

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36332

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

Digest:<sup>1</sup> In this decision, the Board determines compensation for the Northeast Illinois Regional Commuter Railroad Corporation and the Commuter Rail Division of the Regional Transportation Authority's use of the National Railroad Passenger Corporation's Chicago Union Station facility.

Decided: August 16, 2021

The National Railroad Passenger Corporation (Amtrak) owns Chicago Union Station (CUS)<sup>2</sup> and uses it to provide intercity train service. (Amtrak Opening 1.) The Northeast Illinois Regional Commuter Railroad Corporation and the Commuter Rail Division of the Regional Transportation Authority (collectively, Metra) have used CUS for their Chicago Metropolitan Area commuter service since 1974. (Metra Opening 5.) Metra is presently the primary user of CUS. (Amtrak Opening 1.)

Metra's use of CUS was previously governed by an agreement that expired on July 29, 2019 (1984 Agreement), and Amtrak and Metra have since been unable to reach a new agreement.<sup>3</sup> (Amtrak Opening 1.) On July 22, 2019, Amtrak filed a petition under 49 U.S.C. § 24903(c)(2), requesting that the Board institute a proceeding and enter an order determining the compensation and terms for the use of CUS by Metra. At the parties' request, the Board

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> Until recently, CUS was owned by Chicago Union Station Company (CUSCo). (Amtrak Opening 6.) In 1976, the Penn Central Corporation conveyed its interest in CUSCo, which constituted 50% of all outstanding shares, to Amtrak pursuant to the Final System Plan under the Regional Rail Reorganization Act of 1973 (3R Act), Pub. L. No. 93-236, 87 Stat. 985. (Id.) In 1984, Amtrak acquired the remaining 50% of outstanding CUSCo shares, and CUSCo became a wholly owned subsidiary of Amtrak. (Id.) In May 2017, CUSCo and Amtrak merged, with Amtrak as the surviving entity. (Id.) As a result, ownership of CUS passed from CUSCo to Amtrak. (Id.)

<sup>3</sup> Amtrak states that the parties began exchanging initial proposals for a new agreement during March and April 2018. (Amtrak Pet. 4.)

issued an interim service order in this docket on July 26, 2019, allowing Metra to continue to access CUS pursuant to the terms of the 1984 Agreement until further order of the Board. In this decision, the Board determines compensation for Metra’s use of CUS.<sup>4</sup>

## I. BACKGROUND

Historical Background. In 1976, Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), Pub. L. No. 94-210, 90 Stat. 31. Section 701(a)(6) of the 4R Act gave Amtrak the authority to make agreements with other carriers and commuter agencies for freight and commuter services over rights-of-way acquired by Amtrak. The current version, codified at 49 U.S.C. § 24903(a)(6), allows Amtrak to make agreements with other carriers and commuter authorities for freight rail and commuter rail passenger transportation over rights-of-way and facilities Amtrak acquired under the 3R Act and the 4R Act. In the event of a failure to agree, section 705(a) of the 4R Act also directed the ICC to determine compensation for the provision of services. In 1985, Congress included additional language specifying how the ICC should assign costs. See Consol. Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 4017(b)(5), 100 Stat. 82, 111.

The present version, codified at § 24903(c)(2), specifies that if the parties do not agree, the Board “shall order that the transportation continue . . . and shall determine compensation (without allowing cross-subsidization between commuter rail passenger and intercity rail passenger and rail freight transportation) for the transportation.” Congress directed the Board to assign “the costs Amtrak incurs only for the benefit of the carrier, plus a proportionate share of all other costs of providing transportation under this paragraph incurred for the common benefit of Amtrak and the carrier. . . . based on relative measures of volume of car operations, tonnage, or other factors that reasonably reflect the relative use of rail property covered by this subsection.” § 24903(c).

CUS. Metra has provided commuter rail passenger transportation at CUS since 1974. (Metra Opening 5.) On May 1, 1984, Amtrak’s predecessor in interest and Metra entered into the 1984 Agreement to govern Metra’s use of CUS. (Amtrak Pet., Ex. A.) On May 1, 1988, the parties amended the agreement and extended it to April 30, 2019. (Id., Ex. B.) On March 6, 2019, Amtrak and Metra extended the agreement to July 29, 2019. (Id., Ex. C.) Amtrak and Metra stipulate that the term of their next agreement will extend from May 1, 2019<sup>5</sup> to September 30, 2029, with the option to extend for an additional 10 years. (Joint Stipulation ¶ 17, Jan. 19, 2021.)

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<sup>4</sup> The parties designated certain information contained in this decision as confidential in their pleadings. While attempting to avoid references to confidential information in its decisions, the Board reserves the right to rely upon and disclose such information in decisions when necessary. In this case, the Board determined that it could not present its findings with respect to particular issues without disclosing certain information.

<sup>5</sup> Amtrak and Metra have agreed that the new agreement will apply retroactively to May 1, 2019. (Amtrak Pet. 7 n.3, Ex. C.)

Procedural History. On July 22, 2019, Amtrak filed a petition under § 24903(c)(2), requesting that the Board institute a proceeding, establish a procedural schedule, and enter an order determining the compensation and terms for Metra's use of CUS. At the parties' request, the Board issued an interim service order on July 26, 2019, allowing Metra to continue to access CUS pursuant to the 1984 Agreement until further order of the Board.

On September 27, 2019, the Board instituted a proceeding under § 24903(c)(2). After engaging in discovery, the parties filed confidential versions of their opening statements on May 20, 2020, and confidential versions of their replies on June 24, 2020.<sup>6</sup> Following a period of Board-sponsored mediation requested by the parties,<sup>7</sup> which ended on December 4, 2020, Amtrak and Metra filed supplemental initial briefs on January 22, 2021, and supplemental reply briefs on February 19, 2021.

Meanwhile, on January 19, 2021, Metra filed a letter identifying 16 errata in its June 24, 2020 reply brief. Amtrak responded to Metra's errata letter on January 29, 2021, contending that Metra did not fully correct the errors in its reply brief, explain the meaning of the errors, or correct the errors in the verified statements it submitted in support of its reply brief. Amtrak also offered an explanation and context for the errata. On February 8, 2021, Metra filed a motion to strike Amtrak's January 29, 2021 letter as an impermissible surreply to Metra's June 24, 2020 reply brief, alternatively requesting leave to file a substantive response to Amtrak's January 29, 2021 letter. Amtrak responded to Metra's motion to strike on February 11, 2021, stating that it had no objection to Metra filing a substantive response. On April 13, 2021, the Board issued a decision denying Metra's motion to strike and permitting Metra to file a response to Amtrak's January 29, 2021 letter. On April 20, 2021, Metra filed a response.

## II. DISCUSSION AND CONCLUSIONS

### A. Preliminary Issues

The parties disagree about which party bears the burden of proof, the principles that should guide the Board's cost allocation, and whether the Board's jurisdiction under § 24903(c)(2) extends to the prescription of disputed contract terms where those terms do not involve compensation determinations.

#### a. Burden of Proof

Metra and Amtrak disagree as to which party bears the burden of proof in this matter. Because Amtrak filed the petition, Metra argues that Amtrak bears the burden of proof under 5 U.S.C. § 556(d)(2) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."). (Metra Opening 13-14.) Amtrak disputes that it carries the sole burden of proof in this proceeding. (Amtrak Reply 3, June 24, 2020.) Amtrak contends that

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<sup>6</sup> The parties filed public versions of their opening statements and replies on May 27 and July 1, 2020, respectively.

<sup>7</sup> During mediation, the parties reached an agreement on several, but not all, disputed issues. (See Joint List of Unresolved Issues, Dec. 15, 2020; Joint Stipulation, Jan. 19, 2021.)

§ 24903(c)(2) mandates that the Board determine compensation if the parties do not agree, and either party could have notified the Board of this disagreement by filing a petition. (*Id.*) Amtrak also asserts that a determination that the petitioner carries the sole burden of proof in a § 24903 proceeding would have the adverse effect of incentivizing one party to delay negotiations in an attempt to force the other party to file. (*Id.* at 4 n.2.) Additionally, Amtrak argues that Metra’s position contradicts the cross-subsidization prohibition of § 24903(c)(2) since “under Metra’s proposed burden of proof, if neither party proffered evidence, then the Board would assign no costs to Metra—even though that would result in cross-subsidization.” (*Id.* at 5.)

The Board finds that neither party bears the sole burden of proof in this matter. Amtrak filed the petition, but it does not ask the Board for specific relief. Rather it invokes the Board’s authority pursuant to § 24903(c)(2) to determine compensation when the parties cannot agree. Here, both Amtrak and Metra submit that, despite negotiations, they cannot agree on certain compensation issues and ask the Board to determine compensation for those disputed issues. Accordingly, the Board will determine compensation in this matter by equally weighing the arguments and evidence submitted by both parties to determine the most reasonable cost allocation consistent with the statute.<sup>8</sup>

b. Framework for Cost Allocation

Amtrak and Metra both propose various principles they argue should govern the Board’s cost allocation in this matter. The first difference arises from the parties’ differing interpretations of § 24903(c)(2), which has not been previously interpreted by the Board. Section 24903(c)(2) requires the Board to “determine compensation (without allowing cross-subsidization between commuter rail passenger and intercity rail passenger and rail freight transportation)”<sup>9</sup> by allocating those “costs Amtrak incurs only for the benefit of the carrier, plus

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<sup>8</sup> This methodology is similar to that applied by the Board in Application of the National Railroad Passenger Corp. Under 49 U.S.C. § 24308(a)—Canadian National Railway (Canadian National Railway), FD 35743 (STB served Aug. 9, 2019). In Canadian National Railway, the Board did not place the burden solely on Amtrak when weighing the evidence and arguments submitted by the parties, even though Amtrak filed the application. See also Application of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. 24308(a)—Springfield Terminal Ry., Bos. & Me. Corp., & Portland Terminal Co. (Guilford), 3 S.T.B. 157, 167 (1998) (finding Amtrak’s evidence for the cost of rehabilitation work to be “reasonable and the best evidence of record”).

<sup>9</sup> The statute does not define the term cross-subsidization. Metra argues that cross-subsidization occurs when “one segment of the rail industry bear[s] the expenses of facilities and improvements of primary benefit to another.” (Metra Opening 10 (quoting Bos. & Me. Corp. v. ICC, 911 F.2d 743, 752 (D.C. Cir. 1990), rev’d on other grounds, Nat’l R.R. Passenger Corp. v. Bos. & Me. Corp., 503 U.S. 407 (1992)).) In the context of rate complaints, the Board has stated that cross-subsidization occurs when a captive shipper bears the costs of facilities from which it derives no benefit or does not use. See, e.g., Rate Regul. Reforms, EP 715, slip op. at 10 (STB served July 18, 2013); PPL Mont., LLC v. BNSF Ry., 6 S.T.B. 752, 753 (2003).

a proportionate share of all other costs of providing transportation under this paragraph incurred for the common benefit of Amtrak and the carrier.” In assigning the “proportionate share” of common benefit costs, the Board must choose factors “based on relative measures of volume of car operations, tonnage, or other factors that reasonably reflect the relative use of rail property covered by this subsection.” § 24903(c)(2).

