METR-7

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 36500

CANADIAN PACIFIC RAILWAY LIMITED; CANADIAN PACIFIC RAILWAY COMPANY; SOO LINE RAILROAD COMPANY; CENTRAL MAINE & QUEBEC RAILWAY US INC.; DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION; AND DELAWARE & HUDSON RAILWAY COMPANY, INC. – CONTROL – KANSAS CITY SOUTHERN, THE KANSAS CITY SOUTHERN RAILWAY COMPANY, GATEWAY EASTERN RAILWAY COMPANY, AND THE TEXAS MEXICAN RAILWAY COMPANY

COMMENTS AND REQUEST FOR CONDITIONS OF THE COMMUTER RAIL DIVISION OF THE REGIONAL TRANSPORTATION AUTHORITY D/B/A/ METRA

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THIS FILING CONTAINS COLOR IMAGES

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I. INTRODUCTION

Under federal law, this Board cannot approve a merger of two Class I carriers when the proposed transaction is not consistent with the public interest. 49 U.S.C. § 11324(c). Here, Canadian Pacific Railway Limited and its corporate affiliates ("CP")[1] and Kansas City Southern and its corporate affiliates ("KCS")[2] (together, "Applicants") seek approval of a proposed Transaction[3] that CP's own data in the Application and associated workpapers indicates will increase new freight traffic up to 380% on commuter rail lines owned by the Commuter Rail Division of the Regional Transportation Authority ("Metra"). Because CP dispatches the lines under a 99-year Trackage Agreement entered into over 40 years ago by the parties' predecessors, Metra and Illinois taxpayers can expect additional new disruptive delays to commuter rail schedules and an exacerbation of safety issues caused by CP trains traveling through stations at busy commuter times, forcing Metra trains to serve passengers on the "wrong" side of station tracks, and blocking routes to Metra trains and crossings. Taxpayers can also expect CP to further ignore commuter needs such as when CP recently denied Metra's requests to add four trains daily to serve job centers in in Lake Forest, Illinois, stating that there is no capacity on the line. Finally, Illinois taxpayers can anticipate paying for the costs attributable to these new freight trains on Metra's lines, burdening an infrastructure that never anticipated the length and weight of freight trains that CP currently runs. As a result, the Transaction proposed here is inconsistent with the public interest and cannot be approved.

[1] Canadian Pacific Railway Limited ("Canadian Pacific"), Canadian Pacific Railway Company ("CPRC"), and their U.S. rail carrier subsidiaries Soo Line Railroad Company, Central Maine & Quebec Railway U.S. Inc., Dakota, Minnesota & Eastern Railroad Corporation, and Delaware and Hudson Railway Company, Inc. (collectively, "CP").
[2] Kansas City Southern and its U.S. rail carrier subsidiaries The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and the Texas Mexican Railway Company (collectively, "KCS").
[3] The "Transaction" is the proposed merger between CP and KCS as accepted in the Board's Decision No. 11 in Docket No. FD 36500, served November 23, 2021. Unless otherwise indicated, capitalized terms in these comments have the meaning as defined in Board Decision No. 11.

"Rail Traffic Controller" ("RTC") modeling is the gold standard that provides information on rail patterns and the abilities of trains to operate efficiently on the same line. The ***only*** RTC modeling conducted for this Transaction supports Metra's concerns that the merger will undermine the safety and reliability of commuter service. This modeling demonstrates that Applicants' proposed Operating Plan will not work, and that CP's freight traffic will increase Metra train delays per 100 train miles by more than 400% on Metra's Milwaukee District-West Line ("MD-W") and Milwaukee District-North Line ("MD-N").[4] Without explanation, CP stated, under oath, that it declined to perform RTC modeling, and has instead relied on an inferior model for these purposes, i.e. MultiRail software and spreadsheet analysis, which this Board has found to be inadequate to assess the impacts of this Transaction.[5]

In reviewing the Application, the Board should consider that CP has a history of non-cooperation and contractual breaches with Metra, that CP's poor dispatching leads to regular — weekly, and in some cases daily — interference with Metra's peak and non-peak train service, endangering and inconveniencing riders, and that the infrastructure on the Metra lines cannot accommodate the trains that the Transaction will bring to Metra's lines. The additional freight and Amtrak trains that Applicants propose to bring to Metra's lines will degrade the safety and reliability of Metra's service.

[4] *See infra.* at Section III.

[5] Months after Metra requested from CP any modeling and data related to modeling Metra's lines and adjacent lines, with less than two weeks before the deadline for submitting comments, CP produced 39 modeling simulations covering the subdivisions for which Metra requested data. CP produced these without any explanation regarding even what request they were responsive to or why they were produced so late and produced them in a manner that was initially unusable. CP has consistently confirmed, however, that the conclusions in the Application do not rely on the results of those late-supplied modeling results.

In view of the direct harm to commuter rail services, on behalf of Illinois citizens, Metra requests that the Board deny the merger Application. Alternatively, if the Board elects to approve the Application, Metra requests the following:

1. Require CP to amend its agreement with Metra to transfer dispatching control to Metra.
2. Require CP to adopt Metra's RTC modeling or cooperate in refining RTC modeling to objectively gauge capacity and assess the impact of future proposals.
3. Require Metra and CP to agree to a binding standard and process for Metra schedule changes and new trains based on an accurate and objective capacity assessments.
4. Complete a series of capital enhancements to the right-of-way and facilities (described more fully in Section VII.3., below) that will reduce (although not eliminate entirely) the adverse impacts of the proposed Transaction if it is approved.
5. Impose a 10-year STB oversight condition with respect to CP dispatching practices (if dispatching is not transferred) and require that CP and Metra agree to binding workable dispatching standards that do not interfere with Metra's service and that prioritize Metra's peak period service.
6. Impose a 10-year STB oversight condition of any other conditions imposed with respect to Metra's service.
7. Require CP to incorporate all new terms imposed into a binding agreement between the parties.

II. BACKGROUND: METRA'S INTEREST IN THE PROCEEDINGS AND RELATIONSHIP TO THE TRANSACTION

A. Metra's Commuter Service

Metra operates and oversees commuter rail services in northeast Illinois, owning lines, facilities and rolling stock, setting fare and service levels, and implementing capital improvements and system planning. Metra provides for service to and from downtown Chicago via a rail network of 11 routes including 242 stations, nearly 500 route miles, and almost 1,200 miles of track.[6] As a critical part of the region's transportation and economic network, Metra provides commuter rail service upon which much of Chicago's workforce relies[7] and that enhances the economic and environmental health of northeastern Illinois.

Safety and on-time performance are key drivers for Metra's "precision" commuter railroading. Safety is crucial to Metra's service and ingrained in Metra's operational philosophy and practices. Metra also prioritizes operational reliability: Metra operates a time-critical service, where passengers expect and deserve on-time transportation, and where even a few minutes' delay impacts passengers' work schedules, experience, and satisfaction. Accordingly, Metra's business model requires that it avoid delays, which are detrimental to maintaining ridership and the trust of Metra's customers.

Since Metra's establishment in 1984, the largely suburban counties surrounding Chicago that Metra serves have grown dramatically, with three—Kane (served by MD-W), McHenry (served by MD-N via terminus at Fox Lake), and Will counties—nearly or more than doubling in population.[8] In response, Metra has also increased its service levels by double-digit percentages,

[6] Metra, 2020 State of the System Report, 3 (Nov. 2020) (hereinafter "2020 System Report"), https://metra.com/sites/default/files/2021-02/2020_State_of_the_System_Report.pdf.
[7] In 2019, commuters were responsible for 91% of Metra's 74 million passenger trips. 2020 System Report at 4.
[8] Resident Population in DuPage County, IL, Fed. Reserve Bank of St. Louis (updated May 5, 2021), https://fred.stlouisfed.org/series/ILDUPA0POP; Resident Population in Kane County, IL, Fed. Reserve Bank of St.

adding 26 more trains during off-peak periods and 13 more trains during peak times.[9] This growth has meant greater demand for reliable, timely commuter rail service by a more geographically dispersed customer base along a more complex network.

The COVID-19 pandemic caused a dramatic drop in ridership during 2020. Ridership climbed sharply in 2021, though it remains below pre-pandemic levels.[10] Metra expects ridership to steadily recover during the next few years, growing by 45% to 67% annually between 2022 and 2024 and reaching 80% of 2019 passenger trips by the end of 2024.[11] Metra expects that many changes to working and commuting practices that arose due to the pandemic, i.e. the rise in remote and hybrid work and flexible commuting schedules, will continue, and will evolve. Metra is preparing for these shifts, including by adapting its service schedules to offer better reverse-commute and express services to meet customer needs and grow ridership to maintain financial sustainability.[12] For example, in 2021 Metra launched pilot schedules on the BNSF, Metra Electric, Rock Island, and Union Pacific North lines. These pilot schedules step away from pre-pandemic service models that prioritized peak rush-hour service in favor of offering off-peak operations.[13] Metra has seen ridership gains following the implementation of the new pilot schedules.[14] Several projects that will expand the vitality of Metra's reverse

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Louis (updated May 5, 2021), https://fred.stlouisfed.org/series/ILKANE2POP; Resident Population in Lake County, IL, Fed. Reserve Bank of St. Louis (updated May 5, 2021), https://fred.stlouisfed.org/series/ILLAKE7POP; Resident Population in McHenry County, IL, Fed. Rsrv. Bank of St. Louis (updated May 5, 2021), https://fred.stlouisfed.org/series/ILMCHE0POP; Resident Population in Will County, IL, Fed. Reserve Bank of St. Louis (updated May 5, 2021), https://fred.stlouisfed.org/series/ILWILL7POP.

[9] Metra, Ridership Trends: Annual Report 2020, 26 (Feb. 2021), https://metra.com/sites/default/files/inline-files/2020_annual_ridership_report_v5.pdf.

[10] Metra Rail Summary, Reg'l Transp. Auth. Mapping & Stat. (accessed Jan. 25, 2022), https://rtams.org/ridership/metra/summary.

[11] Metra, 2022 Proposed Operating & Capital Program & Budget, 7, 58 (2021), https://metra.com/sites/default/files/inline-files/Brochure_8.5x11_ProposedBudgetBookElectronic_2022_VFINAL.pdf.

[12] *Id.* at 1, 2.

[13] *Id.* at 13.

[14] *Id.*

commute and non-peak period service on MD-W and MD-N have been identified as priority projects in planning.[15] Metra is currently taking steps to initiate direct service to O'Hare International Airport, which abuts MD-W and CP's Bensenville Yard. These and other projects require Metra to know that it can use any available capacity on its lines, capacity which it spent over $1.4 billion to acquire, maintain, and enhance, [16] and plans for increased service using the excess capacity that may be available on its lines.

The federal government indicated the critical place that commuter rail holds in the passage of the Infrastructure Investment and Jobs Act ("Infrastructure Act")[17] passed last year. Growing support for environmentally sustainable transit options supported by numerous studies makes clear that Millennial and Generation Z Americans are concerned about climate change and reducing carbon emissions.[18] Millennials have expressed substantially lower affinity for car ownership than have older Americans[19] while reporting an especially strong desire to live near, and to expand, public transit.[20] Metra, with its existing environmental advantages and its commitment to reduce carbon emissions, is well-positioned to attract more of those riders as the size and nature of the workforce and commuting public grows.

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[15] Metra, Systemwide Cost Benefit Analysis of Major Capital Improvements, Final Report (Jan. 16, 2019), App. A-7 and A-8, https://metra.com/sites/default/files/assets/cba_final_report_20190116.pdf; Chicago Metropolitan Agency for Planning, Transit Projects, https://www.cmap.illinois.gov/2050/mobility/regionally-significant-projects/transit#MetraMilwaukeeDistrictWest (visited Mar. 6, 2022).
[16] 2020 System Report, Introduction at 10, Table 11.
[17] Infrastructure Investment and Jobs Act, Pub. L. 117–58, 135 Stat. 429.
[18] *E.g.*, Alec Tyson et al., Gen Z, Millennials Stand Out for Climate Change Activism, Social Media Engagement with Issue, Pew Res. Ctr. (May 26, 2021), https://www.pewresearch.org/science/2021/05/26/gen-z-millennials-stand-out-for-climate-change-activism-social-media-engagement-with-issue; Matthew Ballew et al., Do Younger Generations Care More About Global Warming?, Yale Prog. on Climate Change Comms. (June 11, 2019), https://climatecommunication.yale.edu/publications/do-younger-generations-care-more-about-global-warming.
[19] Angie Schmitt, Millennials Unhappily Stuck in Their Parents' Transportation System, Streetsblog USA (Nov. 13, 2018), https://usa.streetsblog.org/2018/11/13/millennials-unhappily-stuck-in-their-parents-transportation-system.
[20] Nicole Dungca, Millennials Love Public Transit, Survey Says, Boston Globe (Nov. 14, 2015), https://www.bostonglobe.com/metro/2015/11/14/millennials-love-public-transit-survey-says/CM5X2zbmO0brsaQqL5tC0N/story.html; News Release: Millennials Favor Walkable Communities, Says New NAR Poll, Nat'l Ass'n of Realtors (July 28, 2015), https://nacto.org/wp-content/uploads/2016/02/1_Natl-Assoc-of-Realtors-2015-Community-Preference-Survey.pdf.

B. Rail Service on Metra's MD-W and MD-N Lines

Applicants repeatedly refer in the Application to Metra's lines as CP's. To be clear, Metra and not CP owns MD-W, which CP uses as its Elgin Subdivision, and MD-N, which CP uses as its C&M Subdivision. CP operates over these two lines under the Trackage Agreement with Metra.

CP's increased traffic will impact Metra's MD-W and MD-N, which constitute an integral part of Metra's service and operations in the Chicago region. MD-N operates between Chicago Union Station ("CUS") in downtown Chicago to Rondout on the C&M Subdivision, and then to Fox Lake, Illinois, on the Fox Lake Subdivision, a total of 50 miles north of Chicago. Along MD-W are 22 stations serving communities with a combined population of over half a million people and with burgeoning new job centers.[21] MD-W operates between CUS and Elgin, Illinois, approximately 40 miles west of Chicago's downtown, and likewise is home to 22 stations and serves an area with a population of nearly one million people.[22]

[21] 2020 System Report, MD-N at 9.
[22] *Id*. MD-W at 9.

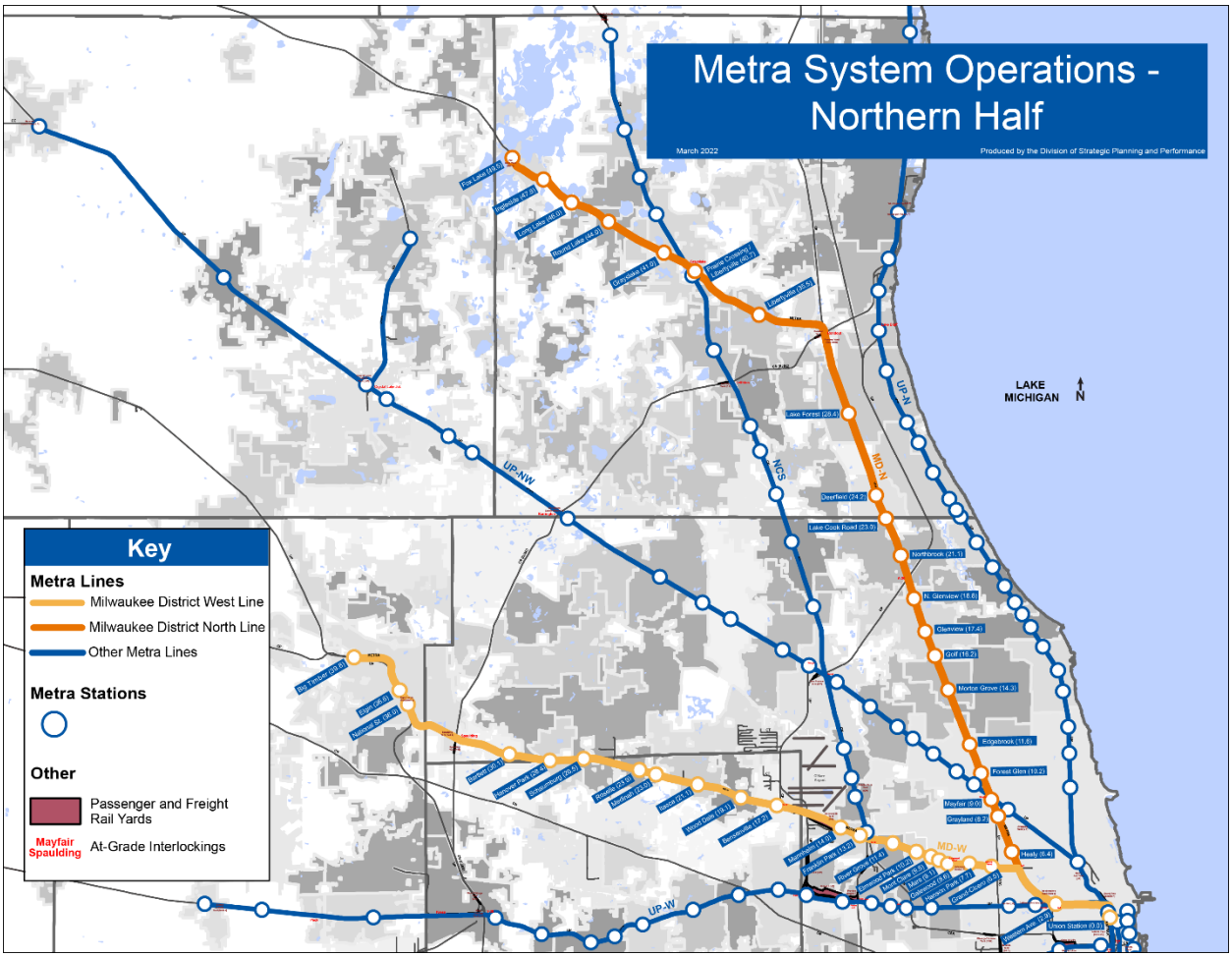

Figure 1

In 2019, pre-pandemic, Metra operated 800 scheduled passenger revenue trains on MD-W and MD-N combined each week, including morning and evening "peak period" trains, which are outnumbered by non-peak period trains on these two routes.[23] The MD-N and MD-W provided more than 12.45 million passenger trips in 2019 and accounted for almost 17% of Metra's systemwide ridership.[24] While ridership decreased during the COVID-19 pandemic in

[23] 2020 System Report, MD-N at 1, MD-W at 1. In 2020 frequency on both lines was reduced in response to the pandemic.
[24] *See* Metra, 2021 Proposed Operating & Capital Program & Budget, Exhibit 19 (2021), https://metra.com/sites/default/files/assets/brochure_8.5x11_budgetbookelectronic_2021_nov_final_0.pdf.

