
BEFORE THE
SURFACE TRANSPORTATION BOARD
DOCKET NO. NOR 42175

COMPLAINT AND PETITION OF THE NATIONAL RAILROAD PASSENGER CORP.
UNDER 49 U.S.C. § 24308(f)–FOR SUBSTANDARD PERFORMANCE OF
AMTRAK’S SUNSET LIMITED TRAINS 1 AND 2

**AMTRAK’S REPLY TO HOST RAILROAD RESPONSES TO
AMTRAK’S COMPLAINT AND PETITION AND PROPOSED PROCEDURES**

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INTRODUCTION

The National Railroad Passenger Corporation (“Amtrak”) hereby replies to the filings submitted on January 27, 2023 by Union Pacific Railroad Corporation (“UP”), Illinois Central Railroad Company (“CN”), and BNSF Railway Company (“BNSF”) (collectively, the “Host Railroads”) regarding proposed procedures for the Surface Transportation Board (“STB” or “Board”) investigation into Amtrak’s Complaint and Petition, which was brought under Section 213 of the Passenger Rail Investment and Improvement Act of 2008 (“PRIIA”), Pub. L. 110-432, 122 Stat. 4848 (2008) (codified at 49 U.S.C. § 24308(f)), and concerns the deficient customer on-time performance of Amtrak’s Sunset Limited Service.¹

First and foremost, Amtrak recommends that the Board officially open its investigation and do so immediately. It is undisputed that the Board has a mandatory obligation to initiate an investigation under Section 213. No party has asserted that Amtrak’s Complaint is deficient or that it should be dismissed. The investigation must proceed.

The Host Railroads do not dispute the Board’s obligation to investigate, but they propose alternative procedures for the investigation. Those procedures are contrary to statutory requirements and will result in further delay, which is exactly what Congress sought to avoid in enacting Section 213. The arguments made by the Host Railroads require Amtrak to make two important points at this stage about the plain text of Section 213.² First, because the statute calls

¹ On February 1, 2023, Norfolk Southern Railway Company (“NS”) also filed a letter in this proceeding, requesting in a footnote that it be granted intervenor status despite the fact that it is not a host railroad for the Sunset Limited. *See* NS Resp. at 1, 3, n.1. While Amtrak does not object to NS being added to the service list for purposes of receiving copies of filings and Board decisions, it is not appropriate for NS to be granted intervenor status as if it were a host of the Sunset Limited, particularly before the Board has commenced its investigation.

² The Host Railroads have made additional arguments that Amtrak will address based upon the Board’s direction in the course of its investigation. These include, as examples, CN’s factual contentions regarding its status as a Sunset Limited host and UP’s contentions regarding the Board’s authority under 49 U.S.C. § 24308(c)-(f), both of which Amtrak disputes. CN Resp. at 7-11; UP Resp. at 8 n.25.

for the *Board* to investigate, this proceeding must be Board-led and should not become an adversarial, party-driven litigation. Second, and for the same reason, the investigation should not be delayed for mediation.

I. Use of Party-Directed Adversarial Discovery and Litigation Procedures Is Contrary to PRIIA’s Instructions.

In PRIIA, Congress clearly placed responsibility for conducting Section 213 investigations on the Board. The Host Railroads ask the Board to abandon that responsibility and to direct the parties to engage in adversarial, party-directed discovery and litigation. That request is inconsistent with the statutory text, inconsistent with analogous agency investigative practices, and inefficient. Furthermore, the Host Railroads are wrong in arguing that their request is dictated by prior precedent. Notwithstanding the earlier Board proceeding that the Host Railroads cite, changed circumstances support the statutorily specified approach that Amtrak has proposed here. The Board now has clear guidance from the Federal Railroad Administration (“FRA”) about the criteria to consider when investigating substandard on-time performance, and the Board also now has its own investigative staff to conduct Section 213 proceedings. Amtrak briefly elaborates on each point below.