In Metra’s view, the application of such factors is not sufficient to avoid cross-subsidization. Metra contends that because “the generalized, perfect, usage factor that does not result in cross-subsidization may not exist in many factual circumstances,” the Board should apply the cross-subsidization prohibition “as a secondary, ‘as-applied’ limitation” after applying those factors that reasonably reflect the parties’ relative use of CUS. (Metra Opening 12-13.) Metra argues that, in practice, the Board would need to exclude certain costs of “marginal utility” to Metra after applying reasonable factors because impermissible cross-subsidization would result if Metra were to pay for costs that primarily benefit Amtrak. (*Id.* at 13.)

Amtrak, however, disputes that this secondary step is warranted. Although Amtrak agrees that “no factor will be able to allocate costs to a certainty based on exact use,” in Amtrak’s view, the Board’s role is merely to “find a good, broad proxy that provides a reasonable basis for sharing the costs of facilities used by both Amtrak and another commuter rail agency.” (Amtrak Opening 15.) According to Amtrak, the Board avoids cross-subsidization simply by applying factors that reasonably reflect the relative use of CUS, as prescribed by § 24903(c)(2). (Amtrak Reply 5-6, June 24, 2020.) Amtrak also argues that the Board avoids cross-subsidization by allocating all costs from which Metra receives some benefit because “if Metra receives a benefit from Amtrak without paying for it, that constitutes cross-subsidization.” (Amtrak Opening 15.)

Furthermore, in determining the factors that “reasonably reflect the relative use of rail property,” Amtrak advises the Board to consider as instructive the methodologies adopted by the Northeast Corridor Commission (NECC).<sup>10</sup> (Amtrak Opening 15-18; Amtrak Reply 9 n.5, June 24, 2020.) Metra, however, disputes the relevance of the NECC policy to this proceeding on the grounds that: (1) the policy is “of dubious legal and constitutional validity,” (2) the policy addresses issues specific to the Northeast Corridor, and (3) neither Metra nor the State of Illinois were involved in the policy’s formation. (Metra Opening 3-6.)

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<sup>10</sup> In Section 212 of the Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848, as amended by Title XI of the Fixing America’s Surface Transportation Act of 2015, Pub. L. No. 114-94, 129 Stat. 1312, entitled the Passenger Rail Reform and Investment Act of 2015, codified at 49 U.S.C. § 24905, Congress established the NECC and charged it with developing and implementing a standardized policy for determining and allocating costs, revenues, and compensation for Northeast Corridor commuter rail passenger transportation. 49 U.S.C. § 24905(c)(1). Amtrak and the public authorities that provide commuter rail transportation on the Northeast Corridor are required to implement this policy in their agreements. 49 U.S.C. § 24905(c)(2). If the parties fail to enter into new agreements or otherwise fail to comply with the policy, then the Board “shall determine the appropriate compensation . . . after taking into consideration the [policy], as applicable.” *Id.*

Metra also contends that, pursuant to the Board’s recent decision in Canadian National Railway, FD 35743, slip op. at 22 n.41, the Board may only allocate costs to Metra that are “specific, verifiable, and quantifiable.” (Metra Opening 9.) Based on this principle, Metra argues that “actual costs” should be used as the basis for compensation when they are available and reasonable. (Id.) Moreover, Metra contends that this standard prohibits Amtrak from recovering a cost that is “‘normalized,’ ‘projected’ or ‘budgeted’—or even subsidized by a third party such that it no longer exists as a cost.” (Id.)

Amtrak responds that the costs it identified in this proceeding are specific, verifiable, and quantifiable. (Amtrak Reply 6, June 24, 2020.) Nonetheless, Amtrak contends that Metra’s argument incorrectly assumes that this case, like Canadian National Railway, requires an incremental costs analysis. (Id.) Amtrak argues that “the requirement that proposed costs be ‘specific, verifiable, and quantifiable’ sprang directly from the fact that those costs were incremental (and therefore had to be expended . . . in order to be reimbursable).” (Id. at 7.) Amtrak also reasons that § 24903(c)(2) permits allocation of projected and budgeted costs because “[t]he purpose of this proceeding is to devise a forward-looking compensation framework that will remain in place for several years into the future, including an inflation index.” (Id.) Finally, Amtrak asserts that its funding sources have no bearing on the Board’s analysis because they do not affect whether Amtrak incurred the cost or whether the cost provides a benefit to Metra. (Id. at 7-8.)

The Board first turns to the parties’ dispute over whether the application of factors that reasonably reflect the relative use of CUS is sufficient to avoid cross-subsidization under § 24903(c)(2). While Metra contends that “a secondary, ‘as-applied’ limitation” is necessary because “the generalized, perfect, usage factor” does not exist, (Metra Opening 12), the Board concludes that § 24903(c)(2) does not require the Board to identify a “perfect” usage factor. As the Board has previously recognized, allocation of costs “involves judgment on a myriad of facts” and has “no claim to an exact science.” Amtrak’s Pet. for Determination of PRIIA Section 209 Cost Methodology, FD 35571, slip op. at 3 (STB served Mar. 15, 2012) (internal citations omitted). By directing the Board to utilize factors that reasonably reflect the relative use of the rail property, § 24903(c)(2) prescribes the method by which the Board determines compensation without allowing for cross-subsidization. The Board declines to construe the statute as requiring some sort of “secondary, ‘as-applied’ limitation.” Moreover, Metra’s approach contemplates that the Board will exclude certain costs of “marginal utility” to Metra, but Metra does not attempt to define that standard or provide any practical way for the Board to determine which costs provide only “marginal utility” to Metra such that they should be excluded. Furthermore, as § 24903(c)(2) directs the Board to allocate “the costs Amtrak incurs only for the benefit of the carrier, plus a proportionate share of all other costs of providing transportation under this paragraph incurred for the common benefit of Amtrak and the carrier,” the Board finds that it must allocate some proportion of all costs that benefit Metra. The Board may consider relative benefit in determining factors for common benefit cost allocation. However, the Board finds that Metra’s proposed approach would require the Board to exclude costs that provide some benefit to Metra in a manner contrary to the methodology prescribed by statute.

With respect to the NECC policy, the Board will not consider the methodologies adopted therein as dispositive in this proceeding. Although the parties' agreed-upon factors for allocation of dispatching and maintenance of way costs and the agreed-upon formula for allocation of station operations and maintenance (SOM) costs correspond to the methodologies adopted by the NECC, (Amtrak Opening 25, 32), the parties disagree about whether the NECC policy factor is appropriate for the allocation of policing costs (Amtrak Reply 8-9, June 24, 2020; Metra Reply 8, June 24, 2020). Moreover, despite Amtrak's insistence that the NECC policy should be utilized by the Board, Amtrak departs from it in its proposed methodology for capital expenses. (See Amtrak Opening 20; Metra Reply 7, June 24, 2020.) Since CUS is located outside the Northeast Corridor, and § 24905(c)(1) therefore does not apply to this proceeding, the Board is not required to adopt the NECC policy here. Accordingly, although in some instances a factor that reasonably reflects the relative use of CUS in this proceeding may correspond to one contained in the NECC policy, the Board is not required to adopt Amtrak's proposed factor over another simply because of its connection to the NECC policy.

Lastly, the Board finds that the "specific, verifiable, and quantifiable" costs standard from Canadian National Railway does not apply to this proceeding. Pursuant to the statute relevant to Canadian National Railway, 49 U.S.C. § 24308, the Board was required to "consider quality of service as a major factor when determining whether, and the extent to which, the amount of compensation shall be greater than the incremental costs of using the facilities."<sup>11</sup> However, § 24903(c), unlike § 24308(a), does not direct the Board to consider incremental costs. Moreover, the costs at issue in this proceeding do not include the sorts of potentially unverifiable costs at issue in Canadian National Railway, such as "freight rate suppression, capacity costs, foregone volume, [and] lost opportunity costs." Canadian Nat'l Ry., FD 35743, slip op. at 22. To the extent Metra suggests that projected, budgeted, or subsidized costs cannot be recovered because they are necessarily unspecific and unverifiable, the Board rejects this argument, particularly in the context of this proceeding in which the Board must establish a forward-looking cost allocation framework.

c. Disputed Contract Terms

The parties also disagree on the extent to which the Board should prescribe for the parties disputed contract terms that are not specifically related to compensation.<sup>12</sup> Amtrak argues that

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<sup>11</sup> In defining the term "incremental costs," which is not defined by statute, the Board determined that incremental costs are those costs that are actually incurred, and that would not have been incurred "but for" the presence of Amtrak. Canadian Nat'l Ry., FD 35743, slip op. at 22. The Board also found that incremental costs do not include costs that cannot be specifically and verifiably quantified. Id.

<sup>12</sup> The Board notes that, early in this proceeding, the parties appeared to contemplate that the Board would determine compensation and prescribe non-compensation terms. (See Joint Submission Regarding List of Issues for Determination 1, Feb. 7, 2020 ("The Parties have not agreed to the terms of an agreement under [§] 24903(a)(6) for Metra's use of the [CUS] properties. Thus, the Board must impose terms, including compensation, on the Parties.")) However, the parties' positions diverge in their briefs. Amtrak also suggests that the Joint Submission included issues that only one party believed that the Board should decide.

the Board must both determine compensation and set specific contract terms for the parties' agreement. (Amtrak Suppl. Br. 4.) In Amtrak's view, § 24903(c) contemplates that the Board would impose terms both while the proceeding is pending and in the final order. (*Id.* at 4-5.) Amtrak also asserts that the Board suggested it would set terms in its July 26, 2019 order when, at the agreement and request of both parties, the Board ordered Amtrak to continue to provide Metra access to CUS on an interim basis under the terms of the 1984 Agreement until further order of the Board. (*Id.*) Additionally, Amtrak contends that the Board should not offer general guidance on the disputed contract terms because § 24903 is not "a mechanism under which parties can request advisory opinions to influence contract negotiations" and, moreover, that the parties need "the material contractual terms to go with the Board's determination of compensation." (Amtrak Reply 1, Feb. 19, 2021.)