2020 and 2021,[25] Metra expects the eventual return of ridership towards pre-pandemic levels and is planning and budgeting accordingly.[26]

Between Metra's creation by the State of Illinois in 1984 and November 2020, Metra has made capital improvements of nearly $1.45 billion to MD-N and MD-W, representing 17% of Metra's capital investments system-wide.[27] Capital investments included $269 million for track and structure, $246 million for signal, electrical, and communication upgrades, and $141 million for stations and parking.[28]

CP's C&M and Elgin lines, of which MD-N and MD-W, respectively, are a part, serve as part of a critical juncture connecting traffic south and west of Chicago with Chicago and points east. These lines are located on one of CP's busiest rail segments, and connect to Bensenville Yard, one of CP's busiest yards. As shown in Figure 2, MD-W and MD-N connect with Indiana Harbor Belt Railroad ("IHB") and Belt Railway Company of Chicago ("BRC") to create interchanges for CP with five other Class I railroads, sending traffic from the Quad Cities region[29] to Detroit, eastern Canada, and Buffalo, New York.[30] According to Applicants, CP currently operates 16 trains daily on MD-W and 11 trains daily on MD-N.[31] According to the Application, these freight trains carry "intermodal containers from the Port of Vancouver,

[25] For instance, MD-W and MD-N only saw 1.2 million from July 2020 through June 2021. 2020 System Report, MD-N at 1, MD-W at 1.
[26] 2022 Metra Budget, at 29.
[27] 2020 System Report, Introduction a 10, Table 11.
[28] *Id.*
[29] This refers to a web of communities on the Iowa- Illinois border. The five largest communities are Rock Island, Moline and East Moline, Illinois, and Davenport and Bettendorf, Iowa. There are also a number of smaller communities in that region.
[30] *See* Appl. 2-267 to 2-270, Ex. 13, Operating Plan at 11-14 (Redacted Version).
[31] Appl. 2-364 and 2-365, Ex. 13, Operating Plan at 8-9 (Redacted Version).

fertilizers, chemicals, crude oil, frac sand, automotive, grain, and other agricultural products."[32] Two to three Wisconsin Southern ("WSOR") freight movements also occur on the lines daily.[33]

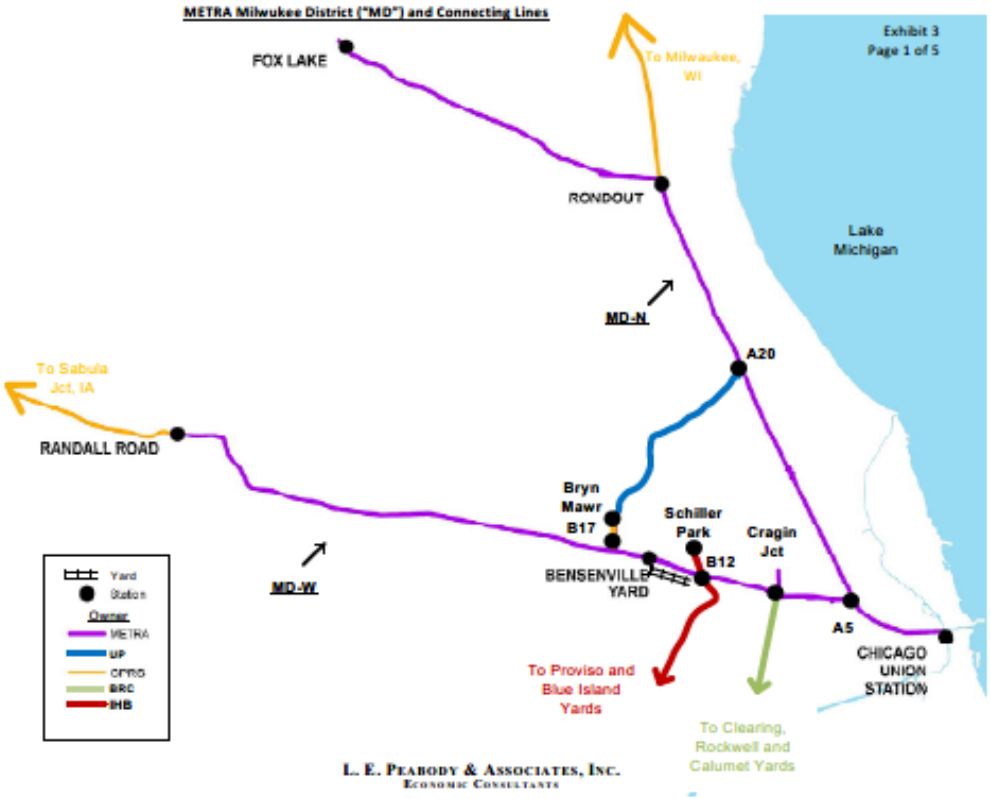

Figure 2

C. CP's Trackage and Dispatching Rights on MD-W and MD-N Lines

CP dispatches and operates freight service over MD-N and MD-W pursuant to the Trackage Agreement[34] that Metra inherited through acquisition of ownership interest in the lines from the Trustee for the bankrupt Chicago, Milwaukee, St. Paul and Pacific Railroad nearly 40 years ago.

[32] Appl. 2-270, Ex. 13, Operating Plan at 14 (Redacted Version).
[33] Appl. 3-142, Letter from WATCO to STB (Redacted Version).
[34] The agreement is valid through December 31, 2083. *See* Ex. A, V.S. Gentil at 1.

The Trackage Agreement requires that CP's operation over Metra's lines "shall at all times be in accordance with reasonable safety and operating rules."[35] The Trackage Agreement as amended expressly requires that "[CP] shall not interfere or permit any third party to interfere with peak period trains," and "[CP] may make *reasonable adjustments* to the operations of traffic on the Joint Line *which do not unreasonably disrupt or delay trains which are not peak period trains*. [Emphasis added.]"[36] As explained below, CP violates this contractual obligation regularly.

For changes to Metra's service, the Trackage Agreement provides that Metra must seek CP's prior written consent, "which may not be unreasonably withheld [by CP]; providing that such change shall not materially interfere with freight operations."[37] Yet, CP has not complied with this contractual obligation. The Trackage Agreement does not allocate a maximum number of trains or proportion of excess capacity to either Metra or CP. It is up to the parties to the Trackage Agreement to confer about capacity and determine what space is available for increased numbers of trains to operate on the corridor—the decision is not unilaterally reserved to CP, as CP has claimed.[38] Regarding capital improvements, the Trackage Agreement as amended calls for cost-sharing for capital projects that benefit both parties and outlines an annual planning and approval process, and caps CP's contribution on capital projects at 50%.[39]

At the time the respective parties entered the agreements that now govern the relationship between CP and Metra on these line segments, train operating characteristics were different – freight trains have become longer and thus take longer to cross the territory, and longer sidings

[35] Ex. A, V.S. Gentil at 2, Ex. A-2, SLRCO 1985 Trackage Agreement, Section 8.3.
[36] Ex. A, V.S. Gentil at 2, Ex. A-3, Metra-CP 1993 Supplement, Art. 7 (adding Section 8.15).
[37] Ex. A-3, Metra-CP 1993 Supplement, Art. 7 (adding Section 8.16).
[38] Ex. B, V.S. Oppenheim at 15-16.
[39] Ex. A-3, Metra-CP 1993 Supplement, Art. 6 (amending Section 7.2).

are required to ensure that they do not disrupt the passenger trains that move across the network at higher speeds and more frequently.[40]

D. Description of the Transaction in Relation to MD-W and MD-N

CP is a Class I common carrier railroad[41] serving the United States and Canada, providing transportation subject to the jurisdiction of the STB. KCS is a Class I common carrier railroad[42] serving the United States and Mexico, providing transportation subject to the jurisdiction of the STB. On October 29, 2021, CP and KCS filed their Application with the STB proposing the merger of CP and KCS.[43] The Application seeks STB approval for CP's acquisition of KCS and common control by CP of KCS's U.S. railroad subsidiaries and affiliates.[44] On November 23, 2021, the STB accepted the Application.[45]

As described below, Applicants downplay the anticipated negative impact on Metra while their own statements contradict that approach with their projection of increases in traffic on already congested lines. Metra's territory, and particularly MD-W and MD-N, sits at an important juncture in Applicants' rail system, and comprises one of the busiest segments of CP's entire system.[46]

The Application incorrectly and, as discussed more fully below, without RTC modeling evidence, describes "moderately increased freight traffic on lines used by passenger trains," including increased traffic flows into the Chicago area.[47] "The highly integrated nature of rail

[40] Ex. B, V.S. Oppenheim at 6.
[41] More specifically, CP-affiliated Soo Line Railroad Company is a Class I railroad. *See* Appl. 1-57.
[42] More specifically, KCS-affiliated Kansas City Southern Railway Company is a Class I railroad. *See* Appl. 1-57.
[43] *Canadian Pac. Ry.—Control—Kan. City S. (Decision No. 11)*, FD 36500, slip op. at 1 (STB served Nov. 23, 2021).
[44] *Decision No. 11*, slip op. at 1.
[45] *Id.* at 9.
[46] *See* Appl. 2-267, Ex. 13, Operating Plan at 11 (Redacted Version).
[47] Appl. 1-172–1-174, V.S. Creel at 17-19 (Redacted Version).

operations means that disruptions in one location have the potential to affect all carriers" and "Chicago remains vulnerable to disruptions that can create chokepoints for multiple carriers and impact freight movements across broad swaths of the rail network."[48]

Applicants hinge much of the public benefit of the Transaction on the "North-South" Corridor that will create a direct route from Canadian ports to Mexican ports.[49] In the north, this North-South Corridor will connect with CP's Canadian network via two separate U.S. hubs in Chicago and the Twin Cities. Applicants' proposed North-South corridor will connect with Chicago via Metra's MD-W and MD-N lines. Bensenville Yard, CP's primary classification yard in the Chicago region and one of the busiest in its system, is located on MD-W and will play a critical role in accommodating the new traffic expected under the Transaction.[50] As further set forth below, Metra currently experiences an unreasonable number of commuter delays during "peak periods" due to CP dispatch interference including operating issues at Bensenville Yard such as conducting crew changes on the main line that CP and Metra share when the Yard is too congested to handle the trains. After the Transaction, Bensenville will "see an increase of 112 cars for processing daily" and "face additional demand from anticipated growth in automotive and intermodal traffic"[51] and Metra can reasonably anticipate further delays. The Application acknowledges that Bensenville will see an 11% increase in processing demands, which will influence traffic flows "beyond Chicago to other parts of the CP/KCS system."[52]

[48] Appl. 2-312, Ex. 13, Operating Plan at 56 (Redacted Version).
[49] Appl. 1-15–1-16, 1-19 (Redacted Version); Appl. 1-160–1-162, V.S. Creel at 5 (Redacted Version); Appl. 1-191–1-196, V.S. Ottensmeyer at 5-10 (Redacted Version).
[50] Appl. 2-267–2-269, Ex. 13, Operating Plan at 11-13 (Redacted Version).
[51] Appl. 2-306, Ex. 13, Operating Plan at 59 (Redacted Version).
[52] Appl. 2-315, Ex. 13, Operating Plan at 51, 89-90 (Redacted Version).

Meanwhile, Applicants assert that Bensenville will undergo a reconfiguration project, although no details are given regarding what the improvements are or how they will help congestion.[53]

To reach Bensenville from the North-South Corridor via the Elgin Subdivision, Applicants misleadingly state that there will be an increase of 7.1 trains per day on the Elgin Subdivision between Almora and Bensenville—in fact CP's figures show that the increase on MD-W will be higher, and the proportionate change several times higher than Applicants' cited numbers suggest.[54] The Application asserts, without support, that "there is ample capacity for these additional train frequencies" because the Elgin Subdivision is double track, with triple track east of Bensenville.[55] CP further claims in its Application that MD-N will not see any additional traffic,[56] although in the Application's documentation, Applicants disclose that they plan to add an average of 0.9 additional line-haul freight trains to that segment to account for "organic growth" on the system.[57] In general, Applicants' statements on train increases are internally contradictory and misleading, and are not supported by evidence, including RTC modeling, as discussed in further detail in Section V.C.

One of Applicants' major, although unsubstantiated, claims is that the Transaction will divert traffic from the heavily trafficked Chicago area by way of Applicants' Twin Cities connection via Applicants' North-South Corridor.[58] Applicants assert that CP's Soo Line

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[53] Appl. 2-307, 2-345–2-346, Ex. 13, Operating Plan at 51, 89-90 (Redacted Version).
[54] Appl. 2-364 to -367, Ex. 13, Operating Plan Appendix A at 1-4 (Redacted Version). In Exhibit A to their Operating Plan Applicants report 16.3 current trains per day on the Elgin Subdivision, and 23.4 trains after the Transaction, amounting to a 7.1—or 44%--increase. However, as discussed further below in Section V.C.1., the number that Applicants state is extremely misleading and understated because it only applies to part of MD-W east of Bensenville Yard, whereas the freight traffic west of Bensenville Yard is expected to change from 2.9 to 11.1 trains per day, an increase of 380%.
[55] Appl. 2-322, Ex. 13, Operating Plan at 66 (Redacted Version).
[56] Appl. 2-321–2-322, Ex. 13, Operating Plan at 65-66 (Redacted Version).
[57] Appl. 2-324, Ex. 13, Operating Plan (Redacted Version); Appl. 2-365, Ex. 13, Operating Plan Appx. A: Trains Per Day by Subdivision (Redacted Version). As discussed further below in Section V.C.1., on the C&M Subdivision, Applicants report 11.1 current trains per day and 12.0 future trains per day, amounting to a 0.9—or 8%--increase.
[58] Appl. 1-169–1-170, 1-174 V.S. Creel at 14-15 (Redacted Version); Appl. 1-196, V.S. Ottensmeyer at 10 (Redacted Version); Appl. 2-313, Ex. 13, Operating Plan at 57 (Redacted Version).

between the Twin Cities and Kansas City, consisting of the Marquette, Davenport, Ottumwa, Laredo, and Kansas City Subdivisions, would serve as this alternative to the Chicago gateway.[59] Applicants expect significant increases in traffic on the Marquette Subdivision and other subdivisions that constitute the Twin Cities connection to the new North-South Corridor. The Application argues that the Marquette Subdivision provides an "efficient pathway" between Mexico, the South Central United States, and Western Canada "without having to traverse the congested Chicago area."[60] Following the Transaction, the Marquette Subdivision is expected to see an increase of 6.6 trains per day by routing trains around Chicago,[61] nearly doubling existing freight traffic.[62] The Application predicts this increase in traffic from "likely future growth in bulk commodities (especially grain and crude oil) that would have moved via this line to interchange in Chicago" that "will now be routed in single-line service via the Marquette Subdivision, far to the west of Chicago."[63] Because the Marquette Subdivision currently does not have capacity to handle additional traffic, Applicants propose to construct improvements *over the course of 5 years*.[64] Critically, the Application is silent on how Applicants will handle that additional traffic while they build the facilities they say will arrive.

As illustrated in the diagram below, Figure 3, the Marquette, Chicago, Elgin, C&M, Watertown, and Tomah Subdivisions form a diamond with vertices located at River Junction, MN, Sabula, IA, Chicago, IL, and Milwaukee, WI. The four sides of the diamond are made up of (1) Marquette Subdivision; (2) Chicago and Elgin Subdivisions; (3) C&M Subdivisions; and

[59] *See* Appl. 1-32 (Redacted Version) (Soo Line operates lines from Twin Cities to Kansas City); Appl. 1-169–1-170, 1-174 V.S. Creel at 14-15, 19 (Redacted Version) (explaining plan to bypass Chicago area and showing subdivisions routed from Minnesota around Chicago area to Kansas City).
[60] Appl. 1-164, V.S. Creel at 9 (Redacted Version).
[61] Appl. 2-313, Ex. 13, Operating Plan at 57 (Redacted Version).
[62] *See* Appl. 2-364, Ex. 13, Operating Plan Appx. A: Trains Per Day by Subdivision (Redacted Version).
[63] Appl. 2-314–2-315, Ex. 13, Operating Plan at 58-59 (Redacted Version).
[64] Appl. 2-337, 2-341, Ex. 13, Operating Plan at 81, 85 (Redacted Version); Appl. 2-460, Ex. 13, Operating Plan, Appx. R: Line Capacity Improvement Projects (Redacted Version).

(4) Tomah and Watertown Subdivisions. Combined, this diamond is situated at a critical juncture point that connects Applicants' combined U.S. and Mexican rail network south of Sabula, Iowa, to CP's vast network north via either the Twin Cities or Chicago. To avoid Chicago and travel via the Twin Cities, trains must travel over the Marquette Subdivision, which is largely single-tracked and contains timber bridges[65] and other dated structures. Alternatively, to reach the Twin Cities, trains may travel over the CP Chicago Subdivision and Metra's heavily trafficked Milwaukee District lines. If one of these two (2) routing alternatives becomes congested, the other becomes the only alternative for moving the massive volume of international freight flows that CP/KCS project will result from the proposed merger. Because the Tomah/Watertown/C&M and the Chicago/Elgin routes are clear alternatives to the Marquette Subdivision, those routes can expect increased traffic along the North-South Corridor if the Marquette Subdivision were congested, undergoing improvements, or otherwise unavailable.

[65] *See* Appl. 2-332, Operating Plan at 76 (Redacted Version).

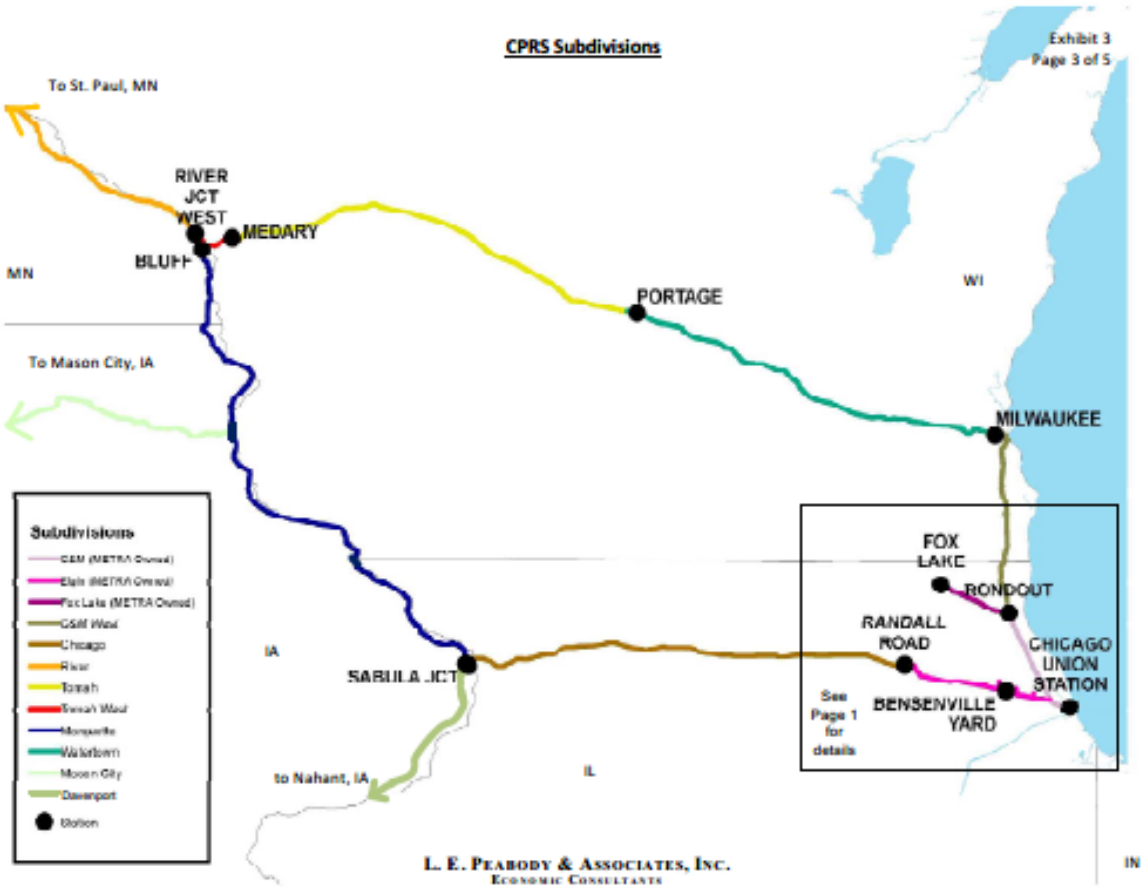

Figure 3

Another proceeding currently before the Board regarding interchange between the Canadian National Railway's Wisconsin Central, Ltd. and CP's Soo Line Railroad Company, in Finance Docket No. 36397 could further complicate and exacerbate the impact of the Transaction on Metra's service. The determination of interchange point between these parties could significantly alter traffic patterns and return to a state of affairs in the 2000s during which Metra's service experienced serious delays due to interchange of these two parties. That proceeding is revived, and the outcome is uncertain, but the Board must take it into account in considering this Application and ensure that the combination does not interfere with Metra's service even further.

