytical flaws are so fundamental that “[r]egardless of whether CN’s SRS data is reliable enough to use for measuring and attributing responsibility for delay to specific freight trains, methodological problems with Baranowski/Fisher’s delay minutes analysis doom it to failure.”¹⁹⁶

The fundamental flaws in CN’s methodology which “doom it to failure” are set out fully in the Crowley/Mulholland RVS at p. 4-11. In sum, CN’s analysis selectively ignores information contained either in the delay codes themselves, or in the comment fields accompanying those codes, “selecting in both cases the approach that results in increased delay minutes attributed to Amtrak.”¹⁹⁷ For example:



¹⁹⁵ Crowley/Mulholland RVS, 2.

¹⁹⁶ Crowley/Mulholland RVS, 4.

¹⁹⁷ Crowley/Mulholland RVS, 7.

¹⁹⁹ Crowley/Mulholland RVS, 7-8.

[REDACTED]

3. The Record Does Not Support A Finding That CN *Actually Incurred* Any Additional Costs As a Result of Freight Train “Delays” That It Seeks To Attribute to Amtrak

Even if the Board overlooks the unreliability of CN’s estimates of freight train delays and its method of attributing causation, CN still has failed to meet its evidentiary burden of proving that it *actually incurred* any additional costs as a result of specific freight train delays that were caused by Amtrak. While in some instances estimates and models may be appropriate in lieu of specified and detailed evidence, CN has not explained why it failed to provide any direct evidence to support its delay and interference claim. Moreover, the estimation methodologies and assumptions used by CN to estimate its claim conflict with actual operating and costing practices and therefore constitute a wholly inadequate substitute for actual proof.

²⁰⁰ Vilter/Maga RVS, 33; Baranowski/Fisher VS, 4, Table FTI-4.
²⁰¹ Crowley/Mulholland RVS, 9-11.
²⁰² *Id.* at 9-10.
²⁰³ *Id.* [REDACTED]

[REDACTED]

a) Train Crew Costs

CN claims that it incurred approximately \$1.4 million in additional train crew costs during the 18-month Analysis Period from freight train delays that it attributes to Amtrak.²⁰⁴ But CN has not met its burden of proving that any additional train crew costs were actually incurred.

- CN has offered no evidence that it *actually paid* additional train crew wages necessitated by any delay it attributes to Amtrak.²⁰⁵ Freight train delays may require individual CN train crews to devote additional time to operating those freight trains on any given day, but this does not necessarily mean that CN incurred any additional train crew wages because (i) train crews typically are paid for a fixed shift (even if they do not engage in productive work for the entire shift), and (ii) railroads build slack time into crew schedules to absorb anticipated delays, regardless of the cause.²⁰⁶
- CN has offered no evidence that it *actually paid any overtime* necessitated by any delay it attributes to Amtrak. Railroad employees working under a fixed shift arrangement typically are paid an hourly overtime rate when their work exceeds the period of the fixed shift.²⁰⁷ However, CN submitted no evidence that specific freight train delays that CN attributed to Amtrak pushed individual crews over their 10-hour basic shift into their 2-hour overtime buffer.²⁰⁸
- CN has offered no evidence that it *actually hired* additional train crews necessitated by any delay attributed to Amtrak. Even if delays can be presumed to have prevented CN train crews from completing their work assignments in the most efficient manner or from performing other unspecified duties, it does not follow that CN actually

²⁰⁴ CN's train crew cost claim includes direct wages, constructive allowances and fringe benefits. Baranowski/Fisher VS, 11-14.

²⁰⁵ For example, CN failed to provide any payroll reports, paystubs or other evidence which links CN's payment of any additional train crew wages to freight train delays that it believes were caused by Amtrak.

²⁰⁶ Crowley/Mulholland RVS, 14-16. For example, CN train crews may be paid for a 10-hour shift but only productively work 9 of those 10 hours. A one-hour delay to the crew during the course of its daily shift (regardless of the cause of the delay) will not necessarily result in any additional payment to that crew. *Id.*

²⁰⁷ Crowley/Mulholland RVS, 15. For example, a locomotive engineer working under a 10-hour fixed shift arrangement would be paid overtime if his/her daily tasks required more than 10 hours of work (up to the applicable Hours of Service Act limit of hours before a rest period). *Id.*

²⁰⁸ Crowley/Mulholland RVS, 15-16. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

employed additional train and engine personnel, or if they did so that it was traceable to any specific Amtrak delays.²⁰⁹

- Absent any evidence that CN incurred additional train crew wages or hired additional train crews as a result of delays caused by the presence of Amtrak, there is no support for CN's claim to constructive allowance for vacation, training and other non-operating time as part of its train crew cost estimate, nor any evidentiary basis for CN to apply the fringe benefit additive to its estimated total salary and wage expense (which includes both direct wages and constructive allowances).²¹⁰

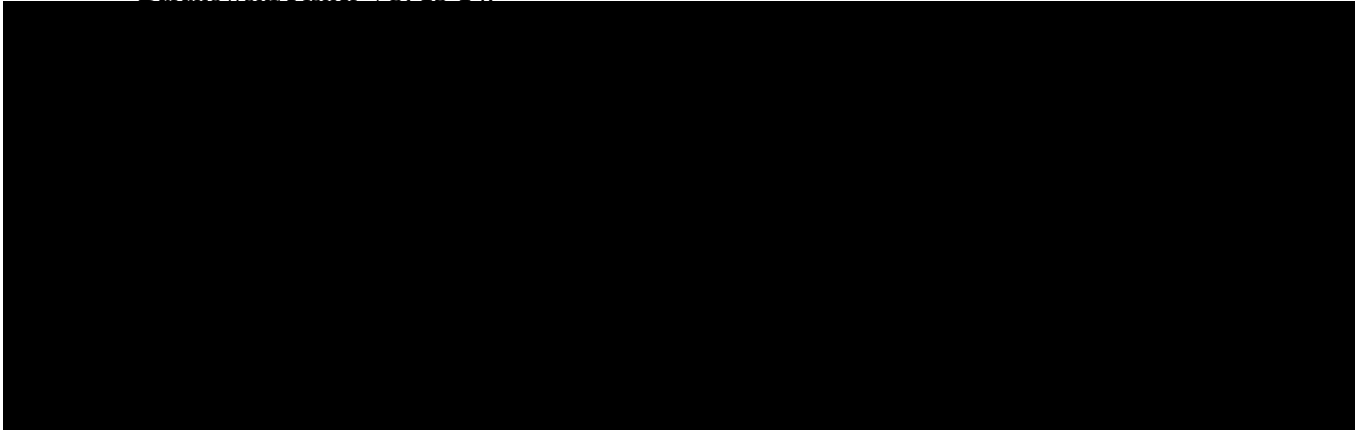
b) Fuel Costs

CN has failed to prove with any reliability that it incurred any compensable fuel costs attributable to Amtrak-caused delays, as explained more fully in Crowley/Mulholland RVS at pp. 20-24 and summarized below:

- CN estimates that it incurred \$524,782 in additional fuel costs associated with allegedly unplanned freight train stops caused by Amtrak and \$179,153 in additional fuel costs from locomotive idling during such stops in the 18-month Analysis Period.²¹¹ However, CN improperly included fuel costs associated with CN freight train stop/restart events that would have occurred even without the presence of Amtrak.²¹² Moreover, all of the remaining stop/restart events were related to [REDACTED] delays, for which CN improperly allocated 100 percent of the delay minutes to Amtrak despite dispatcher comments in the delay records to the contrary.²¹³ If Baranowski/Fisher had properly evaluated the comments field of these delay records, they would have acknowledged multiple non-Amtrak factors contributing to the

²⁰⁹ Crowley/Mulholland RVS, 16. Railroads are staffed and equipped to move variable levels of traffic on a day-to-day basis and their pay structures accommodate variable levels of production from shift to shift, both in their basic pay format and in their provisions for overtime. *Id.* Baranowski/Fisher offer no proof for their claim that Amtrak delays resulted in CN retaining additional crew personnel.

²¹⁰ Baranowski/Fisher VS. 13-14.



delays, so an even greater number of the stop/restart events included in their fuel cost estimate should have been excluded.²¹⁴

- Baranowski/Fisher relied on flawed assumptions regarding fuel consumption to develop their estimate. They assigned fuel costs to Amtrak based on the unproven assumption that the locomotives on delayed CN freight trains remained active in the idle throttle position for the entire duration of all delays.²¹⁵ This ignores the fact that, by 2013, up to 40 percent of CN's locomotive fleet was equipped with Auto Engine Start Stop ("AESS") technology, which automatically shuts down an idle diesel engine to prevent it from burning fuel while idle.²¹⁶ CN's assumption that all CN freight locomotives continuously burned four (4) gallons of fuel per hour while idling is wholly unsupported.
- Baranowski/Fisher, for no explained or obvious reason, relied on a fuel simulation study rather than analyzing actual fuel consumption data from CN locomotives, which would be more reliable than model outputs.²¹⁷

c) Equipment Costs

CN estimates that it incurred approximately \$2.3 million in additional locomotive costs and approximately \$275,000 in additional freight car costs as a result of delays to freight trains

at reduced speed). Crowley/Mulholland RVS, 22 n. 39.

²¹⁶ Crowley/Mulholland RVS, 23.

²¹⁷ Crowley/Mulholland RVS, 24 . Baranowski/Fisher also failed to explain whether the TPC modeling exercise conducted by CN to estimate fuel cost accounted for recent increases in locomotive fuel efficiency. *Id.*

that CN seeks to attribute to Amtrak.²¹⁸ However, these estimates should be disregarded for the reasons described fully in the Crowley/Mulholland RVS and summarized below.

- CN provided no evidence that it was required to acquire or lease additional locomotives to move its trains as a result of freight train delays that it seeks to attribute to Amtrak.²¹⁹ Freight train delays from any cause may result in extended running times for the in-service locomotives used by CN to move its freight trains, but it does not follow (and has not been proved) that CN had to (or did) acquire additional locomotive power as a result of such delays.²²⁰
- CN provided no evidence that freight train delays it attributed to Amtrak “restrict[ed] the ability of CN owned locomotives to perform necessary services.”²²¹ This claim is based entirely on a false premise – that CN’s locomotive fleet is fully utilized at all times.²²² CN also ignores the fact that it can reposition its locomotive power as needed to handle delays and other operational challenges inherent in the railroad industry as a result of routine ebbs and flows in traffic.²²³ Whether CN did so in any case of an alleged freight train delay that CN attributed to Amtrak is unknown (and not something that can be determined from the evidence submitted by CN).
- CN provided no evidence to support its assumption that freight train delays it attributed to Amtrak caused foreign railcars to remain on CN’s network for longer periods of time resulting in higher per diem payments to foreign railroads, and its

²¹⁸ Baranowski/Fisher VS, 20-25. CN’s estimate of locomotive costs is based on the average horsepower-per-hour (“HPH”) cost formula set forth in CN’s locomotive run-through agreements with foreign carriers. CN estimated foreign locomotive delay costs by multiplying that HPH formula against the total amount of alleged “unproductive” foreign locomotive time that CN attributes to Amtrak.. *Id.* at 21. CN estimated its own locomotive delay costs using the same HPH formula, but included an additional return on investment cost “to account for the opportunity cost of the unproductive delay time.” *Id.* at 22. CN’s estimate of equipment costs was developed by multiplying the “average per diem cost per hour” that CN pays for using foreign railroad cars on its network against the total minutes of alleged “delay” to both CN cars and foreign railroad cars that CN attributes to Amtrak. *Id.* at 24-25.

²¹⁹ For example, CN failed to provide any locomotive bill of sale, invoice, lease agreement or other specific evidence that it was required to acquire or lease additional locomotive power as a result of freight train delays that were caused by Amtrak.

²²⁰ Crowley/Mulholland RVS , 25.

²²¹ Baranowski/Fisher VS, 21.

²²² Crowley/Mulholland RVS, 26 (explaining that Class I railroad locomotive utilization rates are typically between 25% and 35%).

²²³ Crowley/Mulholland RVS, 26. In addition, there is no evidence in the record that CN made HPH balancing payments to use foreign locomotives on its network as a result of any freight train delays that it seeks to attribute to Amtrak. *Id.* at 28-29.

estimate of such costs also is methodologically flawed.²²⁴ Because CN's freight cars routinely sit idle in freight yards or at industry sidings for extended periods before they are redeployed, longer transit times may have simply resulted in reduced yard time or less time in storage.²²⁵ CN's freight car cost estimate also improperly uses the per diem rates that foreign railroads pay to CN for time CN cars spend on foreign rail networks as a surrogate for the CN car costs that CN purportedly incurs on its own system as a result of train delays – even though CN does not actually incur per diem charges when its own cars are on its own system.²²⁶

* * *

In sum, CN has not proved with specific and reliable evidence that (1) it actually incurred any costs (2) from delays to freight trains (3) that are attributable to Amtrak. Because each element is an independent prerequisite for CN's base compensation claim, the failure to prove any one of them should, without more, result in rejection of CN's proposal.

D. CN's Base Compensation Claim Should Be Rejected As A Matter of Law

As discussed above, the record does not support CN's claim to additional base compensation for alleged delay and interference costs, and therefore the Board should reject CN's base compensation claim without reaching the legal question of whether such costs would be compensable as a matter of law. Should the STB overlook the evidentiary deficiencies in CN's submission, it should still reject CN's incremental cost claim because the types of costs CN is claiming are not, as a matter of law, recoverable as incremental costs. Even assuming that CN had met its burden of proving that it actually incurred specific, additional train crew, fuel or equipment costs as a result of freight train delays that were caused by Amtrak, such costs still would not be recoverable by CN under the governing statute as part of its base compensation because such costs would not qualify as incremental costs – *i.e.*, short term avoidable costs

²²⁴ Crowley/Mulholland RVS, 31. Baranowski/Fisher estimate that CN incurred \$274,784 in additional freight car costs during the Analysis Period that they attribute to delays allegedly caused by Amtrak. Baranowski/Fisher VS, 24-25.

²²⁵ Crowley/Mulholland RVS, 31.

²²⁶ Crowley/Mulholland RVS, 32.

incurred by CN from Amtrak's use of CN's facilities or CN's provisions of services to Amtrak. Nor can CN's base compensation proposal be deemed "reasonable" because it is in direct conflict with the "public bargain" between Amtrak and the host railroads and the statutory mission, goals, and purposes that arose from that bargain and form an integral part of the Amtrak-host relationship.

1. The Statutory Standard: Base Compensation Must Consist Only of The Incremental Costs For Amtrak's Use of CN's Facilities And CN's Provision of Services To Amtrak

Under the governing statute, the Board's responsibility in this proceeding with respect to CN's unprecedented claim for additional base compensation is to "prescribe reasonable terms and compensation for using the facilities and providing the services." 49 U.S.C.

§ 24308(a)(2)(A)(ii). The statute further specifies that such base compensation cannot exceed the "incremental costs of using the facilities and providing the services." 49 U.S.C.

§ 24308(a)(2)(B).²²⁷ Thus, CN's claimed costs must be both "incremental" and for Amtrak's use of CN's facilities and CN's provision of services to Amtrak.

a) Definition of Incremental Cost

Base compensation is limited to "incremental cost." Though not defined in Section 24308(a), the meaning of the statutory term "incremental cost" is clear from the relevant case law and the intent of Congress as reflected in the legislative history.