Conversely, Metra suggests that the Board may lack the authority to prescribe specific contract terms because § 24903(c) directs the Board only to set compensation. (Metra Suppl. Br. 3.) Metra proposes that, in the absence of a clear statutory mandate to prescribe contract terms, the Board should exercise its discretion to offer its perspective and guidance on the disputed contract terms and allow the parties to continue to negotiate on the specific language. (*Id.*)

The Board has carefully considered the plain language of § 24903(c) and finds that its jurisdiction over this matter extends only to determining compensation for Metra's use of CUS. The language of § 24903(c) is narrower than other statutes in which Congress has specifically given the Board the authority to set both compensation and other terms and conditions. Compare § 24308(a)(2) (specifying that in the event of failure to agree, the Board shall "prescribe reasonable terms and compensation for using the facilities"), and 49 U.S.C. § 11102(a) (stating that "the Board may establish conditions and compensation for use of the facilities") with § 24903(c) (directing the Board to "determine compensation . . . for the transportation" if the parties do not agree). Nothing in the legislative history suggests a contrary conclusion. Furthermore, the Board did not, as Amtrak argues, make any determinations about its authority to prescribe non-compensation contract terms when, at the agreed-upon request of both parties, the Board ordered Amtrak to continue to provide Metra access to CUS on an interim basis pursuant to the 1984 Agreement until further order of the Board. In that July 2019 decision, the Board merely preserved the status quo until issuance of this final decision, as directed by § 24903(c)(2) (the Board "shall order that the transportation continue"). Accordingly, the Board will not prescribe contract terms for the parties where those terms do not involve determining the amount of compensation that Metra must pay Amtrak for the use of CUS.<sup>13</sup>

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(See Amtrak Opening 14 n.8 ("Amtrak's joint submission of that document does not imply that Amtrak believes the Board must actually decide every purported issue listed there."))

<sup>13</sup> Although courts have not yet addressed this specific issue, a recent decision by the U.S. District Court for the District of Columbia contemplated the Board's § 24903(c) role as limited. See Nat'l R.R. Passenger Corp. v. Se. Pa. Transp. Auth., No. 1:19-cv-00537, 2021 WL 325957, at \*12 (D.D.C. Feb. 1, 2021) (rejecting Amtrak's argument that declaratory relief would interfere with the § 24903(c) proceeding before the Board because the Board's proceeding "focuses only on compensation").



Thus, in the following section of this decision, the Board will address only the disputed compensation categories of (1) SOM, (2) policing, (3) capital expenses, and (4) ground power, as well as the applicable general and administrative (G&A) expenses addition amount and the inflation index that will apply to multiple cost categories.<sup>14</sup> The parties' remaining disputed contract terms, many of which the parties identified as issues but did not brief,<sup>15</sup> would require the Board to make findings on issues that do not involve compensation determinations. For example, the parties ask the Board to resolve whether the agreement should include a provision governing termination for material default and whether Amtrak should have ultimate authority to set service schedules, among other issues. However, the parties have not explained how, if at all, these terms would impact the compensation that they are asking the Board to determine.<sup>16</sup>

The Board declines to provide advisory guidance on the disputed non-compensation contract terms for the reasons discussed above. Given that one party has expressed a renewed interest and optimism in resolving those disputed contract terms through subsequent mediation, (see Metra Reply 3-4, 24, Feb. 19, 2021), the Board strongly encourages the parties to consider mediation on any remaining disputed non-compensation contract terms.

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<sup>14</sup> The parties have reached agreement on compensation for dispatching and maintenance of way costs. (Joint Stipulation ¶ 1-2, May 18, 2020.)

<sup>15</sup> From the joint issues list that the parties submitted at the close of mediation, neither party presented argument for the issues involving modification of ingress, egress, and square footage used by Metra and its customers at CUS; the standard under which Amtrak must provide janitorial and maintenance services; funding for extraordinary maintenance and capital improvements; whether Metra may assert control over emergency responses; whether Metra is entitled to any parking; and ADA compliance.

<sup>16</sup> The only other disputed contract term that the parties associate with a dollar amount is the monthly fee for dispatching technology. Here, Amtrak asks the Board to require Metra to pay a monthly fee of \$500 to use the dispatching feed. (Amtrak Suppl. Br. 9-10.) Although Metra states that it is willing to pay the monthly fee for access to the dispatching feed, Metra argues that it should have access to technology that would allow Metra to “‘play back’ Amtrak’s CUS dispatching activities.” (Metra Suppl. Br. 12.) Amtrak objects, arguing that “[p]roviding Metra with this additional service would go beyond the status quo and present additional costs and burden to Amtrak.” (Amtrak Reply 9, Feb. 19, 2021.) In order to set a monthly fee for dispatching technology, the Board would need to determine (1) whether Metra is entitled to play-back technology (a non-compensation issue) and (2) how much play-back technology would cost (for which there is no evidence in the record). Thus, the Board cannot set compensation for the dispatching feed unless the parties reach an agreement on Metra’s entitlement to play back technology and provide the Board with evidence of the cost of such technology.

## B. Compensation

### a. G&A Expenses

Amtrak's cost calculations include the addition of the following G&A expenses: 6.97% for Fiscal Year (FY) 2016 and 5.81% for FY2017.<sup>17</sup> (Amtrak Opening 23-24, 33.) Amtrak describes the G&A addition as a "common financial tool used to account for indirect costs that are not tied to a specific cost objective but rather benefit several functions at once," such as a phone line that cannot be tied to any specific business function but indirectly supports the business as a whole. (Amtrak Reply 12 n.7, June 24, 2020.)

Metra "accepts the application of an overhead additive in the spirit of compromise" but proposes an alternative G&A addition of 3.73% for FY2016 and 3.03% for FY2017. (Metra Opening 42-43.) Metra argues that Amtrak's proposed figures "would result in Metra contributing to Amtrak's overall G&A costs, much of which have nothing to do with CUS but rather with Amtrak's core function of providing intercity rail passenger service, and for which Metra derives absolutely no benefit." (*Id.* at 43.) Metra excluded the following expenses as unrelated to CUS operations: administrative services, automotive, chief executive officer, emergency management and corporate security, government affairs, information systems, and labor relations. (*Id.*, V.S. Thomas Crowley & Robert Mulholland 10-11.)

Amtrak responds that Metra calculated its proposed G&A addition by excluding expenses in an arbitrary and unexplained way. (Amtrak Reply 32-34, June 24, 2020.) Amtrak argues that Metra's exclusion of information systems appears particularly "result-driven" because Amtrak incurs over \$100 million a year in expenses related to information systems.<sup>18</sup> (*Id.* at 33-34.)

The Board will apply a G&A addition but does not adopt either party's calculations in full. The Board agrees with most of the expenses Metra excluded from Amtrak's G&A calculation, as the expenses related to Amtrak's chief executive officer, government affairs, labor relations, automotive, and administrative services do not provide any readily apparent benefit to Metra's operations at CUS. Apart from a conclusory statement that the expenses Amtrak included "indirectly support [CUS]," (*see* Amtrak Reply, V.S. Nancy Miller ¶ 35, June 24, 2020), Amtrak does not offer specifics about the individual expenses that these categories include or the ways in which they support CUS. Furthermore, Amtrak offers very limited detail about information systems by simply stating that these expenses support human resources,

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<sup>17</sup> The parties agreed, for purposes of this proceeding, to use FY2016 and FY2017 data as the basis for establishing future costs because they began negotiating the new agreement in 2018. (Amtrak Opening 23 n.11; Metra Opening 18.) Although Amtrak and Metra express their proposed costs in both FY2018 dollars and/or FY2020 dollars throughout their briefs, the Board will express disputed costs in FY2018 dollars in this decision. The parties' proposed numbers are taken from their workpapers, and where FY2018 numbers were not provided, the Board has recalculated those numbers in FY2018 dollars for comparison purposes.

<sup>18</sup> By way of comparison, the next two largest categories of expenses (legal and finance) are less than half the amount of information systems expenses. (Amtrak Opening, V.S. Nancy Miller, Ex. 18.)

payroll, inventory management, and work management systems. (*Id.* at 33, V.S. Nancy Miller ¶ 36.) However, as Amtrak notes, information systems expenses account for, by far, the largest share of G&A expenses that it seeks to allocate to Metra. (*Id.* at 33-34.) For such a large category of expenses, the Board would have expected Amtrak to provide much more detail about the specific expenses included and describe how those expenses function at CUS.<sup>19</sup> Without more information from Amtrak about how these expenses benefit CUS and Metra, the Board cannot include them in the G&A calculation while preventing cross-subsidization.

The Board will, however, include expenses related to emergency management and corporate security. Unlike the other disputed expenses, Amtrak explains how these particular expenses support CUS by “cover[ing] the cycle of planning, training, equipping, and responding before, during, and after an emergency.” (*Id.* at 33.) As discussed in the policing section below, Metra clearly benefits from Amtrak’s efforts to maintain the overall safety and security of its facilities. Accordingly, the Board finds that the appropriate G&A addition will be 3.97% for FY2016 and 3.27% for FY2017.<sup>20</sup>

#### b. Inflation Index

Amtrak and Metra agree that an inflation index should be applied annually to costs but disagree about the appropriate inflation index. Amtrak advocates for the Association of American Railroads Quarterly Index of Chargeout Prices and Wage Rates (Table C), East, “material prices, wage rates and supplements combined (excluding fuel)” (AAR Index). (Amtrak Opening 49-50.) According to Amtrak, the AAR Index is “most closely related to the type of costs being indexed” because it is the standard index used in agreements between carriers, and it is directly tied to the types of costs incurred by carriers. (*Id.* (quoting Guilford, 3 S.T.B. at 170).)

Metra argues that the Board should apply the Core Personal Consumption Expenditures (Core PCE) Index to costs because Amtrak applies the Core PCE Index to the vast majority of CUS expenses for internal forecasting purposes in the normal course of business. (Metra Opening 48.) Metra also asserts that it utilized a market basket index (MBI)—in which it selected relevant indexes for services, utilities, materials, and labor in the Chicago market and weighed them based on the observed distribution of FY2016 and FY2017 SOM expenses—to examine whether inflation patterns for certain CUS costs correspond to the Core PCE Index. (*Id.*) According to Metra, the MBI validates the use of the Core PCE Index as a reasonable proxy for inflation. (*Id.*)

Amtrak disputes that the Core PCE Index would accurately reflect cost changes at CUS because the Core PCE Index is a consumer-facing metric based on the cost of goods and services

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<sup>19</sup> Although Amtrak does itemize costs associated with reservations and telephone data communications expenses, it does not identify the remainder of individual expenses composing the information systems category. (See Amtrak Opening, V.S. Nancy Miller, Ex. 18.)

<sup>20</sup> The Board notes that although the parties included a line item for contract administration expenses in the FY2017 G&A calculation, they did not do so for the FY2016 G&A calculation. (See Amtrak Opening, V.S. Nancy Miller, Ex. 18.)

regularly consumed by individuals that does not include labor costs. (Amtrak Opening 50.) According to Amtrak, Metra's argument is flawed because it is based upon the incorrect premise that Amtrak uses the Core PCE Index internally as the inflator for 99% of the policing costs at issue in this proceeding. (Amtrak Reply 19, June 24, 2020.) Amtrak contends that policing expenses include a significant wages component for which Amtrak uses an agreed-upon labor index for inflation of wages in its internal calculations. (Id.) Metra's mistake, Amtrak argues, "is not limited to one line-item of expenses but is endemic to their entire discussion of inflation indices." (Id. at 19-20.)