III. METRA'S TRAIN MODELING ANALYSIS SHOWS THAT THE TRANSACTION WILL SIGNIFICANTLY INTERFERE WITH METRA'S SERVICE

Astonishingly, Applicants did not conduct RTC modeling of the potential impacts of the proposed Transaction. Instead, they used a less rigorous methodology that the STB has previously confirmed does not adequately determine the impacts of transactions of the size and scope of the one before this Board.[66] Because CP's capacity analysis on the Transaction was insufficient, Metra conducted its own study using RTC modeling. Metra's modeling reveals a stark reality: that Applicants' proposed Transaction will break the rail system at the critical "diamond" juncture that serves as the only connection between Applicants' northern and southern continental systems. Applicants' much-promoted North-South Corridor—specifically the Marquette Subdivision—cannot handle the additional traffic resulting from the Transaction, which means that even more traffic than is already projected will be re-routed onto Metra's lines.

Metra's modeling reveals that Applicants' operating plan is unworkable and the proposed volume increase cannot be accommodated on Metra's lines without causing significant additional interference with Metra's service. Not only will expected freight train increases on MD-W and MD-N significantly deteriorate service, Metra's modeling also shows that Applicants' new North-South Corridor, and specifically the Marquette Subdivision, cannot handle expected new traffic on it, even with proposed capital improvements. As a result, Applicants will likely divert even more traffic to Metra's lines.

Using conservative estimated and available data,[67] Metra's experts ran base case and future case RTC modeling of Metra's lines and adjacent lines that would impact Metra's lines,

[66] *See*, discussion *infra* at Section V.A.

[67] Metra encountered significant challenges in obtaining accurate information from CP, as indicated in Metra's First and Second Motions to Compel in these proceedings, METR-3 and METR-5, respectively, as well as Metra's Request for Extension of Time, METR-4.

including the Marquette Subdivision on Applicants' North-South Corridor. Metra's experts explain the methodology they used to conduct their analysis of the impacts of the proposed Transaction on Metra's service in their attached Verified Statement.[68]

The RTC base case simulation, which was run using conservative pre-existing conditions and actual train event data from April 2021, support Metra's experience that CP intentionally prioritizes freight trains over Metra trains in CP's dispatching of Metra's lines. Interference with Metra's service was reduced in the Base Case model because it did not take intentional decisions to prioritize freight trains, as CP does in some cases into account.[69] In real-world operations, as described in the Verified Statement of Rich Oppenheim,[70] CP dispatchers regularly prioritize freight trains over Metra's trains, as reflected in Metra's well-documented experience and communications with CP.[71] Mr. Oppenheim also notes that additional capacity is available if CP were to make use of nighttime hours, rather than daytime hours when Metra' operates.[72]

To further test the impact of CP's current dispatching practices, Metra's experts attempted to run a base case sensitivity analysis preventing CP trains from running on Metra's lines during peak periods in order to avoid the regular interference that Metra encounters during those times.[73] After imposing the restrictions on CP freight trains in the commuter peak periods, the RTC simulation would not run to completion.[74] This may explain why CP's dispatchers moves CP freight trains during the commuter peak periods—its current operations depend on such interference.[75]

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[68] Ex. C, V.S. Crowley and Mulholland.
[69] *Id.* at 60.
[70] V.S. Rich Oppenheim attached to this Comment as Exhibit B.
[71] *See* discussion *infra* at Section IV.B. and in Exhibit B, V.S. Oppenheim.
[72] Ex. B, V.S. Oppenheim at 10.
[73] Ex. C, V.S. Crowley and Mulholland at 62.
[74] *Id.*
[75] *Id.*

In Metra's base case model, most delays to Metra's service stemmed from CP's operations along the Marquette Subdivision, a critical segment of the North-South Corridor that Applicants assert will help divert traffic from Chicago. Existing sidings on the Marquette Subdivision struggle to handle the congestion caused by the longer trains that CP operates over this line.[76] The base case model reflects that the Marquette Subdivision is presently at or near capacity, and Applicants' proposed addition of trains along this segment of the merged railroads' network will increased future delays, both on the Marquette Subdivision and on Metra's lines due to re-routed trains.[77]

When Metra's experts ran the future case based on CP's projected increases in freight and Amtrak traffic, as well as CP's proposed line improvements meant to alleviate increased congestion, the RTC modelling software could not execute the simulation—i.e., the program could not find a resolution that would accommodate the number of trains expected to operate over the simulated network even with additional infrastructure added to the system.[78] Only after removing 13 trains that CP predicts will be added to the system, both from the Marquette Subdivision and from routes operating in and out of Bensenville Yard, from the seven-day simulation was the future case simulation able to run.[79] This result indicates that Applicants' operating plan is unworkable given the projected increases in traffic. That is, the operations following the implementation of the proposed Transaction will inflict enormous disruption on Metra's operations.

Furthermore, even after removing trains to allow the model to run, the simulated results indicated declines in average train speeds across all train types—freight and passenger—and

[76] *Id.* at 65-66.
[77] *Id.*
[78] *Id.* at 65.
[79] *Id.* at 66-67.

increases in delay statistics above and beyond those currently experienced.[80] Specifically, Metra incurred a nearly 600% increase in delay hours, and a 400% increase in train delays per 100 train miles.[81] Just as importantly, freight trains also incurred considerable increases in delays in the future model—far higher than Metra in absolute hours delayed, and two to three times higher than currently experienced[82]—which CP would try to offset by delaying Metra trains even more, based on CP's current practices. In short, the future base case shows that the Transaction will hurt both passenger and freight performance significantly across the board, although CP currently can mitigate the impact to its own trains at Metra's expense through its dispatching power on Metra's lines.

Further analysis on the future case model indicated that the infrastructure of the Marquette Subdivision is inadequate to accommodate the new projected traffic on that line, and that Applicants' proposed infrastructure additions to the Marquette Subdivision are woefully insufficient to accommodate the projected increase in train volumes.[83] Moreover, the topography along the Marquette Subdivision makes it extremely difficult for Applicants to make additional infrastructure investment that would be required to accommodate their planned volume increases.[84] The only alternative is to re-route even more trains through Chicago, including over Metra's MD-W and MD-N, as CP already does at times, resulting in even greater traffic increases than Applicants already project. Applicants provided no discussion or analysis of this scenario. This likely re-routing scenario makes it even clearer that Applicants' analysis of the

[80] *Id.* at 66
[81] *Id.* at 67-68 (594% and 405%, respectively).
[82] *Id.* at 67
[83] *Id.* at 66-67.
[84] *Id.* at 5-6, 15.

impact on Metra's lines is completely inadequate, given that Applicants have not sufficiently analyzed even the added traffic that they do predict over Metra's lines.

Metra also tested what additional infrastructure improvements on Metra's lines might help alleviate the adverse impacts to Metra's service projected by Metra's RTC modeling. These improvements included:

- Eight additional infrastructure expansion projects on the MD-W:
    1. Addition of receiving tracks at Bensenville Yard equal to the maximum length of incoming trains;
    2. Addition of receiving tracks at Galewood Yard equal to the maximum length of incoming trains;
    3. Addition of new powered cross-overs at Bartlett and Itasca;
    4. Addition of two (2) new mainline tracks between Tower B12 and Tower B17;
    5. Separation of the CP and Metra Milwaukee West tracks and construction of a fly-over from south of Tower A5 to northerly dedicated west bound Metra track;
    6. Reduction of the curves at Tower A5 to allow increased speeds from 10 MPH to 25 MPH; and
    7. Addition of a new southeasterly wye leg at Cragin Junction to direct CP traffic south onto BRC without a reverse move; and
    8. Addition of two new mainline tracks between Tower A5 and Tower B12.
- Three additional infrastructure expansion projects on the MD-N:
    1. Addition of new universal cross-overs at Lake Forest and Glenview;
    2. Addition of a new third main line between Rondout and Tower A20; and
    3. Addition of a new connection at Tower A20 to allow CP trains to exit the Metra mainline before entering UP territory.

The modeling results showed that, although these infrastructure additions on Metra's lines would improve performance, even these were not enough to return Metra's service to current baseline levels.[85]

Metra used RTC modeling to determine far more accurately than Applicants have done the potential impact of the Transaction on Metra's operations. The bottom line is that Metra's passengers will suffer. Serious delays and interference are inevitable. As discussed in Section VII.1., only by providing Metra with dispatching authority over its own lines, which will allow Metra to control the movement of its trains to avoid the impacts of the likely increase in traffic volumes, can the Board help mitigate the impact on commuter rail service. Without this adjustment of control over the movement of trains on the MD-N and MD-W, this Board cannot mitigate the adverse impacts of the Transaction on the safety and reliability of Metra's service.

IV. CP'S OPERATION ON AND DISPATCH OF METRA'S LINES ALREADY INTERFERE WITH METRA'S COMMUTER RAIL SERVICE AND THE TRANSACTION PORTENDS WORSENING OF AN ALREADY PROBLEMATIC OPERATION

A. Measuring CP's Impacts

Safety and on-time performance are the keystones of successful, responsive commuter service and commuter "precision railroading." Metra has described above the negative impacts of the proposed Transaction on Metra's operations. To be clear, the history of Metra's operating relationship with CP explains why Metra is so deeply concerned about the potential for increased traffic, increased delays, and increased interference with passengers' access to trains at stations. As Metra's testimony, summarized below, explains, the history of that relationship causes Metra to fear for the safety of its passengers and the integrity of its operations if the Transaction is

[85] *Id.* at 70.

approved without allowing Metra to control dispatching of the operations on the MD-W and MD-N lines.

Metra tracks and reports on-time performance of its trains monthly.[86] Consistent with commuter railroad standards, a Metra train is on time if it reaches its final destination within five minutes and 59 seconds of its scheduled arrival.[87] Metra collects reportable delay data in its Train Operations and Performance System ("TOPS") data warehouse. When a Metra train does not meet this threshold, it is recorded as a "reportable delay."[88] This standard filters out some delays that are beyond Metra's control. Thus, to be consistent with industry standards, Metra must achieve at least 95% on time performance for all of its trains, based on the above metric.[89]

Reportable delays used to calculate Metra's official on-time performance do not encompass all types of delays, nor do they reflect other types of serious interference with Metra's service. Notably, reportable delays are measured at a train's final destination, and do not register delays that passengers encounter at interim stations, which have been significant. Thus, while Metra trains can make up time along a route to mitigate intermittent delays encountered during their trips, greater delays at particular interim stops, or small but consistent delays, have seriously impacted customers and diminish their perception of Metra's reliability, decreasing passengers' goodwill towards the system.

For Metra, safety is primary. On-time performance data does not reflect the unsafe conditions created by CP's dispatching when CP trains block passengers' access to Metra trains.

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[86] *See* Metra.com, On-Time Performance Reports, https://metra.com/time-performance-reports (accessed Jan. 23, 2021).
[87] Ex. B, V.S. Oppenheim at 7.
[88] For "Construction Schedules", which include most midday trains from April through November, the arrival time at final destination is generally restated to 10 minutes later than the standard scheduled time that is advertised to the public —i.e., a train can officially be reported as "on time" so long as it is no later than 15 minutes and 59 seconds off its scheduled arrival at its final destination.
[89] Ex. B, V.S. Oppenheim at 7.

CP's dispatching decisions too often require passengers to cross tracks unnecessarily, dodge on-coming freight trains, or circumnavigate idling freight trains at Metra stations. In such cases, Metra conductors are put in a difficult position of choosing between waiting for impeded passengers to board or departing in order to adhere to scheduled operations. Metra's mission critical, time-sensitive public service has been often thwarted by CP's conduct, as set forth below.

Metra routinely calls upon CP to cease interfering with Metra's service, as more fully memorialized in e-mail communication from Metra staff to CP staff. When Metra staff learn of a delay or disruption affecting commuter service caused by CP, they email a short description to other members of Metra's operating staff. Then, Metra's Train Master will forward on the e-mail to CP for an explanation.[90]

These e-mails record delays and events that are not captured in the reportable delay data that tracks Metra's official on-time performance metrics. For example, a CP caused delay at a particular station for which a Metra train "makes up" time on the remainder of its route will not appear on reportable delay data but is reflected in the e-mail and impacts on passengers' commuting experience, such as making them late for work or for day-care pick up or other obligations. As another example, retracking of Metra trains to bypass CP freight trains may not result in a recordable delay but forces passengers to unexpectedly cross train tracks or avoid oncoming or idling freight trains to access their train. Further, these e-mails document the causes of delays as well as subsequent dialog between Metra and CP on the subject.

Metra reviewed hundreds of e-mails dating back to 2016 documenting these day-to-day communications[91] of CP's interference with Metra's "peak periods" in violation of the Trackage

[90] *Id.* at 9.
[91] *Id.* at 9-10.

Agreement. Exhibit B-2 to the Verified Statement of Rich Oppenheim, Metra's Director of Operations, Metra Chicago Union Station ("CUS") District, includes copies of emails between Metra and CP personnel, providing a detailed picture of the unsafe dispatching practices that both endanger Metra's passengers and create delays to train operations. A summary index of these emails is provided in Exhibit B-3 to Mr. Oppenheim's Verified Statement. Too often, CP continually ignores Metra's requests to cease interfering with Metra operations.

Additional documentation maintained by Metra's team also supplements the statistics provided by on-time performance records. Between February 2020 and November 2021 Metra's dispatching staff tracked delays caused by CP's dispatching of and operations on MD-W and MD-N.[92] These records, which record hundreds of reported and unreported delays and interference such as retracking of Metra trains on tracks other than the normal tracks they used to serve stations, reflects a chronic pattern of interference.[93]

Notwithstanding CP's assertions of "work[ing] cooperatively with Metra" to achieve "a greater than 94 percent on-time performance,"[94] documentation reveals the longstanding pattern of interference with Metra's commuter rail service, both during peak and non-peak periods. To repeat an important point – the overall on-time performance of a train at its end station belies the delays and the attendant impacts on passengers that come from interference with Metra service at intermediate stations.

B. Metra's Documentation of Endangered Passenger Experiences and Metra Operating Delays Reflects Years of CP Operations and Dispatching Decisions Causing Substantial and Frequent Delays to Metra's Service

[92] Ex. D, V.S. Rodriguez at 1-2.
[93] *Id*. at 2; Ex. D-1, Spreadsheet of 2020-2021 CP delays.
[94] Appl. 1-172, V.S. Creel at 17 (Redacted Version).

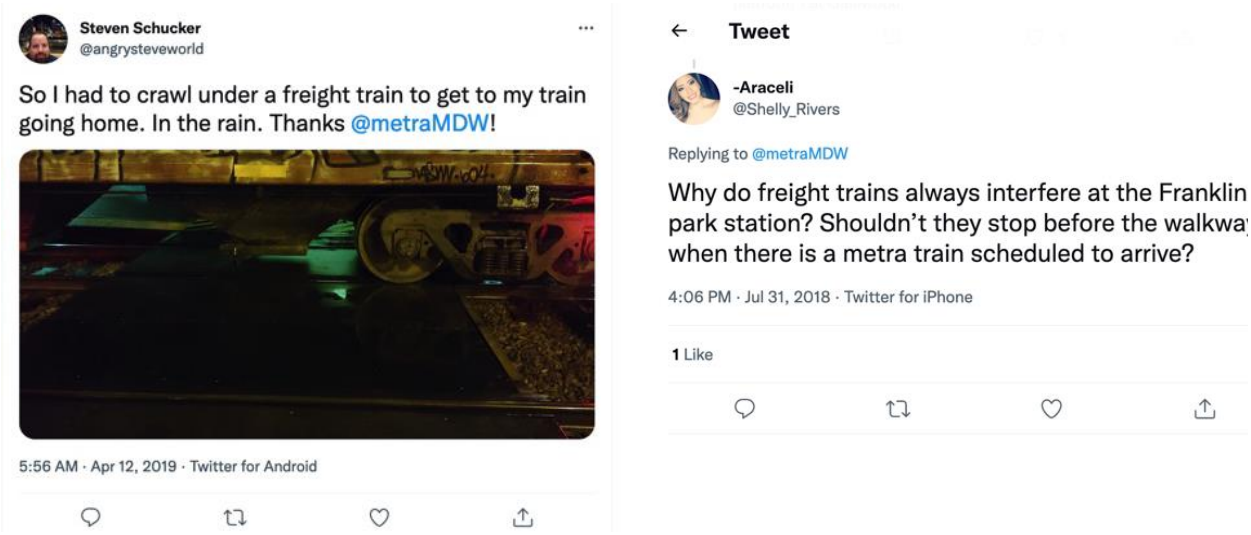
1. CP's creates unsafe conditions by dispatching freight trains in a way that requires Metra trains to serve Metra passenger stations on 'alternate' tracks, endangering and inconveniencing passengers

Both Metra's MD-N (except for the Fox Lake Subdivision) and MD-W consist of double- or triple-track main lines. While it is possible to dispatch passenger and freight trains in either direction, Metra trains are scheduled to use one identified main line track for service into the City on a regular basis, and the other main line track for service in the other direction. This provides Metra customers with predictability and safety in knowing which side of the tracks to wait for a train at a station, and to avoid requiring passengers to run to reach the opposite side of the tracks on short notice. In fact, Metra signage on each station platform indicates whether that platform is for trains "To Chicago" or "From Chicago".[95]

Nevertheless, CP regularly dispatches Metra trains on different main line tracks from the ones that Metra has identified for use by its passengers heading in a specified direction.[96] Frequently, a freight train is not only moving on the track that the scheduled Metra train normally would use but is operating in the opposite direction from Metra trains, so that a passenger on the platform, looking in the direction where they anticipate their train appearing, would have their backs to the approaching freight. While CP is contractually required to dispatch MD-W and MD-N in a manner that prioritizes Metra trains during peak periods and avoids interference with Metra trains at all other times, CP's regular practice of dispatching freight trains directly ahead of Metra trains, or dispatching a freight train between Metra trains, results in dispatchers relying on the practice of changing Metra's scheduled main line track.

[95] Ex. B, V.S. Oppenheim at 13.
[96] *Id.*; Ex. B-2, Metra Emails 2016-2022 at 28 (documenting dispatching to alternate "wrong" tracks on July 28, 2016), 141 (same on May 30, 2019), 317 (same on Feb. 22, 2022).

The result severely impacts safety; passengers must get to the opposite side of the tracks, often by darting across the tracks in the face of an oncoming freight train, or around a stationary one. Consequently, Metra trains either wait, causing a delay, or leave passengers behind. Passengers make risky or dangerous decisions in order to make their trains and avoid being delayed for work or other appointments, such as running across tracks ahead of oncoming freight trains, crossing tracks at places other than designated crossings, or even crawling under idling freight trains.[97] As reflected in social media posts such as those included below at Figure 4,[98] obstruction of passengers' access to Metra trains by freight trains causes justifiable frustration and safety concerns among Metra passengers, as well as reputational damage to Metra.



[97] Ex. B, V.S. Oppenheim at 14.