Upon inception, the RPSA required Amtrak to pay host railroads "just and reasonable compensation" for providing facilities and services to Amtrak, and the statute made no reference to "incremental cost." In 1973, the ICC construed the "just and reasonable" compensation

²²⁷ The statute also makes it clear that to the extent the Board prescribes compensation in excess of the incremental costs incurred by CN in providing facilities or services to Amtrak, such additional compensation (if any) must be based on the quality of service provided by CN.

standard in a compensation dispute between Amtrak and the Trustees of Penn Central

Transportation Company (“*Penn Central*”).²²⁸ The ICC considered three cost baselines for “just and reasonable” compensation in the *Penn Central* case:

- i. Avoidable cost in the short run – referred to as the “incremental cost”— which the ICC said “represents that amount of maintenance of way, maintenance of equipment, and transportation expenses which could be saved if a particular service were eliminated.” *Penn Central*, 832.
- ii. Avoidable cost in the long run – referred to as the “avertable cost” – which the ICC said “represents the variable and fixed costs directly traceable to the particular service, as well as the common costs which vary with the level of traffic attributable to that particular service.” *Id.*
- iii. Fully allocated costs were described as “those costs both solely related and a portion of the unattributable common, directly allocable to a particular service.” *Id.*

The ICC concluded that “just and reasonable” compensation was fully allocated costs on the Boston-Washington corridor and avertable cost on the rest of the Penn Central system hosting Amtrak trains. *Id.* at 833. In other words, the ICC adopted two of the cost standards it considered and rejected the third (“incremental cost”) standard.

Congress acted swiftly to amend the statute and made it clear that its intent in doing so was to overturn *Penn Central*. In the Amtrak Improvement Act of 1973 (“AIA of 1973”), Congress added to the statute a provision requiring the ICC to fix base compensation at incremental cost.²²⁹ The incremental cost provision now reads:

²²⁸ *Determination of Compensation under Section 402(a) of the Rail Passenger Service Act of 1970 (Penn Central)*, ICC Finance Docket No. 27353 (Sub No. 1), 342 I.C.C. 820 (1973).

²²⁹ Amtrak Improvement Act of 1973, Pub. L. No. 93-146, 87 Stat. 548, 552 (codified as amended at 45 U.S.C. § 562(a)(1973)) (“In fixing just and reasonable compensation for the provision of services ordered by the Commission under the preceding sentence, the Commission shall, in fixing compensation in excess of incremental costs, consider quality of service as a major factor in determining the amount (if any) of such compensation”). In 1978, Congress amended the incremental cost provision to clarify that it applied to both the use of facilities and provision of services. Amtrak Improvement Act of 1978, Pub. L. No. 95-421, 92 Stat. 923, 929 (codified as amended at 45 U.S.C. § 562(a)(1978)). Prior to this amendment, the ICC applied the incremental cost standard for services only. See, *Nat’l R.R. Passenger Corp. v. Interstate*

When prescribing reasonable compensation under subparagraph (A) of this paragraph, the Board shall consider quality of service as a major factor when determining whether, and the extent to which, the amount of compensation shall be greater than the incremental costs of using the facilities and providing the services.

49 U.S.C. § 24308(a)(2)(B).

Congress not only made it clear that its intent in enacting this amendment was to overturn the result of *Penn Central* – such that base compensation to be paid by Amtrak was to be limited to “incremental cost”²³⁰ – but also expressed an intent that “incremental cost” be defined as the ICC did in the *Penn Central* decision. *See e.g.*, 119 Cong. Rec. 34591 (1973) (Statement of Sen. Magnuson) (referring to *Penn Central* and explaining that Section 402(a) covers “short-run avoidable costs”);²³¹ *Nat’l R. R. Passenger Corp. v. ICC*, 610 F.2d 865, 872 (D.C. Cir. 1979) (“Congress mandated use of the term ‘incremental costs,’ which appears to coincide with the Commission’s definition: ‘Avoidable cost in the short run’”). “When a Congress that re-enacts a

Commerce Commission, 610 F.2d 865, 875 (D.C. Cir. 1979). The version of this provision enacted in 1978 was then amended as part of a Congressional effort to make technical improvements to laws impacting transportation. Codification of Certain U.S. Transp. Laws as Title 49, United States Code, 103 Pub. L. 103-265 (codified as amended 49 U.S.C. § 24308(a)(2)(B)). The 1994 technical amendment eliminated the reference to “just and reasonable compensation” and replaced it with “reasonable terms and compensation.” In 2008, Congress revised it again to substitute “Board” for “Commission.” Clean Railroads Act of 2008, 110 Pub. L. No. 432, 122 Stat. 4848, 4926 (codified as amended 49 U.S.C. § 24308(a)(2)(B)).

²³⁰ 119 CONG. REC. 34481 (daily ed. Oct. 17, 1973)(statement of Congressman Dingell speaking in support of the conference report that codified the incremental cost language). Congressman Dingell said, “I rise to create legislative history” and that “ICC staff has informed the committee staff in connection with this matter [FD 27353 (Sub-No. 1)] that if this language [incremental costs] is adopted, it totally vitiates the purposes of the proceedings...and assures that the \$40 million assessment against Amtrak - and indirectly against the tax payers who are subsidizing this creature – will not go into being, and it is the intention of myself as the author of the amendment, a member of the conferees, and I now express also the same intention of the conferees, that the proceedings referred to would be vacated thereby, and it is the intent of the conferees to so vitiate that particular unwise action of the ICC.”

²³¹ As is often the case, some comments in the legislative history are less precise, sometimes equating the statutory “incremental cost” language with “avoidable costs.” *See e.g.*, 119 Cong. Rec. 34591 (1973)(Statement of Rep Dingell). S. REP. NO. 93-226 at 2336 (1973). However, these less precise references are not inconsistent with the more specific concept of “avoidable costs in the short run” that was used to define “incremental costs” in the *Penn Central* decision, which the legislative history makes clear was the definition that Congress intended to adopt in the 1973 legislation.

statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation.” *Hooks v. Clark Cty. Sch. Dist.*, 228 F.3d 1036, 1040 (9th Cir. 2000).²³² The definition of incremental cost as “short-run avoidable costs” – consisting of “that amount of maintenance of way, maintenance of equipment, and transportation expenses which could be saved if a particular service were eliminated” – was thus imported into the meaning of “incremental cost” as used in sec. 24308(a).²³³

Section 24308(a) also requires that any base compensation awarded be limited to those “incremental costs” (as defined above) for Amtrak’s use of the “facilities and services” of the host railroad. Amtrak will discuss more fully below why CN’s claimed costs do not meet this statutory standard.

b) Compensation Above Incremental Costs, If Awarded, Must Be Based on Quality of Service

Section 24308(a) also makes it clear that the Board, in setting terms and compensation for the parties, is not obligated to award any compensation to the host railroad beyond the

²³² See also *United States v. Bd. of Comm’rs of Sheffield*, 435 U.S. 110, 134 (1978); *Cooper Hosp. / Univ. Med. Ctr. v. Burwell*, 179 F. Supp. 3d 31, 49 (D.D.C. 2016), *aff’d sub nom. Cooper Hosp. Univ. Med. Ctr. v. Price*, 688 F. App’x 11 (D.C. Cir. 2017) (“This doctrine unquestionably applies where Congress indicates not only an awareness of the administrative view, but also takes an affirmative step to ratify it.”)

²³³ Later appellate and ICC/STB decisions where specific cost categories were not in contention or where application of the “short run avoidable cost” standard was not raised and would not have made a difference in the outcome have used less precise language to describe the incremental cost standard. However, this less precise language (which in some cases refers to the generic concept of “avoidable costs” without defining the applicable timeframe) does not conflict with the portions of the legislative history which make it clear that Congress intended the term “incremental costs” to refer to “avoidable costs in the short run.” See, e.g., *Metro. Transp. Auth. v. I.C.C.*, 792 F.2d 287, 291 (2d Cir. 1986) (where Metro North contested the applicability of 402(a) to it and the court did not decide the precise cost standard). *Nat’l R.R. Pass. Corp.-Section 402(a) of the Rail Passenger Serv. Act - Order to Require Serv. & Set Comp. Terms*, I.C.C. Finance Docket 31895, 1992 WL 41630, at *2 (I.C.C. Mar. 2, 1992) (“Bay Colony”)(“The statutory compensation standard in section 402(a) proceedings is incremental cost, commonly called avoidable cost. Avoidable costs are those costs that would not be incurred if the minority user’s service (here, Amtrak) were eliminated”); *Nat’l R.R. Pass. Corp. & Consol. Rail Corp. – Application Under Section 402(a) of the Rail Passenger Serv. Act for an Order Fixing Just Comp.*, 10 I.C.C. 2d 863, 871 (I.C.C. Dec. 29, 1995) ([w]e prescribe compensation on the basis of incremental cost, that is, track maintenance costs that Conrail would not incur if Amtrak did not operate over its lines.”).

incremental costs of Amtrak’s use of the facilities and services. Thus, the statute provides that the Board should consider “whether ... the amount of compensation shall be greater than the incremental cost of using the facilities and providing the services,” with “quality of service” to be a “major factor” in considering whether – and if so to what extent – to award compensation over and above the host’s incremental costs in providing the facilities and services to Amtrak.

c) The Total Amount of Compensation Awarded Must Satisfy An Overall “Reasonableness” Standard

Finally, where discretion is left to the Board (*e.g.*, in determining whether quality of service justifies an award of compensation above incremental cost, and if so, the amount), the compensation must still be “reasonable.” The concept of reasonableness” can and should be guided by several precepts.

First, compensation cannot, *ipso facto*, be “reasonable” if it does not follow the minimum statutory requirements – *i.e.*, that base compensation be limited to the incremental costs of Amtrak’s use of the hosts facilities and services, and that any compensation awarded over that amount be based on quality of service.

Second, the Board’s award must be consistent with its mission to “carry out” the precepts of 49 USC §§ 24101 *et seq.* That section includes Congressional findings and a declaration of purpose within which Section 24308(a) should be construed and applied, including findings that

[a] modern, ***efficient, intercity railroad passenger service*** is a necessary part of a balanced transportation system; that the public convenience and necessity require the ***continuance and improvement*** of such service ***to provide fast and comfortable transportation*** between crowded urban areas and in other areas of the country ...²³⁴

In addition, Section 24101 explicitly enumerates aspects of Amtrak’s statutory mission that, as discussed more fully below, are relevant here:

²³⁴ Rail Passenger Service Act, Pub. L. No. 91-518, § 101, 84 Stat. 1328 (1970)(emphasis added).

- o To “provide efficient and effective intercity passenger rail mobility consisting of high quality service that is trip-time competitive with other intercity travel options” (§ 24101(b));
- o To “improve its contracts with operating rail carriers” (§ 24101(c)(1)(D));
- o To “operate Amtrak trains, to the maximum extent feasible, to all station stops within 15 minutes of the time established in public timetables” (§24101(c)(4)); and

Any award of compensation that conflicts with, or prevents Amtrak from accomplishing, its statutory goals and mission should not be considered “reasonable.”

2. CN’s Proposal For Additional Base Compensation Is Unsupported By The Statute And Unreasonable On Its Face

CN’s claim to additional millions of dollars in annual base compensation is for the “practically quantifiable” portion of what it claims are costs for Amtrak’s “consumption of CN’s network capacity.” The portion CN has attempted to quantify consists of purported additional crew, fuel, and equipment costs. Of course, costs incurred in connection with *certain types* of crew, fuel, and equipment costs have traditionally been treated as incremental costs, have long been included in the parties’ Operating Agreement²³⁵ and are not in dispute here. But these agreed-to costs are actually incurred by CN in providing services to Amtrak or from Amtrak’s use of its facilities. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²³⁵ See, e.g., Current Operating Agreement, App. IV, Items 1(a), (b).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The fuel, wage and equipment “costs” that CN seeks in this case are of a completely different kind. They are characterized by CN as the “practicably quantifiable” portion of the potential economic benefits (or opportunity costs) that CN claims to have lost as a result of hosting Amtrak trains. This basis for compensation has never been recognized – and should not be recognized – as constituting “incremental cost” in the sense used in Section 24308(a). Indeed, CN’s base compensation proposal in this proceeding is equivalent to charging market price, rather than incremental cost, for access to CN’s facilities and services. If the overarching set of claimed “costs” do not constitute “incremental costs” as required by statute, it goes without saying that any subset – such as the types of fuel, wage and equipment “costs” claimed by CN here – also do not constitute “incremental costs.”

a) The Theoretical Underpinnings of CN’s Compensation Proposal

CN’s base compensation proposal rests entirely on the economic theories presented in the initial and rebuttal testimony of Professor Willig. In essence, Professor Willig maintains the following:

Professor Willig begins his analysis with the assertion that “Amtrak’s consumption of CN’s network capacity imposes incremental costs on CN for which CN is not compensated.”²³⁷ He claims that the costs that arise from “Amtrak’s consumption of CN’s network capacity” include “more obvious costs, such as the costs of added wear and tear on railroad infrastructure, services required by Amtrak’s operations (e.g., clearing wrecks), CN-owned station facilities used by Amtrak, and CN personnel performing functions for Amtrak.”²³⁸ It is notable that these “more obvious costs” are already included in the base compensation specified in the Operating Agreement, and further that such costs fall squarely within the statutory definition of costs incurred by CN in providing services to Amtrak or for Amtrak’s use of CN’s facilities.

But Professor Willig claims that costs arising from “Amtrak’s consumption of CN’s network capacity” *also* include “any costs of freight service capacity lost to Amtrak’s presence” (which he refers to as “delay and interference costs”), including:

(i) increased operational costs, (ii) lost business; (iii) reduced demand for additional service; (iv) any resulting price suppression; and (v) the costs of additional capacity required to replace capacity utilized to accommodate hosting requirements.²³⁹

Professor Willig opines that only by applying the above precepts will the parties arrive at the “optimum amount and quality of intercity passenger rail service.”²⁴⁰ Stated another way, Professor Willig believes that Amtrak is currently “incentivized to demand more than is socially optimal,”²⁴¹ and that Amtrak makes “a socially harmful trade-off between passenger and freight

²³⁷ Willig VS, 3.

²³⁸ Willig VS, 4.

²³⁹ Willig VS, 4-5.

²⁴⁰ Willig RVS, 2.

²⁴¹ Willig RVS, 8-9.

service by demanding service levels that are too high.”²⁴² Tellingly, Professor Willig posits that if Amtrak “internalized the costs it [allegedly] generates – as it would be compelled to do through the process of rate negotiation in an ordinary commercial context – it would think carefully about whether and up to what point the benefits of improved performance are worth the costs, and what are the most efficient way(s) to achieve improved performance.”²⁴³

In short, Professor Willig’s testimony essentially consists of his postulation of what an “economically efficient” compensation scheme would look like if there had been no “public bargain,” no expression of Congressional intent as to the meaning of “incremental costs,” and no expression of public policies and goals in support of promoting fast and efficient Amtrak passenger rail service.²⁴⁴

b) The Compensation Scheme Advocated By CN is Antithetical to the Statutory Concept of “Incremental Cost” Within the Structure and Purposes of the Amtrak-Host Relationship As Mandated By Congress

Professor Willig’s expansion of the concept of “incremental cost” to include such economic variables as lost business, reduced demand, and price suppression demonstrates, without more, that Professor Willig is not describing the same “incremental cost” concept as is required in Section 24308(a).²⁴⁵ As Dr. Frankel states in his testimony:

Professor Willig’s use of the term incremental costs cannot be reconciled with the statutory cost framework implemented by the Rail Passenger Service Act (“RPSA”). Professor Willig appears to disagree with the compensation framework established by Congress, but rather than advocating a legislative

²⁴² Willig RVS, 9.

²⁴³ Willig RVS, 12.

²⁴⁴ See Frankel RVS, 19 (concluding that Professor Willig “disagrees with the wisdom of those public policies, but by simply ignoring them, his opinions are irrelevant to the question at hand”).