First, an adversarial, party-directed litigation process is contrary to the plain text of the statute. PRIIA’s instructions are clear: “[U]pon the filing of a complaint by Amtrak, . . . *the Board shall initiate [] an investigation*, to determine whether and to what extent delays or failure to achieve minimum standards are due to causes that could reasonably be addressed by a rail carrier over whose tracks the intercity passenger train operates or reasonably addressed by Amtrak or other intercity passenger rail operators.”³ PRIIA further directs that in “carrying out such an

³ 49 U.S.C. § 24308(f)(1) (emphasis added).

investigation, *the Board shall obtain information* from all parties involved and identify reasonable measures and make recommendations to improve the service, quality, and on-time performance of the train.”⁴ And PRIIA provides the Board with express “authority to review the accuracy of the train performance data and the extent to which scheduling and congestion contribute to delays.”⁵ Congress thus imposed a mandatory obligation on the Board to initiate an investigation, obtain information from the parties, provide recommendations, and, if appropriate, award damages and prescribe other relief.

Second, the party-directed proceeding that the Host Railroads contemplate does not comport with broader agency investigative practices. Agency-led investigations are commonplace. Amtrak is not aware of any other agency that allows for party-directed adversarial litigation as a means to discharge investigative responsibility upon the filing of a complaint. Instead, to name just a few examples, agencies like the Federal Communications Commission (“FCC”), the Federal Election Commission (“FEC”), and the Federal Energy Regulatory Commission (“FERC”) all discharge their investigative obligations through agency-led efforts. *See, e.g.*, 47 U.S.C. § 618(a) (FCC); 52 U.S.C. § 30109(a)(2) (FEC); 16 U.S.C. § 825f(a) (FERC). There is no reason to believe that when Congress in PRIIA directed the Board to investigate, Congress expected the Board to proceed any differently than any other agency with investigative authority.

Third, an adversarial litigation process would introduce inefficiencies, delays, and excess costs. The nature of a Section 213 proceeding, which contemplates an investigation into

⁴ *Id.* (emphasis added).

⁵ *Id.*

substandard customer on-time performance based on two consecutive calendar quarters,⁶ necessarily anticipates that both investigation and remedy will occur quickly and efficiently.⁷ Delay is in no party's interest, and it is certainly not in the interest of Sunset Limited passengers. Amtrak's proposed procedures preserve the Board's authority over Section 213 investigations and effectuate PRIIA's purpose: To permit expedited evaluation and remediation of substandard on-time performance. The procedures involve Board-led fact-finding, require the parties to promptly provide information on factual issues related to causes of delay and preference, and would narrow the remedial issues eventually considered as a result of the investigation. Contrary procedures proposed by the Host Railroads would instead delay the production of materials through inevitable party-based litigation and discovery disputes, preclude the Board from focusing the parties on key issues, and require the Board to evaluate an unnecessarily wide range of remedial concerns unconnected to the core causes of delay on the Sunset Limited.

Amtrak recognizes that the Board once previously authorized party-directed adversarial litigation in a Section 213 proceeding.⁸ However, that approach is no longer appropriate. In the intervening years, FRA has promulgated metrics to guide the Board in investigating the causes of substandard on-time performance.⁹ That rulemaking process provided the Host Railroads with a full and fair opportunity to present their positions on the appropriate evidence for a Section 213 proceeding.¹⁰ The Host Railroads embraced that opportunity, but their concerns about the

⁶ 49 U.S.C. § 24308(f)(1).

⁷ See Amtrak Proposed Procedures at 5-7.

⁸ *National Railroad Passenger Corporation—Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Railway Company*, Docket No. NOR 42134 (STB served Jan. 3, 2012) (“*Canadian National*”).

⁹ Amtrak Proposed Procedures at 3-4.