[98] *Sources for Figure 4, from top/left to bottom/right:* Steven Schucker (@angrysteveworld), Twitter (Apr. 12, 2019, 5:56 AM), https://twitter.com/angrysteveworld/status/1116550619777646593?s=20&t=oesjPDmB2EM9rDWsFO0ovg; Araceli (@Shelly_Rivers), Twitter (Jul. 31, 2018, 4:06 PM), https://twitter.com/Shelly_Rivers/status/1024295223608926210; Kevin Mitchell (@kamitchell), Twitter (May 7, 2018, 4:33 PM), https://twitter.com/kamitchell/status/993499153656438786?s=20&t=oesjPDmB2EM9rDWsFO0ovg; Chris Corr (@Chris_Studios), Twitter (Oct. 17, 2019, 5:15 PM), https://twitter.com/Chris_Studios/status/1184850423632543744?s=20&t=oesjPDmB2EM9rDWsFO0ovg.

Figure 4

Even as Metra drafted this document, on February 22, 2022, a Metra peak period train was dispatched to a track other than its usual one, to avoid a freight train that was dispatched ahead of it. Passengers waiting at the River Grove, Elmwood Park, Mont Clare, Mars, Galewood, Hanson Park, and Grand Cicero Stations were forced to walk across all three main tracks at the last minute to board trains. Some were blocked by the stopped freight train. Most passengers had their backs to the freight train as it approached, anticipating the arrival of their Metra train.[99] A similar event occurred again on March 3, 2022, affecting peak period service.[100]

[99] Ex. B, V.S. Oppenheim at 14-15.
[100] Ex. B-2, Metra Emails 2016-2022 at 331 (March 6, 2022).

In another example, on August 2, 2019, a CP dispatcher gave a CP freight train leaving Bensenville Yard priority over a Metra train that was running 8 minutes late due to high passenger counts related to a concert event. The dispatcher had the freight train take up the mainline that the Metra train was already using, requiring the Metra train to change to a mainline not normally used by that train. The dispatcher's decision not only caused further delay to the Metra train, but the switch to another mainline meant that passengers at several stops would find the freight train between themselves and the Metra train they were seeking to board. This scenario prompted passengers to dash across the tracks ahead of the freight train in order to catch their Metra train, resulting in serious safety concerns.[101] Such scenario occurs on a regular basis, including recently on January 18, 2022, February 22, 2022, and March 3, 2022.[102] CP failed to respond to these situations or otherwise recognize the serious need to correct the manner in which it dispatches.

As stated previously, Metra's primary focus is safety. CP's dispatching decisions that create scenarios such as those described here confirm Metra's concern that CP does not share that priority, underscoring the need for transfer of dispatching authority from CP to Metra when increased traffic on the Metra lines will increase CP's dispatchers' opportunities to endanger Metra's passengers.

2. CP-caused delays to Metra's service are longstanding and persistent

Although the number of freight-caused delays for Metra trains varied from year to year, CP's interference of commuter operations has persisted for more than 20 years. All told, during this time freight-related delays impacted 1.23 million Metra customers with delays totaling

[101] Ex. B, V.S. Oppenheim at 15. *See* Ex. B-2, Metra Emails 2016-2022 at 131 (Email exchange Aug. 2, 2019).
[102] Ex. B-2, Metra Emails 2016-2022 at 308 (Jan. 18, 2022), 317 (Feb. 22, 2022), 332 (March 3, 2022).

57,048 minutes, or nearly 40 days and nights.[103] The blue line in Figure 5 below depicts the number of Metra trains each year since 2000 on MD-N and MD-W that were delayed by freight trains, *i.e.* trains stopped while a freight train operates ahead of a Metra train, during both peak and non-peak periods. The orange line in Figure 5 depicts the number of cascading delays, e.g., Metra trains delayed as a result of the initial delay.[104] Even while ridership dropped dramatically in 2020 and 2021, and the number of trains that Metra operated was reduced due to reduced demand during the peak of the COVID pandemic, delays on these lines overall during this time did not, indicating that delays per rider were worse than historical trends. Metra expects ridership to steadily increase as the pandemic eases.[105]

[103] Ex. E, V.S. Godfrey at 3.
[104] *Id*. at 2 Cascading delays refer to delays caused by an initial delay caused by freight activity. Most often this occurs where a delayed train arrives behind time at its final destination and "flips" directions as a new train behind schedule.
[105] Ex. B, V.S. Oppenheim at 3.

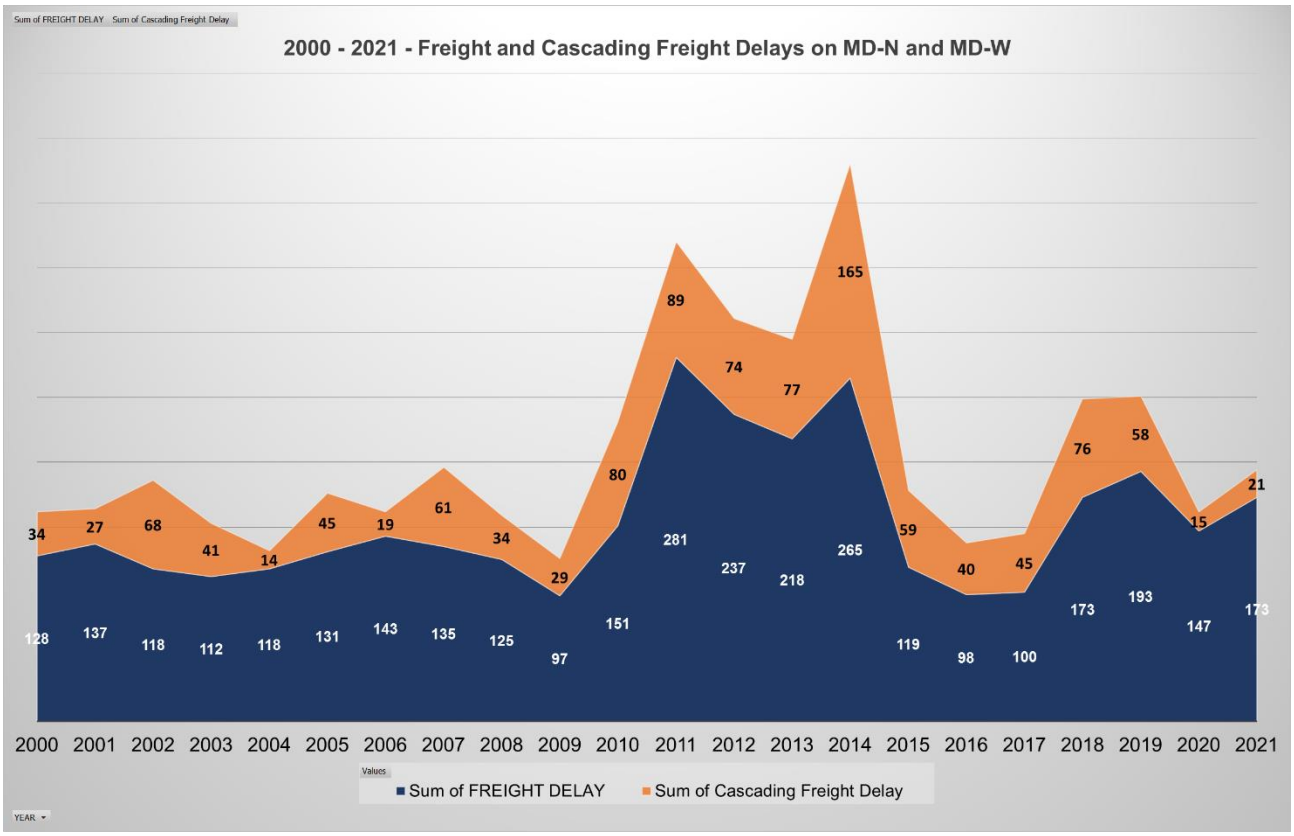


Figure 5

Initial delays to Metra trains cause cascading delays because Metra's operations are planned to make the most efficient use of its equipment. Metra trainsets arriving at a final destination are often "flipped" and depart from the same station shortly thereafter as a train running in the opposite direction. If a Metra train's arrival at its final destination, that means the trainset needed to depart in the reverse direction will usually also be delayed.

Notably, the data depicted in Figure 5 capture only reportable delays, not delays that are shorter than five minutes and 59 seconds (or 15 minutes and 59 for construction schedules), including during Metra's critical peak periods.[106]

[106] *Id*. at 7.

3. Shorter-term data over the past five years indicates that the underlying problems with CP-caused delays are the same or getting worse

CP's improper dispatching demonstrates that its representations to the STB of its cooperation with Metra are not true. CP does not honor its obligation for the contractually provided priority for Metra operations during "peak periods." Within the last two years, CP data show daily operation of CP trains during Metra's "peak period" times,[107] resulting in constant delays.[108] Since CP's implementation of Precision Scheduled Railroading (PSR) during 2019-2020, the number of ***intentional delays***, where CP dispatchers advance freight traffic knowingly causing Metra delays despite contractually-mandated priority for Metra during "peak periods", has increased.[109] Moreover, there are documented incidents where senior CP management personnel are directly involved in this improper prioritization of freight trains.[110]

From January 2016 to October 2021, MD-N and MD-W passengers collectively experienced 53,196 hours of delay due to freight interference – 2,217 days, which is just over six years of time collectively spent delayed due to freight interference.[111] Figure 6 below depicts these delays graphically.[112] While overall delay hours was down in 2020 and 2021, proportional to the reduction in overall passenger hours experienced due to COVID-19, per-passenger delay hours were actually higher.[113]

[107] Ex. E, V.S. Godfrey at 3-4.
[108] Ex. B, V.S. Oppenheim at 10; Ex. B-2 and Ex. B-3.
[109] Ex. E, V.S. Godfrey at 5.
[110] *Id.* at 5-6.
[111] Ex. F, V.S. Maertins at 2.
[112] *Id.* at 3.
[113] *Id.* at 2.

From January 2016 to December 2021, MD-N and W passengers experienced a collective 53,196 hours of delay due to freight interference – **2,217 days or just over six years of time spent delayed due to freight interference.**

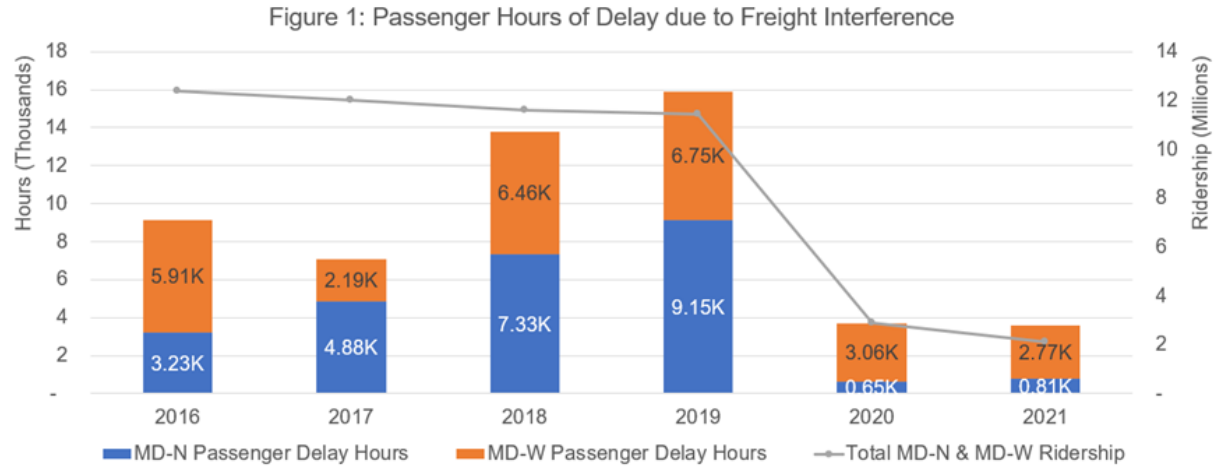


Figure 6

Despite COVID-era ridership being lower and fewer trains being operated, the share of riders experiencing freight interference delay increased since 2016.[114] Overall, MD-N and MD-W riders are twice as likely to have experienced a freight-caused delay in 2021 compared to 2016; and MD-W riders are three times as likely to have experienced a freight-caused delay since 2016. Metra passenger train delays, due to freight train interference on MD-N, increased between 2016 and 2019, and overall by 137% during that period.[115] In 2020 and 2021, delays due to freight train interference on MD-N fell, but only proportionally to the reduced number of passenger trains operated by Metra during that time.[116] Likewise, Metra passenger train delays due to freight train interference on MD-W increased each year between 2018 and 2021, an overall increase of 23%, and reached five-year highs in both 2020 and 2021.[117] Figure 7 below depicts these trends.[118] For the five-year period from 2017-2021, freight train interference delays

[114] *Id.* at 3.
[115] *Id.*
[116] *Id.* at 3-4.
[117] *Id.* at 4.
[118] *Id.* at 3.

caused the combined MD-N and MD-W lines to miss Metra's 95% on-time performance goal.[119] Even if 95% on time performance were satisfactory—Metra strives to exceed this metric[120]—CP-caused events allow Metra no margin of error to account for unpreventable delays attributable to no-one.

Despite COVID-era ridership being lower and fewer trains being operated, the share of riders experiencing a freight interference delay has increased since 2016. **Overall, MD-N and W riders are twice as likely to have experienced a freight delay in 2021 compared to 2016; and MD-W riders are three times as likely to have experienced a freight delay since 2016.**

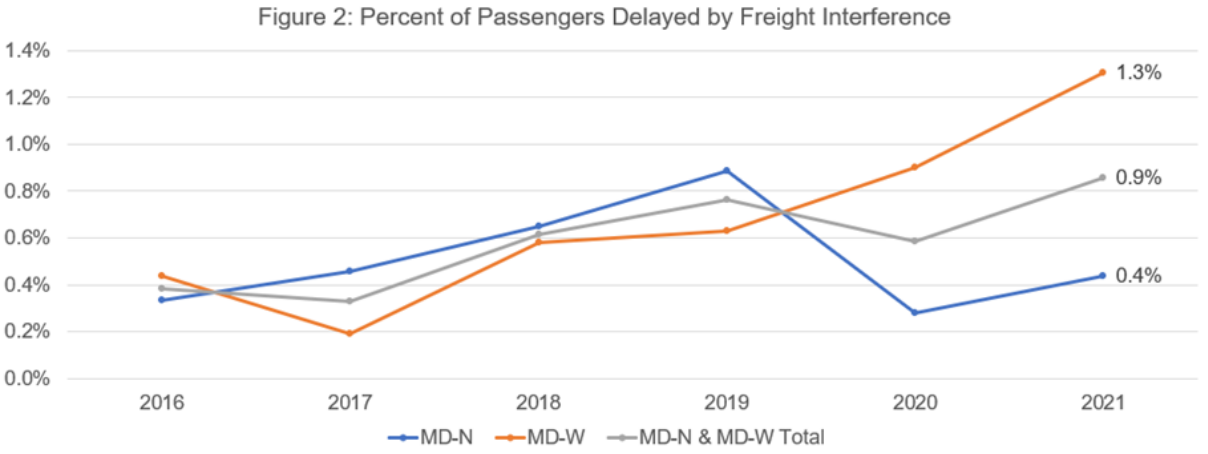


Figure 7

Although the onset of the COVID-19 pandemic resulted in a greater than 95% reduction in daily ridership (at the lowest point in the Spring of 2020) as compared to pre-March 2020 levels, MD-W freight delays reached a five-year high in both 2020 and 2021.[121] MD-N delays fell in 2020 and 2021 proportionally to the reduced number of trains being operated. Figure 8 indicates that, proportionate to overall service, delays on the MD-W and MD-N lines are as bad as ever, and arguably worse.[122]

[119] *Id.*
[120] *Id.* As explained *supra* in Section IV.A., on-time performance is a narrow tool that does not adequately capture many types of delays and interference.
[121] Ex. F, V.S. Maertins at 4.
[122] *Id.* at 4-5.

Despite fewer trains being operated compared to pre-COVID levels from March 2020 to the present, MD-W freight delays reached five-year highs in both 2020 and 2021. MD-N delays fell in 2020 and 2021 proportionally to the reduced number of trains being operated.

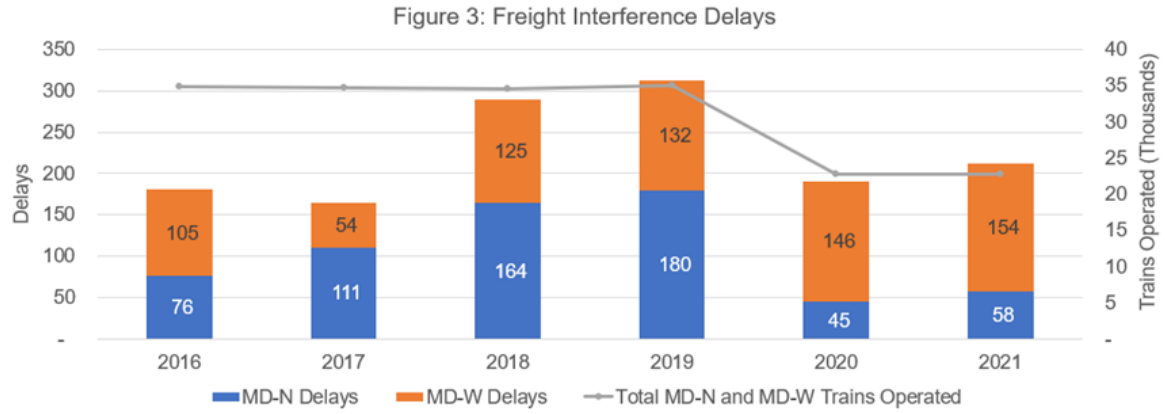


Figure 8

More than 87,000 riders experienced a freight interference delay on the MD-N and MD-W in 2019.[123] Despite COVID-era ridership being much lower than pre-2020 levels, more than 16,000 riders in 2020 experienced a freight delay on the MD-N or MD-W lines in 2020.[124] In 2021, while ridership went even lower due to COVID-19, passengers experiencing a freight delay increased to 18,000.[125] These numbers represent only passengers on a train that experienced a "reportable" delay (greater than five minutes and 59 seconds, or 15 minutes and 59 seconds for construction schedules). Figure 9 below represents the trends in passenger experienced delays on MD-N and MD-W from 2016 through 2021.[126]

[123] *Id.* at 4.
[124] *Id.*
[125] *Id.*
[126] *Id.* at 4-5.

More than 87,000 riders experienced a freight interference delay on the MD-N and W in 2019. Despite COVID-era ridership being much lower than pre-2020 levels, more than 15,000 riders experienced a freight delay on the MD-N and MD-W lines in 2020. These numbers represent only passengers on a train that experienced a reportable delay (greater than five minutes).

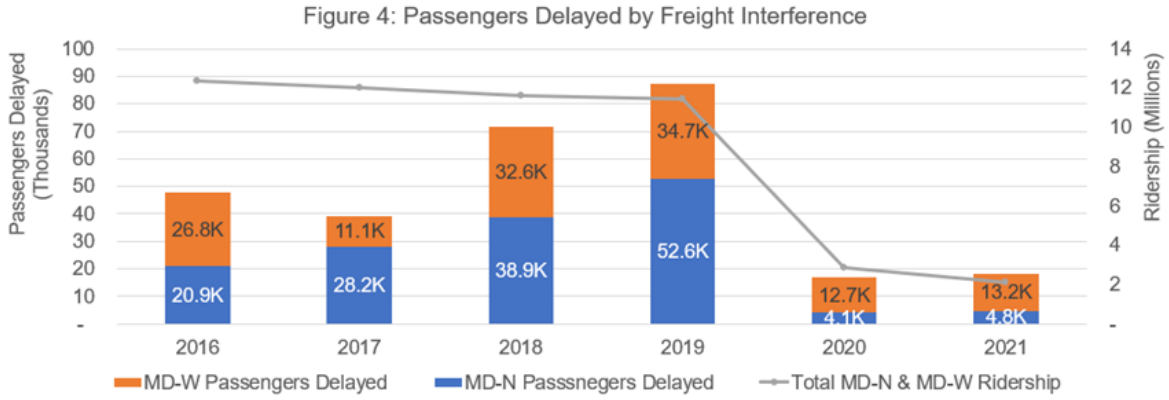


Figure 9

To provide a snapshot, in February 2020, just before the full impact of the COVID-19 pandemic, Metra's MD-W Line experienced 22 freight-related delays on 11 different days, during both peak and off-peak times, resulting in an average of 40 minutes delay each day in which delays occurred, and as much as two hours in a single day.[127] Causes for the delays included stopped or slowed freight trains on Metra's mainline track, including crew changes on mainline track near CP's busy Bensenville Yard.[128] Metra riders encounter delays for these causes all too frequently, confirming CP's practice of placing safety and reliability of Metra's service far down on its list of priorities.