²⁴⁵ Professor Willig’s expansive theory about “incremental costs” is adopted by CN’s other witnesses. See, e.g., Baranowski/Fisher VS, 1; Ladue/Kuxmann VS, 15.

expansion of compensation beyond incremental costs, he instead recharacterizes other costs as incremental costs to obtain the same result.”²⁴⁶

The items identified by Professor Willig represent “foregone revenue or profit” rather than compensable host railroad expenses,²⁴⁷ depend on an overbroad time horizon for measuring incremental costs,²⁴⁸ and cannot be measured.²⁴⁹ In effect, they are equivalent to “market rates including a profit to the host,” and requiring Amtrak to pay any such amounts is “economically equivalent to requiring Amtrak to pay full arms-length market prices to induce CN to voluntarily provide Amtrak access to CN’s facilities.”²⁵⁰ Indeed, Professor Willig essentially concedes as much when he opines that Amtrak should pay CN for not only actual costs, but also all of CN’s alleged lost opportunities and profits, “as it would be compelled to do through the process of *rate negotiation in an ordinary commercial context*.”²⁵¹

Of course, the Amtrak-host relationship is not a process of negotiation “in an ordinary commercial context,” but is informed by the statutory requirements and public policy goals discussed above. Professor Willig ignores these entirely. Thus, Professor Willig ignores the fact that settled public policy regarding the “socially optimal” quality of passenger service already exists as an integral part of the compensation statute; *i.e.*, the provision of “efficient and effective intercity passenger rail mobility consisting of high quality service that is trip-time competitive with other intercity travel options,” wherein Amtrak trains are operated “to the maximum extent

²⁴⁶ Frankel RVS, 3.

²⁴⁷ Frankel RVS, 13.

²⁴⁸ Frankel RVS, 12 (concluding that Professor Willig uses an overbroad time horizon in his definition of incremental costs because “the choice of time horizon depends importantly on the context – the economic question being addressed. Here, Professor Willig again ignores the legal and regulatory context relevant under the RPSA and espouses an overbroad incremental cost standard”).

²⁴⁹ Frankel RVS, E-14.

²⁵⁰ *Id.*

²⁵¹ Willig RVS, 12 (emphasis added).

feasible, to all station stops within 15 minutes of the time established in public timetables.”²⁵²

Requiring Amtrak to either pay exorbitant costs equivalent to the market price of access to CN’s tracks, or to spend hundreds of millions of dollars to improve CN’s rail network, would not only be inconsistent with these statutory goals, but would defeat them entirely.

Professor Willig also ignored the existence of Amtrak’s statutory right, under Section 24308(c), to “preference over freight transportation in using a rail line, junction, or crossing.”²⁵³ This again casts the Amtrak-CN relationship as an arms-length, market-based relationship rather than one bound by statutory rights and obligations. As Dr. Frankel testified:

It could as readily be said that CN causes the claimed costs to arise by operating a freight train at a place and time when Amtrak is operating a passenger train. Without a guiding principle or rule to govern such a conflict, each railroad could attribute at least some delay-related costs to the presence and operations of the other track user.²⁵⁴

Amtrak’s statutory preference right is that guiding principle, as a result of which “it is not economically reasonable to attribute to Amtrak a host’s delay and interference costs.”²⁵⁵ Dr. Frankel further states that “CN may choose to operate a train that conflicts with an Amtrak train, but presumably when it does so the additional profit or other benefit to CN of increasing its freight service outweighs additional delay and interference costs (if any) associated with honoring Amtrak’s preference.”²⁵⁶ Dr. Frankel determined that the alleged freight train delay

²⁵² 49 U.S.C. § 24101. Professor Willig’s theory about how the optimal level of Amtrak service should be determined by economic efficiency considerations also ignores the contractual obligation that CN has under Section 3.4 of the Operating Agreement (which is not in dispute) to provide the level of service agreed to by the parties.

²⁵³ 49 U.S.C. § 24308(c). There is an exception to the preference for emergency situations and a procedure for host railroads to seek relief from preference in specified circumstances.

²⁵⁴ Frankel RVS, 9.

²⁵⁵ Frankel RVS, E-8 -9.

²⁵⁶ Frankel RVS, 9.

costs sought by CN “are costs that flow from CN’s own operational decisions, in the context of Amtrak’s Congressionally granted preference.”²⁵⁷

Moreover, to the extent that granting Amtrak preference as required by statute would “materially affect the quality of freight transportation” provided by CN, the “economically efficient” solution is not to force Amtrak to fund between \$377 million and \$534 million in capital improvements to CN’s railroad, as argued by Professor Willig,²⁵⁸ but the statutory remedy wherein CN applies to the Board for preference relief under section 24308(c).²⁵⁹

c) CN’s Compensation Proposal Includes Items That Are Not “Incremental Costs” For The Further Reason That They Are Not “Avoidable in the Short Run”

Professor Willig claims that the incremental cost standard for base compensation “has been interpreted by this agency and its predecessor as being equivalent to avoidable cost” and that avoidable cost is “a term that economics applies to costs avoidable over any period of time.”²⁶⁰ Dr. Frankel explains, however, that the choice of time horizon depends on the economic question being addressed, that Professor Willig’s indefinite time horizon is overbroad, and that the proper standard is “avoidable cost in the short run,” further defined by the ICC as “maintenance of way, maintenance of equipment, and transportation expenses.”²⁶¹ Maintenance of way, maintenance of equipment and transportation expenses incurred by CN for Amtrak’s use of its facilities and CN’s provision of services to Amtrak “all could be avoided immediately or

²⁵⁷ Frankel RVS, 9. Likewise, Dr. Frankel determined that “CN could make a capital investment to increase its capacity to run freight trains without causing delays to those trains or to Amtrak trains, adjust its freight schedules to avoid causing delay to Amtrak trains, or appeal for [preference] relief from the Board.” Frankel RVS, 10.

²⁵⁸ Willig VS, 2-3.

²⁵⁹ See also discussion in Section IV.D.2.d) below describing preference relief available to CN.

²⁶⁰ Willig VS, 3.

²⁶¹ Frankel RVS, 6, 12-13.

almost immediately upon cessation of Amtrak service.”²⁶² Thus, three of the delay cost categories proffered by Professor Willig – “lost [freight] business,” “reduced demand for additional [freight] service,” and “any resulting [freight] price suppression” – are not recoverable because they depend on an overbroad time horizon for defining incremental costs.²⁶³

d) CN, Not Amtrak, Controls The Factors That Affect The Performance Of, And Delays To, CN Trains

Professor Willig erred in arguing that it is necessary for Amtrak to “internalize” (*i.e.*, pay for) CN’s lost profits and infrastructure in order to be incentivized to make “efficient decisions” about the amounts and levels of service it “demands” from CN. Given the complete control that CN has over its own infrastructure and operations, CN is in the best position to control costs associated with train operations over its network and find efficient ways of controlling them.²⁶⁴ Whether viewed as demonstrating a lack of causation (*i.e.*, that CN’s proposed costs are not primarily, if at all, attributable to Amtrak’s presence), or as demonstrating that these costs are not incurred by CN for providing services to Amtrak or for Amtrak’s use of its facilities, the fact that the costs CN is seeking to impose on Amtrak are predominantly controlled by, and sensitive to, CN’s actions and decisions with respect to its infrastructure and freight train operations, rather than Amtrak’s actions and decisions, is a separate reason why they cannot be awarded as compensation to CN.²⁶⁵

²⁶² Frankel RVS, 13.

²⁶³ Frankel RVS, 12-13. Several of the specific subsets of costs that CN seeks to collect suffer from this same defect, as described more fully in Section IV.D.2.f) below. Crowley/Mulholland RVS, 13, 25.

²⁶⁴ See *generally* Vilter/Maga RVS, 8-21.

²⁶⁵ Professor Willig also argues that CN should be compensated for its alleged freight train delay costs in order to avoid subsidization of Amtrak service by CN or its customers. Willig RVS, 8. However, this argument ignores the public bargain which gave Amtrak statutory access to CN’s facilities and services, and the public policy of promoting fast, efficient and comfortable Amtrak service as a viable transportation alternative for the traveling public. It also ignores that fact that ordering Amtrak to transfer

To begin with, to the extent that there are costs associated with current capacity constraints on the CN lines, those constraints are caused by the dramatic growth in freight traffic rather than the relatively static, regularly-scheduled passenger traffic operated by Amtrak. Since 2009, total gross ton miles for freight trains operating over the CN subdivisions on which Amtrak operates have increased by over one-third.²⁶⁶ In contrast, Amtrak service over CN lines has grown only modestly²⁶⁷ since the creation of Amtrak (and Amtrak is not seeking any increase in its level of service over CN).²⁶⁸

Against that backdrop, CN unilaterally decides (without input from Amtrak) the level of railroad infrastructure to build, maintain and retain. This includes decisions by CN to remove railroad infrastructure and reduce the capacity on its rail network when doing so is deemed to be beneficial to CN.²⁶⁹ In fact, the Illinois Central (“IC”) converted its mostly double track main line between Chicago and Memphis to single track with passing sidings in the early 1990s (over the objections of Amtrak) based on the IC’s assessment of how the facility reduction would impact IC financially and operationally.²⁷⁰ CN also maintains its rail lines to the level it chooses for its own business objectives, balancing the advantage gained from the operation of faster

more than \$3 million in additional base compensation per year to CN, and to build new infrastructure for CN in the amount of \$377 million to \$534 million, as compensation for “costs” that CN has failed to prove, is a cross-subsidization of CN and its freight business by Amtrak and the taxpayers which fund it.

²⁶⁶ Vilter/Maga RVS, 8. The current Amtrak service also pales in comparison to the passenger train volume on the IC and GTW lines just prior to Amtrak’s establishment, which had daily train miles almost three times higher than today. *Id.* at 9-10.

²⁶⁷ Vilter/Maga RVS, 9.

²⁶⁸ Vilter/Maga RVS, 9-10. Ironically, CN now claims that Amtrak should pay to replace much of the same capacity that the IC removed in the early 1990’s. Williams/Roberts RVS, 10.

²⁷⁰ Vilter/Maga RVS, 10-12.

freight trains (and reduced slow orders) against any increased capital and track maintenance expenses.²⁷¹ CN's decisions in all these areas have significant impacts on the level of delay experienced by all trains operating over its facilities – much more so than, say, the one daily round-trip Amtrak train on the Chicago-New Orleans route.

CN's freight train scheduling and operating decisions also significantly impact the level of delay experienced by any trains using its facilities and services. CN makes its own unilateral decisions regarding when to run freight trains, what mix of locomotive power,²⁷² equipment and lading to include in such trains, and how to deploy its train crews in connection with such operations to comply with Hours of Service requirements and other operational objectives. CN's freight train schedules, its level of operational adherence to those schedules (which in many cases are arbitrary),²⁷³ and the other CN decisions made by CN with respect to its freight train operations determine whether, where and to what extent CN's freight trains meet or pass other freight trains, commuter trains and Amtrak trains on its network.²⁷⁴

CN also establishes its own freight train performance priorities which can likewise have a significant impact on the level of delays experienced by CN freight trains. Ironically, CN is seeking additional base compensation system based on a metric (freight train delay) that is at odds with what CN describes as its own operational priorities (velocity and train length).²⁷⁵ Running longer freight trains for the benefit of increasing velocity can mean that freight trains

²⁷¹ Vilter/Maga RVS, 10-13.

²⁷² CN decides the number and the horsepower of locomotives used on all of its freight trains, which (all else being equal) determines the acceleration rate of CN trains. This is one of a myriad of operational factors determined and controlled by CN which can impact the level of delays experienced by CN freight trains. Vilter/Maga RVS, 12-16.

²⁷³ Vilter/Maga RVS, 16-21.

²⁷⁴ See generally Vilter/Maga RVS, 8-23.

²⁷⁵ Vilter/Maga RVS, 13-16.

are longer than siding length, reducing capacity for meets and passes at sidings and increasing delays, and are slower to accelerate to (if they are even able to reach) maximum speed.²⁷⁶

Finally, as CN has conceded, the “delay and interference costs” it seeks to recover from Amtrak vary would increase with any increases in the level of CN freight train activity.²⁷⁷ This differentiates CN’s newly-minted category of “incremental costs” from the items that have constituted base compensation in the prior Operating Agreements. For example, CN’s maintenance of way costs charged to Amtrak vary only with changes (weight, speed, consist, etc.) in *Amtrak* traffic, not with decisions by CN about freight operations outside of Amtrak’s control. Thus, although Professor Willig characterizes these freight train delay costs as “avoidable,” they are in fact avoidable only by the actions or inactions of CN itself, and it would therefore be unreasonable to assess them against Amtrak.²⁷⁸

CN can also take steps to control any costs it can prove it incurs as a result of freight train delays by exercising other statutory rights. The statutory limit on base compensation for Amtrak’s use of a host’s facilities and the host’s provision of services to Amtrak, coupled with Amtrak’s statutory preference over freight operations, do not leave a host railroad unprotected from the consequences of Amtrak’s presence on its network. Section 24308(c) provides that if CN can prove that granting Amtrak preference in a particular instance “materially will lessen the

²⁷⁶ Exhibit 4 in the Crowley/Mulholland RVS contains numerous examples from SRS during the 18-month Analysis Period of situations involving CN freight trains that were delayed because they were too long to fit into sidings on the portions of the CN rail network used by Amtrak.

²⁷⁷ See *Morehouse VS*, 5 (“If freight traffic continues to grow as expected, the freight delay costs attributable to Amtrak are likely to increase more rapidly as remaining areas of excess capacity that CN can use to manage traffic growth are exhausted.”); *Willig RVS*, 4 (asserting that freight train delays costs would rise if CN made efforts to provide Amtrak with better service).

²⁷⁸ For these reasons, Professor Willig’s characterization of these “delay and interference costs” as arising “unavoidably” from Amtrak’s operations is wrong. *Willig RVS*, 7. Even if Amtrak’s use of CN’s facilities and receipt of services from CN remains at a steady level, the alleged freight train delay costs claimed by CN could skyrocket as a result of the unilateral capital, maintenance and operating decisions made by CN in connection with its freight train business.

quality of freight transportation provided to shippers,” it may appeal to the Board and, upon such proof, the Board “shall establish the rights of the carrier and Amtrak on reasonable terms.” 49 U.S.C. § 24308(c). Of course, CN would have no reason to seek relief from preference if it could instead secure additional base compensation for costs associated with every minute of alleged freight train delay that it attempts to attribute to Amtrak.²⁷⁹ The preference relief provision would be a nullity if CN could simply recover freight train delay costs from Amtrak under Section 24308(a) as part of its base compensation.²⁸⁰

e) CN’s Assertion That “Incremental Cost” Includes the Alleged Freight Train Delay Costs Also Conflates Base Compensation With Quality Payment Compensation

CN’s claim for additional base compensation for alleged freight train delay costs also would conflate incremental cost base compensation with compensation for quality service under the incentive system. The governing statute provides that to the extent the Board prescribes compensation *above* incremental cost, *then* quality of service must be a major factor in determining the amount (if any) of such compensation. 49 U.S.C. § 24308(a)(2)(B). CN claims that its purported freight train delay costs increase when CN minimizes delays to Amtrak trains.²⁸¹ To the extent CN minimizes delays to Amtrak trains, this contributes to improved on-

²⁷⁹ Crowley/Mulholland RVS, 15-16 (observing that most CN freight train delays reflected in SRS that CN seeks to attribute to Amtrak are of short duration).

²⁸⁰ It should be noted that CN made no attempt in its evidence to differentiate the alleged freight train delays caused by granting Amtrak preference, if any, from delays caused by the simple existence of Amtrak trains on their tracks. However, to the extent there were proved any delays caused by granting Amtrak preference which in turn improved the quality of service to passenger trains, such costs would not be incremental costs but would subject to the Board’s discretion to determine whether, and to what extent, they should be compensated for in excess of incremental costs. Of course, Amtrak already compensates CN in an amount above incremental cost in the form of incentive payments that are pegged to improved performance as measured by negotiated benchmarks.

²⁸¹ See Morehouse VS, 5; Willig RVS, 4.

time performance of Amtrak trains.²⁸² Thus, when CN seeks additional base compensation for alleged freight train delay costs, it is in effect seeking base compensation for quality service.