Metra challenges the relevance of the AAR Index by arguing that CUS expenses principally relate to property management, janitorial and building maintenance services, and utilities, which differ from the Class I freight railroad expenses reflected in the AAR Index, such as materials and freight railroad labor union contracts. (Metra Reply 33-34, June 24, 2020.) Metra further argues that the AAR Index does not accurately account for the scope of Amtrak's labor costs at CUS because Amtrak's analysis conflates company-wide labor costs with CUS-specific labor costs. (Id. at 34.) Although Metra acknowledges that an AAR index was appropriate in Guilford, 3 S.T.B. at 170, which involved the allocation of costs to Amtrak by another carrier for Amtrak's operation of passenger rail service over the other carrier's lines, Metra argues that the present proceeding differs because it involves predominantly terminal costs for building upkeep and maintenance. (Id. at 34-35.)

The Board will apply the AAR Index to maintenance of way and dispatching costs, and the Core PCE Index to SOM, policing, and ground power. As the parties observe, the Board has expressed a preference for "the index that is most closely related to the type of costs being indexed." See Guilford, 3 S.T.B. at 170. The AAR Index is appropriate for maintenance of way and dispatching costs because expenses for these operations at CUS are similar to the Class I freight railroad expenses reflected in the AAR Index. However, the Board finds that the Core PCE Index is appropriate for the other cost categories at CUS that involve expenses primarily associated with property management and building maintenance. Although the Core PCE Index does not include labor costs, the labor costs reflected in the AAR Index associated with freight rail operations differ significantly from the labor costs at CUS associated with building maintenance. Furthermore, although Amtrak correctly observes that Metra overstates the expenses for which Amtrak uses the Core PCE Index in its internal forecasting, Metra's calculation error does not, as Amtrak argues, invalidate its entire argument since Amtrak uses the Core PCE Index to forecast a significant amount of CUS expenses.

c. SOM

The parties agree on the formula for calculating total SOM costs, and they agree to allocate those costs to Metra based upon a special formula ratio (SFR) with inputs reflecting the square footage of CUS. However, the parties disagree about how many square feet should be designated as common benefit area, Metra exclusive use area, and Amtrak exclusive use area, as well as how the total station area should be defined.

i. Total SOM Costs

To calculate total SOM costs,<sup>21</sup> the parties have agreed to: (1) use Amtrak's SOM cost data for FY2016 and FY2017; (2) add G&A expenses (as determined by the Board); (3) apply an inflation index (as determined by the Board) to convert the FY2016 and FY2017 cost amounts to FY2018 dollars; and (4) average the adjusted FY2016 and FY2017 cost amounts. (Amtrak Reply 29-30, June 24, 2020; Metra Opening 39.) The resulting amount will serve as the parties' foundation for computation of future SOM costs through application of the inflation index. (Metra Opening 39.) Pursuant to the parties' agreed-upon formula (with the addition of G&A expenses and the application of the Core PCE Index as determined by the Board), the total allocable SOM costs will be \$12,244,427 for FY2018.

ii. SOM Cost Allocation

Amtrak and Metra have also agreed to several aspects of the SOM cost allocation. First, the parties agree to allocate SOM costs based on square footage, and they agree that only the basement, concourse, and mezzanine levels of CUS are relevant for purposes of the SOM cost allocation. (Joint Stipulation ¶ 3(a), May 18, 2020.)<sup>22</sup> Second, Amtrak and Metra agree that Metra's share of SOM costs should be determined pursuant to the following SFR:

$$\frac{\text{Metra exclusive use area} + (\text{usage factor} \times \text{common benefit area})}{\text{total station area}}$$

(Amtrak Opening 26; Metra Opening 35.) Third, the parties have agreed that 83%<sup>23</sup> is the proper usage factor for the equation. (Amtrak Reply 34, June 24, 2020; Metra Reply 17 n.11, June 24, 2020.) Metra and Amtrak disagree on the other equation inputs: (1) common benefit area, (2) Metra exclusive use area, and (3) total station area.

1. Common Benefit Area

Amtrak designates 196,590 square feet as common benefit area based upon the areas of CUS that both parties may access and use.<sup>24</sup> (Amtrak Opening 29, 32.) Amtrak asserts that it

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<sup>21</sup> Pursuant to the parties' agreement, these amounts do not include SOM costs related to dispatching, as the costs incurred for maintenance and operation of those areas are accounted for in the dispatching allocation to which the parties agreed. (See Amtrak Opening 29 n.13; Metra Opening 44-45; Amtrak Reply 31 n.18, June 24, 2020.)

<sup>22</sup> Amtrak states that CUS is divided horizontally by floor into 12 levels, including the sub-basement, basement, concourse, mezzanine, street level, and floors two through eight. (Amtrak Opening 27.) In addition to the horizontal levels, Amtrak states that CUS is divided vertically into two areas referred to as the headhouse and concourse. (Id.)

<sup>23</sup> This figure represents the average of Metra's share of train movements and passenger boardings and alightings at CUS.

<sup>24</sup> Amtrak explains that it consulted with its employees at CUS to designate areas as Metra exclusive use, Amtrak exclusive use, or as common benefit area based on whether one or

did not consider the parties' relative use of the common benefit areas because "[i]t is not administratively feasible to divvy up the square footage for each individual area based on the relative use of each individual area and assign a different allocation factor to each area." (Id. at 30.)

Conversely, Metra designates only 74,850 square feet as common benefit area. (Metra Opening 37.) Metra bases its proposed number largely on what it refers to as the "Consensus Floor Plan," which, according to Metra, the parties developed after a walk-through of CUS on January 9, 2020, and related discussions and email correspondence. (Id., V.S. Alvin Terry 2.) Furthermore, Metra considers relative use by excluding certain spaces in the common benefit area calculation that Amtrak purportedly uses more than Metra. (Id., V.S. Alvin Terry 4-9.)

The primary area of dispute between the parties involves an area of 120,040 square feet located on the concourse level of the headhouse building, which includes the Great Hall (Concourse Headhouse).<sup>25</sup> Metra argues that only 11,092 square feet (or alternatively, 16,517 square feet) of the Concourse Headhouse should be designated as common benefit area and the remainder as Amtrak exclusive use area. (Metra Surreply 3, Apr. 20, 2021; see also Metra Reply 25, June 24, 2020.) Conversely, Amtrak designates approximately 75,000 square feet of the Concourse Headhouse as common benefit area and the remainder as Amtrak exclusive use area. (Amtrak Reply 2, Jan. 29, 2021.) Metra asserts that its proposed number is appropriate because the Concourse Headhouse primarily benefits Amtrak passengers, who remain in the area for extended periods of time as they await the arrival and departure of Amtrak trains, whereas Metra passengers use this area as "merely a momentary pass-through" to other areas. (Metra Reply 25-26, June 24, 2020.) Metra also suggests that the Board should adopt its proposal because Amtrak previously agreed that it should bear most of the costs associated with the Concourse Headhouse before changing its position. (See Metra Surreply 1, Apr. 20, 2021; Metra Reply 28-31, June 24, 2020.) In support, Metra cites to (1) the June 2019 Proposed Agreement in which Amtrak allocated only 15% of the Great Hall to Metra; (2) an Amtrak study estimating passenger dwell time in the Great Hall; and (3) the "Consensus Floor Plan," which designates only part of the Great Hall as common benefit area. (See Metra Surreply 1-3, Apr. 20, 2021; Metra Reply 26-28, June 24, 2020.)

In addition to the Concourse Headhouse, Metra identifies 12,637 square feet that it argues should be designated as Amtrak exclusive use area, rather than common benefit area: (1) crew

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both parties can access or use the area, with the exception of those areas from which Amtrak derives revenue (such as areas occupied by tenants paying rent to Amtrak), which Amtrak designated as Amtrak exclusive use areas even though Metra passengers may access them. (Amtrak Opening 29.)

<sup>25</sup> In various pleadings, Metra refers to this disputed area as the "Great Hall," "Great Hall Building Concourse," and "Great Hall Concourse." (See Metra Reply 28, June 24, 2020; Metra Reply 1, Jan. 19, 2021; Metra Surreply 1, Apr. 20, 2021.) Amtrak, however, asserts that the term "Great Hall" refers to only one room (an area of approximately 25,000 square feet) within the greater concourse level of the headhouse building. (Amtrak Reply 2, Jan. 29, 2021.) For purposes of this decision, the Board will refer to the 120,040-square foot disputed area as the Concourse Headhouse.

quarters (1,080 square feet) in the basement consisting of a locker room and rest facilities that Metra's staff uses minimally; (2) the refuse dock (1,637 square feet) in the basement consisting of a trash receptacle dock to which Metra passengers contribute less solid waste than Amtrak's retail and commercial tenants; (3) six floor paths allowing for North and South stairwell access (1,946 square feet) to the Great Hall stairs and taxi stand that Metra commuters do not use regularly; (4) a constrained passageway (2,342 square feet), for which Amtrak has constructed makeshift barriers discouraging pedestrian flow; (5) headhouse building stairs to Jackson Street (527 square feet) that Metra passengers generally do not use; (6) a public restroom (610 square feet) that Amtrak does not permit Metra or other members of the public to use; (7) a parking garage tunnel (2,160 square feet) that Metra passengers rarely use; and (8) tracks 18-26 (2,335 square feet) that only a single Metra trainset uses on a daily basis. (Metra Opening, V.S. Alvin Terry 4-9.)

Finally, Metra's proposed allocation does not include two cab stands<sup>26</sup> that Amtrak designated as common benefit area.<sup>27</sup> (Metra Surreply 5-6, Apr. 20, 2021.) Metra argues that these cab stands should not be included because the parties did not agree that the cab stands were common benefit areas on the "Consensus Floor Plan," Amtrak did not designate the cab stands as public circulation areas in floor plans created "outside of litigation," Amtrak has blocked public access to one of the cab stands, and there is no passenger circulation in these areas. (*Id.* at 6.)

In response, Amtrak contends that Metra's methodology is flawed because it "takes spaces that Metra clearly, and many times admittedly, uses, but then assigns to Metra no costs associated with those spaces" on the basis that Metra does not use the areas "enough." (Amtrak Reply 39-40, June 24, 2020.) Amtrak argues that Metra's reliance on relative use is improper because such methodology requires "detailed and expensive studies, which Metra has not performed," and furthermore, because Metra selectively considers relative use in a manner that works only to Metra's advantage. (*Id.*) Amtrak asserts that pursuant to Metra's approach, the Board would need to designate, as Metra exclusive use areas, those areas that Amtrak uses less than Metra (e.g., areas directly in front of the platforms where Metra passengers queue); however, Metra did not provide this information to the Board such that its preferred methodology could be applied in an even manner. (*Id.* at 39.) In Amtrak's view, any areas that both parties use should be designated as common benefit areas such that both parties contribute to the costs of those areas. (*Id.* at 38.)

Amtrak also argues that Metra mischaracterizes its previous position on the Concourse Headhouse. Amtrak explains that in pre-litigation discussions, it offered to allocate a lesser percentage of the Great Hall room to Metra, but never did so with respect to the entirety of the Concourse Headhouse. (Amtrak Reply 3, Jan. 29, 2021.) Subsequently, before submitting its opening statement, Amtrak "further analyzed how Metra passengers and employees use [CUS], and the areas to which they have access," and determined that the Great Hall should be

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<sup>26</sup> Metra indicates that the "cab stands" to which it refers are "[n]ot to be confused with the currently-in use 'Taxi Stand'" referenced by Alvin Terry in his verified statement. (Metra Surreply 6 n.7, Apr. 20, 2021.)