Other data reveal that COVID has not changed the consistent interference Metra experiences due to CP's dispatching and operations on Metra's lines. Metra data collected between February 2020 and October 2021 reveal hundreds of delays, with an average of 16 individual delay events each month and 6.5 peak delay events each month.[129] MD-W

[127] *See* Ex. C-1, Spreadsheet of 2020-2021 CP delays at 2.
[128] Ex. B, V.S. Oppenheim at 11; Ex. E, V.S. Godfrey at 5.
[129] Ex. D, V.S. Rodriguez at 2; Ex. D-1, Spreadsheet of 2020-2021 CP delays, at 1.

specifically experienced at least one delay an average of 8 days each month, or roughly twice weekly.[130] This pattern of interference is inconsistent with CP's obligation to avoid interference with Metra's service and to prioritize Metra's peak period service and in violation of the Trackage Agreement. Metra can anticipate this issue being exacerbated, particularly in the manner in which CP dispatches.

Nor has the onset of these proceedings induced any change. As reflected in Metra's e-mail correspondence with CP, Metra has consistently encountered delays up until the filing of these Comments.[131]

4. The sources of CP-caused delays reflect an unwillingness to prioritize Metra's passenger service on Metra's own lines as required by the Trackage Agreement

Metra's on-time performance has consistently been negatively affected by freight train interference and/or dispatcher actions and error.[132] A steady stream of communications between Metra and CP shows that Metra has notified CP of these issues, with little or no success.[133] While indicating it is receptive to this input,[134] CP's senior leadership ignores Metra's requests and condones interference with Metra's commuter service.[135] Indeed, CP dispatchers have been directed by senior management to move CP trains, regardless of the impact on the network as late as November 2021, after Applicants submitted their Application.[136]

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[130] *Id.*
[131] *See* Ex. B-2, Metra Emails 2016-2022.
[132] Ex. B, V.S. Oppenheim at 10-12; Ex. E, V.S. Godfrey at 5.
[133] Ex. B, V.S. Oppenheim at 10. *Specifically*, *see*, *e.g.*, Ex. B-2, Metra Emails 2016-2022 at 41 (Email exchange Dec. 29, 2017), 70 (Email exchange Aug. 17, 2018), 79 (Email exchange Aug. 23, 2018), 252 (Email exchange Sept. 9, 2021).
[134] While normally receptive to Metra's comments, CP at times has acted dismissive at the outset. Ex. B, V.S. Oppenheim at 10-11. *See* Ex. B-2, Metra Emails 2016-2022 at 97 (Email exchange Aug. 7, 2019).
[135] Ex. B, V.S. Oppenheim at 11. *See* Ex. B-2, Metra Emails 2016-2022 at 73 (Email exchange, Mar. 14, 2018), 68 (Email exchange, Oct. 18, 2018), 131 (Email exchange, Aug. 2, 2019).
[136] Ex. B, V.S. Oppenheim at 11; Ex. B-2, Metra Emails 2016-2022 at 329 (documenting delay reportedly sanctioned by senior CP management on March 6, 2022); Ex. E, V.S. Godfrey at 6.

Documentation of examples of CP's dispatching from 2016 to the present include:

- Operation of trains over 10 thousand feet in length between Bryn Mawr and Shermer that arrive at Tower B17 or Tower A20 without a sufficient time window to allow them to move without interfering with scheduled Metra trains, and without sidings long enough to allow faster Metra trains to pass;[137]
- Lack of planning for routes through the Bensenville Yard that cause entering CP freight trains to stop and block B17 while throwing yard switches;[138]
- CP crew changes, power, marker light changes, or pick up, or set out of cars, or other activities that should be confined to yard tracks on Metra's main tracks;[139]
- Poor operational and dispatching control of freight trains entering and exiting Bensenville that result in use or fouling of Metra mainline;[140]
- Dispatching of CP freight trains between Rondout and Tower A20 in a manner that delays scheduled Metra traffic;[141]
- Failure of CP westbound freight trains to clear tower A20 a minimum of ten minutes ahead of scheduled Metra and Amtrak trains;[142]

[137] Ex. B, V.S. Oppenheim at 11. *See, e.g.*, Ex. B-2, Metra Emails 2016-2022 at 67 (documenting delays caused by l1,000+ft trains interfering with Metra trains on Aug. 7, 2019), 97 (same on Dec. 5, 2018), 331 (same on March 6, 2022).
[138] Ex. B, V.S. Oppenheim at 11. *See, e.g.*, Ex. B-2, Metra Emails 2016-2022 at 41 (documenting delay on Dec. 27, 2017), 317 (same on Feb. 22, 2022).
[139] Ex. B, V.S. Oppenheim at 11. *See, e.g.*, Ex. B-2, Metra Emails 2016-2022 at 243 (Email exchange documenting crew change causing interference on Oct. 13, 2021), 318 (same on Dec. 20, 2021), 313 (same on Jan. 13, 2022), 317 (same on Feb. 22, 2022).
[140] Ex. B, V.S. Oppenheim at 11. *See, e.g.*, Ex. B-2, Metra Emails 2016-2022 at 48 (documenting poor operational and dispatching decisions at Bensenville causing Metra delays on Apr. 28, 2017), 317 (same on Feb. 22, 2022).
[141] Ex. B, V.S. Oppenheim at 12.
[142] *Id*. at 12

- Failure of CP eastbound trains to clear Rondout a minimum of fifteen minutes ahead of scheduled Metra and Amtrak trains.[143] In some cases, CP dispatchers have intentionally held Metra trains.[144]

A typical example of CP-caused delays[145] occurred on August 31, 2020, when a CP train stopped on Metra's mainline track to cut off power and make a crew change outside of Bensenville Yard, even though this activity should have been conducted inside the yard to avoid interference with Metra trains. The event resulted in delaying a Metra train 20 minutes.[146] This action recurs often weekly, as shown by emails and Metra's delay records,[147] notwithstanding that for years Metra's staff asked CP to reserve adequate space in the Bensenville Yard, or to make crew changes at other non-mainline track locations, to avoid stopped CP trains on Metra's mainline track.[148]

In another typical example, between 3:05 and 3:25 pm on December 10, 2021, two Metra trains (train nos. 2221 and 2240) were held up for 20 minutes each for a 12,000+ foot CP freight train (train no. 286) waiting to enter the Bensenville Yard, due to another 13,000-foot CP train (train no. 241) arriving at the Bensenville Yard at the same time. Although the Bensenville Terminal Superintendent recognized the likelihood of delays and called CP's dispatching office in Minneapolis to request that one train be held back (train no. 286), he was overruled and the train was lined up to run through and go in the yard, resulting in a 20 minute delay for Metra's

[143] *Id*.
[144] *Id*.
[145] The tabulated list of interference recorded by email at Exhibit B-2 and Exhibit B-3 attached to the Verified Statement of Richard Oppenheim provide numerous instances of delays caused by the factors described above and below. As shown by Exhibits B-2 and B-3, These are not isolated incidents.
[146] Ex. E, V.S. Godfrey at 5.
[147] *See supra* n. 139.
[148] *See e.g.*, Ex. B-2, Metra Emails 2016-2022 at 92 (Email exchange Aug. 27, 2018), 147 (Email exchange Nov. 12, 2019).

trains.[149] Excessively long train lengths, i.e. those over 10,000 feet, increase the likelihood of delays because they hang out of the yard and block longer segments of track.[150]

CP's dispatching of Amtrak trains also impacts Metra's operations and its budget. While Metra is the host for the portion of Amtrak's Chicago-Milwaukee Hiawatha Service and its Empire Builder that runs over Metra's line, CP dispatches Amtrak trains over both Metra and CP lines for these services.[151] This is often problematic since Metra is held accountable for Amtrak performance on its tracks, but has no direct control over how the trains operate in relation to CP freight trains.[152] It is not uncommon for CP to dispatch a CP freight train ahead of an Amtrak train far enough ahead to clear CP-owned tracks but not Metra-owned tracks, with the result that CP is credited with handling Amtrak trains on time, but Metra is then charged with causing an Amtrak delay.[153]

C. CP rejected Metra's proposals to reinstitute and expand passenger service based on an asserted lack of capacity

CP unilaterally claims all unused capacity on Metra's lines as its own. Nothing in the Trackage Agreement gives CP that right.

In the Trackage Agreement Metra is required to obtain CP's approval for any commuter service changes, ***which is not to be unreasonably withheld***. CP has continually maintained that Metra cannot add trains over the lines to service its customers, presumably because there was no capacity. It is now clear that CP breached the Trackage Agreement and that CP unreasonably withheld its approval.

[149] Ex. B, V.S. Oppenheim at 12-13.
[150] *Id*.
[151] *Id*. at 24.
[152] *Id*.
[153] *Id*.

In 2019, for example, Metra pursued the addition of 4 non-peak, reverse commuter trains on the MD-N line (C&M Subdivision).[154] As required under the Trackage Agreement, Metra sought CP's consent (which, according to this governing document, CP cannot unreasonably refuse).[155] However, CP refused, although time slots were empty, and CP responded that if Metra wanted to grow its operations on the Metra-owned corridor, Metra had to use public funds to make millions of dollars in corridor improvements.[156] CP further stated "[t]he issue is capacity" and that "[p]rotection of capacity is vital."[157] Thus, CP blocked Chicago-area residents' access to a critical urban transportation service to reach major employment centers in Lake Forest, Illinois. It is essential that Metra be allowed to expand and change its service outside of peak periods to allow for economic growth in the area, such as with the planned service to O'Hare Airport.

Even capacity that was historically Metra's was usurped by CP. In 2019, Metra wanted to *reinstate* four Saturday and two Sunday commuter trains that were eliminated in 2018 due to budgetary issues. Metra sought CP's consent (which cannot be unreasonably withheld) to implement this change.[158] CP refused, stating that there was limited or no capacity on the line, even though these slots were not being used for freight.[159] As a result, Metra was barred from reinstating its previous service, depriving Chicagoans of an effective and efficient transportation option that they previously enjoyed. And yet, CP proposes to add trains on the lines.

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[154] *Id.* at 16.
[155] *Id*.; Ex. B-5, Metra Letter March 5, 2019 to CP re: Peak Period Trains; Ex. B-7, Metra Letter March 26, 2019 to CP re: Reverse Commute Trains.
[156] Ex. B, V.S. Oppenheim at 16; Ex. B-6, CP Letter March 12, 2019 to Metra re: Reverse Commute Trains; Ex. B-8. CP Letter April 2, 2019 to Metra re: Reverse Commute Trains.
[157] Ex. B, V.S. Oppenheim at 16; Ex. B-7, Metra Letter March 26, 2019 to CP re: Reverse Commute Trains.
[158] Ex. B, V.S. Oppenheim at 16.
[159] Ex. B, V.S. Oppenheim at 15-16.

CP's negotiated "settlement" with Amtrak in this proceeding underscores the manner that CP ignores the needs of commuters in northeast Illinois. That settlement provides for additional Amtrak passenger trains on MD-N, contrary to CP's statements to Metra that there was no capacity for additional passenger service. If there always was capacity, then CP violated the Trackage Rights Agreement with Metra, by falsely claiming capacity did not exist, or, its current unsubstantiated statements (without evidentiary support of RTC modeling) to the STB are equally false.

D. CP's past practice confirms that it cannot be trusted to allow the Transaction to go forward unless this Board gives Metra more control over the MD-W and MD-N lines.

1. CP has refused to conduct RTC modeling to determine increased efficiencies that would benefit operations on Metra's lines.

RTC is a software modeling program that simulates train operations to and the impact of various operational scenarios based on input data.[160] It is the "industry-standard dispatching model" to evaluate the ability of trains to operate on a particular line or set of lines based on factors such as track alignment, locations of crossings, interlocks, and turnouts.[161] Class I freight railroads and the Board recognize the importance of RTC and similar analysis, which allows for a better understanding of the impacts of a proposed service in the context of a line's present and future traffic volumes and engineering design and conditions."[162]

In 2019, in its discussions with CP for additional service on MD-N, Metra suggested that the parties conduct RTC modeling.[163] CP refused and asserted "[m]odeling is a snapshot in time

[160] *See* Ex. C, V.S. Crowley and Mulholland at 44-46.
[161] *See Canadian National Ry. Co. and Grand Trunk Corp. – Control – EJ&E West Co.*, FD 35087, slip op. at 41 n.90 (STB served Dec. 24, 2008).
[162] *See Application of the National Passenger R.R. Corp. Under 49 U.S.C. 24308(e) – CSX Transp., Inc., and Norfolk S. Ry. Co.*, FD 36496, slip op. at 4, 7 (STB served Aug. 6, 2021).
[163] Ex. B-8, CP Letter to Metra April 2, 2019 to Metra re: reverse Commute Trains. In addition, and quite astonishingly as discussed in these comments, CP has stated that it did not conduct RTC modeling on the Metra

typically based on past history. It does not capture the dynamics of the business, unpredictable challenges, or the judgment necessary to evaluate capacity,"[164] perhaps knowing that the modeling would conclude that capacity for Metra trains was available. Until CP can demonstrate capacity through RTC modeling, it should not be permitted to allow further trains (apparently at Metra's financial detriment) on Metra owned tracks.

2. CP has delayed updating dispatching software to align with dispatching software governing Metra's other lines, compounding unresponsive dispatching service

Both Metra's MD-W and MD-N, which are dispatched by CP, and the rest of Metra's lines, which are dispatched by Metra, are dispatched using Wabtec Train Management Dispatching Systems ("TMDS") computer-aided dispatch ("CAD") systems. This software serves a critical component in Metra's operation, and is a requisite for implementing federally mandated Positive Train Control ("PTC") requirements.

In 2021, when upgrading new TMDS CAD software in Metra and CP systems, some Metra installations had to be delayed to accommodate interoperability with CP's other systems on non-Metra owned lines. Although Metra offered CP the opportunity to update its own software at the same time as Metra, CP declined. Because the software interface changed between updates, some of the same features included in the new update were not available in the older version. This difference resulted in at least one dispute between Metra and CP on the ability of a dispatcher to correct a signal designation that lead to exasperating a delay of Metra trains.[165] The fact that CP's timetable, rule book, and protocols and decisions regarding software

lines as part of its assessment of the potential impacts of the Transaction. *See supra* Section III; Ex. H-4, Applicants' Joint Response to Metra's Second Interrogatories at 6.

[164] Ex. B-8, CP Letter April 2, 2019 to Metra re: reverse Commute Trains.

[165] Ex. E, V.S. Godfrey at 6.

updates govern the operation of Metra's service on Metra's lines increases the likelihood of unnecessary disruption to Metra's operations.[166]

3. CP's unresponsiveness, non-cooperation, and de-prioritization of Metra service create cascading problems that amplify disruptions that could otherwise be minimized

CP's control over dispatching and poor responsiveness compound problems for Metra.[167] In one recent example, on a weekday morning on December 9, 2021, Metra's inbound commuter peak period service suffered major disruptions due to failure primarily of CP dispatching systems. Problems began when a track circuit that went out on one of Metra's main tracks, which caused red signals for that segment of the line and closed crossing gates for several blocks. Because the initial report regarding the gates came from a private citizen, the receiving CP dispatcher issued a directive requiring train crew members to manually flag two busy crossings.

When Metra's Director of Operations for the Metra CUS District Rich Oppenheim called the MD-N line (C&M Subdivision) dispatcher via the hot line to address the problem, the hot line phone rang for 20 minutes before he hung up without an answer.[168] After Metra's signal maintainer arrived on the scene and confirmed that the problem was a false activation that did not require manual flagging of the crossings, the signal maintainer contacted the CP dispatcher to change the directive. CP's dispatcher refused, stating that the "system would not allow it,"[169] contrary to the established standard protocol.[170] As a result, six Metra trains were delayed between 10 and 24 minutes at the peak of morning commute time. CP's refusal increased the

[166] *Id*.
[167] *See*, *e.g.*, Ex. B, V.S. Oppenheim at 17-18; Ex. B-3, Table Summary of Emails on Sept. 9, 2020, Dec. 9, 2021, Dec. 10, 2021, Dec. 17, 2021).
[168] Ex. B, V.S. Oppenheim at 17; Ex. B-2, Metra Emails 2016-2022 at, 252 (Email Dec. 9, 2021).
[169] Ex. B, V.S. Oppenheim at 17; Ex. B-2, Metra Emails 2016-2022 at 252 (Email Dec. 9, 2021).
[170] Ex. E, V.S. Godfrey at 5.

delays to Metra's stuck trains by 10 to 15 minutes, even though CP and Metra previously established a protocol for these types of signal issues that should have resolved the problem in under five minutes.[171]

Subsequent investigation revealed that CP's operational decision-making around software updates contributed to the problem. The software used by CP's dispatchers outside of Metra's lines had not been updated as those dispatching Metra's had, which would have allowed for easier switching of directives. At the time of software update of Metra line dispatching, CP had intentionally refused to update the rest of its system, resulting in difference in dispatcher software functionality between Metra lines and other CP lines.[172]

In the above example, Metra's lack of control over dispatching, the unresponsiveness of CP dispatchers, and CP's unwillingness to implement software changes that would benefit operational efficiencies all contributed to turning what would have likely been a minimal delay into a significant one in the middle of peak commuting time.

E. CP does not pay its fair share of capital projects to address capacity and operational issues

When CP rejected Metra's requests to add several trains for a reverse commute in 2019 on the MD-N line (C&M Subdivision), CP suggested that Metra's only option would be to "seek[] the capital necessary to add additional capacity", even though there was capacity on the line, as evidenced by the Application.

Now CP seeks an expansion in service on lines it has said are capacity constrained. Under the Trackage Agreement as amended, CP must pay for capital improvements that it solely

[171] Ex. E, V.S. Godfrey at 3.
[172] Ex. B-2, Metra Emails 2016-2022 at 252 (Email Dec. 9, 2021).

benefits from.[173] If CP now unilaterally appropriates capacity on Metra's lines made available through Metra's investments in these lines, CP should compensate Metra for all capital improvements if the Board approves the Transaction.

CP pays a small percentage of the cost of capital improvements for the lines—approximately 21% over the past ten years[174]—and CP's overall contributions to maintaining and improving Metra's lines represents a smaller proportion of the costs that Metra covers for these lines.[175] While CP's underpayment is not itself a consequence of the Transaction, it is a factor in assessing the financial sustainability of introducing new traffic on these lines without addressing baseline maintenance impacts or accurately accounting for actual capacity available. Indeed, the "ample" capacity on Metra's lines described by Applicants in their Application[176] is funded largely by Metra's investment in them and is not solely CP's to use for the purposes of the proposed Transaction, either under the Trackage Agreement or equitably based on ownership or investment in the lines.