This is contrary to the statutory requirement set forth in Section 24308(a)(2)(B).²⁸³

**f) Specific Categories of “Delay and Interference Costs”
Asserted By CN Do Not Individually Qualify As Incremental
Costs**

If, as shown above, the broad category of “delay and interference costs” alleged by CN are not cognizable as incremental costs, then by definition neither are any of the component parts of that broad category. In addition, however, two of the three component types of freight train delay costs alleged by CN are not incremental costs, for independent reasons.

As described above, “incremental costs,” as defined in *Penn Central* and adopted in the 1973 amendment to Section 24308(a), consist of “avoidable costs in the short run,” which, in the passenger train/host railroad context, consists of “that amount of maintenance of way, maintenance of equipment, and transportation expenses which could be saved if a particular service were eliminated.”²⁸⁴

Amtrak’s expert witnesses Thomas Crowley and Robert Mulholland explain what constitutes short-run avoidable costs as applied to the specifically alleged crew and equipment costs that CN seeks to attribute to Amtrak’s presence. Their opinion is guided by railroad

²⁸² Vilter VS, 3.

²⁸³ To the extent that CN is able to obtain incentive payments for handling Amtrak trains in a timely manner pursuant to the incentive system established by the parties, it receives compensation (above its incremental costs) for providing quality service. The quality of service payments that Amtrak makes to CN under the current Operating Agreement do not correlate well with the impact of CN’s performance on Amtrak’s passengers, but Amtrak’s proposal would better align the quality of service payments above incremental cost, and penalties, to CN’s actual contribution to on-time performance.

²⁸⁴ *Penn Central* at 832.

costing principles adopted by the Railroad Accounting Principles Board (“RAPB”).²⁸⁵ These RAPB costing principles define “avoidable costs” as “costs that would be eliminated by the discontinuance of a particular activity over the relevant time frame.”²⁸⁶ The “short-run” is “the time period during which capacity-limiting input factors are fixed”²⁸⁷ and during which “production capacity is constrained by existing plant and equipment.”²⁸⁸ Thus, short-run avoidable costs are costs that would be eliminated after discontinuing an activity (in this case, Amtrak’s use of CN’s facilities and CN’s provision of services to Amtrak), but before CN’s capacity is changed.²⁸⁹

Based on their evaluation of CN’s freight delay cost estimates, Messrs. Crowley and Mulholland concluded that CN improperly included train crew and equipment costs that do not qualify as short-run avoidable costs under the RAPB costing principles.²⁹⁰ CN’s train crew wage claim is premised on the assumption (without supporting evidence) that Amtrak’s presence on its network required CN to employ additional freight train crews, which is a change in a capacity-limiting input factor and the associated costs of those train crews by definition cannot qualify as

²⁸⁵ Crowley/ Mulholland RVS, 12 (quoting the Railroad Accounting Principles Board – Final Report, September 1, 1987.)

²⁸⁶ *Id.* (quoting the Railroad Accounting Principles Board – Final Report, September 1, 1987, Volume 2 – Detailed Report (“RAPB Final Report Volume 2”), at 115).

²⁸⁷ *Id.* (quoting RAPB Final Report Volume 2 at 117).

²⁸⁸ *Id.* (quoting RAPB Final Report Volume 2 at 10). A railroad’s capacity generally is determined by its people, plant and equipment. Any change in such capacity-limiting input factors demarcates the boundary between the short-run and the long-run under railroad accounting principles. Crowley/Mulholland RVS, 12.

²⁸⁹ See Crowley/Mulholland RVS, 12 n. 17 (concluding that the Railroad Accounting Principles Board definitions of “short run” and “avoidable cost” are consistent with how the ICC defined short-run avoidable costs in the 1973 *Penn Central* case). “Maintenance of way, maintenance of equipment and transportation expenses are the types of costs that often can be eliminated by discontinuing an activity before any change is made in fixed capacity.” *Id.*

²⁹⁰ Crowley/Mulholland RVS, 13-20, 25-32.

short-run avoidable costs.²⁹¹ CN's inclusion of the costs of additional train crews is incorporated into its constructive allowance and fringe benefits estimates and suffers from the same deficiency.²⁹²

In addition, constructive allowance expenses predominantly represent costs associated with vacation, training and other non-working days. The amount of these expenses is determined by the position and seniority of specific employees. These expenses generally do not change based on whether a crew worked nine or ten hours on a given basic shift, or whether a crew may have worked overtime to complete a job on any particular day. Thus, they are not costs that would be avoidable if Amtrak discontinued its service over CN.²⁹³ Similarly, CN's equipment cost calculation includes costs of leasing or acquiring additional freight locomotives or freight cars, which is a change in a capacity-limiting input factor and therefore the associated equipment costs cannot qualify as short-run avoidable costs.²⁹⁴

In many respects, as discussed above, CN's freight train delay cost claims represent "opportunity costs" that CN seeks to recover from its purported inability to use its train crews, locomotives and freight cars for productive activity during each period of delay that CN attributes to Amtrak. In some cases, CN has failed to meet its evidentiary burden of proving it incurred any opportunity costs. [REDACTED]

²⁹¹ Crowley/Mulholland RVS, 13-17.

²⁹² Crowley/Mulholland RVS, 18-20.

²⁹³ *Id.* at 18. In addition, Baranowski/Fisher's estimate of additional crew hours does not differentiate between hours worked by existing crews and hours worked by extra crews allegedly required to be retained due to delays that they attribute to Amtrak. If a CN locomotive engineer worked an extra hour because of a delay that CN attributes to Amtrak, CN would not pay any more for his health benefits. Crowley/Mulholland RVS, 19-20.

²⁹⁴ Crowley/Mulholland RVS, 25-32. In fact, CN's locomotive use, lease and acquisition assumptions include long-run avoidable costs that are expressly outside the definition of short-run avoidable cost set forth in the railroad accounting standards. Crowley/Mulholland RVS, 27-30.

[REDACTED]

[REDACTED]²⁹⁵ However, they relied on a formula to develop this estimate which included an ownership cost component which they expressly identify as an “opportunity cost.” CN points to no specific “other CN train” it was unable to move with these locomotives due to a lack of operating capacity. Absent any demonstration that some alternative was not taken, *i.e.*, other CN trains that could not be moved, there is no opportunity cost in this situation.²⁹⁶

Similarly, Baranowski/Fisher’s claim that “delays caused by Amtrak prevent[ed] CN train crew personnel from performing other required duties”²⁹⁷ contradicts their explicit statement that their delay cost estimate “does not include significant opportunity costs.”²⁹⁸ In this case, Baranowski/Fisher claim that the action not taken was CN crews “performing other required duties.” However, by not identifying a specific alternative not taken, there is nothing to which to assign a value representing opportunity cost.²⁹⁹

²⁹⁶ Also, within the construct proposed by Baranowski/Fisher, opportunity cost would be measured by the foregone revenue associated with the specific other CN trains not moved relative to the revenue earned on the specific alternate operations. This is a flawed argument, as the costs of performing the alternate operations are the same as the costs of the selected operation. Crowley/Mulholland RVS, 30 n. 57.

²⁹⁷ Baranowski/Fisher VS, 11.

²⁹⁸ Baranowski/Fisher VS, 1.

²⁹⁹ Opportunity cost is a measure of the value of one alternative relative to another when a decision between two alternatives is required by scarcity of resources. It is not a measure of the cost incurred to perform either alternative. Crowley/Mulholland RVS, 17.

E. The Board Should Reject CN's Proposal For Amtrak To Either Pay For Alleged Delay and Interference Costs That Are "Not Practicably Quantifiable" Or Cripple Its Passenger Service for the Benefit of CN and its Shareholders

CN claims that even the alleged freight train delay costs discussed above would not "come close to providing CN with full compensation for all of its incremental costs of delay and interference due to Amtrak."³⁰⁰ In addition to seeking its purported freight train delay costs, and as a means of either providing CN with "full compensation for," or eliminating, all of the opportunity costs it claims to lose as a result of Amtrak's presence, CN proposes that the STB:

1. add a provision to the Operating Agreement requiring Amtrak to pay additional but unspecified incremental costs when and if CN can quantify them; and/or
2. order that Amtrak reduce the quality of its passenger service by lengthening its schedules and/or running fewer trains;³⁰¹ and/or
3. order that Amtrak fund capital projects that CN claims are "necessary to restore the capacity Amtrak consumes on CN's lines," in an amount estimated by CN to be in the range of \$377 million to \$534 million.³⁰²

As an initial matter, as Amtrak has demonstrated, since the opportunity costs for which CN seeks compensation are not cognizable from a legal or evidentiary standpoint, it stands to

³⁰⁰ Ladue/Kuxmann VS, 52. As discussed above, the term "delay and interference costs" as used by Ladue/Kuxmann is equivalent to what CN witness Professor Willig calls "any cost of freight service capacity lost to Amtrak's presence." Willig VS, 4. Professor Willig's definition includes such elements as lost business and price suppression, *id.* at 4-5, which Amtrak witness Dr. Frankel refers to as "opportunity costs." Frankel RVS, E-14.

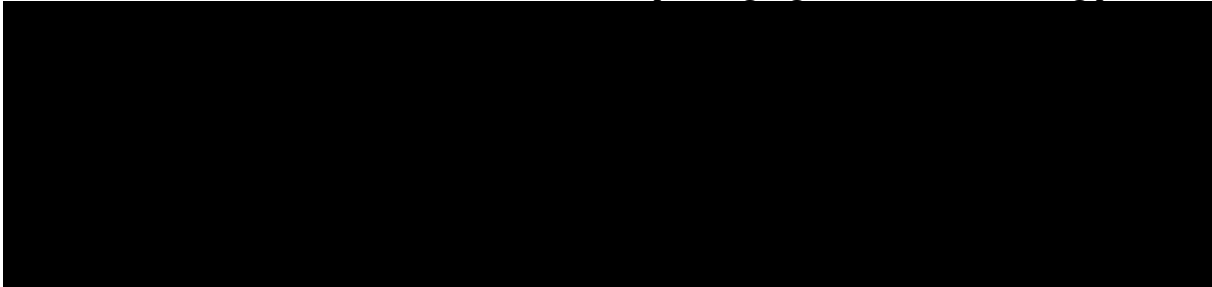
³⁰¹ CN has not proposed any specific term in its proposed Operating Agreement in relation to this issue or the capital improvement issue described below. It is not clear that the Board has jurisdiction to consider these CN suggestions in the absence of specific terms and conditions for the Operating Agreement.

³⁰² Ladue/Kuxmann VS, 52-53. The "theoretical" support for these proposals is contained in the testimony of Professor Willig, discussed in Section IV.D.2 above.

reason that any “alternatives” to those costs are also not cognizable. Each of the proposed alternatives also fails on their own merits.

1. Amtrak Should Not Be Bound To An Open-Ended Obligation To Pay Whatever CN Claims To Be “Incremental Costs” In The Future

CN asks the Board to insert into the Operating Agreement the following provision:



Given that CN’s definition of what constitutes incremental costs is, as shown above, in contravention of the requirements of the statute and the purposes behind it³⁰⁴ – coupled with CN’s inability to prove the existence of even those costs it deems to be “practically quantifiable” – the Board should not impose on Amtrak an open-ended, prospective obligation to pay whatever additional compensation CN may demand in the future. CN’s proposal is also an attempt to subvert the Board’s authority to determine the meaning of incremental costs under Section 24308(a) by transferring that authority to CN alone (or, in the inevitable event of a dispute, an arbitrator pursuant to the Agreement’s arbitration provision). As CN’s own witness has testified, a compensation scheme that “will inevitably lead to conflict, rather than efficient cooperation” should be rejected.³⁰⁵

³⁰³ Ladue/Kuxmann SVS, Exhibit 1, Appendix IV, Item 28.

³⁰⁴ Frankel VS, 9.

³⁰⁵ Willig RVS, 8.

2. The Board Should Reject CN's Invitation To Reverse The Public Bargain Struck In 1970 And Make Passenger Rail Slower, Less Efficient, And Unattractive To Passengers

CN suggests that its lost opportunity costs could be reduced or eliminated if the STB would only order Amtrak to “modify its schedules [and/or] to run fewer trains.”³⁰⁶ The Board should reject CN's proposal to turn back the clock and cripple Amtrak's passenger service (even more than CN already has with its abysmal performance as the worst Class I railroad host) as being completely antithetical to the “public bargain” which the Federal government and the host railroads struck, and the goals and missions incorporated into and made a part of Section 24308(a) and the RPSA generally.³⁰⁷

Indeed, penalizing Amtrak passengers in this way would be unreasonable, since all of the opportunity costs that CN claims in this proceeding, to the extent they exist, “are costs that flow from CN's own operational decisions,” and it is peculiarly “in CN's power and discretion to reduce the claimed delay and interference costs allegedly arising from Amtrak's presence.”³⁰⁸ CN would have the Board transfer the financial consequences of these CN decisions to Amtrak and its passengers, but “[i]nsulating CN in this way from the cost-increasing consequences of its own decisions would exacerbate conflicts and inefficiency.”³⁰⁹

³⁰⁶ Ladue/Kuxmann VS, 52.

³⁰⁷ As described more fully in Section II.B above, these goals and missions include, for example, providing “efficient and effective intercity passenger rail mobility consisting of high quality service that is trip-time competitive with other intercity travel options,” implementing “schedules based on a systemwide average speed of at least 60 miles an hour” and operating “Amtrak trains, to the maximum extent feasible, to all station stops within 15 minutes of the time established in the public timetables.”

³⁰⁸ Frankel VS, 9-10. See discussion in Section IV.D.2.(d) above.

³⁰⁹ Frankel VS, 11.

3. The Board Should Reject CN's Proposed Requirement That Amtrak Provide CN With Hundreds Of Millions Of Dollars To Fund The Improvement of CN's Rail Network

CN proposes that the Board order Amtrak to fund CN infrastructure improvements estimated to cost between \$377 million and \$534 million (depending on the desired level of Amtrak service) in capital improvements on CN's Illinois Central corridor between Chicago and New Orleans ("IC Corridor") and CN's Grand Trunk Western corridor in Michigan ("GTW Corridor").³¹⁰ This proposal essentially would require Amtrak to pay to rebuild significant parts of CN's rail network that the IC removed between 1989 and 1991. For example, CN is proposing the installation of 36 miles of double-track in the vicinity of Champaign Yard, with 2 full and 7 partial crossovers, at a total project cost of \$155.6 million.³¹¹ As evidenced by internal CN documentation, in identifying infrastructure improvements that CN seeks to have Amtrak pay for on the IC corridor, [REDACTED]

[REDACTED]³¹² This belies CN's contention that the infrastructure funding it is proposing on the Chicago-Carbondale route is caused by Amtrak's two scheduled daily round-trip trains, as opposed to CN's own past infrastructure decisions.³¹³

³¹⁰ Ladue/Kuxmann VS, 52-53.

³¹¹ Williams/Roberts RVS, 18 n.36 (citing "IC's Single-Minded Maintenance Strategy," *Railway Track & Structures*, April 1993).

³¹² Williams/Roberts RVS, 18 n.36 and Attachment C-1, May 11, 2011 email from CN's Mark Nordling to CN employees (and witnesses) Paul Ladue and Harald Krueger.

³¹³ CN/IC realized significant cost savings by removing the double track and sidings on the IC corridor. Maga/Vilter RVS, Exh. 4, Frank Malone, "Why IC is Single-Tracking," 191 RAILWAY AGE 2, Feb. 1990. It would be an unearned and unjust windfall to CN if Amtrak were required to fund rebuilding of that same infrastructure.