<sup>27</sup> Collectively, the two cab stands total 36,841 square feet. (See Amtrak Opening, V.S. Nancy Miller, Ex. 16.)

designated as common benefit area. (Amtrak Opening 29 n.14.) With respect to the dwell time study cited by Metra, Amtrak contends that the estimates contained therein amount to “merely an ‘exercise’ based on assumptions, not data.” (Amtrak Reply 38 n.20, June 24, 2020.) Furthermore, Amtrak argues that Metra’s reliance on the so-called “Consensus Floor Plan” is misplaced since “[i]t is not true that the parties reached an agreement about square footage allocation, or that there was any ‘consensus’ about how square footage should be allocated.” (Id. at 37.) Amtrak contends that “had there been such an agreement, the parties would have submitted a stipulation, as they have done for the numerous other areas on which they were able to reach agreement.” (Id.)

With respect to the other miscellaneous areas that Metra excludes, Amtrak argues that Metra regularly uses the parking garage tunnel to access a terminal for transfer passengers, the public restroom on the concourse level, and the concourse basement trash receptable dock. (Id. at 37-38.)<sup>28</sup>

The Board will adopt Amtrak’s proposed common benefit area allocation. Amtrak’s proposal to designate areas that the parties both use as common benefit area complies with § 24903(c)(2)’s mandate that the Board assign a proportionate share of “all other costs . . . incurred for the common benefit of Amtrak and the carrier.” Conversely, Metra’s proposal would require the Board to designate several areas that Metra uses (and benefits from) as Amtrak exclusive use areas. Metra acknowledges that its employees or passengers use almost all of the disputed areas (besides a restroom, which Amtrak contends that Metra employees regularly use, and the cab stands discussed below). Although Metra argues that it does not use certain areas to the same extent that Amtrak does, Metra does not provide sufficient evidence from which the Board could meaningfully assign individual usage factors to each space.<sup>29</sup> For example, Metra asks the Board to exclude a trash receptable dock on the basis that Metra passengers contribute less solid waste than Amtrak’s retail and commercial tenants, but the record contains no evidence about the percentage of solid waste that Metra contributes to this single trash receptable dock as compared to Amtrak. Furthermore, as Amtrak notes, Metra does not apply its methodology evenly by excluding from the common benefit area total and including in the Metra exclusive use area total individual areas that Metra uses more than Amtrak.

Metra’s argument that the Board should adopt its proposed allocation because Amtrak purportedly agreed to it previously and then changed its position prior to the submission of opening statements is not persuasive. Amtrak asserts that the parties did not reach an agreement as to square footage allocation, and the documents that Metra submits as evidence of the alleged consensus do not demonstrate that one existed. Regardless, Amtrak is clearly permitted to adopt

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<sup>28</sup> Amtrak did not respond to Metra’s arguments with respect to the two cab stands since they were raised for the first time in Metra’s April 20, 2021, surreply, although Metra did account for the presence of the cab stands in its square footage calculations in its earlier filings.

<sup>29</sup> The dwell time study cited by Metra is not sufficient because the study merely estimates usage based on assumptions of how much time Amtrak and Metra passengers spend in the Great Hall. Furthermore, since the Great Hall constitutes only one room in the larger Concourse Headhouse area, (see Amtrak Reply 2, Jan. 29, 2021), the study provides no information about the majority of common benefit areas in dispute.



a different position in its opening statement than it offered during the parties' settlement discussions.

The Board also finds that the cab stands were appropriately included as common benefit area. In addition to Metra's misplaced reliance on the "Consensus Floor Plan," which does not show an agreement between the parties, the other documents cited by Metra do not indicate that its passengers cannot use the cab stand areas. Contrary to Metra's assertion, it is not clear from the document cited that Amtrak has blocked one of the areas from public access. (See Amtrak Opening, V.S. Nancy Miller, Ex. 15.) Furthermore, in support of its argument that no passenger circulation exists in these areas, Metra refers the Board to a model labeled as a "Conceptual illustration of Union Station concourse passenger flows in PM rush, when there are delayed Metra departures and late arrival of an Amtrak train." (Metra Opening, V.S. Robert Byrd, Ex. 1 at 62.) This evidence is unconvincing since the description of the model suggests a specific, limited situation. Otherwise, Metra does not explain why its passengers would be barred from accessing cab stands at CUS.<sup>30</sup>

Table 1 summarizes the parties' positions and the Board's conclusion on common benefit area allocation.

TABLE 1

<b>Common Benefit Area</b>		
<b>Amtrak</b>	<b>Metra</b>	<b>STB</b>
196,590	74,850	196,590

## 2. Metra Exclusive Use Area

Metra asserts that the parties agreed to designate 10,629 square feet to Metra's exclusive use. (Metra Opening 37.) Metra's number is based solely on the Metra exclusive use areas designated on the "Consensus Floor Plan," (Metra Opening, V.S. Alvin Terry, Ex. 2); however, Amtrak reiterates that this document does not in fact reflect a consensus between the parties, (Amtrak Reply 37, June 24, 2020). In contrast, Amtrak proposes to assign 8,120 square feet as Metra exclusive use area. (Amtrak Opening 32.) Amtrak's proposed number includes those individual areas that Amtrak designated as solely for the benefit of Metra based on discussions with CUS operating and station personnel. (See Amtrak Opening, V.S. Nancy Miller 17, Ex. 3.)

The Board will adopt Amtrak's number for assignment of Metra exclusive use area. Metra bases its proposed number on the "Consensus Floor Plan," which, for the reasons discussed above, the Board does not accept as a binding agreement between the parties.

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<sup>30</sup> The areas identified by the parties (Concourse Headhouse, cab stands, and other miscellaneous areas) account for all but a small amount of the total disputed common benefit area. However, neither party discusses which areas of CUS account for the remainder of the disputed common benefit area and the floor-by-floor square footage allocations provided by the parties do not clarify the remaining areas in dispute. In any event, the Board finds Amtrak's common benefit area number more reasonable for the reasons discussed above.

Furthermore, the Board notes that the use of Amtrak’s number for assignment of Metra exclusive use area produces a more favorable number to Metra, although the cost allocation percentage differs only slightly.<sup>31</sup>

Table 2 summarizes the parties’ positions and the Board’s conclusion on Metra exclusive use area allocation.

TABLE 2

<b>Metra Exclusive Use Area</b>		
<b>Amtrak</b>	<b>Metra</b>	<b>STB</b>
8,120	10,629	8,120

### 3. Total Station Area

As mentioned above, the parties agree that only the basement, concourse, and mezzanine levels of CUS are relevant for purposes of the SOM cost allocation. (Joint Stipulation ¶ 3(a), May 18, 2020.) Without any adjustments, this area totals 489,555 square feet. (Amtrak Opening 32.) However, Amtrak argues that the appropriate calculation for total station area is 360,932 square feet, which includes the entire concourse level, mezzanine level, and the basement level of the concourse building (Basement Concourse), but only 5% of the basement level of the headhouse building (Basement Headhouse). (*Id.* at 27-28.) Amtrak argues that an adjustment to the Basement Headhouse is appropriate because the area is “primarily devoted to mechanical and other uses,” including a loading ramp and parking lot, that account for no more than a de minimis proportion of SOM costs, such as utilities and janitorial services, compared to other heavily-traveled areas of CUS. (*Id.* at 28.) In support, Amtrak submits photographs of the Basement Headhouse depicting the entry gate and the areas surrounding the loading dock. (Amtrak Reply 40-41, V.S. Christine Suchy ¶¶ 19-21, June 24, 2020.)

Metra opposes Amtrak’s adjustment of the Basement Headhouse. Metra argues that Amtrak does not offer evidence to support its claim that the Basement Headhouse consumes significantly fewer SOM services than other areas of CUS. (Metra Reply 22-23, June 24, 2020.) Metra also contends that no such evidence exists because Amtrak’s accounting assigns SOM costs to CUS on a generalized basis without tracking the amount of resources each individual area of CUS consumes. (*Id.* at 24.) Furthermore, because Amtrak does not adjust any other areas at CUS, Metra argues that Amtrak’s adjustment of the Basement Headhouse is a results-driven attempt to achieve a lower SFR denominator and thereby allocate more SOM costs to Metra. (*Id.* at 22.)

The Board will not apply Amtrak’s proposed adjustment factor to the Basement Headhouse. Amtrak’s claim that the Basement Headhouse accounts for no more than a de minimis proportion of SOM costs compared to other areas of CUS is unsupported by the record. Amtrak presents no data detailing the proportion of SOM costs consumed by the Basement Headhouse relative to other areas at CUS, but rather simply submits photographs that

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<sup>31</sup> The difference is approximately 0.5%.

provide no basis for a determination that the area consumes 95% less in SOM costs than other areas at CUS. Amtrak offers minimal description of how it uses the Basement Headhouse and vaguely describes the area as devoted “to mechanical and other uses”; however, to keep any area of CUS safe and functional for users, Amtrak would need to expend SOM costs for services such as lighting and mechanical repairs. The Board also observes that Amtrak’s downward adjustment of the Basement Headhouse contradicts other aspects of its proposed methodology. Amtrak argues that “[i]t is not administratively feasible to divvy up the square footage for each individual area based on the relative use of each individual area,” (Amtrak Opening 30), but Amtrak justifies its adjustment of the Basement Headhouse based upon relative use of SOM resources. As Metra observes, Amtrak’s adjustment of the Basement Headhouse appears arbitrary in the context of the fact that Amtrak does not adjust the other areas of CUS or explain why it is not feasible to do so. Lastly, the Board notes that Amtrak’s proposed adjustment has a significant impact on the SOM cost allocation by removing almost half of Amtrak’s exclusive use area from the square footage calculation entirely. (See Amtrak Opening 32.) In the absence of additional evidentiary support, the Board declines to make such a significant adjustment.

Table 3 summarizes the parties’ positions and the Board’s conclusion on total allocable station area.

TABLE 3

<b>Total Station Area</b>			
<b>Location</b>	<b>Amtrak</b>	<b>Metra</b>	<b>STB</b>
Basement Headhouse	6,770	135,393	135,393
Basement Concourse	88,150	88,150	88,150
Concourse	197,980	197,980	197,980
Mezzanine	68,032	68,032	68,032
Total	360,932	489,555	489,555

#### 4. Conclusion

Based upon the parties’ agreed-upon SFR, Metra will be responsible for 35% of SOM costs (\$4,285,549 in FY2018 dollars). Table 4 summarizes the parties’ positions and the Board’s conclusion on SOM cost allocation.