V. IN LIGHT OF EXISTING CONDITIONS, THE APPLICATION CANNOT BE APPROVED ABSENT CONDITIONS THAT WILL ADDRESS THE SIGNIFICANT ADDITIONAL INTERFERENCE WITH METRA'S COMMUTER RAIL SERVICE THAT WILL OCCUR FOLLOWING IMPLEMENTATION OF THE TRANSACTION

A. Applicants' methods for assessing existing and projected rail line and yard capacity are grossly inadequate

Applicants claim that the Chicago-Elgin Subdivision has ample capacity to handle additional freight traffic without impairing Metra's operations is based on calculations of the

[173] Ex. A, V.S. Gentil at 3; Ex. A-3, Metra-CP 1993 Supplemental, Art. 6 (amending Section 7.2).
[174] Ex. G, V.S. Stepp at 2-3.
[175] Ex. G, V.S. Stepp at 2-3; Ex. A, V.S. Gentil at 3.
[176] Appl. 2-322, Ex. 13, Operating Plan at 66 (Redacted Version).

estimated sustainable capacity on the line without conducting RTC or other modeling on the Metra lines to test the accuracy of this projections.[177]

To do so, Applicants used "MultiRail" to develop its railcar blocking and train operating plans. After developing the operating plan, Applicants used a mathematical capacity analysis framework to determine where capacity expansion projects will be required to accommodate the projected increase in traffic. The capacity analyses and operating plan details supplied by Applicants are insufficient to demonstrate that the proposed merger will have no impact on Metra's service.

1. MultiRail-based Operating Plans Must Be Evaluated through Modeling

Rather than using RTC modeling, Applicants explain in their Operating Plan that "MultiRail was used as the primary tool to design efficient blocking and train service for an integrated Applicants system" and describes MultiRail as "a standard software application for railway operating plan development with a long history of intensive use at CP and other railroads."[178] However, MultiRail is used most often and most effectively as a scoping tool, not a modeling tool.[179] For example, MultiRail is not by itself able to confirm the ability of a yard to process the train service plan it develops.[180] Significantly, it does not fill the role that RTC modeling plays in determining capacity, as the STB has itself expressly stated.[181] Detailed review comparing CP's Application of MultiRail to actual train data, which Metra's expert

[177] *See* Ex. H-4, Applicants' Joint Response to Metra's Second Interrogatories at 6 ("CP has not conducted any RTC modeling, or engaged a third party to review or conduct any train modeling and/or RTC modeling on the Applicable Routes since January 1, 2017.").
[178] *See*, Appl. 2-280, Ex. 13, Operating Plan at 24 (Redacted Version).
[179] *See* Ex. C, V.S. Crowley and Mulholland at 36-37. *See also* UP Petition to Reject, UP-4 at 11-12.
[180] Ex. C, V.S. Crowley and Mulholland at 36.
[181] *See E. I. DuPont de Nemours and Company v. Norfolk Southern Railway Company*, NOR 42125, slip op. at 41 (STB served Mar. 24, 2014) ("[MultiRail] does not replace the Board's traditional RTC simulation that must still be run to confirm the feasibility of the operating plan developed."). *See* also *SunBelt Chlor Alkali Partnership v. Norfolk Southern Railway Company*, FD 42130, slip op. at 17 (STB served June 20, 2014).

consultants conducted using RTC modeling, reveals that the MultiRail conclusions results in significant oversights that undermine the overall analysis and severely underestimate traffic and congestion.[182]

2. The Spreadsheet-Based Capacity Modeling Calculations Applicants Used Are Inadequate

The other tool that Applicants rely on to model subdivision capacity was a simple mathematical formula, which is far less precise and far less informative than RTC. Applicants explain that they based their mathematical formula on the estimated time it takes for two (2) trains moving in opposite directions to traverse the longest segment between sidings on the subdivision.[183] This calculation includes generalized estimates on "sustainable capacity" for which Applicants provide no support.[184] Applicants inaccurately assert that their modeling of capacity using this strictly mathematical approach allows them "sufficient flexibility to manage engineering work blocks, unplanned outages and other impacts that can create surges in traffic and congestion in each subdivision."[185]

Applicants' assessment is inadequate and inaccurate. Based on Applicants' workpapers, Applicants' capacity analysis of the Elgin Subdivision did not consider Metra's priority use of Metra's line segments during commuter Peak Periods as defined in the Trackage Agreement.[186]

Further, Applicants' claim that the MD-W line has ample capacity to handle additional freight traffic without impairing Metra's operations is based on the purely mathematical calculation of the estimated sustainable capacity on the line. The STB long ago rejected using purely mathematical calculations to determine track capacity and operating requirements and

[182] *See* Ex. C, V.S. Crowley and Mulholland at 44.
[183] *See* Appl. 2-340, Ex. 13, Operating Plan at 84 (Redacted Version).
[184] *See* Ex. C, V.S. Crowley and Mulholland at 39-41.
[185] *See* Appl. 2-340, Ex. 13, Operating Plan at 84 (Redacted Version).
[186] *See* Ex. C, V.S. Crowley and Mulholland at 20.

instead adopted a more sophisticated approach of rail traffic simulation to determine a rail line's capacity, based on RTC and similar programs.[187]

a) The STB No Longer Relies Upon Simple Mathematical Calculations of Operations

The STB and railroads no longer rely exclusively on the simple tools that Applicants use to support their Application because doing so can lead to erroneous conclusions due to a lack of specificity within the model, as noted by this Board in past cases.[188]

For example, Applicants' model incorrectly assumes that all trains operating over a line segment will travel at the same speed. In reality, passenger trains operate at different speeds than freight trains on the Elgin Subdivision and some freight trains operate at different speeds than other freight trains.[189] While the CP methodology attempts to differentiate between trains operating on a segment by using more than one observation, it does not require that the train speeds reflect all train types operating over a segment.[190] CP also did not provide support for the train speeds it included in its capacity calculations, even though its own process states all train speed calculations should be noted and included in the capacity model spreadsheet.[191]

Applicants' simple mathematical capacity model assumes average meet factors will be identical for all trains, ignoring many testable factors that affect these estimates, such as train length, train weight, and turnout type and configuration.[192] Its capacity analysis sensitivity did not account for the larger (*e.g.* 13,000-foot) trains that routinely operate over Metra's lines.[193]

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[187] *Id*. at 40-41.
[188] *See FMC Wyoming Corporation and FMC Corporation v. Union Pacific Railroad Company*, FD 42022, slip op. at 150 (STB served May 12, 2000) ("FMC").
[189] *See* Ex. C, V.S. Crowley and Mulholland at 42.
[190] *See id*.
[191] *See id*.
[192] *See id*.
[193] *See id*. at 43-44.

Overall, Applicants' model is based on such broad inputs and assumptions as to provide nothing but the most basic indication of a line's actual sustainable capacity.

The limitations on the type of analysis that Applicants used is why the STB now relies upon and endorses more sophisticated train simulation models to evaluate rail line capacity,[194] and to understand the impact of railroad mergers.[195]

b) Simple Mathematical Models Do Not Capture Capacity on Double and Triple-Track Rail Lines

Applicants' calculations of rail capacity use a model that is not well-suited to evaluating rail segments with multiple main line tracks. The model is designed to estimate the capacity of single-track rail lines, but the Elgin Subdivision uses double- and triple-tracked lines along its length.[196] Peer-reviewed research demonstrates, using methods like the one Applicants used on double- and triple-track lines can result in output showing more capacity than is actually the case when taking into account other factors such as traffic mix (trains with different speeds, characteristics, and customer requirements), track outages for repairs and maintenance, spacing between block signals and interlockings, and queuing at entrances of terminals and junctions.[197] Applicants did not account for these.

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[194] *See id*. at 34-36; *Public Service Company of Colorado d/b/a Xcel Energy v. The Burlington Northern and Santa Fe Railway Company*, FD 42057B Mar. 24, 2014). Outside of maximum reasonable rate proceedings before the STB, parties have used the RTC model to test rail line capacity in, *Application of The National Railroad Passenger Corp. Under 49 U.S.C. § 24308(E) – CSX Transportation, Inc. And Norfolk Southern Corporation*, FD 36496, filed March 16, 2021 ("Amtrak Gulf Coast Service") and *Entergy Arkansas, Inc. & Entergy Services, Inc. v. Union Pacific Railroad Company, Missouri & Northern Arkansas Railroad Company, Inc., & BNSF Railway Company*, NOR 42104 (STB served November 26, 2012).

[195] *See, Canadian National Railway Company and Grand Trunk Corporation – Control – EJ&E West Company*, FD 35087, *discussed in* Ex. C, V.S. Crowley and Mulholland at 45-46.

[196] V.S. Ex. C, V.S. Crowley and Mulholland at 46.

[197] *See id*. at 47, discussing "Capacity Modeling Guidebook for Shared-Use Passenger and Freight Rail Operations," NCHRP Report 773, Transportation Research Board, 2014 ("TRB Report"). The TRB undertook the study to provide state departments of transportation with technical guidance to aid in their understanding of the methods host railroads use to calibrate and apply capacity models to determine if adequate capacity exists to support new or increased passenger rail service.

More importantly, the train figures for the Elgin Subdivision included in Applicants' workpapers *do not include dozens of Metra and Amtrak passenger trains*, nor do they account for the full impacts of Bensenville Yard, one of CP's busiest.[198] The presence of significant passenger train volumes in the mix of traffic moving over this line make the capacity issue even more complex, given passenger train's contractual priority and significantly different operating characteristics of all the train types that actually use the line segments being studied. Applicants' omission of these trains from the calculations undercuts the validity of their calculations and underscores Metra's concern that CP's current disregard for its obligations under the current agreement will only be exacerbated following the implementation of the proposed Transaction unless this Board requires CP to adopt the conditions that Metra is proposing.

c) Applicants Omit Delay Factors and Foreign Railroad Conflicts from Their Capacity Analysis

Applicants' simple mathematical capacity model calculations are based on the speed at which unimpeded trains move between sidings. This model ignores upstream and downstream events that cause trains to sit idle in yards, sidings and sometimes on mainline tracks.[199] In fact, Applicants make no mention of delays in their capacity analysis, and their capacity model factors out any delays a train may incur while operating over the studied segments. Even more concerning is Applicants' failure to consider the impact of other railroads' operations, both on jointly operated track segments and on downstream, offline track segments owned by foreign carriers, on CP's operations.

The Chicago Terminal is the predominant interchange terminal in North America. In their description of CP's current Chicago operations, Applicants state the following:

[198] Ex. C, V.S. Crowley and Mulholland at 48.
[199] *Id*. at 49.

> Between 75 and 80 percent of CP carloads passing through Chicago either originate or terminate on another railroad. With the majority or railyards in the region lying to the south of downtown Chicago, much of CP's interchange volumes depart CP's network to connect with yards further south, sharing the same highly trafficked corridors as other Class I carriers.[200]

Nevertheless, Applicants did not ascertain whether connecting railroads can accommodate their proposed increase in traffic, including interline traffic.[201] CP provided train delay data for select subdivisions in response to Metra's requests for production in this proceeding. The CP delay data attributes a significant portion of the train delays that CP incurred over the critical line segments for which it provided data to interference from other carriers' equipment and operations from January 1, 2019 through December 14, 2021.[202]

Applicants presume that the additional volume they plan to add will not impact operations of the carriers with whom they interchange traffic and/or share trackage and will not be impacted by delays on those other carriers' lines. However, as documented in CP's own delay data, the current volume of traffic (both interchange trains and local trains) moving over these critical line segments already causes substantial delay to CP (and Metra). Moreover, although Metra's expert consultants did not have delay data of the connecting carriers to evaluate, the train conflicts recorded in CP's train delay data obviously cause delays on all other systems as well.[203]

In most capacity models, train delay times are normally considered implicitly or explicitly in determining train capacity.[204] In rail simulation models, such as the RTC, train delays are explicitly considered either as a result of the rail simulation as trains encounter other

[200] *See* Appl. 2-269, Ex. 13, Operating Plan at 13 (Redacted Version).
[201] Ex. C, V.S. Crowley and Mulholland at 49.
[202] *Id*. at 50.
[203] *Id*. at 50.
[204] *Id*. at 51.

trains or as direct inputs for such things as maintenance delays or bridge openings.[205] In less sophisticated models, such as Applicants' simple mathematical capacity model, delays can be implicitly accounted for by including delay times in the development of average train speeds or transit times.[206] However, the operating instructions for Applicants' mathematical model explicitly *exclude delay times* in considering line capacity,[207] meaning that delayed trains were omitted from consideration. Thus, this traffic selection explicitly overstates the capacity on the line segment.

B. The Application fails to explain, in light of Applicants' projections, how the Transaction will not interfere with Metra's commuter rail service

1. Applicants have no explanation for why projected increases on Elgin Subdivision/MD-W will not interfere with Metra's MD-W service

Notwithstanding the above, Applicants' projections indicate up to a 380% increase in freight traffic—in addition to the dozens of existing daily Metra trains—on parts of the Elgin Subdivision.[208] As discussed below, the actual projected daily increase in freight traffic west of Bensenville Yard is far larger than indicated by the numbers cited in the Application because Applicants list traffic changes on the Elgin Subdivision that only apply to one portion east of Bensenville Yard. Metra's service on MD-W already suffers significant delays and interference caused by CP's existing freight service, notwithstanding CP's contractual obligations to avoid interference in dispatching the lines. Thus, an increase in freight traffic will increase delays and interfere with Metra's service, as CP would have learned if it had conducted RTC modeling as Metra has done. Yet Applicants claim that "there is ample capacity" for the daily increase in

[205] *Id*.
[206] *Id*.
[207] *Id*.
[208] Appl. 2-313, 2-322, Ex. 13, Operating Plan at 57, 66 (Redacted Version).

freight trains on MD-W.[209] What Applicants ignore is that even with the alleged "low current freight train frequencies" Metra's operations are frequently interrupted with freight handling.

The Application documents provide no support for CP's assertions regarding a lack of impact on MD-N. Nor does CP explain why the Transaction will result in no additional traffic on MD-N, when its own analysis provides that there will be additional traffic. Applicants also ignore the implications of MD-N (and MD-W) as an alternative route for the Marquette Subdivision, either before or during improvements to that subdivision, or during times of high traffic or any other operating issues with the line. Those trains that Applicants project for movement on the Marquette Subdivision will likely find their way to Metra's territory more often than is already the case, at the expense of Metra riders.[210]

2. The implications if CP is correct about no impact on Metra's service

Assuming *arguendo,* that CP was correct and there was "ample" capacity on MD-W and no impact on MD-N to accommodate the increases that CP anticipates, then CP's prior refusal to allow Metra to add the trains it requested (1) was dishonest, (2) breached its contractual obligations to Metra by denying Metra the opportunity to expand service and, (3) interfered unnecessarily and unreasonably with Metra's service. Further, CP states it "will facilitate Amtrak's' planned expansion of its passenger rail network, and specifically on MD-N.[211] In fact, Amtrak announced a settlement with CP under which CP will permit additional Amtrak trains on MD-N.[212] This raises a conflict. If there is ample capacity for Amtrak trains now, there was ample capacity for Metra's trains when Metra submitted its request.

[209] *Id*. at 66.
[210] Ex. B, V.S. Oppenheim at 22-23.
[211] Appl. 1-174, V.S. Creel at 19 (Redacted Version).
[212] *See* Amtrak Medio Center, "Amtrak Pledges Support for CP-KCS Combination, https://media.amtrak.com/2022/01/amtrak-pledges-support-for-cp-kcs-combination/ (Jan. 6, 2022).

As Metra will discuss at greater length below, the Application cannot be approved without requiring CP to address ongoing issues and the future aggravation of those issues that the proposed Transaction will cause.

C. CP's assertions regarding capacity on Metra's lines are based on misstated, incomplete, and incorrect information

Applicants' assertions that the Transaction will have no impact on Metra's service are based on the inaccurate representation that train volumes on Metra's lines into Chicago are slight, that they are lightly travelled by a couple dozen daily CP trains. In reality, over 100 freight and passenger trains traverse Metra's MD-W and MD-N daily and the volume causes both Metra and CP to incur multiple train delays daily. The pre- and post-merger train counts cited by Applicants represent only a small fraction of the trains that traverse those lines.

1. Misstated Projections of Line-Haul Train Counts

Applicants state that "[t]he Transaction is projected to increase freight traffic by 7.1 trains per day on the western 24.2 miles of [the MD-W] line, between Almora and CP's Bensenville Yard."[213] If taken at face value, this increase constitutes a 44% increase in freight traffic on CP's Elgin Subdivision/MD-W.[214] However, the 7.1 daily train statistic is misleading. Although Applicants state that there will be a daily increase of 7.1 freight trains on its Elgin Subdivision from the Transaction, the information in the Application indicates that freight traffic on Metra's MD-W west of Bensenville Yard will actually increase 380%, from 2.9 to 11.1 trains per day. This number is derived from the statement in the Application that an increase from 2.9 to 11.1 trains per day will occur on the subdivision directly west of MD-W. That traffic has

[213] *See* Appl. 2-322, Ex. 13, Operating Plan at 66 (Redacted Version).
[214] *See* Appl. 2-364, Ex. 13, Operating Plan, App. A.

nowhere else to go or come from except MD-W.[215] The actual 380% increase in traffic on MD-W west of Bensenville Yard is supported by analysis of highly confidential information provided by CP.[216] Even this number excludes projected local and foreign (non-CP) freight trains from the total, which CP omitted from its calculations, thus further undercounting total freight trains that currently do and would operate on the line. [217]

On Metra's MD-N line, Applicants state that there will be no increase in freight trains on the C&M Subdivision, i.e., the southern portion of the Metra-owned MD-N Line. Specifically:

> 183. Metra operates 18 trains per weekday and nine trains per weekend day in each direction between Rondout and Fox Lake, and 64 trains per weekday and 20 trains per day on weekends between Rondout and Chicago Union Station. The Transaction is not expected to generate additional freight traffic on this segment, and as a result there will be no impact on Metra operations.[218]

While Applicants' Operating Plan narrative does not project additional regularly scheduled line-haul freight trains, i.e., so-called "operating plan trains," on MD-N, its Appendices and supporting workpapers demonstrate that plan to increase freight traffic by 0.9 trains per day, or a 7.5% increase.[219]

2. Complete Omission of all Passenger Service and Other Classes of Freight Trains

Altogether, Applicants' omission of passenger trains and certain classes of freight trains on Metra's lines from their assessment of the impacts of the Transaction result in undercounting

[215] *See* Appl. 2-364, Ex. 13, operating Plan, App. A.; *See also id.* 2-426)
[216] Ex. C, V.S. Crowley and Mulholland at 18-19.
[217] *Id.* at 18.
[218] *See* Appl. 2-321, 2-322, Ex. 13, Operating Plan at 65-66 (Redacted Version).
[219] *See* Appl. 2-365, Ex. 13, Operating Plan, Appendix A: Trains per day by Subdivision. *See also* Ex. C, V.S. Crowley and Mulholland at 19-20.

trains by more than 500%[220] while also not accounting for seasonal or daily variation in traffic that will mean that Metra's lines at times will see even higher counts.

a) Passenger Trains

Applicants ***completely exclude Metra passenger trains*** from the pre-merger and post-merger train counts identified in the Operating Plan workpapers and other materials supporting the proposed Transaction,[221] even though Applicants acknowledge Metra's daily train volumes of 90 trains per day over the MD-W and MD-N lines in the Application narrative.[222] Given that Metra is currently operating a combined 595 trains per week on MD-W and MD-N, Applicants' omission of these trains from their train counts means that they are disregarding a more than 500% difference in total train counts in both pre- and post-merger calculations.[223] Applicants' failure to account for Metra train volumes in describing the impact of the proposed operating plan over Metra's track results in a gross understatement of actual train volumes,[224] and thus a gross understatement of the impacts on Metra's service. Moreover, when Metra returns to its historical (pre-COVID) service frequency from the reduced COVID schedule of trains it is currently operating, its train counts will increase from the current low levels.