CN can point to no statutory authority for an order requiring Amtrak to fund any infrastructure improvements to CN's network.³¹⁴ Section 24308(a) contains no such requirement, in contrast to Section 24308(d), the provision governing accelerated speeds.³¹⁵ "[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."³¹⁶

Even if such authority did exist, CN's infrastructure proposal is unreasonable and unsupported by competent evidence, for the following reasons.

a) CN's Capacity Modeling is Methodologically Flawed, Casting Substantial Doubt on the Reliability of the Results and The Conclusions Drawn From Those Results

CN's modeling efforts purport to "quantify the effect of Amtrak on CN's freight operations" and "identify the infrastructure (track and signal plant) improvements required" so that Amtrak services may achieve specified OTP targets at their endpoints on CN's lines "without Amtrak's trains causing net incremental delay to CN's freight traffic."³¹⁷ But design flaws in CN's simulation cast substantial doubt on the trustworthiness of the results from CN's modeling, and the conclusions CN draws therefrom.

³¹⁴ See Frankel VS, 14-15 (capital improvements to alleviate alleged delay and interference costs are not within the bounds of the relevant definition of incremental costs); Crowley/Mulholland VS, 29 (any cost associated with a change in a capacity limiting input factor on the CN network, such as capital improvement costs, does not qualify as a short-run avoidable cost).

³¹⁵ Under 24308(d), if Amtrak wants to operate trains at accelerated speeds and a host carrier refuses to allow such faster service, Amtrak can apply to the Board for an order requiring the host carrier to allow the accelerated speeds. Among other things, the Board would determine "which improvements would be required to make accelerated speeds safe and practicable" and "establish the maximum allowable speeds of Amtrak trains on terms the Board decides are reasonable." *Id.*

³¹⁶ *NetCoalition & Sec. Indus. & Fin. Mkts. Ass'n v. SEC*, 715 F.3d 342, 350 (D.C. Cir. 2013) quoting *Russello v. United States*, 464 U.S. 16, 23 (1983). This so-called negative pregnant rule is "the rule of construction that an express statutory requirement here, contrasted with statutory silence there, shows an intent to confine the requirement to the specified instance." *Field v. Mans*, 516 U.S. 59, 67 (1995).

³¹⁷ Krueger VS, 2-3.

First, CN’s capacity modeling is premised on the assumption that Amtrak is an interloper to a freight-only railroad network which would otherwise function smoothly and therefore Amtrak as the “newcomer” must pay for extensive upgrades to CN’s network. This ignores the operational reality that the daily fluctuations in CN’s freight traffic levels and freight capacity needs create limitations and challenges for CN’s network that are entirely unrelated to Amtrak.³¹⁸

Second, CN’s capacity modeling is designed such that, regardless of the factual inputs used in the model, the modeling exercise will always result in Amtrak owing CN more infrastructure. CN’s modeling creates “a potential infinite loop of delay allegedly attributable to Amtrak,” such that even if the proposed infrastructure were funded by Amtrak and built, if the CN simulation were run again,

regardless of the traffic and infrastructure on the line, CN’s model will always lead to the conclusion that additional infrastructure is necessary to mitigate what CN asserts is the ‘incremental delay’ that is ‘attributable to Amtrak.’ Put another way, CN’s study is designed such that *it is impossible to conclude that no infrastructure is needed.*³¹⁹

This phenomenon is described in detail in the Williams/Roberts RVS at pp. 14-20. In a nutshell, CN derived its estimate of increased infrastructure costs by comparing a “baseline” scenario that includes no Amtrak trains at all – *i.e.*, a scenario that bears no resemblance to a realistic baseline for the current performance of all trains using the modeled corridor – against a scenario in which Amtrak trains are added back into the model.³²⁰ The result is that, even if the baseline were adjusted to include all the infrastructure CN claims is required to eliminate freight train delays, the same modeling methodology would once again show a “need” for still more infrastructure to

³¹⁸ Williams/Roberts RVS, 11-14.

³¹⁹ Williams/Roberts RVS, 14 (emphasis added).

³²⁰ Williams/Roberts RVS, 13. This precluded CN from validating the base case against actual real-world operations, in contravention of standard capacity modeling practice, *id.* 11, and is inconsistent with the manner in which CN has previously conducted capacity modeling studies of Amtrak service over CN lines. *Id.* at 13 n. 27.

be built, even if the levels of freight and passenger traffic stayed the same.³²¹ As Williams/Roberts conclude, “CN’s study provides no support for their claims that Amtrak creates the need for and, therefore, should pay for, added infrastructure on the CN network.”³²²

Third, the CN modelers made a number of data choices and simplifying assumptions that detach the model from relevance to the real world, compromise the integrity of the CN model and undermine the validity of their results. These include selection of a non-representative study period, and assumptions made about delay targets, freight traffic, freight operations and line capacity. These significant flaws are explained in depth in Williams/Roberts RVS, pp. 20-36.

The above design and data flaws are enough to discredit CN’s modeling results. It should be noted, however, that a complete assessment of the reliability of CN’s capacity study is prevented by the fact that CN used its own, proprietary “Route Capacity Model” (“RCM”) instead of a capacity modeling tool such as RTC, which is widely known, utilized, and accepted in the railroad industry. As a result, the RCM simulation inputs, methodology, and results are not readily able to be analyzed by Amtrak or the Board, “thus hindering full evaluation of CN’s analyses and even introducing a substantial risk of bias.”³²³ In short, CN’s conclusions regarding required infrastructure are undermined due to the “black box” nature of CN’s proprietary modeling tool.³²⁴

b) CN’s Infrastructure Proposals, Drawn From CN’s Flawed Capacity Studies, Lack Any Evidentiary Support

Even the best simulation model does not itself identify, select, or recommend infrastructure additions to mitigate train delay; the modelers themselves do that. In a typical

³²¹ Williams/Roberts RVS, 19.

³²² Williams/Roberts RVS, 20.

³²³ Williams/Roberts RVS, 9.

³²⁴ Williams/Roberts RVS, 9-11.

exercise, the modelers identify a number of infrastructure improvements to test, and any proper evaluation of the modeler's recommended improvements requires a full understanding of the subjective judgments made in selecting infrastructure options to run through the model.³²⁵

Here, CN has put no evidence of any such selection process into the record. Amtrak's expert witnesses reviewed the relevant testimony and workpapers "and were unable to find an explanation of why the CN modelers chose the specific infrastructure improvements they are recommending."³²⁶ Nor has CN submitted evidence showing the alternative mixes of infrastructure improvements considered, or whether they at any point considered lower-cost operational changes as part of the model inputs, or whether they considered the cost of specific infrastructure as a factor in their recommendations, or whether lower-cost alternatives might be equally or more effective.³²⁷ As Williams/Roberts conclude, not only do these omissions preclude a meaningful evaluation of CN's proposed infrastructure improvements, but it is "unlikely CN would invest its own money with this level and quality of analysis."³²⁸

The Williams/Roberts RVS describes in detail other failings of CN's submission with respect to its infrastructure proposal at pp. 40-80, and these failings are, individually or in combination, sufficient grounds for the Board to reject CN's demand that Amtrak rebuild a substantial portion of its rail network. But one additional flaw should be noted here. That is, with respect to the specific projects CN would have Amtrak fund, at least some of CN's proposed locations for capacity improvements "appear to address delays to CN freight trains experienced at meets or passes with other freight trains," rather than with Amtrak trains; while

³²⁵ Williams/Roberts RVS, 37-38.

³²⁶ Williams/Roberts RVS, 38.

³²⁷ Williams/Roberts RVS, 38-39.

³²⁸ Williams/Roberts RVS, 39.

CN's own modeling also shows that some components of CN's proposed new infrastructure would be used infrequently or not at all.³²⁹

V. OTHER TERMS AND COMPENSATION PRESENTED TO THE BOARD

A. Amtrak's Other Proposed Changes to the Operating Agreement Are Designed To Implement The Substantial Public Benefits of Amtrak's Proposal

The other terms and compensation included by Amtrak in its proposed Operating Agreement would further the substantial public benefits of its delay-based incentive system proposal and should be adopted by the Board.

1. Term of the Operating Agreement

Amtrak has proposed that the new Operating Agreement should have a term of 10 years from the effective date of the Board's decision prescribing reasonable terms and compensation.³³⁰ Amtrak's position is driven in part by the length of time it has taken the parties since the contractual expiration of the existing Operating Agreement in May 2013 to negotiate a potential successor agreement and to litigate this ongoing dispute before the Board following Amtrak's filing of its Application in August 2013. It would be extremely impractical and inefficient to enter into a new Operating Agreement with only a three-year term (as CN proposes)³³¹ given the amount of time and substantial resources that the parties and the Board would have invested in establishing reasonable terms and compensation for the next Operating Agreement.

³²⁹ Williams/Roberts RVS, 41-61

³³⁰ Amtrak's Proposed Agreement § 8.8.

³³¹ Ladue/Kuxmann SVS, Exh. 1, Section 8.8A (enabling either party to terminate the Operating Agreement after 3 years). CN has not explained how a three-year term would be in the public interest or otherwise warranted under the circumstances.

2. Retroactivity

Both Amtrak and CN initially asked the Board to make its decision in this proceeding establishing reasonable terms and compensation for Amtrak's use of CN's facilities and services pursuant to the new Operating Agreement retroactive to the August 9, 2013 date on which the Board accepted Amtrak's Application in this proceeding. In its Surrebuttal filing, CN requests that the Board order any increase in CN's base compensation to be retroactive to August 2013, but CN for the first time requests that the incentive system should be applied prospectively from the future date of any Board decision prescribing the system.³³² CN has failed to explain why such inconsistent treatment of the retroactivity issue would be warranted or appropriate under the circumstances.³³³

3. Requiring CN Best Efforts to Remove Slow Orders

CN objects to Amtrak's inclusion of language in its draft Operating Agreement proposal which would obligate CN to use its best efforts to remove slow orders on CN's network.³³⁴ CN's objection fails to acknowledge that this same "best efforts" language about slow orders appears in Appendix IV, Section III, Item 6 of the current Operating Agreement, which CN did not delete from the proposed Operating Agreement that it submitted with its Surrebuttal Evidentiary Submission.³³⁵ Therefore, there is no basis for CN's objection to this best efforts requirement.

³³² Ladue/Kuxmann SVS, 47.

³³³ In prior decisions, the ICC and STB have determined that prescribed terms and compensation could be given retroactive effect only if both Amtrak and the host railroad consented. *See, e.g., Nat'l Rail Pass. Corp. Application Under Section 402(a) of the Rail Passenger Service Act*, 1 ICC2d. 243, 248 (ICC decided Oct. 25, 1984). To the extent that the Board determines that any increase to CN's base compensation is warranted in this proceeding despite the legal and evidentiary deficiencies in CN's claim, Amtrak objects to the retroactive implementation of any such change.

³³⁴ Ladue/Kuxmann RVS, 53.

³³⁵ CN also asserts that the annulled/cancelled train compensation provision that Amtrak included as Section 5.1.F of its proposed Operating Agreement is purportedly outside the scope of the disputed issues identified by Amtrak in October 2013. Ladue/Kuxmann RVS, 57. To the extent the Board agrees with

4. Confidentiality of the Operating Agreement

Amtrak also has proposed a provision in the Operating Agreement pursuant to which the parties would agree to maintain the confidentiality of its terms and conditions and not disclose its contents to any third parties without the consent of the other party, except to the extent that disclosure was required by law.³³⁶ As a result of the manner in which Amtrak was created and given statutory access rights to host railroad facilities and services, Amtrak must negotiate periodically with each of the host railroads over which it operates upon expiration of the terms of the relevant Operating Agreements. Each such negotiation may involve certain tradeoffs, concessions, and specific provisions that Amtrak would not necessarily agree to with another host railroad in a different context. Thus, in order to avoid prejudicing Amtrak in future negotiations with other host railroads, Amtrak believes it would be reasonable for the Board to require that the next Operating Agreement executed by Amtrak and CN should be treated as confidential.

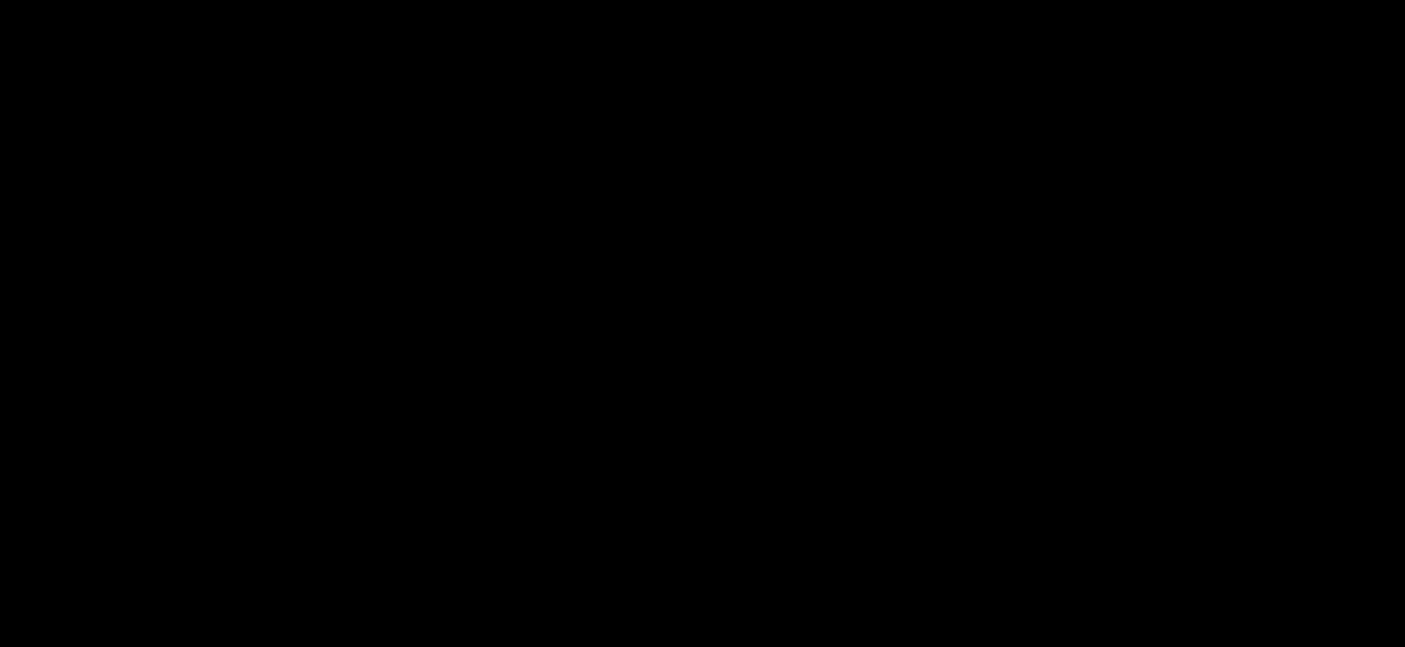
5. Elimination of the Unnecessary Incremental Cost References In the Operating Agreement Is Consistent With Amtrak's Proposal

Amtrak has proposed eliminating unnecessary references to the defined term “incremental cost” in the Operating Agreement given the contentious dispute between the parties

CN's narrow interpretation of the Board's authority to prescribe terms and compensation that were not explicitly defined in the disputed issue submissions made the parties at the outset of this proceeding, the Board must reject various proposals made by CN (including but not limited to its request to amend the *Illini/Saluki* schedules) which also were not explicitly identified in its October 2013 submission of issues in dispute. CN's similarly claims that Amtrak allegedly “never discussed” with CN its proposed elimination of the obligation to pay for an Accounting Staff employee at CN. Ladue/Kuxmann RVS, 59. This objection also elevates form over substance and would (if accepted) require the Board to reject many of the provisions set forth in CN's proposed Operating Agreement which CN never discussed with Amtrak.

³³⁶ Section 8.13 of Amtrak's Proposed Operating Agreement set forth in Attachment 3 of the Vilter VS (and shown as a comparison against the current Operating Agreement).

about the precise meaning of that term.³³⁷ CN is making the unprecedented claim in this proceeding that the statutory reference to “incremental costs” entitles CN to so-called “freight and interference costs.” CN also argues that the Operating Agreement should include a provision which would entitle CN to recover any future costs that CN identifies as within the category of incremental costs.³³⁸ Amtrak’s proposed changes to the Operating Agreement are designed to eliminate future ambiguity and areas of potential dispute between the parties by eliminating any unnecessary references to incremental cost, and instead specifying that the cost categories set forth in Appendix IV of the Operating Agreement include all of the incremental costs that CN will be entitled to receive from Amtrak under the Operating Agreement as part of its base compensation.