TABLE 4

<b>SOM (FY2018)</b>			
	<b>Amtrak</b>	<b>Metra</b>	<b>STB</b>
Total Allocable SOM Costs	\$12,801,311	\$12,215,859	\$12,244,427
Cost Allocation Percentage	47.5%	14.9%	35%
Total Allocated SOM Costs	\$6,080,623	\$1,820,163	\$4,285,549

d. Policing

Pursuant to 49 U.S.C. § 24305(e), Amtrak may “directly employ or contract with rail police to provide security for rail passengers and property of Amtrak.” (Amtrak Opening 8.) Metra’s police department does not police CUS. (*Id.*) Accordingly, both parties agree that Metra should pay some proportion of Amtrak’s CUS policing costs. However, the parties disagree about (1) whether certain specific costs should be included in the total allocable amount and (2) the appropriate factor for allocation of policing costs.

i. Total Policing Costs

To calculate total policing costs, Amtrak (1) uses the average of Amtrak’s actual FY2016 and FY2017 costs; (2) adds costs associated with four additional officers that Amtrak anticipated adding in FY2018; (3) subtracts costs associated with one position to reflect the approximate expense of officers riding Amtrak trains or patrolling the Amtrak rail yard; (4) adds costs associated with the Amtrak K-9 unit and three detectives assigned to CUS; and (5) adds G&A expenses and applies the AAR Index. (Amtrak Opening 33.) Amtrak states that it did not include the costs of equipment, training programs, or labor costs for police management and the Amtrak police intelligence and counterterrorism unit. (*Id.* at 35.)

In addition to questioning the appropriate inflation index and G&A addition (discussed above), Metra disagrees with two aspects of Amtrak’s total policing costs calculation. First, Metra argues that Amtrak erred in adding costs associated with four officers that Amtrak anticipated adding in 2018 because “[a] budgeted but unfilled position provides no police protection, and it is not an actual, incurred police cost.” (Metra Opening 19.) Second, Metra disputes Amtrak’s inclusion of an officer dedicated to working with the Drug Enforcement Agency (DEA) because Metra argues that this officer does not benefit Metra.<sup>32</sup> (*Id.* at 20-21.) Metra contends that the DEA position “targets larger-scale, intercity and interstate narcotics trafficking, consistent with the scope and baggage-oriented manner of Amtrak travel” as evidenced by the fact that between January 1, 2016, and March 31, 2019, only 0.8% of all

<sup>32</sup> Metra also disputes the inclusion of another officer assigned to work with the Federal Bureau of Investigations on an anti-terrorism task force. (Metra Opening 21-22.) However, Metra’s argument is moot because Amtrak states that this position was not included in the calculation. (Amtrak Reply 15-16, June 24, 2020.)

reported narcotics-related incidents and calls for service<sup>33</sup> involved Metra customers. (Id.) Furthermore, Metra argues that the costs of the DEA position are “already reimbursed” to Amtrak through the 10% bounty Amtrak receives for the value of drugs seized at CUS. (Id. at 21.)

In its reply, Amtrak argues that the projected positions were properly included because the cost allocation process is designed “to make a reasonable and appropriate determination of the costs Amtrak was likely to incur throughout the life of the future contract based on past costs.” (Amtrak Reply 15, June 24, 2020.) Amtrak states that although it hired only three officers in 2018, it based its projection of four officers on the best information available at the time. (Id.) Furthermore, Amtrak contends that it properly included the DEA-adjacent position because Metra benefits from the work of Amtrak police in preventing narcotics trafficking that could lead to violence at CUS. (Id. at 16.) Moreover, Amtrak asserts that its share of assets seized at CUS is irrelevant to this matter. (Id.)

The Board will include the budgeted police officers and the officer dedicated to working with the DEA. Police staffing needs will naturally fluctuate when officers are promoted or leave the force, and Amtrak is permitted to make projections to account for anticipated staffing changes. Metra argues that it does not benefit from budgeted but unfilled police positions; however, Amtrak states that it filled three of the four budgeted positions. The Board will subtract costs associated with one unfilled position. With respect to the officer who works with the DEA, the Board finds that Metra benefits from efforts to ensure the overall safety of CUS, including the prevention of drug trafficking and related crime. Metra argues that the costs of this position are reimbursed to Amtrak through bounties from seized assets at CUS, but the record does not contain evidence of any specific reimbursement amounts. Accordingly, the total allocable policing costs will be \$4,320,554 for FY2018.

#### ii. Policing Cost Allocation

To determine Metra’s share of policing costs, Amtrak proposes a factor based upon an equal weighting of relative train movements and ridership, equivalent to the parties’ agreed-upon SOM cost allocation usage factor, which would allocate 83% of the policing costs to Metra. (Amtrak Opening 33; Amtrak Reply 20, June 24, 2020.) Amtrak argues that this factor is appropriate because the costs and benefits of policing directly relate to the number of trains and passengers traveling through CUS. (Amtrak Opening 34.) Furthermore, Amtrak contends that the NECC policy, which adopted this methodology, “provides a clear and appropriate roadmap for allocation of policing costs that can and should be replicated here.” (Amtrak Reply 28, June 24, 2020.)

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<sup>33</sup> Metra states that the term “incidents” denotes “dispatched or self-initiated events for police to conduct investigations, make arrests, formally document a crime, report an injured person, or similar occurrences”; and the term “calls for service” denotes “non-criminal events documented for the purpose of measuring police activity, and to provide a reference marker for statistical data, such as providing information for lost and found items, assisting a homeless person or passenger with an issue, or reporting a section of inoperable lighting requiring repair.” (Metra Opening 24.)

Metra argues that neither train counts nor passenger counts should be used to allocate policing costs. Metra asserts that train counts should not be considered because “[t]rains do not commit crimes, and trains do not need medical assistance.” (Metra Opening 23.) Moreover, Metra argues that the use of passenger counts misrepresents Metra passengers’ need for police services because Metra passengers generally spend less time at CUS and are less frequently targeted by criminals “because of their brisk pace and familiarity with surroundings.” (*Id.* at 24.) In support, Metra emphasizes that Amtrak’s records attribute more incidents and calls for service to Amtrak passengers than Metra passengers, and that Amtrak’s “heat maps”<sup>34</sup> show that incidents and calls for service more frequently occur in areas of CUS in which Metra passengers spend less time. (*Id.* at 25.)

Metra also asserts that § 24903(c)(2) prohibits Amtrak from allocating policing costs to Metra that are unrelated to providing transportation, such as the costs of policing the food court and event spaces at CUS. (Metra Reply 9-10, June 24, 2020.) According to Metra, CUS attracts non-train-riding users who visit various vendors, photograph and admire the Great Hall, and use CUS as a covered pathway to other areas. (Metra Opening 28.) Metra contends that it should not be required to pay for the police services that Amtrak provides to non-train-riding users of CUS, although Metra acknowledges that it does not have access to data that specifies how many non-train-riding users access CUS each day. (*Id.* at 28-29.)

Metra proposes to allocate 4.28% of Amtrak’s policing costs, which represents the percentage of incidents and calls for service attributed to Metra passengers between January 1, 2016, and March 31, 2019 (3,482 out of 81,353 total incidents and calls for service).<sup>35</sup> (Metra Opening 25-26.) Alternatively, since only 8,285 of the 81,353 total incidents and calls for service were attributed to either Amtrak or Metra, and Metra accounted for 42% of the attributed incidents and calls for service, Metra argues that a 40% cost allocation “is a somewhat plausible allocation alternative.” (*Id.* at 27, 29.)

Metra also proposes a separate allocation for CUS K9 unit expenses. (*Id.* at 29.) Metra proposes to pay 1.1% of K9 unit costs on the basis that Amtrak primarily uses those services, as evidenced by the fact that of the 281 total incidents and calls for service involving drugs and bombs recorded between January 1, 2016, and March 31, 2019, only 1.1% of those were attributable to Metra passengers. (*Id.* at 30.)

Metra also asks the Board to consider that (1) each year since 2016, Amtrak has qualified for \$10 million in grant money that Metra argues may be used to defray policing costs;

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<sup>34</sup> Metra states that the term “heat maps” signifies “a graphic representation of data,” reflecting “the layout of various floors at CUS with plotting of [i]ncidents and [calls for service], color coded to reflect the frequency of those events in various portions of CUS.” (Metra Opening 25 n.23.)

<sup>35</sup> Metra acknowledges that “[u]ndoubtedly, some number of additional [i]ncidents and [calls for service] could have been associated with Metra passengers”; however, Metra argues that since “Amtrak elected not to secure and retain that information . . . Amtrak alone should bear responsibility for its inability or unwillingness to generate and retain more complete data.” (Metra Reply 13, June 24, 2020.)

(2) according to an article in the Washington Post, Amtrak announced in February 2020 that it would deploy more police officers to ride Amtrak trains rather than patrol stations; (3) Amtrak posts police at CUS 24 hours a day, even when no Metra trains are scheduled and the station is closed; and (4) Metra already pays separately for CUS security services through a contract with BNSF Railway (BNSF) and these officers “handle a variety of security-related tasks that might otherwise fall to Amtrak’s police.” (Id. at 32-33.)

In response to Metra’s proposal, Amtrak argues that Metra’s methodology is inconsistent with § 24903(c)(2), which requires the Board to allocate costs based on “factors that reasonably reflect the relative use of the rail facility,” not factors that reasonably reflect the relative use of the police. (Amtrak Opening 36; Amtrak Reply 25, June 24, 2020.) Furthermore, Amtrak argues that the incident and calls for service figures upon which Metra relies are “essentially meaningless” because Amtrak police do not regularly assign or otherwise denote in their reporting whether incidents or calls for service are associated with Amtrak or another entity unless the information is volunteered or the incident or call for service can be geolocated (a process that is subject to human error and not always precise). (Amtrak Opening 36; Amtrak Reply 22-23, June 24, 2020.) Amtrak asserts that more than 55% of incidents and 90% of calls for service were categorized as unknown. (Amtrak Opening 36.)

Moreover, Amtrak argues that police provide many other important services, beyond responding to incidents and calls for service, that ensure the safety of Metra passengers.<sup>36</sup> (Id.) Amtrak argues that Metra fails to support its assertion that its passengers are less frequently targeted by criminals because its cited expert, Robert Byrd, a retired police chief with no experience regarding Amtrak, CUS, or a comparably large urban train station, does not have the qualifications to opine on policing practices at CUS. (Amtrak Reply 21-22, June 24, 2020.) Amtrak also asserts that Metra’s claim that incidents and calls for service occur in places that are less likely to be frequented by Metra passengers is also incorrect, since the heat maps upon which Metra relies “reflect a limited subset of data and do not represent all activity in [CUS].” (Id. at 23.) Moreover, “the fact that some areas have fewer incidents would show that policing is *working* in those areas, not that there is no need for police and Metra therefore does not benefit from their presence.” (Id. at 24.)