As with Metra's trains, Applicants also fail to account for Amtrak trains operating over Metra's and CP's tracks. Applicants' operating plan acknowledges that, "the C&M subdivision accommodates CP's freight operations as well as a total of eight Amtrak train pairs per day."[225] The narrative incorrectly suggests that Applicants are assessing the impact of additional traffic

[220] *See* Ex. C, V.S. Crowley and Mulholland at 24.
[221] Ex. C, V.S. Crowley and Mulholland at 23-24.
[222] *See*, Appl. 1-172, V.S. Creel at 17 (Redacted Version); and Appl. 2-321, 2-322, Ex. 13, Operating Plan at 65-66 (Redacted Version). Even this passing mention of Metra's trains understates the volumes, because it relies on the reduced COVID schedule implemented in 2020.
[223] *Id*. at 24.
[224] *Id*.
[225] *See* Appl. 2-268, Ex. 13, Operating Plan at 12 (Redacted Version).

on the lines using an accurate count of trains operating there, but the work papers demonstrate otherwise. *These trains are not included in Applicants' train counts*. Adding these daily eight train pairs (16 trains per day) would themselves increase by more than 50% Applicants' stated pre- and post-train counts.[226]

In addition, Applicants recently struck an agreement with Amtrak to operate additional daily trains in Hiawatha service.[227] This creates several issues. First, Amtrak's operations over Metra's lines are governed by an agreement between Metra and Amtrak, not CP. Second, Applicants have not submitted either a revised operating plan or other information that explains how the new Amtrak trains will impact operations on Metra's MD-N line, or how Applicants will address those impacts to make sure that there is no additional interference with Metra's operations, just as the operating plan includes no discussion of the expanded commuter operations that Metra had previously requested. In fact, neither Applicants nor Amtrak have engaged with Metra at all regarding Amtrak's proposed increase of service on Metra's lines.

b) Local and Other Freight Trains

In addition, the unit trains included in Applicants' totals are daily averages that smooth out seasonal peaks.[228] Unlike the scheduled merchandise trains, these unit train volumes will not be spread out evenly throughout the year. Rather, they will ebb and flow with seasonal and market-based changes in demand.[229] For example, increased volumes of unit grain trains move after harvest time. As a result, relatively high volume "peak" freight periods for unit train commodities can overwhelm the existing system. Applicants do not address this problem.[230]

[226] *See* Ex. C, V.S. Crowley and Mulholland at 21-22.
[227] *See* Amtrak-Canadian Pacific Agreement, filed with the Board in FD 36500 on February 2, 2022.
[228] Ex. C, V.S. Crowley and Mulholland at 22.
[229] *Id*.
[230] *Id*.

As discussed above, the workpapers supporting the Application and the nearly three (3) years of train event data provided in response to Metra's requests for production reveals that CP *excluded many classes of freight traffic from the daily train count totals it presented to the STB*. Applicants' estimates of existing and projected train volumes include only regularly scheduled line-haul merchandise trains and unit trains. They do not include local trains, yard trains, work trains, or foreign trains.[231] The CP train event and train route data provided in response to Metra's document requests identify significant numbers of daily yard and local trains operating all over Applicants' system, including on Metra-owned line segments.[232]

With few exceptions, foreign trains do not appear in the provided train counts or the provided train event data.[233] For example, Applicants' Operating Plan states that both NS and UP regularly provide "direct service into Bensenville" via BRC and IHB tracks, respectively.[234] However, the train event data did not include any foreign trains moving over the BRC and IHB connecting tracks onto Metra's MD-W line, i.e., the Elgin Subdivision, into Bensenville. [235]

3. Impact of Actual Total Train Volumes on Metra Operations

Analyzing the total volume moving over Metra's lines rather than the grossly understated line-haul freight train totals presented by Applicants is problematic. As demonstrated by Metra's records[236] and confirmed by CP's train event data by Metra's expert consultants,[237] CP often runs its own trains over Metra-owned lines during designated commuter Peak Periods, during which CP has acknowledged that it is contractually required to prioritize Metra service.

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[231] *Id*. at 22-24.
[232] *Id*. at 23.
[233] *Id*.
[234] *See* Appl. 2-270, Ex. 13, Operating Plan at 14 (Redacted Version).
[235] Ex F, V.S. Crowley and Mulholland at 22-23.
[236] *See* Ex. B, V.S. Oppenheim at 13 and Ex. E, V.S. Godfrey at 5.
[237] *See* Ex. C, V.S. Crowley and Mulholland at 25.

The continual interference of CP freight trains with Metra Peak Period trains indicates that even with baseline freight train volumes, CP cannot effectively dispatch or operate its service while prioritizing Metra's commuter Peak Periods.[238] Adding multiple CP freight trains to the Metra-owned line segments will increase the likelihood and frequency of freight trains during Metra commuter windows, thereby increasing the likelihood of interference with Metra's core service.

Moreover, Applicants' projections indicate increased interference with Metra's service. Most of the daily trains Applicants plan to add to the Elgin Subdivision, i.e., the Metra-owned MD-W Line, will be routed into/out of CP's Bensenville Yard—one of the busiest yards on CP's system.[239]

Furthermore, many of the line-haul intermodal and merchandise trains that Applicants operate into and out of Bensenville are exceptionally long—regularly over 2 miles long and sometimes over 13,000 feet (2.5 miles).[240] The proposed additions will also be long trains. Yarding long trains at Bensenville is difficult because the trains exceed the length of the receiving tracks, which requires the CP train crews to pull the head end all the way (or nearly all the way) through the yard and break up the trains on arrival. This operation entails throwing a series of yard switches and causes the tail end of arriving trains to hang out and block the mainline track while the train crew performs the required switching, and block Metra's access to stations. Often when this happens, as described in the Verified Statement of Rich Oppenheim and the email communications that are attached to that Verified Statement, Metra's trains are delayed and/or rerouted to the opposite mainline track.

[238] *See id.* at 26-27.
[239] *See Id.* at 27.
[240] *See Id.*

However, there are no sidings on the MD-W Line, and few on CP's adjoining Chicago Subdivision that are long enough to hold the daily intermodal and manifest trains that Applicants propose to add. The siding that Applicants propose adding on the Chicago Subdivision, west of the MD-W line will not be long enough to accommodate CP line-haul merchandise trains, which regularly exceed 12,000 feet.[241]

On the C&M Subdivision, i.e., Metra-owned MD-N Line, Applicants project an increase of 0.9 trains per day. As noted above, the Application touts the new network's ability to bypass Chicago, instead making use of the new Upper Midwest North-South Corridor from the Twin Cities to Kansas City. However, traffic congestion on the Marquette Subdivision (where Applicants state that they will add an average of 6.6 daily line-haul freight trains) could reasonably lead to train diversions causing higher train volume on both of Metra's Milwaukee District lines, at least while Applicants implement improvements over many years that are necessary to manage the expected new traffic.[242] Indeed, the Application indicates that (a) the Marquette Subdivision will see significant increases in traffic; (b) the Marquette Subdivision does not currently have adequate capacity to handle this traffic, as indicated by the improvements that Applicants proposed; (c) improvements will take several years to build (assuming they are on time), meaning that traffic might need alternative routing in the meantime; (d) even after improvements are made to the Marquette Subdivision, there may be operational reasons to use an alternative route if available; (e) the Tomah/Watertown/C&M/Elgin/Chicago route could serve as an alternative route.

[241] *See* Ex. C, V.S. Crowley and Mulholland at 27-28.
[242] *Id*. at 28.

CP asserts that the majority of the new traffic between the Twin Cities and KCS will operate via the Marquette Subdivision (Dubuque Line - LaCrosse WI to Savanna IL).[243] However, limitations of the Marquette Subdivision—slow speed, few sidings which are too small to accommodate train lengths currently being operated, and no signals—will mean that this line will quickly reach full capacity for handling the anticipated traffic. Historically, CP has sent overflow via the C&M Subdivision, and then West out to Bensenville for a crew change, and on to Savanna to rejoin the "direct" route. This will add to traffic on MD-W, which CP already projects will see considerable freight traffic increase from the Transaction.

CP's data, reviewed by Metra's expert consultants, reveals that CP experiences significant delays, both on Metra's MD-N and MD-W lines and neighboring CP subdivisions whose operations could be expected to impact Metra's lines.[244] It is reasonable to expect that the anticipated increases in traffic, underestimated by CP, will detrimentally cause new and serious impacts on Metra's commuter rail service.

D. The proposed Transaction that will exacerbate the serious issues CP's disregard for Metra's service already creates.

As described in detail above, Metra owns MD-W and MD-N, and by contract has priority during peak periods. Moreover, that same contract commits CP to not interfere with Metra's service at all other times. Strangely, the Application speaks of MD-W and MD-N as if CP owns them and permits Metra trains to operate on them.[245] The Application suggests, contrary to both on-the-ground reality and contractual obligations, that commuter rail service operates only in

[243] *See* Appl. 2-322, Operating Plan at 66 (Redacted Version).
[244] Ex. C, V.S. Crowley and Mulholland at 28.
[245] *See* Appl. 1-172, V.S. Creel at 17 (Redacted Version) (CP being a good partner to passenger service operators "that use our lines", on "CP's former Milwaukee Road lines", and "host" to Amtrak service on Metra's lines); Appl. 1-267, 1-269, 2-322 (Redacted Version) (stating incorrectly that CP owns 17 miles between Rondout and Fox Lake; stating that applicable agreements "restrict the times of day during which passenger . . . trains may operate").

"two daily commuter windows."[246] This reinforces the point Metra has made above that CP has not accounted for, and or does not want the STB to consider or acknowledge existing and future passenger service during non-peak periods.

CP's assertion of available capacity ignores passenger expectations for operating and expanding service on these lines. The Applicants omit Metra service in the capacity calculations[247] and cite only existing lower COVID-19 era train schedules without indicating that these service levels will change.[248]

While Applicants tout CP's 94% on-time performance for MD-W and MD-N,[249] which ignores delays at interim stations between the first station and final destination, patterns of interference with Metra's service detailed above,[250] which is documented in years of e-mails from Metra to CP.[251] Even now, CP continues to assert that it perceives no issues with its dispatching and operation on Metra's lines.[252]

For instance, CP has asserted in one interrogatory response that it does not make a practice of interfering with Metra's trains by occupying Metra's main line tracks or rerouting Metra trains on different tracks contrary to Metra's documentation.[253] They further state that they "do not anticipate that the Transaction would have any effect on CP's practice of avoiding interference with Metra's peak period trains."[254] Nor does CP anticipate that the Transaction

[246] Appl. 2- 268, Ex. 13, Operating Plan at 12 (Redacted Version). *See also id.* at 65.
[247] *See supra*, Section V.C.2.
[248] Appl. 1-172, V.S. Creel at 17 (Redacted Version); Appl. 2-321-322, Ex. 13, Operating Plan at 65-66 (Redacted Version).
[249] Appl. 1-172, V.S. Creel at 17 (Redacted Version).
[250] *See supra*, Section IV.A.
[251] *See* Ex. B, V.S. Oppenheim at 10; Ex. B-2, Metra Emails 2016-2022.
[252] Ex. H-2, Applicants' Joint Response to Metra's First Interrogatories, at 9.
[253] *Id.* at 8, 23.
[254] *Id.* at 11.

will affect CP's dispatching of Metra trains.[255] For the reasons stated above, and in light of the increased train traffic, this is unacceptable to Metra customers.

CP further states in interrogatory responses that it disputes that "CP's current operating practices cause unwarranted delays to Metra trains," but "desires to work cooperatively with Metra to optimize operations on the C&M and Elgin Subdivisions, including by considering ideas Metra may have to reduce any delays that Metra's trains experience."[256] CP "encourages" Metra to identify specific instances of scheduled trains being unable to board at Metra's normal operating tracks.[257] Metra has done so repeatedly, for years, as detailed above and in the Verified Statement of Rich Oppenheim, attached to these Comments as **Exhibit B**. The increase in train frequencies and train lengths will exacerbate the situation. CP's denial that no problems exist and will not exist prospectively is belied by the evidence to the contrary.

CP also states in interrogatory responses, attached hereto, that the Transaction "will not constrain Metra's ability to expand commuter service in the Chicago area," and that it "will not constrain Metra's ability to add capacity supporting additional service ***through the construction of rail trackage and facilities and the acquisition of real estate***. [Emphasis added.]"[258] CP infers that there is no additional capacity on the lines for Metra unless Metra makes capacity-expanding capital improvements funded by Illinois taxpayers, which is unacceptable and contrary to the public interest.

CP's inaccuracies, the failure to perform RTC modeling to provide an accurate picture of the impact of the proposed Transaction, CP's continuing breaches of contract with Metra even when CP management is under scrutiny in this proceeding, foretell increased issues if the merger

[255] *Id.* at 23.
[256] *Id.* at 20-21.
[257] *Id.* at 23.
[258] *Id*. at 24.

is approved. The negative impacts of the Transaction on Metra's service, as set forth in the RTC model, require Applicants to make changes in infrastructure and operations that will, at the very least, prevent the anticipated increases in traffic from making things worse for Metra. Indeed, it seems inevitable that, without changes in CP's operational practices, the added traffic (even using CP's understated estimate) can only result in additional delays and interference with Metra's existing and expected service. Unfortunately, the Application and CP's responses to Metra's discovery requests confirm that unless the Board requires them to do so, Applicants propose to make no such changes.

VI. LEGAL STANDARDS FOR REVIEWING THE APPLICATION CONFIRM THAT THE BOARD CANNOT APPROVE THE PROPOSED TRANSACTION BECAUSE IT IS NOT CONSISTENT WITH THE PUBLIC INTEREST

In reviewing a proposed merger of two Class I railroads, the Board is required by statute to determine whether the proposed merger is in the public interest. 49 U.S.C. § 11324(c). To determine whether such a merger is in the public interest, the Board is required by statute to consider "the effect of the proposed transaction on the adequacy of transportation to the public." 49 U.S.C. § 11324(b)(1).[259] Where, as here, the proposed Transaction will have a serious adverse impact on "the adequacy of transportation to the public," the Application should be denied. Alternatively, the Board may approve a Transaction if it can impose conditions that will mitigate the adverse impacts of the proposed arrangement. If the Board elects to approve the Application, the conditions Metra seeks here will address the issues Metra has identified.

To determine whether the Application is in the public interest, the Board must perform a balancing test that weighs potential benefits to applicants and the public against the potential

[259] The broader consideration of the public interest involved in assessing mergers between at least two Class I railroads sets the standard for the Board's considerations apart from transactions involving smaller Class II and Class III railroads, which focus public interest considerations more squarely on competition for shippers. *See Commuter Rail Div. of the Reg'l Transp. Auth. v. STB*, 608 F.3d 24, 33 (D.C. Cir. 2010).

harm to the public. 49 C.F.R. § 1180.1(c) (2000).[260] The standard includes consideration of "whether the benefits claimed by applicants could be realized by means other than the proposed consolidation that would result in less potential harm to the public." *Id.* Potential benefits are assessed in part on whether the transaction will lead the consolidated carrier to realize operating efficiencies. 49 C.F.R. § 1180.1(c)(1). Potential harm to the public includes consideration of reduction of competition and harm to essential service. 49 C.F.R. § 1180.1(c)(2). A service is essential if there is a sufficient public need for the service and adequate alternative transportation is not available. *Id.*

Board regulations make clear that commuter rail service like Metra's is an "essential service." "The Board must ensure that essential freight, passenger, and commuter rail services are preserved whenever feasible." 49 C.F.R. § 1180.1(c)(2)(ii) (2020).[261] Further, railroads proposing major or significant transactions must prepare an operation plan that "[i]f commuter or other passenger services are operated over the lines of the applicant carriers, detail[s] any impacts anticipated on such services, including delays which may be occasioned because a line is scheduled to handle increased traffic due to route consolidations." 49 C.F.R. § 1180.8(a)(2). Such impacts on commuter and other passenger rail service constitutes a factor for consideration in the Board's analysis of the public interest in approving the Transaction.

[260] In *Decision No. 4*, the Board found the Transaction to be subject to the regulations set forth at 49 C.F.R. Subpart A, in effect before July 11, 2001, pursuant to the waiver for transactions involving the Kansas City Southern Railway Company under 49 C.F.R. § 1180.0(b). Unless otherwise indicated, all references to provisions contained in 49 C.F.R. Subpart A cited in these Comments will refer to the pre-2001 regulations.

[261] While this Application is subject to pre-2001 merger transaction regulations, which did not expressly specify that essential service included passenger or commuter service, nothing from the administrative history regarding promulgation of the 2001 regulations indicate that the protection of passenger and commuter rail service was not implicitly included under the previous regulations. *See Major Rail Consolidation Procedures*, EP 582 (Sub-No. 1), slip op. at 26 (STB served June 11, 2001) ("UP asserts that we should limit the essential services designation to freight service, while some of the passenger authorities argue that every existing passenger service should be considered an essential service. Although we agree that it may not be possible to preserve every existing passenger service, we will give careful consideration to passenger service issues in our merger analysis.").

The Board's authority to approve merger transactions is exclusive, and any such approval has broad preemptive effect. Pursuant to 49 U.S.C. § 11321(a) "[a] rail carrier, corporation, or person participating in [an] approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that rail carrier, corporation, or person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction."

In this matter, Applicants have not provided RTC modeling to support the Application. Rather, Metra has supplied the modeling that indicates that the Application is severely flawed and citizens in northeast Illinois can anticipate increased train traffic that denigrates public transportation, undermines passenger safety, and delays Metra trains. For this reason, as set forth above, Applicants' have not satisfied this burden.

The Board is authorized by federal statute to impose conditions governing approval of railroad mergers. 49 U.S.C. § 11324(c). The Board has "extraordinarily broad discretion in deciding whether to impose protective conditions in the context of railroad consolidations." *Grainbelt Corp. v. STB*, 109 F.3d 794, 798 (D.C. Cir. 1997) (citations and internal quotation marks omitted); see also *Village of Barrington v. STB*, 892 F.3d 252, 269 (7th Cir. 2018). The Board's selection of conditions is afforded "great deference" by reviewing courts, which will deny a petition for review of the Board's decision as long as that decision is supported by substantial evidence in the record and was reached by reasoned decision-making. *Village of Barrington*, 892 F.3d at 269.

Conditions will be imposed if a merger produces effects harmful to the public interest that a condition will ameliorate or eliminate. *Canadian Natl. Ry. Co. et al. – Control – Illinois Central Corp. et al.*, FD 33556, slip op. at 21 (STB served May 25, 1999). The principal harms

for which conditions are appropriate include the loss of the ability to provide essential services. *See id.* "A condition must address an effect of the transaction and will generally not be imposed to ameliorate longstanding problems which were not created by the merger." *Id.* slip op. at 22 (internal quotations and citations omitted). A condition should also be tailored to remedy adverse effects of a transaction and should not be designed simply to put its proponent in a better position than it occupied before the consolidation. *Id.* Pursuant to applicable Board regulations, conditions are normally imposed where essential services are affected and the condition: "(i) is shown to be related to the impact of the consolidation; (ii) is designed to enable shippers to receive adequate service; (iii) would not pose unreasonable operating or other problems for the consolidated carrier; and (iv) would not frustrate the ability of the consolidated carrier to obtain the anticipated public benefits." 49 C.F.R. § 1180.1(d).