³³⁷ Vilter VS, Attachment 3, Comparison of Amtrak’s Proposed Agreement to the Current Agreement Arts. I, IV, V, App. IV.

³³⁸ Ladue/Kuxmann SVS, Exh. 1, App. IV, Section III, Item 28.

³³⁹ The only other change proposed by CN relates to a provision requiring Amtrak to pay for any additional “incremental costs” that CN should purport to discover during the term of the Agreement. That proposed provision is discussed in Section IV.E.1 above.

³⁴⁰ Ladue/Kuxmann SVS, 46; Ladue/Kuxmann SVS, Exh. 1, App. IV, Section III, Items 26 and 27.

³⁴¹ The side letters were submitted into the record as Exhibit 14 to the Ladue/Kuxmann VS.

VI. CONCLUSION

For the reasons discussed above, Amtrak hereby seeks a Board order prescribing the terms and compensation reflected in Amtrak's proposed Operating Agreement that was submitted as Attachment 3 to the Vilter VS, including but not limited to the following:

[REDACTED]

³⁴³ Ladue/Kuxmann VS, Exh. 14.

³⁴⁴ *Id.* (emphasis added).

[REDACTED]

- A. The Board should prescribe adoption of Amtrak’s delay-based quality payment and penalty system, as reflected in the proposed version of Appendix V that Amtrak submitted with the Vilter VS as Attachment 3;
- B. The Board should prescribe adoption of Amtrak’s other proposed changes to the Operating Agreement as set forth in Attachment 3 to the Vilter VS, including but not limited to the following provisions:
 - 1. Amtrak’s proposal to make the Operating Agreement effective for 10 years from the effective date of the Board’s decision prescribing Amtrak’s proposed terms and conditions;
 - 2. Amtrak’s proposal to include a confidentiality provision in the Operating Agreement; and
 - 3. Amtrak’s proposal to make its proposed terms and conditions retroactive to the August 2013 date on which the Board accepted Amtrak’s Application in this proceeding.
- C. The Board should reject CN’s proposal to adopt a modified version of the KOTP incentive system as reflected in CN’s proposed changes to Appendix V of the Operating Agreement submitted with CN’s Surrebuttal.³⁴⁶
- D. The Board should reject CN’s other proposed changes to the Operating Agreement that are reflected in CN’s Surrebuttal, including but not limited to the following provisions:
 - 1. CN’s proposal to obtain additional base compensation for so-called “freight delay costs” as reflected in Appendix IV of CN’s proposed Operating Agreement that was submitted with its Surrebuttal;
 - 2. CN’s proposal to include the “lookback” provision in any incentive system prescribed by the Board and to implement the “reopener” provision set forth in Section 8.13 of the proposed Operating Agreement that was submitted with its Surrebuttal;
 - 3. CN’s proposal to include a provision which allows CN to charge Amtrak for any unspecified, future incremental costs that CN may identify during the term of the Operating Agreement, as reflected in Appendix IV of CN’s proposed Operating Agreement that was submitted with its Surrebuttal;
 - 4. CN’s proposal to include a provision requiring the parties to engage in a binding schedule review process every 5 years, as reflected in Section

³⁴⁶

In the event that the Board decides to prescribe some form of a checkpoint/relief-based incentive system despite its substantial flaws, the Board should (at a minimum) prescribe Amtrak’s proposed adjustments to the KOTP system that are set forth in Exhibit 28 of the Vilter/Maga RVS and summarized in the attached Appendix A.

3.2.G of CN's proposed Operating Agreement that was submitted with its Surrebuttal, and CN's related proposal to dramatically lengthen the schedules for Amtrak's *Illini/Saluki* trains;

5. [REDACTED]
[REDACTED] in accordance with the language set forth in Appendix IV of the proposed Operating Agreement that CN submitted with its Surrebuttal; and

6. CN's proposal to mandate use of the so-called "root cause" concept to attribute responsibility for delays to Amtrak trains.

E. The Board also should reject CN's proposal that Amtrak be required to pay for substantial capital improvements on CN's tracks, and should reject CN's related suggestion that Amtrak should reduce the quality of its passenger service by lengthening its schedules and/or running fewer trains, neither of which requests are reflected in the proposed Operating Agreement that CN submitted with its Surrebuttal.

Respectfully submitted,



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APPENDIX A

EVEN IF THE BOARD ADOPTS A KOTP INCENTIVE SYSTEM DESPITE ITS SIGNIFICANT DEFICIENCIES, THE MODIFICATIONS PROPOSED BY AMTRAK MUST BE IMPLEMENTED

In the event that Board determines to prescribe some form of a KOTP incentive system despite its substantial flaws, the Board must adopt Amtrak's proposed adjustments to the KOTP system that are reflected in Exhibit 28 of the Maga/Vilter RVS that was submitted with Amtrak's Rebuttal Evidentiary Submission. The key components of Amtrak's proposed modifications, and why such modifications would need to be implemented by the Board instead of the KOTP system changes proposed by CN, are summarized in this Appendix.

A. CN Mischaracterizes Amtrak's Proposed Modifications to the KOTP System

Although misstatements are pervasive throughout CN's evidentiary submissions in this proceeding, CN's Surrebuttal filing in particular contains a number of mischaracterizations about Amtrak's position in relation to CN's KOTP system proposal. For example, CN claims that the "essential premise" behind Amtrak's proposed adjustments to the KOTP system is that CN should reduce delays beyond its control.³⁴⁷ This is not at all Amtrak's position. Rather, Amtrak has been unequivocal in specifying that CN should be held accountable for delays *within* its control, as opposed to the current KOTP system which allows CN to obtain substantial incentive payments from Amtrak despite causing excessive delays (and which also rewards CN for favorable circumstances that it does not cause).³⁴⁸

³⁴⁷ Ladue/Kuxmann SVS, 3.

³⁴⁸ See Section III.B above.

B. The Lookback Does Not Allow the Penalty System to Properly Function and Must Be Eliminated From Any KOTP System

If the checkpoint/relief-based system is continued, the Board should eliminate the “lookback” provision to ensure that the Operating Agreement includes a properly functioning penalty system that motivates CN to avoid providing untimely performance. During sustained periods of poor performance by CN, the lookback limitation nullifies the penalty system in the current Operating Agreement.³⁴⁹ A penalty that CN does not actually have to pay cannot motivate CN to improve on-time performance.

The Rail Passenger Service Act (as amended) specifies pursuant to 49 U.S.C. § 24308(a) that Amtrak’s agreements with host railroads “shall include a penalty for untimely performance.” CN’s sustained poor performance as a host for the relevant Amtrak services has made it clear that the lookback provision prevents the penalty provision in the incentive system under the current Operating Agreement from working effectively. Unless the lookback provision is eliminated, CN will continue to avoid accountability for providing unacceptable levels of service to Amtrak. The lookback provision insulates CN from having to pay penalties for untimely performance when its performance has been consistently poor, which is contrary to the statutory mandate.

C. Delay Attribution for Amtrak Trains Should Continue to be Based on Direct Cause, Not The Overly Subjective and Inherently Vague “Root Cause” Concept Advocated by CN

Delay coding for Amtrak trains should continue to be based on the “direct cause” system used by Amtrak’s conductors for all of Amtrak’s operations over host railroad track. CN’s advocacy for a so-called “root cause” approach would introduce unnecessary subjectivity into the

³⁴⁹ See Maga/Vilter RVS, Exh. 28, Section E; see discussion in Section III.B above. This is true whether the Board adopts Amtrak’s proposed delay-based system or under the checkpoint/relief-based system.

process and would be unmanageable for the reasons described in Section III.E.3.b) above. This is important whether the Board adopts Amtrak’s delay-based proposal or prescribes some form of checkpoint/relief-based system.

D. CN’s Performance Should be Measured at All Amtrak Stations and Exit Points on CN Lines

Another fundamental deficiency of CN’s KOTP proposal is that it only measures CN performance at limited checkpoints that are (with one exception)³⁵⁰ at the endpoints of the Amtrak services over CN. In order to meet the statutory goal of delivering Amtrak passengers to their stations within 15 minutes of their scheduled arrival time, CN needs to be motivated to reduce HRDs and provide timely performance at all stations for all Amtrak passengers – not just those passengers boarding and alighting at the limited checkpoints reflected in the current KOTP system.

In stark contrast to Amtrak’s proposal to include checkpoints at all Amtrak stations, CN essentially argues that the non-checkpoint stations are irrelevant because smaller numbers of Amtrak passengers use those stations. In fact, CN argues that its proposal on checkpoints is sufficient because a majority of Amtrak passengers travel to or from checkpoints (as if only one end of a passenger’s trip is relevant).³⁵¹ However, CN’s attempt to minimize the importance of those Amtrak passengers boarding or detraining at non-checkpoint stations is unreasonable

³⁵⁰ [REDACTED]

³⁵¹ Ladue/Kuxmann SVS, 7 (containing a Table that purports to reflect the percentage of Amtrak passengers in calendar year 2016 traveling to or from the additional checkpoint stations proposed by Amtrak relative to the total number of Amtrak passengers using the relevant service). The “Average” column in CN’s Table is misleading because it only represents the average percentage of Amtrak passengers using any of the additional checkpoint stations when compared to the total ridership for the relevant service (including passengers using stations that are not located on CN’s portion of the route).

considering the tens of thousands of passengers that pass through such stations for the Amtrak services operating over CN.³⁵²

CN initially rejected the idea that any additional checkpoints should be added to the existing system. However, in its Surrebuttal Evidentiary Filing, CN has proposed adding one checkpoint at the approximate midpoint of the Illini/Saluki service (at Champaign) and two checkpoints on the *City of New Orleans* service (at Carbondale and Jackson) but only if CN's proposal to drastically lengthen the schedules for the Illini/Saluki trains and to make similar changes to the schedules for the *City of New Orleans* trains is adopted. CN's revised position is nothing more than an empty gesture which recognizes the validity of Amtrak's concern about the lack of checkpoints at intermediate stations.

The vast majority of Amtrak passengers ride to and/or from intermediate stations.³⁵³ Therefore, CN on-time performance at intermediate stations is important to more Amtrak passengers than on-time performance solely at the endpoint stations. Nonetheless, CN would disregard the interests of these Amtrak passengers in favor of a system with more limited checkpoints in order to increase its chances of earning incentives without having to provide better performance to all stations.

CN's proposal disregards the interests of Amtrak passengers and is motivated solely by the opportunity to obtain incentives without having to provide better performance. Amtrak's

³⁵² See **Table 2** above. CN's disregard for any of the Amtrak passengers using non-checkpoint stations demonstrates that its proposal would undermine the entire purpose of the incentive system, which is to motivate CN to handle Amtrak trains without delay at all points along the Amtrak routes.

³⁵³ Vilter/Maga RVS, 39.

statutory goal to ensure that all passengers arrive at their station stops within 15 minutes of scheduled arrival time requires the addition of checkpoints at all intermediate stations.³⁵⁴

E. CN's Performance Should Be Measured Using the Published Schedules, Not A Separate Contract Schedule

CN argues that Amtrak's proposed conforming changes to the definition of "Checkpoint" and "Scheduled Arrival Time" for purposes of the KOTP system would reduce the "scheduled time against which CN's performance is judged."³⁵⁵ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] This is only disadvantageous to CN if its sole objective is to maximize its incentive payments by measuring its performance against longer schedules. CN's attempt to maintain contract schedule run time instead of matching the schedules agreed to by the parties in the existing Operating Agreement (as Amtrak has proposed) is another effort by CN to maximize its opportunity for incentive payments by lengthening the schedule against which its performance is measured without any concern about the impact of its performance on Amtrak and its passengers.³⁵⁸

³⁵⁴ CN's claim (Ladue/Kuxmann SVS, 2) that Amtrak is seeking to add such checkpoints "indiscriminately" is puzzling, since there is nothing indiscriminate about adding checkpoints at all Amtrak stations in order to fulfill the statutory goal of delivering Amtrak passengers to their stations in a timely manner.

³⁵⁵ Ladue/Kuxmann SVS, 16

³⁵⁶ Vilter/Maga RVS, 40.

³⁵⁷ Ladue/Kuxmann SVS, 16

[REDACTED]

CN also claims that the additional time in the existing contract schedules is necessary because Amtrak incorporated “negative recovery time” into the agreed upon schedules for some trains. However, CN’s claim is factually inaccurate and misconstrues the purpose of the current schedule structure for the trains in question.³⁵⁹ CN also claims, without any evidence, that the additional time reflects Amtrak’s desire to reduce schedule time on a segment to motivate Amtrak crews to achieve run time and avoid overtime. In fact, to the extent that negative recovery time does exist, it was added at CN’s request in order to prevent trains from arriving early at stations due to excessive PRT that CN has refused to allow Amtrak to eliminate from the schedules. Thus, CN has failed to provide a reasonable basis for rejecting Amtrak’s proposal to match the schedule used for measuring CN’s performance under the checkpoint/relief-based system with the public schedule for Amtrak’s trains.

F. Amtrak Should Be Permitted to Use Its Proportionate Share of Available Recovery Time for Station Dwell Delays and Lateness from Origin

One of the myriad problems with the current checkpoint/relief-based system is that CN has the ability to absorb recovery and miscellaneous time in the schedules for its own delays, to the detriment of Amtrak. The existing KOTP incentive system provides CN with relief for the excess of actual delays from certain events over Recovery Time Base (“RTB”). The RTB is the Amtrak portion of recovery time in the schedule skeleton for a particular Amtrak service, and the

³⁵⁹ *Id.*

other half of the recovery time is the host portion.³⁶⁰

The purpose of the incentive system is to measure and motivate CN's performance in order to decrease delays to Amtrak's passengers. The KOTP system proposed by CN, which enables CN to obtain an incentive windfall whenever there happen to be few delays not caused by CN, skews the assessment of CN's actual contribution to on-time performance and enables CN to earn incentive payments in circumstances where CN actually caused large amounts of

³⁶⁰ Sacks RVS, 7 n. 9.

³⁶¹ Current Operating Agreement, Appendix V, Table 1.

³⁶² Vilter/Maga RVS, Exh. 28, Section A.2 and Appendix II.

³⁶³ Vilter/Maga RVS, Exh. 28, Sections A.3, B.1.

delay. As Amtrak has explained throughout this proceeding, CN currently receives substantial incentive payments despite the fact that CN consistently provides poor service to Amtrak's passengers. CN's consumption of all of the recovery time, even that intended to be used for Amtrak Responsible Delays or Third Party Delays, is one reason why CN can continue to receive disproportionately favorable incentive payments for poor service.

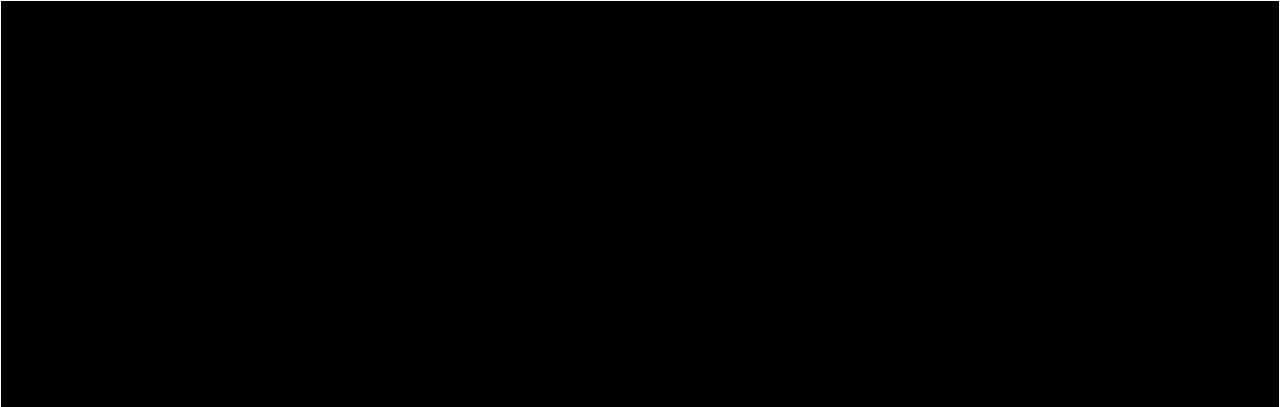
³⁶⁵

Ladue/Kuxmann SVS, 19.