With respect to K9 costs, Amtrak argues that Metra benefits from K9 teams, which patrol and monitor the entirety of CUS, which is a famous landmark that could be the target of attack. (Id. at 17-18.) Regarding Metra’s reference to a \$10 million grant, Amtrak clarifies that it cannot use the grant to fund CUS officers’ regular wages and salaries and, moreover, that Amtrak’s sources of funding are irrelevant to the cost allocation in this matter. (Id. at 26.) Amtrak

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<sup>36</sup> According to Amtrak, police respond to medical emergencies, requests for assistance, suspicious packages, thefts, pickpocketing, assaults, and lost property or persons; stand watch over Metra trains and property; maintain crowd control; work with local law enforcement agencies to keep CUS safe; provide support and security during special events; protect CUS at all hours from being damaged, looted, or destroyed; prevent and investigate theft and other crime by monitoring over 250 cameras; and deter crime and harmful behavior. (Amtrak Reply 10, June 24, 2020.)

acknowledges that its police sometimes ride trains but claims that this is not a daily occurrence and emphasizes that its proposal addresses this issue by subtracting one position from the total policing cost calculation. (*Id.* at 27.) Amtrak also disagrees with Metra's suggestion that Metra should not pay for overnight policing, asserting that policing is necessary to protect CUS, including Metra's areas and facilities, when it is closed. (*Id.* at 27-28.) Lastly, Amtrak contends that Metra fails to explain how the amounts it pays to BNSF for security services affect its share of costs and, even if it had, such amounts are irrelevant to the cost allocation in this matter. (*Id.* at 28.)

The Board will not adopt either of the parties' proposed factors. Amtrak's proposal does not adequately account for the substantial benefit that Amtrak, as the owner of CUS, derives from the security of the station. Since police at CUS protect both people and property, the number of officers required at CUS depends upon the nature of the property, as well as train and passenger counts. Amtrak's proposed factor, based solely on trains and passengers, does not consider that CUS contains a greater proportion of Amtrak exclusive use areas requiring police protection as compared to Metra exclusive use areas.

However, Metra's proposal is also deficient, as it relies on incomplete data. Amtrak asserts that its police do not regularly associate incidents or calls for service with Amtrak, Metra, or another entity. (Amtrak Opening 36; Amtrak Reply 22-23, June 24, 2020.) Metra appears to acknowledge the limitations of the data by noting that approximately 90% of the recorded incidents and calls for service were attributed to neither Amtrak nor Metra and stating that "[u]ndoubtedly, some number of additional [i]ncidents and [calls for service] could have been associated with Metra passengers." (Metra Reply 13, June 24, 2020.) Nonetheless, Metra argues that its proposed factor should be adopted because "Amtrak alone should bear responsibility for its inability or unwillingness to generate and retain more complete data." (*Id.*) However, as discussed above, neither party bears the sole burden of proof in this matter and, regardless, Amtrak is not required to maintain and collect incident data with the level of detail or in the exact format suggested by Metra.

Metra raises four other points (grant money, police deployed on trains, overnight policing, and separate security services) that it asks the Board to consider in allocating costs, (*see* Metra Opening 32-33), but Metra does not explain how it would propose to translate these considerations into specific cost reductions. Moreover, the Board is unconvinced that these factors support Metra's proposed cost allocation. First, the record does not contain any evidence that the grant Amtrak receives from the federal government may be used towards the policing costs that Amtrak proposes to allocate to Metra.<sup>37</sup> Second, Metra offers the Board no meaningful way to consider Amtrak's purported intention to deploy police officers on trains because Metra acknowledges that "how much the shift will affect officers stationed at CUS is unknown." (Metra Opening 33.) Third, the Board finds that Metra benefits from overnight policing, which protects Metra's designated areas from theft and property damage, ensures the safety of Metra employees present after hours, and improves the security of the station as whole for all

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<sup>37</sup> Metra suggests that Amtrak may use the grant to offset training costs, (Metra Opening, V.S. Robert Byrd 24), but Amtrak asserts that it did not include training programs in its calculation of total policing costs (Amtrak Opening 35).



passengers and employees. Fourth, Metra references a separate security contract, in which it retains off-duty police officers to ride Metra trains and patrol Metra platforms, but it does not explain how the presence of these officers should affect the allocation of policing costs.

Instead of adopting either of the parties' proposed factors in full, the Board will allocate police costs based upon the same square footage equation that the parties agreed to apply to SOM expenses. This calculation more fully encompasses the relative benefit the parties receive from policing because it incorporates the parties' proportionate share of trains and passengers (in the form of the equation's agreed-upon usage factor), as well as the parties' relative footprint at CUS. Specifically, use of the percentages generated by the square footage equation ensures that Metra does not pay for expenses associated with policing the Amtrak exclusive use areas of CUS from which Metra derives no benefit.

The Board will also apply this calculation to policing costs associated with the K9 unit. Contrary to Metra's argument, Metra does not derive only 1.1% of the benefits from drug and bomb prevention efforts at CUS. Metra benefits from using a facility in which officers are actively working to deter drug activity and terrorist attacks, as such efforts ensure the safety of its passengers and employees and the continuity of its operations. Accordingly, Metra will be responsible for 35% of policing costs (\$1,512,194 in FY2018 dollars). Table 5 summarizes the parties' positions and the Board's conclusion on policing cost allocation.

TABLE 5

<b>Policing (FY2018)</b>			
	<b>Amtrak</b>	<b>Metra</b>	<b>STB</b>
Total Allocable Policing Costs	\$4,623,836	\$3,981,381	\$4,320,554
Cost Allocation Percentage	83%	4.28%	35%
Total Allocated Policing Costs	\$3,837,784	\$170,403	\$1,512,194

e. Capital Expenses

Amtrak proposes a two-tiered capital program for determination of Metra's share of future capital costs, which is a departure from the parties' present arrangement whereby the parties determine capital project funding on a case-by-case basis. (Amtrak Opening 38, 40.) Amtrak argues that the status quo is untenable because Metra currently contributes less than 20% to capital projects that jointly benefit Amtrak and Metra, which forces Amtrak to cross-subsidize Metra's operations. (Id. at 38.)

For "Tier 1" investment, which Amtrak would solely control, Amtrak proposes that Metra contribute \$1,700,000 annually (with Amtrak contributing an additional \$800,000). (Id. at 39.) For "Tier 2" investment, Amtrak proposes that the parties "identify appropriate capital projects through a joint effort, and together . . . spend up to \$10 million on those projects

annually” for each of the first five years of the agreement. (*Id.*) Amtrak submits that responsibility for Tier 2 investment should be based on relative train movements at the concourse that corresponds to the location of the project. (*Id.* at 40.) Because Metra operates 90.94% of trains at the North Concourse and 63.69% of trains at the South Concourse, Amtrak asserts that Metra should be responsible for 90.94% of capital expenditures for projects on the North Concourse and 63.69% of capital expenditures for projects on the South Concourse. (*Id.*) In addition, Amtrak alleges that, pursuant to § 24903(c)(2), Metra should be responsible for reimbursing Amtrak for costs incurred for capital projects that solely benefit Metra. (*Id.*)

Conversely, Metra contends that Board intervention is unnecessary because Metra has not refused to contribute to any specific capital projects. (Metra Opening 50-51.) Metra asserts that under the parties’ present arrangement, Metra has contributed an average of over \$4 million annually, but Amtrak’s proposed new program would force Metra to contribute to “conceptual, unspecified, and speculative” capital expenditures. (*Id.*) At most, Metra proposes that the Board prescribe a two-step process for contribution to future capital expenses, whereby the parties would commit to good faith negotiation, and, in the event of impasse, initiate dispute resolution through arbitration with any resulting award conforming to § 24903. (*Id.* at 52-54.)

Amtrak responds that Metra has not readily contributed to capital projects in the past. (Amtrak Reply 43, June 24, 2020.) Amtrak explains that pursuant to the parties’ current arrangement, Amtrak and Metra representatives meet each year to discuss necessary upcoming projects, after which Metra tells Amtrak how much it will contribute; however, Metra’s decision does not reflect the amount of necessary capital investment at CUS. (*Id.* at 43-44.) Amtrak contends that Metra has not rejected requests for funding because the process begins with Metra determining how much it will pay. (*Id.* at 44.) Amtrak also disputes Metra’s \$4 million figure for average yearly capital contributions, asserting that Metra only contributed an average of \$1.7 million per year for FY2016 to FY2018, and \$800,000 for FY2019.<sup>38</sup> (*Id.* at 45.)

In its reply, Metra argues that Amtrak’s 20% contribution figure is misleading because the calculation includes projects for which Amtrak did not seek funding from Metra, as well as projects that do not provide a benefit to Metra. (Metra Reply 41-42, June 24, 2020.) Moreover, Metra asserts that Amtrak fails to identify any specific problems at CUS that it needs funding to resolve or the specific projects for which it proposes to spend the investments. (*Id.* at 38-39.) Metra cautions that if the Board prescribes fixed annual capital contributions that do not correspond to specific projects, the Board will not be able to ensure that Metra’s contributions are directed towards projects that benefit Metra. (*Id.* at 41-42.)

The Board will not adopt Amtrak’s proposed two-tiered capital program, as the proposal is flawed and would not prevent cross-subsidization. Amtrak requests that the Board prescribe

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<sup>38</sup> Amtrak also asserts that Metra’s \$4 million figure does not find support in Exhibit E, the exhibit cited to generally by Metra to support the number, (see Metra Errata Sheet, June 22, 2020), and furthermore, that Metra does not explain who calculated the number or where any support for that number can be found. (Amtrak Reply 45, June 24, 2020.)

Metra's participation in a Tier 1 fund that Amtrak would solely control.<sup>39</sup> However, Amtrak does not justify why Metra, as the majority contributor to the fund, should not equally participate in choosing capital projects. Moreover, in practice, Metra's exclusion may only lead to more disputes over the projects that Amtrak chooses in its sole discretion to fund.

For Tier 2 investment, Amtrak proposes that the parties establish a working group to identify appropriate capital projects, but such a working group appears to already exist. (See Metra Reply, V.S. Richard Oppenheim 1, June 24, 2020 (describing scheduled monthly meetings between Amtrak and Metra with a standing discussion of "Station Capital Financial Allocation," among other topics).) The new aspect of Amtrak's Tier 2 proposal is that Metra would be required to pay a set proportion of all capital projects funded with Tier 2 investments. However, Amtrak does not adequately justify its proposed train movements factor, which would allocate most of the expenses associated with all future capital improvement projects to Metra without accounting for the relative benefit provided by individual projects. Due to the diverse nature of capital improvement projects, the Board cannot practically assign a single cost allocation factor to all future projects that will not result in cross-subsidization, particularly when Amtrak did not provide any details about the specific projects it proposes to undertake.