If the Board is inclined to consider the Transaction, it is critical to impose conditions to ameliorate anticipated problems. CP has not been a good partner for public transportation in northeast Illinois. There is an unacceptable number of incidents over the years that demonstrate that its dispatching of trains on Metra's lines negatively impacts safety and reliability of Metra's operations. The only RTC modeling of the Transaction demonstrates that the Transaction will cause more congestion, which will subvert the public interest unless the Board acts.

VII. IF THE BOARD ELECTS TO APPROVE THE PROPOSED TRANSACTION, METRA PROPOSES REMEDIES THAT ARE NECESSARY TO AVOID OR MITIGATE THE REASONABLY FORESEEABLE IMPACT OF THE TRANSACTION ON METRA'S COMMUTER RAIL SERVICE

Metra has demonstrated that the Transaction is contrary to the public interest. If the merger is considered, the Board should address this impact through the following requested conditions, which will be discussed in further detail below:

Metra's Requested Conditions

1. Operational	a. Require CP to amend its Trackage Agreement with Metra to transfer dispatching control to Metra.
2. Planning	b. Require CP to adopt Metra's RTC modeling or cooperate in refining RTC modeling for Metra's lines in order to objectively gauge capacity and assess the impact of future proposals. c. Require Metra and CP to agree to a binding standard and process for Metra schedule changes and new trains based on an accurate and objective capacity assessments (see above).
3. Capital improvements	a. MD-N: i. Require construction of a new third mainline track from Rondout to A-20. ii. Require construction of new universal cross-overs at Lake Forest and Glenview. iii. Require construction of new connection at A-20 to allow parallel moves to new extended connecting tracks to allow CP trains to exit Metra mainline tracks before entering UP territory. b. MD-W, Tower B-12 to B-17: i. Require construction of two new mainline tracks. ii. Require construction of new powered cross-overs at Bartlett and Itasca. iii. At Bensenville Yard, require CP to construct receiving tracks equal to the length of incoming trains or equal to the maximum length possible. c. MD-W Tower A-5 to B-12: i. Require construction of two new mainline tracks. ii. Require CP to pay for new southeasterly wye leg at Cragin Junction to direct CP traffic south to BRC without a reverse move. iii. At Galewood Yard, require CP to construct receiving tracks equal to the length of incoming trains or equal to the maximum length possible. d. MD-W, Tower A 5: i. Require reduction in curves to increase speeds from 10 MPH to 25 MPH for moves to the MD-W. ii. Require CP to separate CP and Metra MD-W tracks and construct fly-over from south of A-5 to MD-W dedicated Metra tracks and dedicated freight connection in NW quadrant interlocking to facilitate freight movements to and from MD-N to MD-W without a reverse move.

4. Financial	a. Require CP to appropriately compensate Metra for additional use and wear and tear on Metra's lines by: i. Require CP to pay for the full cost of projects if increases in its traffic volume and frequency, as well as the length of trains, is the reason that the capital project is pursued; ii. Changing CP's maintenance contribution from flat fee to train counts and gross ton mile; and iii. Changing CP's rental terms from flat fee to dollar per car mile. b. Require CP to compensate Metra for avoidable delay/interference events. c. Require CP to indemnify Metra for performance charges imposed by Amtrak where CP's dispatching of additional trains causes Amtrak delays on Metra's tracks. d. Require CP to compensate Metra for non-compliance with any condition imposed by the Board.
5. Oversight	a. Impose a 10-year STB oversight condition of CP dispatching practices (if dispatching is not transferred), including requiring agreement between Metra and CP to binding workable dispatching standards that do not interfere with Metra's service and that prioritize Metra's peak period service. b. Impose a 10-year STB oversight condition of any other conditions imposed with respect to Metra's service.

1. Order CP to amend the Trackage Agreement to transfer dispatch on the lines to Metra.

Importantly, the Board must require CP to amend its Trackage Agreement with Metra to transfer dispatching control to Metra. [262] The Board has the authority to act here in the context of a merger of two Class I railroads, and the evidence confirms that CP's plans will create significant new interference with Metra's service. Under 49 U.S.C. § 11324(b), the D.C. Circuit recognized that "[i]n such mergers, the Board is expressly required by statute to 'consider,' inter

[262] The Board's previous denial of a similar request by Metra does not control the outcome here. In a case involving the merger of Class II railroads, the Board confirmed that it could only impose conditions that addressed competitive impacts of the proposed transaction. *Canadian Pac. Ry. Co. et al. - Control - Dakota, Minn. and E. R.R. Corp. et al*., D 35081, slip op. at 15 (STB served Sept. 30, 2008), *pet. for review denied, Commuter Rail Div., Reg'l Trans. Auth. v. STB*, 608 F.3d 24 (D.C. Cir. 2010). The situation here is different: the regulations clearly require the Board to assess and address the impacts to commuter carriers. Moreover, the Board's aspiration in 2008 that the parties could resolve matters by commercial negotiation has proven impossible to accomplish due to CP's refusal to acknowledge that its approach to Metra's operations creates a problem and therefore to negotiate a solution. The Board has the authority to act now in this merger of two Class I carriers and must do so to prevent CP from exacerbating the problems it already causes following implementation of the proposed merger.

alia, 'the effect of the proposed transaction on the adequacy of transportation to the public.'" *Commuter Rail Div.*, 608 F.3d at 33.

The law with respect to the merger of two Class I railroads imposes a higher standard that requires consideration of the adequacy of transportation to the public. With evidence of years of issues with respect to CP dispatching, the dispatching and operational relationship between Metra and CP can no longer be left to the contractual arrangements between them. Neither CP nor Metra had a seat at the table in negotiating CP's right to dispatching, and CP's conduct in recent years combined with the prospective impacts of the proposed Transaction confirm that it is appropriate for the authority to dispatch Metra's lines be transferred to Metra. There is no other viable means of mitigating the severe impact that this Transaction will have on Metra's commuter rail service.

Indeed, if Metra seeks to enforce its contractual rights in court and succeeds in obtaining a judicial order for the capacity that belongs to it, such a ruling will impact the viability of the Transaction because CP has assumed it is entitled to the capacity. Alternatively, if the Board authorizes CP's unilateral appropriation of the excess capacity on Metra's lines and increases the existing interference with Metra's service by approving the Application without conditions, the Board will in effect alter the contractual relationship between the parties by preempting Metra's lawful rights to seek redress of CP's infringement on Metra's contractual rights.[263]

The Board has the expertise, the authority, and the opportunity to assess the real impacts of the Transaction and mitigate the harm to Metra. The Board can anticipate and fix the issue now rather than letting Applicants proceed with their plans that will undermine the safety, reliability and efficiency of Metra's operations, not to mention cause additional interference with

[263] 49 U.S.C. § 11321(a)

Metra's service in contravention of CP's contractual duties. The Board should address and remedy these issues while the parties are properly before it in proceedings in which the Board has the specific authority to resolve the issues and protect the public.

2. Planning conditions to mitigate impacts

a) Require CP to adopt Metra's RTC modeling, or cooperate in refining it, for planning purposes

RTC is both the industry standard and the STB's favored method of determining the impacts of projected changes in traffic on line capacity.[264] Yet CP has forgone RTC modeling in this Transaction, replacing it with a method that is totally inadequate for the task.[265]

Consequently, Metra engaged independent expert consultants to model Metra's lines and adjacent CP subdivisions to understand baseline capacity on Metra's lines and anticipate the impacts of increased traffic caused by the Transaction. Thus, the Board should require CP to adopt Metra's modeling before approval of any merger.

While CP has used RTC modeling in the past to understand the impact on its own lines,[266] its approach in these proceedings,[267] as well in previous discussions with Metra,[268] has been to eschew an RTC modeling of Metra's lines. This planning exercise could no doubt be improved by CP's genuine cooperation with these efforts, which Metra would welcome.

[264] *See supra,* Section IV.D.1.
[265] *See supra,* Section V.A.
[266] In discovery during these proceedings CP produced RTC modeling simulation data for a number of its subdivisions, including those impacting Metra's lines. *See* Ex. C, V.S. Crowley and Mulholland at 52.
[267] *See* CP-39/KCS-26, at 2 n.2 (Filed Feb. 23, 2022) (explaining CP's position that "[t]hough RTC modeling can be a useful tool in certain contexts, it was neither necessary nor useful in evaluating the capacity of the CPKC network – expended through ongoing and Transaction -related capital improvements – to accommodate freight traffic growth without adverse passenger or other impacts.")
[268] *See supra,* Section IV.D.1.

b) Require binding process for Metra schedule changes

Given Metra's right to use capacity on MD-W and MD-N,[269] which it owns, Metra proposes that the Board impose a standard and process for Metra schedule changes and new trains, so as to avoid the impact of the Transaction on these engagements, which are inevitable. Given the fact that any Board approval of the Application will severely impact capacity and the future ability of Metra to expand commuter rail service on its own lines, Metra needs a mechanism for accommodating its own expansion and changes in service. As discussed above, Metra anticipates profound changes in ridership patterns that have been accelerated by the COVID-19 pandemic and will require Metra to adapt or risk not serving the needs of its riders.[270] The current method, in which CP can unilaterally deny any proposed Metra expansion based on generalities regarding unreasonable impact on CP operations will not work in the face of the expected significant increase in traffic projected by the Application. Without a workable means of allocating capacity, the Board's approval of the Transaction will function as a bar on future Metra schedule changes or service expansions and will preempt any attempt to enforce Metra's right to reasonable changes in its service. Establishing a binding mechanism for Metra service changes along with the Transaction is in the public interest.

3. Capital improvement conditions to mitigate impacts

Although Metra strongly believes that CP's control of dispatching will be the root of the interference with Metra's service after introduction of increased train volumes caused by the Transaction, there are also some capital improvements that Metra believes could help relieve some of the impacts of the Transaction, if combined with sensible dispatching practices. From an infrastructure standpoint, CP must make the following capacity expansion investments.

[269] *See supra*, Section II.C.
[270] *See supra*, Section II.A.

For MD-N, Metra's experience indicates that the segment between Rondout and the junction between MD-N and the UP line connecting MD-N and MD-W, by Tower A-20, will experience a considerable increase in delays due to additional traffic, particularly in cases where CP decides to reroute traffic from the Marquette Subdivision via the Milwaukee District Lines. Because freight trains take up track on this segment, causing Metra's trains to wait, Metra proposes as a condition that CP construct a new third mainline track from Rondout to Tower A-20.

Installing universal crossovers at Lake Forest and Glenview stations will enable additional routing options that will avoid additional delays at these stations where now the track infrastructure limits the mitigation that dispatchers can make avoiding interference between Metra trains and freight trains. Additionally, construction of a new connection at A-20 to allow parallel moves to new extended connecting tracks would allow CP trains to exit Metra's mainline tracks before entering UP territory, reducing delays and interference that regularly occur here.

On MD-W, the segment of track adjacent to the Bensenville Yard between Towers B-12 to the east and B-17 to the west, where UP's line also connects MD-N to MD-W, is already a major source of delays that will significantly increase due to the larger expected increase in CP traffic using Bensenville. While Applicants assert that planned improvements to the Bensenville Yard will alleviate additional congestion issues, their analysis is inadequate to support this position, and the current delays caused along this segment by freight trains struggling to enter or exit the yard, blocking both towers in the process, is a chronic issue for Metra.

Accordingly, Metra proposes that the Board require construction of two new main tracks between Tower B-17 and Tower B-12. Additionally, at both Bensenville Yard on MD-W and Galewood Yard on MD-N, the Board should order CP to construct receiving tracks equal to the

length of incoming trains or equal to the maximum length possible. As freight train lengths continue to grow, the impact of long trains entering and exiting yards will increase. It has become abundantly clear to Metra over recent years that train movement timing and yard lengths that used to be standard no longer apply, and that the new expected traffic will create new delays at these yards unless the yards are upgraded to accommodate the actual train lengths expected.

Additional new powered crossovers at Bartlett and Itasca Stations will avoid additional delays at these stations where now the track infrastructure limits the mitigation that dispatchers can make avoiding interference between Metra trains and freight trains. Metra proposes that the Board require CP to install these crossovers in order to alleviate the significant new traffic expected on MD-W as a result of the Transaction.

On MD-W between Tower A-5 and Tower B-12, the construction of two new mainline tracks will reduce the impact of additional CP trains in this already congested area. Another point that Metra anticipates will create new issues on MD-W, particularly with longer freight trains, is Cragin Junction, where CP traffic moving southwards toward the BRC must now reverse move, taking up track on MD-W. Metra proposes a new southeasterly wye leg at Cragin Junction in order to direct CP traffic south to BRC without a reverse move.

On MD-W at the junction at Tower A5 where MD-N and MD-W join, is already a bottleneck that will cause significant additional delays with projected increases in traffic. Current curves require speeds of 10 mph which, with increased train lengths, will mean longer occupation of Metra's tracks at this point. Accordingly, Metra proposes that the Board require CP to reduce the curves at this point to increase speeds from 10 mph to 25 mph for moves to MD-W. In addition, Metra believes that separating CP and MD-W tracks and constructing a new fly-over from south of A-5 to MD-W dedicated Metra tracks and dedicated freight connections in

the northwest quadrant interlockings would solve bottleneck issues created by the Transaction by facilitating freight movements to and from MD-N to MD-W without a reverse move.

4. Financial conditions to mitigate impacts

While CP claims "ample capacity" for expansion of freight service on Metra's lines, Metra is the party that is responsible for maintenance of these lines and pays the lion's share of capital improvement expenses on the line.[271] CP on the other hand contributes approximately 21% of the total costs of capital improvements to MD-W and MD-N.[272] The anticipated increases in traffic expected under the Transaction will result in not just more trains, but heavier and longer trains that will disproportionately burden the infrastructure of Metra's lines.[273] It is reasonable to require CP to pay for the costs of this increased traffic, given that it will receive the benefits. While CP may argue that the Board should not interfere with the deal struck between Metra and CP regarding compensation, the fact is that neither CP nor Metra bargained for the initial terms establishing the relationship.[274] Furthermore, this Transaction will introduce considerable increases in freight traffic on Metra's lines, fundamentally altering the circumstances that exist as well as the assumption that underly the existing financial arrangements between the parties.

To address the impact of the Transaction on Metra's infrastructure, the Board should require CP to pay for the full costs of projects if increases in its traffic volume, weight, and frequency, as well as the length of trains, is the reason that the capital project is pursued. This

[271] *See supra*, Section IV.E.
[272] *See supra*, Section IV.E.
[273] *See supra*, Section III; Ex. B, V.S. Oppenheim at 6.
[274] *See supra*, Section II.C.

may mean waiving the 50% cap that currently exists for CP capital improvement contributions on Metra's lines.[275]

Because capital improvement projects do not account for the full financial impact of the Transaction, the Board should also require CP to compensate Metra for maintenance of the Metra's lines, for which Metra is responsible, by changing CP's maintenance contribution from a flat fee to a fee based on train counts and gross ton miles. Finally, the Board should order a change in CP's rental terms from a flat fee to a dollar per car mile, as is standard in the industry.

In order to mitigate the impacts of the Transaction, the Board should also impose penalties for future interference with Metra's service caused by the additional traffic. The impact of additional freight trains caused by the Transaction could be assessed based on the baseline conditions that Metra documents in these comments.[276] This would create an incentive for CP to respect its existing contractual constraints on Metra's lines and serve the public interest by avoiding even further impacts on the essential service that Metra provides to its riders. While the Board has indicated reticence to impose service performance penalties on freight railroads, it has done so based on the underlying assumption that there are already contractual performance-based incentives and penalties in place.[277] This is not the case here, due to the original deal struck between parties that were not CP and Metra and that had no direct interest in protecting commuter rail service on these lines.[278] Accordingly, this is not an instance where the Board

[275] *See supra*, Section II.C.
[276] *See supra*, Section IV.B.
[277] *See*, *Major Consolidation Procedures*, EP 582 (Sub-No. 1), slip op. at 26 (STB served June 11, 2001).
[278] *See supra*, Section II.C.

should refrain from ensuring some form of protection to essential commuter rail service from the impacts of the Transaction.[279]

Metra should also not be held accountable for additional charges imposed by Amtrak for delays caused by CP dispatching. The Board should require CP to indemnify Metra for additional charges that are caused by the Transaction.

Finally, the Board should impose penalties for CP's non-compliance with any conditions imposed by the Board regarding its impact on Metra's service as a result of the Transaction. Given CP's consistent flouting of its contractual responsibility to avoid interfering with Metra's service,[280] Metra believes it is important that there be real consequences for further infringement on Metra's rights with respect to providing service on its own lines.

5. Continuing STB oversight conditions to mitigate impacts

Unfortunately, CP has in the past demonstrated a lack of regard for constraints on its operating and dispatching authority for MD-W and MD-N, suggesting that continued oversight by the Board is necessary to successfully implementing any conditions.[281] In order to avoid this from occurring with respect to the expected impacts of this Transaction, Metra proposes the that the Board impose a ten year oversight condition to ensure that the Transaction does not significantly interfere with Metra's service. This would include oversight of any conditions that the Board imposes to ensure transfer of dispatching rights, as well as oversight more broadly regarding actual impacts to Metra's service that are demonstrated to arise from the Transaction.

[279] *See Major Consolidation Procedures*, slip op. at 26-27 (acknowledging the Board's power to impose appropriate conditions to protect passenger railroads from merger-related harm and indicating that existing contractual provisions may not always be the best way to resolve the sometimes conflicting needs of the parties).
[280] *See supra*, Section IV.B.3, Section IV.D.
[281] *See id*.

In the absence of providing Metra with dispatching control over its own rail lines, the Board must, at a bare minimum, maintain oversight powers to ensure that CP complies with its contractual obligations to avoid interfering with all Metra trains and prioritizing Metra's peak period trains. To accomplish this, the Board should require the parties to adopt clear, binding, and enforceable dispatching standards that reflect and more clearly define the CP's existing dispatching obligations. Any standards should be informed by RTC modeling to ensure protection to Metra's commuter rail service.

Metra specifically requests oversight of CP's dispatching decisions regarding the additional traffic expected on Metra's lines, as Metra anticipates from past experience[282] that dispatching at existing problem spots such as CP's Bensenville Yard will inevitably occur unless this issue is addressed. Oversight conditions are a common and reasonable means for the Board to ensure that Applicants in fact comply with imposed conditions and that the impacts of transactions do not result in unexpected negative impacts.[283]

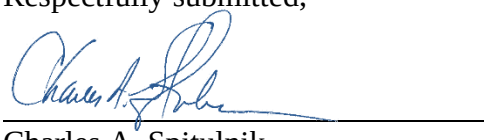
VIII. CONCLUSION

As demonstrated herein, CP has failed to properly analyze or evaluate the serious impacts that the Transaction will have on Metra's lines and Metra's service, just as it has continually failed over the years to live up to its obligations to operate and dispatch in a manner that avoids interfering with Metra's service. The only conclusion that Metra can come to is that CP believes it can steamroll Metra, and the Board, into accepting its version of reality, in complete disregard for the real and serious implications of its proposals. Metra believes that the Board has a statutory authority to consider these impacts, and the obligation to address these issues in its

[282] *See id*.
[283] *See Major Rail Consolidation Procedures*, slip op. at 10; 49 C.F.R. § 1180.1(g) (2020).

consideration of the public interest when reviewing the Application. The Transaction, as described in the Application, is not consistent with the public interest due to the serious negative impacts it will have on commuter rail service provided by Metra. In view of all of the foregoing and of the Verified Statements and exhibits submitted with these Comments, Metra respectfully submits that the Application must be denied or, if not denied, approved only with the conditions that Metra has described herein.

Respectfully submitted,



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Dated: March 15, 2022

CERTIFICATE OF SERVICE

I hereby certify that I have on the 15th day of March 2022, caused to be served a copy of the foregoing COMMENTS, upon all parties of record in this proceeding.

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