Ladue/Kuxmann SVS, 18, 26.

G. CN Should Not Be Permitted To Earn Additional Incentive Payments Due To Favorable Circumstances Which CN Has Not Created

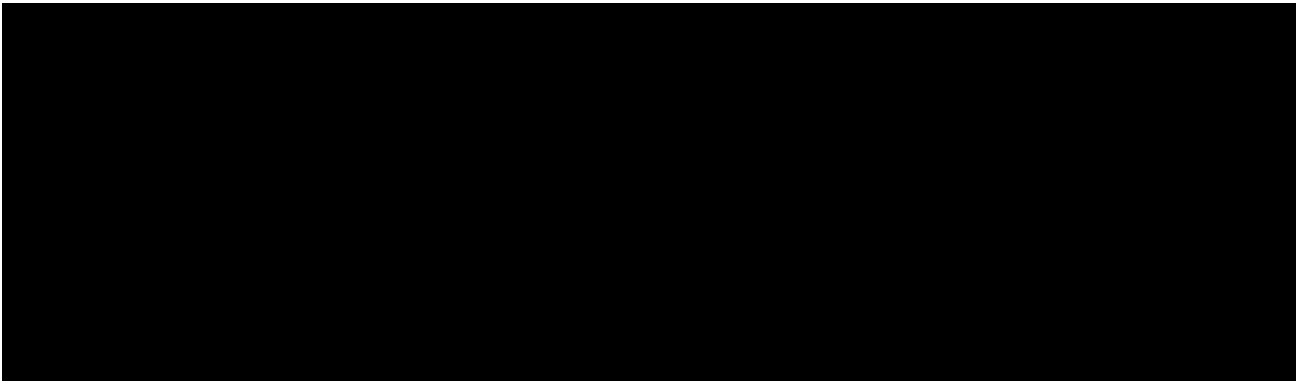
Under the current Operating Agreement, CN often earns incentive payments even when it has significantly delayed an Amtrak train if there happen to be minimal delays to that same train caused by Amtrak or third parties. This is a significant problem with the existing checkpoint/relief-based system.³⁶⁸ In these situations, CN is rewarded despite its poor performance by the fortuitous lack of delays from other causes and therefore CN benefits from the overall performance of the Amtrak train at the checkpoint.³⁶⁹ However, the purpose of the incentive system is to motivate CN's performance and minimize delays caused by CN, regardless of the other factors that may impact the performance of any particular train.



³⁶⁸ This flaw of the existing checkpoint/relief-based system is described in more detail in the Sacks RVS.
³⁶⁹ Sacks RVS, 8.

H. Penalties Under Any KOTP System Should Start At Monthly Performance Below 80 Percent In Order To Motivate CN To Provide Better Service

Under the current KOTP system, CN is not at risk of incurring any penalties unless the number of trips of the Amtrak train arriving at a checkpoint within tolerance is below 70 percent for the month, and quality payments are paid to CN when the number of trips of the Amtrak train arriving at a checkpoint within tolerance is 80 percent or higher for the month. When CN's monthly performance is above 70 percent but below 80 percent, there is no penalty or quality payment.³⁷² This is a significant problem with the existing system, since CN is not motivated by the prospect of avoiding a penalty payment to provide service above 70 percent KOTP. In effect, CN gets a 30 percent buffer zone each month before any penalty would be incurred for poor service. Therefore, Amtrak has proposed to establish the applicable threshold for quality payments or penalties under any KOTP system at 80 percent.³⁷³



³⁷⁰ Vilter/Maga RVS, 41.



³⁷² Current Operating Agreement, Appendix V, Sections B, C.

³⁷³ See Vilter/Maga RVS, Exh. 28, Sections C, D.

³⁷⁴ Ladue/Kuxmann SVS, 35.

I. Penalties Should Increase When Monthly Average Lateness Exceeds 15 Minutes

Extremely late Amtrak trains present particular hardships to Amtrak passengers. When an Amtrak train cannot arrive at a checkpoint within tolerance under the current KOTP system, additional CN responsible delay minutes do not harm CN for incentive/penalty purposes and CN therefore has no incentive to try to minimize further delays to that Amtrak train.³⁷⁶ In other words, a train that is late by 1 minute or by 60 minutes as a result of CN delays has the same impact on CN under the existing KOTP incentive system. However, more severe delays have a significant impact on Amtrak passengers and Amtrak operations.³⁷⁷ [REDACTED]

[REDACTED]

[REDACTED] This will

*help ensure that CN is motivated to not exacerbate delays to Amtrak trains that are unlikely to be “makes” for CN incentive purposes.*³⁷⁹

³⁷⁵ Maga SVS, 2.

³⁷⁶ Vilter VS, 8.

³⁷⁷ Vilter VS, 8-9.

³⁷⁸ See Vilter/Maga RVS, Exh. 28, Section D.2.

³⁷⁹ CN claims that it “is already motivated, by operational and reputational concerns, to avoid additional delays to already-delayed trains.” Ladue/Kuxmann SVS, 36. However, CN has not presented any evidence in this proceeding that such purported operational or reputational concerns have caused CN to avoid delays to already-delayed trains. The Vilter VS contained numerous examples of Amtrak trains that experienced significant delays after CN HRD minutes caused a trip’s travel time to no longer be within tolerance. Vilter VS, 8.

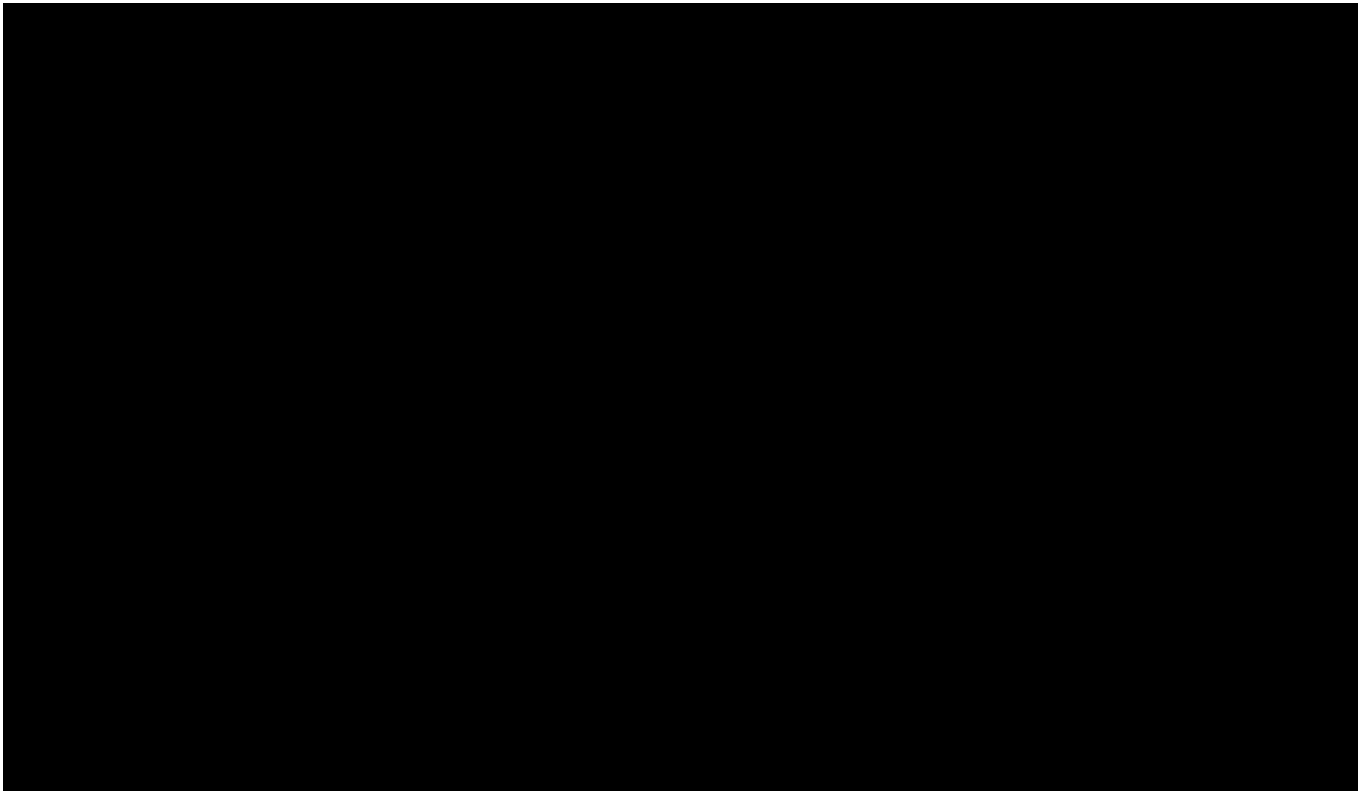
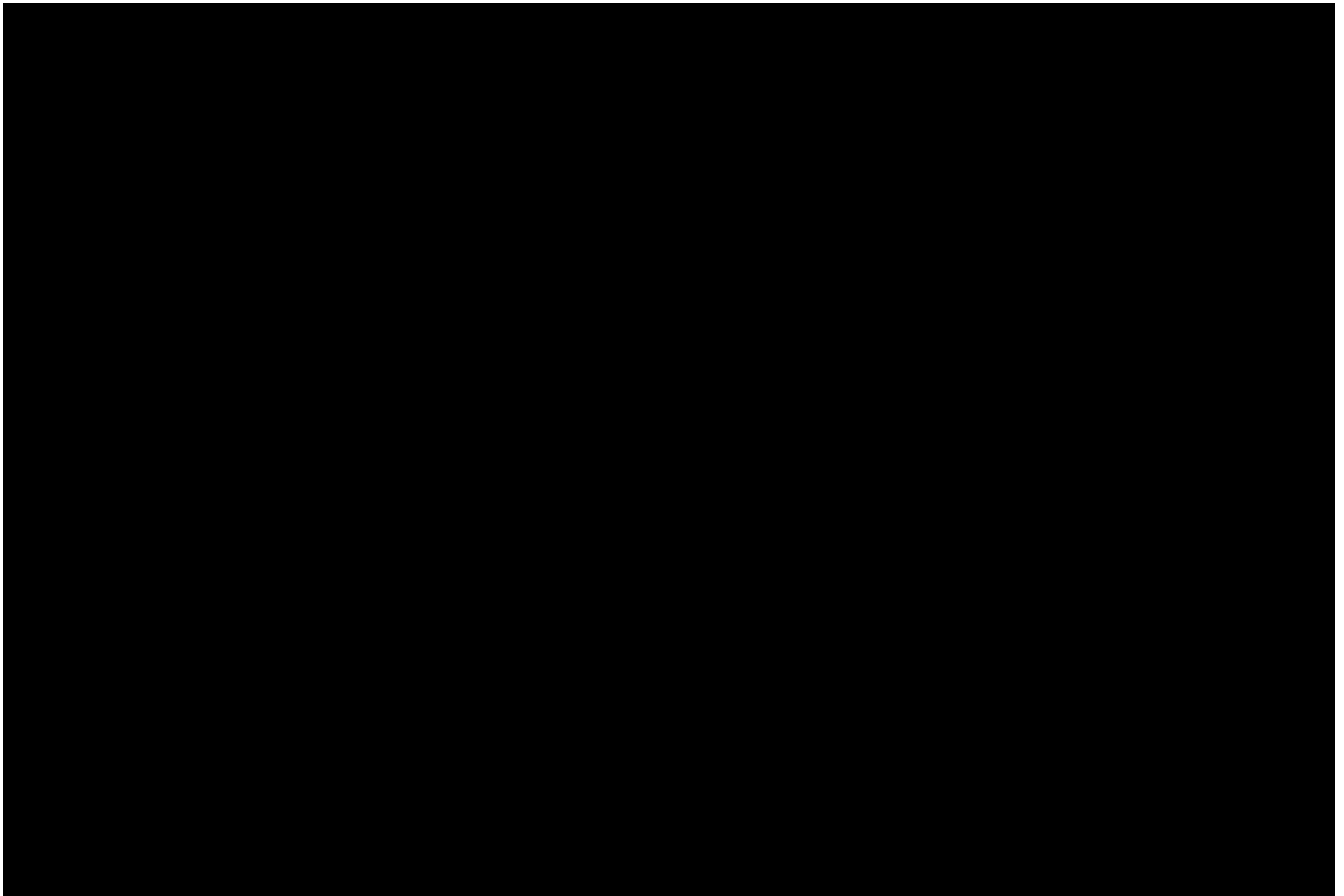
J. CN's Proposed New Relief Items for the Checkpoint/Relief-Based System Should Be Rejected Because CN's Proposal Would Unreasonably Shift Further Delay Responsibility from CN to Amtrak

CN proposes to shift responsibility for delays from CN to Amtrak by adding four new relief items to the KOTP system. CN's attempt to disclaim further responsibility for Amtrak delays should be rejected by the Board. [REDACTED]

[REDACTED]

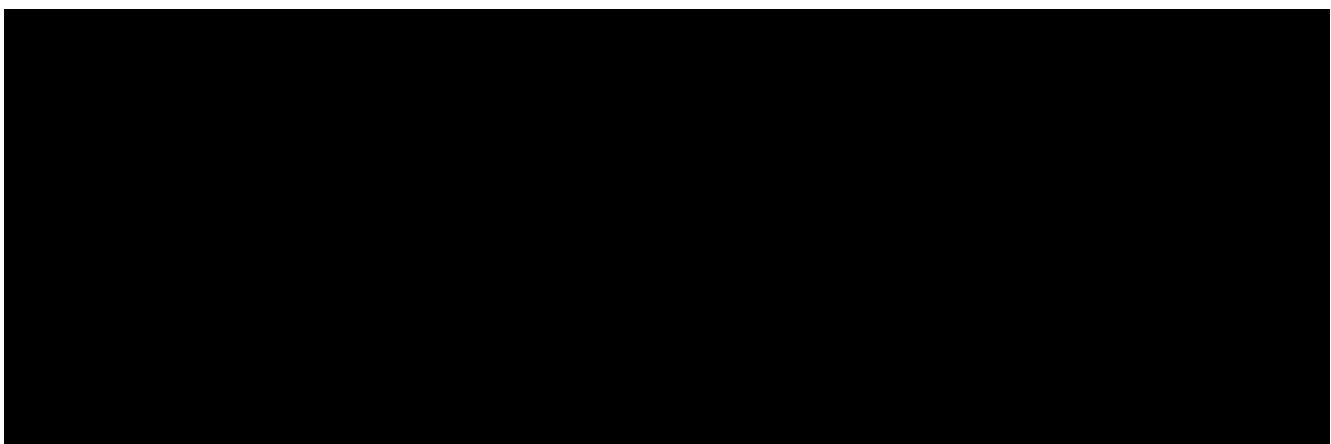
³⁸⁰ Ladue/Kuxmann VS, Exh. 15, CN Proposed Appendix V Section A.1.e.11; Ladue/ Kuxmann SVS, 23-24, Exh. 1, App.V-2.