¹⁰ *Metrics and Minimum Standards for Intercity Passenger Rail Service Final Rule*, 85 Fed. Reg. 72971, 72987 (Nov. 16, 2020) (“Final Rule”) (codified at 49 C.F.R. § 273).

sufficiency of on-time performance metrics were rejected. As FRA made clear: The “STB is responsible for investigating substandard train performance under PRIIA section 213,” and the “final rule provide[s] sufficient information to assist in such an STB investigation.”¹¹ Additionally, unlike at the time of the prior proceeding, the Board now has investigative personnel dedicated to enforcing Section 213. The Office of Passenger Rail was established in October 2022 to “provide[] the Board with expertise related to passenger rail that includes legal and policy guidance, engineering, data analysis, and rail operations,”¹² so that the Board would be prepared to “meet its responsibility to investigate and enforce Amtrak on-time performance,”¹³ and, therefore, shoulder “the burden of developing an administrative record addressing a wide range of complex, data-intensive scheduling and operating issues.”¹⁴ The Board should not cede that authority and duty to the participants in this action.

For each of these reasons, the Board should reject efforts to substitute party-directed adversarial litigation for the exercise of its investigative authority under Section 213, and should proceed to open its investigation.¹⁵

¹¹ *Id.* Section 213 certainly contemplates that an investigation will involve the collection and review of additional information. But consistent with analogous agency investigative authority, the statute makes clear that the *Board* must obtain that information and direct the process.

¹² Office of Passenger Rail, Surface Transp. Bd., <https://www.stb.gov/about-stb/offices/office-of-passenger-rail/> (last accessed Feb. 3, 2023).

¹³ Press Release, *STB Establishes the Office of Passenger Rail* (Oct. 13, 2022) (statement of STB Chair Martin Oberman), <https://www.stb.gov/news-communications/latest-news/> (last accessed Feb. 3, 2023).

¹⁴ UP Resp. at 6.

¹⁵ Doing so does not present any procedural concerns. Agency-led investigations like the one Amtrak advocates are fully consistent with due process and the Board has discretion to proceed without first conducting a rulemaking on procedural issues, as CN itself recognized in the previous Section 213 proceeding that underlies Host Railroad arguments here. *Cf.* CN Answer at 69-70 *Canadian National* (asking Board to implement procedures without conducting rulemaking).

II. Board-Ordered Mediation Is Not Appropriate At This Time.

As Amtrak has argued, the Board should immediately open its investigation. In its response, UP asks that the Board delay its investigation, and instead order Amtrak, UP, and all other Sunset Limited host railroads to participate in Board-sponsored mediation. UP's primary interest is in addressing scheduling issues, but it also contemplates conducting a sprawling mediation that would address all of the issues raised in Amtrak's Complaint. Amtrak remains amenable to any and all discussions with UP that would improve the performance of the Sunset Limited. However, the Board should reject this request to divert the parties to mediation before the Board has investigated and established the factual record.

First, the scheduling issues that UP is focused on mediating are a red herring. As the Board will confirm during its investigation, the Sunset Limited schedule is full of recovery time and excess dwell time, which is built into the schedule to ensure that UP and other host railroads can run Sunset Limited trains to schedule. *See* Complaint and Petition ("Compl.") ¶ 62 and App. A (Sunset Limited Schedule Skeletons). That recovery and excess dwell time are distributed effectively across intermediate station stops and provide more than enough time for Sunset Limited trains to operate on each segment of the route. Put differently, the Sunset Limited schedule is already aligned with the customer on-time performance metric and standard.¹⁶ Any challenges in

¹⁶ UP's assertion that Amtrak's host runtime data demonstrates misalignment is incorrect for several reasons, including reasons addressed in the Complaint and Petition. For example, host runtime data only provides information about endpoint performance and therefore obscures the role that recovery time, excess dwell time, and miscellaneous time play in helping UP recover trains immediately prior to handoffs. Compl. ¶¶ 62, 101-03. In this respect, the host runtime data obscures the customer experience, erasing delays at intermediate stops and creating the illusion of performance to schedule based on a fixed point in time. *See id.* Even if host runtime data could bear the weight that UP attaches to it, UP conspicuously cherry-picks data, relying on metrics from only the first quarter of 2022 and ignoring the precipitous decline in its performance over the subsequent three quarters. *See id.* at tbls. 2, 3.

meeting scheduled arrival times reflect operational issues that reasonably can be addressed by UP, and do not justify deferring the Board’s investigation.¹⁷