Furthermore, Amtrak has not provided adequate support for its argument that the parties' present practice violates § 24903(c)(2) because the record contains no support for Amtrak's contention that Metra does not sufficiently participate in capital project funding. Amtrak argues that a new capital program is necessary because Metra currently contributes less than 20% of the costs to joint capital projects, but the record does not show that Amtrak requested funding from Metra for all 33 projects that Amtrak included in its calculation. (See Metra Reply, V.S. Richard Oppenheim 3, June 24, 2020.) Moreover, the record is unclear as to whether all projects would benefit Metra, as Metra's witness testifies that 11 projects consist of Great Hall improvements designed to market the area as an event space and four projects involve the rehabilitation of Amtrak's commercial space.<sup>40</sup> (*Id.*, V.S. Richard Oppenheim 4, June 24, 2020.) The parties also dispute how much Metra is currently contributing to capital projects at CUS, but the Board cannot verify the calculations for either party's number or determine which specific projects were included.<sup>41</sup>

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<sup>39</sup> Amtrak states that Metra would have "input" for Tier 1 projects, but "not the ability to unilaterally reject projects or add new projects." (Amtrak Opening 39.)

<sup>40</sup> Metra offers as an example that the included "Women's Lounge" is not a women's restroom, but rather an area that Amtrak markets as an event space. (Metra Reply 41 n.31, June 24, 2020.)

<sup>41</sup> Metra's assertion that it has contributed an average of over \$4 million annually to capital projects is unsupported by Metra's citation to Exhibit E. (See Metra Errata 1, June 22, 2020.) Amtrak cites to the verified statements of Christine Suchy in support of its numbers but does not include any underlying calculations. (See Amtrak Opening, V.S. Christine Suchy ¶ 29; Amtrak Reply 45, V.S. Christine Suchy ¶ 27, June 24, 2020.)

Furthermore, Amtrak does not offer any examples of specific negotiation failures or capital projects that Metra refused to help fund.<sup>42</sup> (See Metra Reply, Ex. B at 17, June 24, 2020.) Amtrak contends that “[t]he reason ‘Metra has not rejected’ any requests for funding is because the process runs backwards: it starts with Metra saying how much it will pay, regardless of the amount of capital investment actually needed.” (Amtrak Reply 44, June 24, 2020.) This statement, however, does not explain what, if anything, prevents Amtrak from requesting additional funding from Metra when necessary for specific joint benefit capital projects.

Contrary to Amtrak’s assertions, the record demonstrates consistent participation from Metra in capital project funding. The parties have agreed to capital project funding in 38 instances, most recently in April 2019. (See Metra Reply, V.S. Richard Oppenheim, Ex. 6, June 24, 2020.) The record also shows that the parties pursue third-party funding opportunities cooperatively, as demonstrated by a February 2019 letter agreement for a joint grant application to the Federal Railroad Administration, which details Metra’s commitment to pay for over half of the remaining non-Federal match amount. (Metra Reply, V.S. Richard Oppenheim, Ex. 7, June 24, 2020.) Amtrak has not provided the Board with sufficient justification to disrupt the parties’ current collaborative and case-by-case approach.

With respect to Metra’s alternative proposal, the Board will not mandate arbitration but emphasizes that the parties have access to mediation, arbitration, and assistance through the Board’s Rail Customer and Public Assistance program,<sup>43</sup> to help resolve disputes regarding specific capital improvement projects.

Lastly, Amtrak argues that Metra should bear responsibility for its sole-benefit capital projects, which Metra does not dispute. Furthermore, as with the joint benefit projects discussed above, Amtrak provides no examples of sole-benefit projects that Metra has refused to fund. Since § 24903(c)(2) requires that the Board assign “the costs Amtrak incurs only for the benefit of the carrier,” the Board finds that Metra must pay costs associated with those capital projects incurred solely for its benefit as determined pursuant to the parties’ current collaborative and case-by-case approach.

f. Ground Power

The parties also dispute whether Amtrak’s supply of electrical ground power constitutes an allocable cost to Metra. Amtrak proposes that Metra pay a flat fee of \$10,500 each month (subject to the annual inflation index) to use the 480-volt standby electric power at CUS, which benefits Metra by minimizing locomotive exhaust and facilitating fuel cost savings. (Amtrak Opening 52.) Amtrak asserts that electrical ground power is a transportation cost because its use limits the amount of diesel exhaust in the train station. (Id.)

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<sup>42</sup> Amtrak references the installation of LED lights as an example of a common benefit project that it funded alone; however, there is no indication that Amtrak asked Metra to contribute to the costs of that project. (Amtrak Reply 44, June 24, 2020.)

<sup>43</sup> The Board’s Rail Customer and Public Assistance program can be reached by telephone at 202-245-0238 or email at [rcpa@stb.gov](mailto:rcpa@stb.gov).

Metra argues that electrical ground power is not an allocable transportation cost. (Metra Opening 46-48.) Metra asserts that electrical ground power is only necessary to remediate locomotive exhaust because Amtrak's predecessor in interest previously developed its air rights, which resulted in covered platforms that block the escape of exhaust emissions. (*Id.* at 46.) Accordingly, Metra alleges that any payments for electrical ground power would constitute an impermissible cross-subsidy of Amtrak's real estate business. (*Id.* at 46-47.) Furthermore, Metra argues that by charging Metra for ground power, Amtrak attempts to recover for exhaust remediation twice because Amtrak recovers the costs of locomotive exhaust remediation from air rights users, as evidenced by (1) a 1927 lease between Amtrak's predecessor in interest and the Chicago Daily News Printing Company mandating that the latter include a ventilation system for any constructed structures; (2) two 2001 operating agreements that require the air rights owners to maintain smoke exhaust plenums; and (3) notes from a December 2016 meeting between Amtrak and Metra in which Amtrak expressed an intention to take action regarding certain structural issues at CUS. (See Metra Opening 47-48, Exs. B, C, D; Metra Reply 31, Ex. A, June 24, 2020; Metra Reply, V.S. Richard Oppenheim, Ex. 5, June 24, 2020.)

In response, Amtrak acknowledges that CUS has covered platforms but argues that because those tenants have been at CUS as long as Metra has and Metra chooses to use CUS, it "must take the station as Metra finds it—not invent a hypothetical, preferred station without overbuild, and claim to owe only the costs Amtrak would incur operating *that* station." (Amtrak Reply 46, June 24, 2020.) Amtrak also contends that Metra benefits from ground power because it limits Metra's environmental impact, reduces employees' and passengers' exposure to diesel exhaust, and allows Metra to avoid the fuel costs it would otherwise incur in idling locomotives. (*Id.* at 47.) Lastly, Amtrak argues that its sources of funding are irrelevant to the benefit Metra receives from ground power. (*Id.* at 47-48.)

The Board finds that electrical ground power constitutes an allocable cost to Metra. Electrical ground power qualifies as a transportation cost because its use mitigates the diesel exhaust that would otherwise result from Metra's idling locomotives. The Board also finds that electrical ground power benefits Metra by saving fuel costs and limiting diesel emissions that Metra would need to remediate to avoid adverse effects on its employees and passengers. Furthermore, as Amtrak observes, Metra was aware that CUS had covered platforms when it began operating at the station. Metra may prefer a different power source, but Metra cannot choose an alternative that CUS does not have the infrastructure to support. Metra suggests that the use of ground power is unnecessary because Amtrak recovers the costs of locomotive exhaust remediation from air rights users, but Metra's evidence simply shows some third-party obligation to maintain certain ventilation systems, and neither proves that Amtrak recovers the costs of locomotive exhaust remediation from air rights users nor suggests that CUS has the infrastructure to support Metra's theoretical unrestricted release of diesel exhaust into an enclosed train station. The Board finds that Amtrak reasonably chooses to use electrical ground power to reduce diesel exhaust emissions at CUS. Metra's presence at CUS necessarily requires the use of additional electrical ground power, and Amtrak may pass that additional cost on to Metra.

Amtrak asserts that the \$10,500 proposed monthly amount represents the actual cost of the ground power Metra uses for idling locomotives at CUS based on readings for Metra's

dedicated tracks. (Amtrak Opening, V.S. Nancy Miller ¶ 77; Amtrak Reply 46, June 24, 2020.) Although Metra disputes that electrical ground power is an allocable cost, it does not dispute Amtrak's proposed amount. Accordingly, the Board finds that Metra will be responsible for reimbursing Amtrak for electrical ground power in the amount of \$10,500 each month in FY2020 dollars (subject to the Core PCE Index as discussed above).<sup>44</sup>

g. Conclusion

- G&A Expenses: The G&A addition will be 3.97% for FY2016 and 3.27% for FY2017.
- Inflation Index: The AAR Index will apply to maintenance of way and dispatching costs, and the Core PCE Index will apply to SOM, policing, and ground power costs.
- SOM Costs: Metra will be responsible for 35% of SOM costs (\$4,285,549 for FY2018).
- Policing Costs: Metra will be responsible for 35% of policing costs (\$1,512,194 for FY2018).
- Capital Expenses: The Board will not adopt Amtrak's proposed two-tiered capital program for common benefit capital projects. Metra will be responsible for its sole benefit capital projects.
- Ground Power: Metra will be responsible for \$10,500 per month for FY2020 in electrical ground power costs.

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<sup>44</sup> Although Amtrak does not specify a fiscal year for ground power costs, Amtrak states that the readings that formed the basis for the \$10,500 proposed amount were conducted between August 7, 2018 and August 6, 2019. (Amtrak Opening, V.S. Nancy Miller ¶ 77.) Since Amtrak and Metra used FY2016 and FY2017 data to estimate FY2018 costs for SOM and policing, the Board finds it reasonable to believe that Amtrak used readings from FY2018 and FY2019 to estimate FY2020 ground power costs. Furthermore, since Metra does not dispute the \$10,500 amount, its expression in FY2020 dollars is consistent with the other stipulated cost categories, dispatching and maintenance of way, that the parties expressed in FY2020 dollars. (See Joint Stipulation ¶ 1-2, May 18, 2020.)

Table 6 summarizes total costs.

TABLE 6

<b>Costs Summary<sup>45</sup></b>			
	<b>Amtrak</b>	<b>Metra</b>	<b>STB</b>
Dispatching (stipulated)	\$1,800,000	\$1,800,000	\$1,800,000
Maintenance of Way (stipulated)	\$2,950,000	\$2,950,000	\$2,950,000
Ground Power	\$126,000 <sup>46</sup>	-	\$126,000
SOM	\$6,080,623	\$1,820,163	\$4,285,549
Policing	\$3,837,784	\$170,403	\$1,512,194
<b>Total</b>	<b>\$14,794,407</b>	<b>\$6,740,566</b>	<b>\$10,673,743</b>

It is ordered:

1. Metra is directed to compensate Amtrak for the use of CUS as set forth in this decision.
2. This decision is effective on its service date.

By the Board, Board Members Oberman, Begeman, Fuchs, Primus, and Schultz. Board Member Oberman did not participate.

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<sup>45</sup> Ground power costs are expressed in FY2020 dollars for the reasons discussed above. Dispatching and maintenance of way costs are also expressed in FY2020 dollars because the parties stipulated to these specific amounts in FY2020 dollars. (See Joint Stipulation ¶ 1-2, May 18, 2020.) The disputed cost categories of SOM and policing are expressed in FY2018 dollars, as discussed above.

<sup>46</sup> This figure represents the \$10,500 monthly amount multiplied by 12 months.