[REDACTED]



K. CN's Proposal to Adopt Amtrak Delay Codes As Relief Items Necessitates Certain Additional Changes

CN proposes to eliminate some redundant relief items under the existing KOTP system by using Amtrak's delay codes instead for the purpose of determining when CN receives relief



for delays to Amtrak trains on the IC and GTW lines.³⁹⁰ However, to the extent that Amtrak delays codes are used to define relief items under any KOTP system, certain additional changes are necessary to ensure that CN cannot take advantage of opportunities to seek unjustified relief for delays to Amtrak trains for which CN should remain responsible.

a) CN Agrees That NEC Delay Codes are Inapplicable But Proposes to Retain the Irrelevant [REDACTED]

CN agreed in its Surrebuttal that Amtrak relief codes that are specific to Amtrak services on the Northeast Corridor (“NEC”) should not be included in the Operating Agreement.³⁹¹

However, Amtrak objects to CN’s continued insistence on using the [REDACTED]

[REDACTED] The NOD delay code is not relevant because it represents time spent at a station due to an early arrival time when the Amtrak train must wait for its scheduled departure time. Adopting NOD as a relief item in any KOTP system would mean that every minute of early arrival at one station would allow CN to deliver the Amtrak train that many minutes later at all subsequent stations without consequence for CN (but to the detriment of Amtrak and its passengers).³⁹³ CN provides no explanation for its insistence on using the NOD delay code for relief and no analysis of its potential impact.

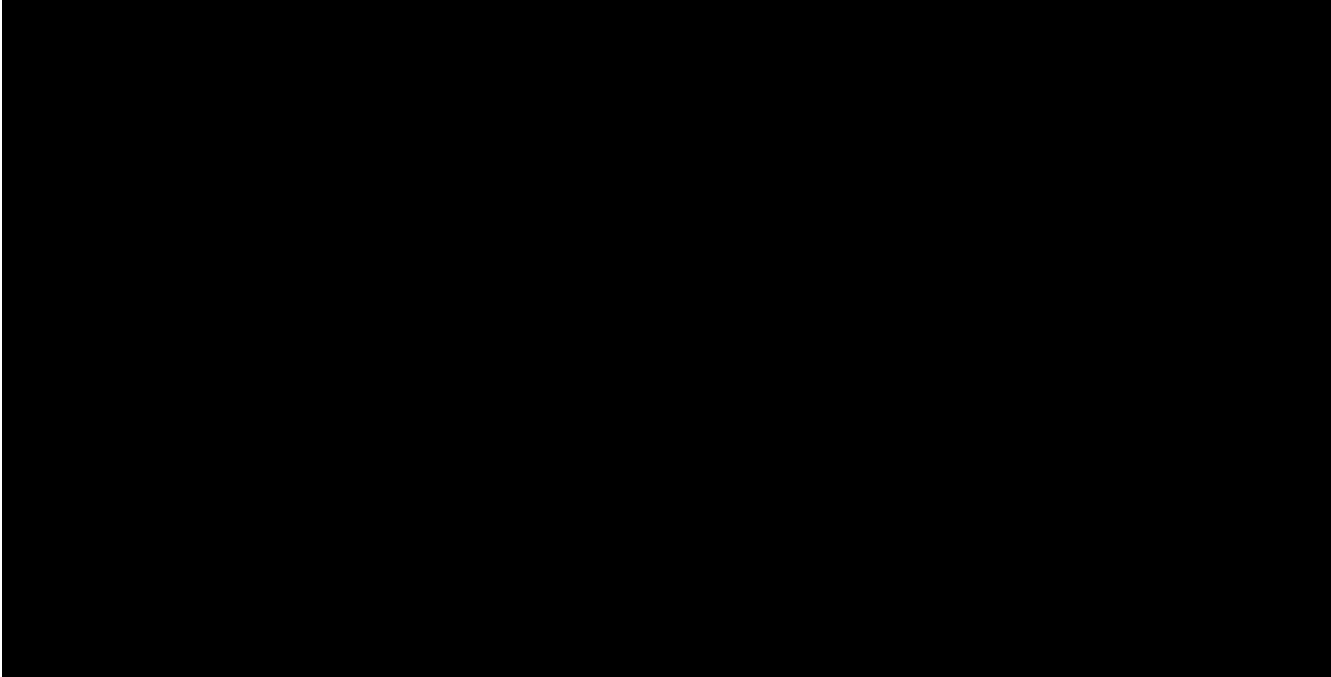
³⁹⁰ Ladue/Kuxmann VS, 56.

³⁹² Ladue/Kuxmann SVS, Exh. I, at App. V.A.1.l(1) & App. XI.

³⁹³ Vilter/Maga RVS, 57.

b) CN Agrees That Adoption of Amtrak Delay Codes As Relief Items Makes Retention and Addition of Certain Other Relief Items Redundant, But CN Still Overreaches With Its Proposal

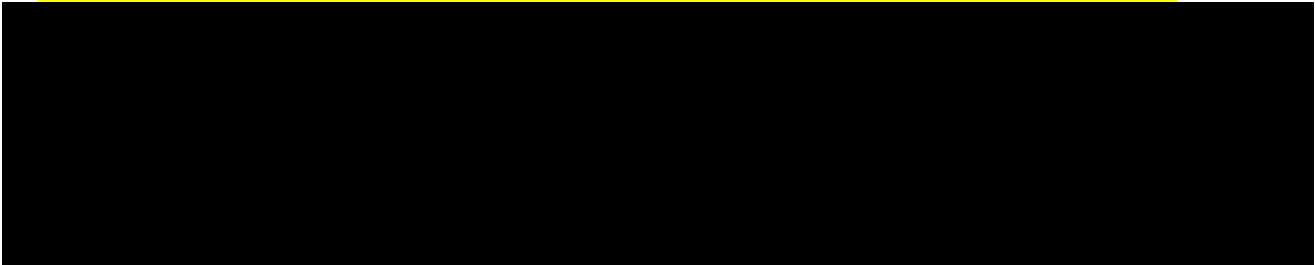
CN concedes that its initial proposal to adopt Amtrak's delay codes as relief items under the KOTP system would create redundancies.³⁹⁴ However, CN's proposal will continue to make the following relief items redundant if the Board adopts Amtrak's delay codes:³⁹⁵



³⁹⁴ Ladue/Kuxmann SVS, 26.

³⁹⁵ Vilter/Maga RVS, 57, Exh. 31.

³⁹⁶ Ladue/ Kuxmann VS, CN Appendix V Section A.1.c. 



³⁹⁷ Ladue/ Kuxmann VS, CN Appendix V Section A.1.e.12.

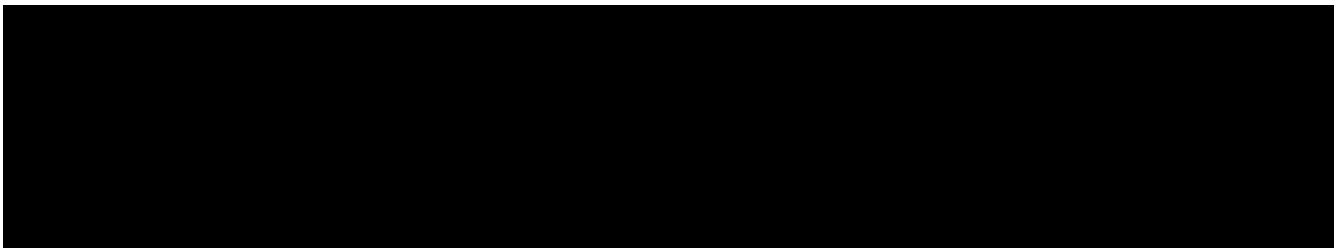
³⁹⁸ Ladue/ Kuxmann VS, CN Appendix V Sections A.1.e.4.

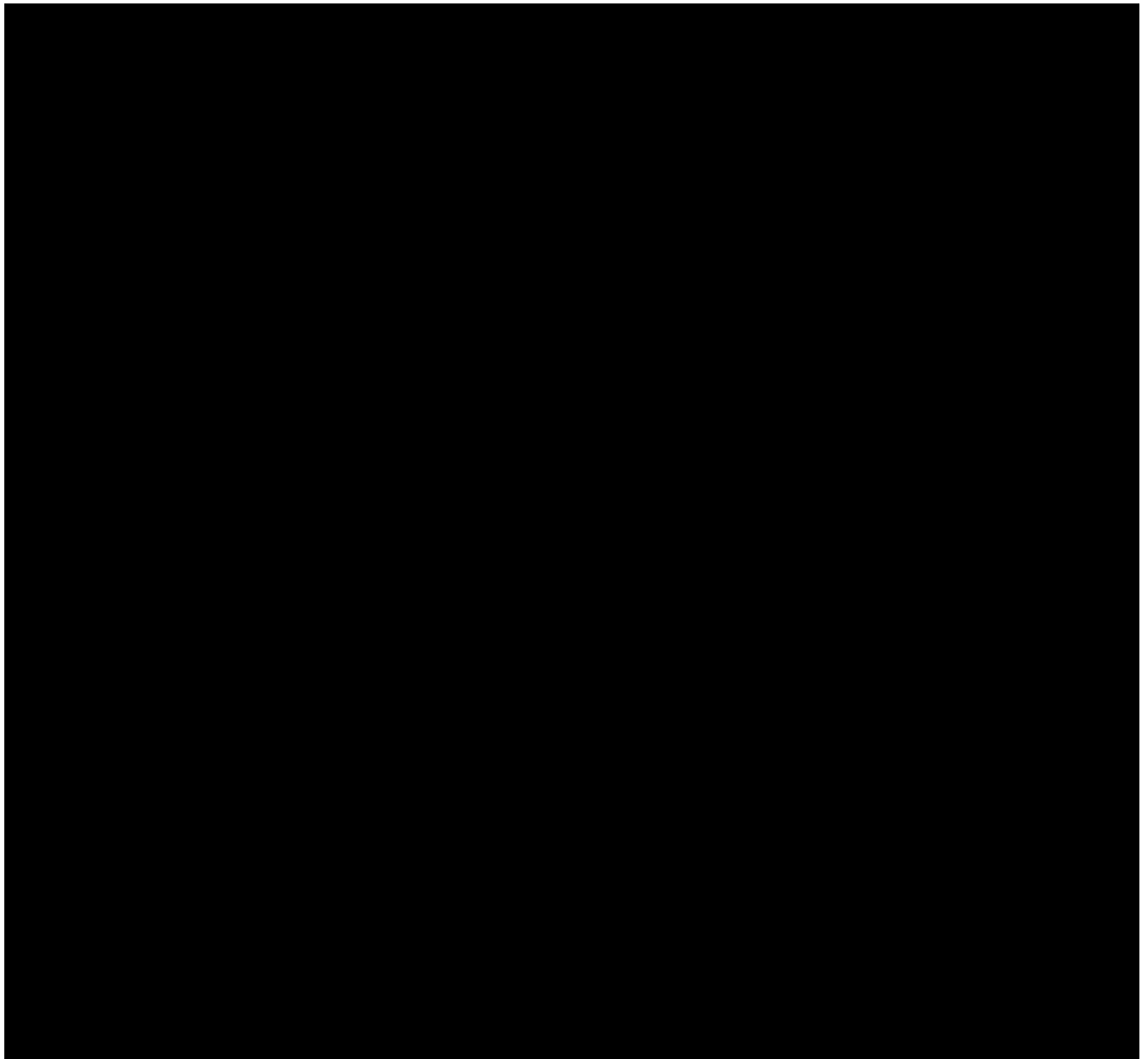


CN seeks to clutter the KOTP system with multiple layers of potential relief items that are redundant and unnecessary, all for the sake of increasing its myriad opportunities to avoid accountability for delaying Amtrak trains. Amtrak disagrees with this position and notes that the delay-based system proposed by Amtrak would be an easier system to administer because there would be no disputes between the parties about the propriety of relief items (which would not exist under the delay-based system).

c) Adding Checkpoints Combined with Adopting Amtrak Delay Codes As Relief Items Would Make Many Provisions for Not Counting Trains in the Quality Payment and Penalty Calculations Obsolete

CN's proposal to adopt Amtrak delay codes as additional relief items and Amtrak's proposal to add checkpoints to the KOTP system would render obsolete many existing provisions that cause an Amtrak train to not be counted for purposes of quality payments and penalty calculations. If CN is granted additional minutes of relief through adoption of the Amtrak delay codes, CN should otherwise remain accountable for reducing Amtrak delays in such situations and should not also have the advantage of using these events to avoid having the train trip count under the incentive system. The adoption of Amtrak delay codes as relief items makes the following "do not count" provisions redundant:





CN argues that the foregoing “do not count” provisions should be retained for two reasons. First, CN asserts that “[t]hese [do not count] provisions deal with unusual circumstances beyond CN’s control that can cause major operating disruptions that may not be

⁴⁰¹ Ladue/Kuxmann VS, Exh. 15, CN Proposed Appendix V Section A.4.c.1.
⁴⁰² Ladue/Kuxmann VS, Exh. 15, CN Proposed Appendix V Section A.4.c.2.
⁴⁰³ Ladue/Kuxmann VS, Exh. 15, CN Proposed Appendix V Section A.4.c.4.
⁴⁰⁴ Ladue/Kuxmann VS, Exh. 15, CN Proposed Appendix V Section A.4.c.5.
⁴⁰⁵ Ladue/Kuxmann VS, Exh. 15, CN Proposed Appendix V Section A.4.c.6.
⁴⁰⁶ Ladue/Kuxmann VS, Exh. 15, CN Proposed Appendix V Section A.4.c.7.

fully accounted for through ordinary relief items.”⁴⁰⁷ Further, CN states that increasing the number of checkpoints in the KOTP system will exacerbate the downstream effects of lengthy delays currently subject to the “do not count” provisions.⁴⁰⁸ CN’s arguments are unpersuasive. CN fails to explain why CN should be able to avoid accountability for delays under the incentive and penalty system following an initial delay. The “do not count” provisions essentially give CN the opportunity to delay an Amtrak train for the remaining portion of a trip following an initial delay event with the assurance that the trip will not count for purposes of the KOTP system (regardless of the severity of the delays inflicted by CN during the latter portions of the trip). Amtrak’s delay codes provide relief to CN for the initial delay. However, CN should remain accountable under the KOTP for any delays that follow the initial delay since the statutory purpose of the penalty provision is for “untimely performance.”⁴⁰⁹

L. CN’s Proposal to Expand the Catch-All Relief Item Should Be Rejected

CN seeks to add a “catch-all” relief item to the KOTP system which would provide CN with relief from [REDACTED]

[REDACTED] However, in addition to the extensive list of existing relief items in Appendix V of the existing Operating Agreement, Section A.1.e.13 of Appendix

⁴⁰⁷ Ladue/ Kuxmann SVS, 30.

V already provides that [REDACTED]

[REDACTED]

[REDACTED] Therefore, CN's proposed new "catch-all" provision is unnecessary.

CN in essence seeks the ability to grant itself relief under the KOTP system for delays that CN unilaterally deems to be beyond its control, as long as it provides Amtrak with information supporting its position. The existing provision relating to "special relief" gives Amtrak the discretion to determine whether CN is entitled to relief in such circumstances. CN has failed to explain why it would be reasonable, necessary or fair for CN to assume the unilateral right to make such a determination of its eligibility for relief under the "catch all" provision. CN also has not submitted any evidence which demonstrates that Amtrak has been unreasonable or unjust in considering CN's requests for special relief (if any) under the existing provision.⁴¹¹ CN's proposal to flip the burden of proof for the "catch-all" relief provision is yet another attempt by CN to further increase its ability to obtain substantial incentive payments from Amtrak without the obligation to provide adequate on-time performance to Amtrak and its passengers.

⁴¹¹ CN claims without any evidentiary support that Amtrak "has an incentive to deny such relief (or seek concessions in return) in order to avoid paying additional incentives, as well as a history of doing so." Ladue/Kuxmann SVS, 32.

CERTIFICATE OF SERVICE

I certify that on January 19, 2018, a Highly Confidential and Public version of the foregoing National Railroad Passenger Corporation's Opening Brief was served electronically upon the following counsel for Canadian National Railway Company:

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