Second, the governing statute already provides the Board with express authority to investigate scheduling issues and does not contemplate Board-ordered mediation as a prerequisite. In this respect, Section 24308(f) could not be clearer. The Board may review “the extent to which scheduling . . . contribute[s] to delays.” 49 U.S.C. § 24308(f). But the *Board* performs that review “[a]s part of its investigation.” *Id.* UP’s request for Board-ordered mediation on the schedule is inconsistent with that statutory mandate.¹⁸ Rather than ordering the parties to mediate the schedule, the Board should conduct its own review of whether scheduling issues bear on delays that passengers experience on the Sunset Limited, and do so as part of its broader investigation into the causes of (i) delays and (ii) failure to achieve the minimum standard. If the parties determine after review of any interim or final findings that a mediation would be productive, they can inform the Board, so that the Board may determine whether mediation would facilitate or encumber its investigation.

Third, any discussion between the parties about purported scheduling issues will benefit from the Board’s investigation. After FRA issued the Final Rule, Amtrak and UP sought to negotiate to address their dispute about the Sunset Limited schedule. Although the parties were not able to resolve their differences, they have continued working collaboratively to identify

¹⁷ UP’s related assertion that the Board should discount the magnitude of the Sunset Limited’s dysfunction because “Amtrak’s complaint focuses on a period in which UP has experienced significant operational challenges,” UP Resp. at 3 n.1, ignores reality. As Amtrak described in its Complaint, the Sunset Limited Service has never come close to satisfying the minimum customer on-time performance metrics and standards. *See* Compl. ¶ 79 & n.87 (listing historical customer on-time performance of the Sunset Limited at 30% in 2020, 20% in 2019, 45% in 2018, and 55% in 2017).

¹⁸ Amtrak’s proposed procedures in no way preclude the Board from exercising its discretion to consider “the extent to which scheduling. . . contribute[s] to delays.” 49 U.S.C. § 24308(f)(1). UP’s suggestion to the contrary is a straw man. *See* UP Resp. at 5-6 (incorrectly asserting that Amtrak’s procedural proposal would restrict the Board’s role).

opportunities to improve Sunset Limited operations. For example, the parties recently agreed to relocate a fueling location from Tucson to Santa Teresa and made corresponding modifications to the schedule to facilitate that operational adjustment.¹⁹ But the parties’ fundamental dispute about whether the existing schedule is aligned with the customer on-time performance metric and standard remains. That dispute can be resolved through the requisite Board investigation.

Finally, proceeding with the requisite investigation and addressing purported concerns about the schedule is hardly controversial. In issuing the Final Rule, FRA emphasized that regulations concerning schedule certification were intended to “encourage[] the parties to agree on certified schedules while not explicitly requiring them.”²⁰ FRA’s refusal to require certification reflected a careful effort to balance host railroad interests and Amtrak interests in a manner consistent with Section 207.²¹ Perhaps because it contemplated precisely this scenario—one in which a host railroad disputes a schedule already aligned with customer on-time performance metric and standard—FRA ultimately determined that any delay in application of the customer on-time performance minimum standard should be temporary.²² That decision reflected sound policy. But as FRA recognized, it was also compelled by PRIIA, which does not require schedule certification, and expressly contemplates that STB investigations may include STB review of the extent to which schedules contribute to delay.²³

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¹⁹ In making this modification, the parties reserved all rights as to their respective positions on whether the Sunset Limited schedule is aligned with the customer on-time performance metric and standard.

²⁰ Final Rule at 72980.

²¹ *Id.*

²² *Id.*

²³ *Id.* (“Section 207 does not require schedule certification and, indeed, section 213 acknowledges that STB investigations may include STB review of the extent to which scheduling contributed to delay.”).

For the foregoing reasons, Amtrak respectfully requests that the Board immediately open its Section 213 investigation, implement procedures consistent with those Amtrak has proposed, and reject UP's request for Board-ordered mediation at this time.

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CERTIFICATE OF SERVICE

I, Jessica Ring Amunson, certify that I have this day served copies of this document by email on counsel for all parties of record on the service list for this proceeding.

February 3, 2023

/s/ Jessica Ring Amunson
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