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Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

May 11, 2023

RE: *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, NOR 42175*

Dear Ms. Brown:

I write on behalf of the Association of American Railroads’ (“AAR”) six Class I host freight railroads with regard to the above-captioned matter. In particular, in light of the Department of Transportation’s (“DOT”) April 13, 2023, letter in this proceeding, I write to reiterate AAR’s previously expressed concern that the process and procedure the Board uses in Section 213 proceedings must be efficient, well-understood, and fair.

DOT would have the Board prioritize “efficien[cy]” and a “time-limited investigation” over fairness and accuracy. It urges the Board to rely on FRA’s quarterly reports publishing Amtrak’s customer on-time performance (“OTP”) and train delay data, which it characterizes as “a valuable indicator in understanding the causes of delay and determining whether host railroads are providing preference to Amtrak trains.” But OTP data measures the performance of Amtrak’s trains against their schedules, even though not all passenger train schedules have been certified to align with the customer OTP metric.¹ This data provides little insight into the causes of delay, let alone whether such delays indicate a failure to give appropriate preference.

Amtrak’s train delay reports do not measure delays against Amtrak’s schedules, but rather delays against an idealized train trip (i.e., one with no delays at all). There is no distinction in the data between delays that affect a train’s OTP and those that do not. Amtrak’s

¹ As the Board noted in the metrics and standards rulemaking, “[r]ealistic schedules that are compatible with Customer OTP will be crucial to avoiding unnecessary litigation before the Board. ... Recognizing that accurate schedules are an essential element in considering OTP, the Board will be interested in comments filed by stakeholders on how to ensure realistic, properly aligned schedules will be implemented....” Comments of the STB, *Metrics and Minimum Standards for Intercity Passenger Rail Service*, Docket No. FRA-2019-0069 (June 1, 2020).

train delay reports assign responsibility for delays based on conductor observations, but conductors only record the observable, immediate cause of delay “out the window.” Conductors are not necessarily reporting, nor aware of, what actually caused the supposed interference. As a result, Amtrak’s delay categories for “host responsible delays” and “freight train interference” include delays that are unavoidable and beyond the host’s reasonable control. For these reasons, Amtrak’s delay data and reports are of limited value in understanding the actual causes of a particular Amtrak train delay or failure to meet customer OTP standards, and of little or no value in addressing the broader question of whether the host freight railroad has failed to honor Amtrak’s statutory right of preference.

The statute requires the Board to: (1) make its own determination regarding (a) the causes of passenger train delay, and (b) the extent to which such delay can reasonably be addressed by the hosts or Amtrak (including the extent to which scheduling contributes to delays); and (2) base its determinations on information provided by all parties involved.² Ignoring Amtrak scheduling issues and relying on Amtrak reporting to determine causation would violate those mandates. Importantly, Congress expressly authorized the Board to review both scheduling issues and the accuracy of the train performance data, putting beyond dispute the question of whether the Board should simply accept Amtrak’s data. (“As part of its investigation, the Board has authority to review the accuracy of the train performance data and the extent to which scheduling, and congestion contribute to delays.”)³

The Board must not short-circuit the full and fair inquiry Congress required. Development of a complete record, with the opportunity for the parties to provide and the Board to consider rebuttal evidence, is required. The Board’s existing procedures for Section 213 investigations afford that process, without requiring “a lengthy, protracted” proceeding.⁴ In fact, the Modified Procedures in 49 C.F.R. Part 1112 are designed for the expeditious handling of matters.⁵ They provide the Board extensive flexibility to establish the procedural schedule and handle the proceeding as it sees fit.⁶ Such existing Modified Procedures are the “efficient and focused process” for which the DOT advocates.

² See 49 U.S.C. § 24308(f)(1).

³ *Id.*

⁴ *National Railroad Passenger Corporation—Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Railway Company*, NOR 42134, at 3 (STB served Jan. 3, 2013) (“[T]he Board believes that this case should be adjudicated using the established procedures governing complaints and the encompassing discovery and motion practice guidelines set forth in Parts 1112 and 1114 of our rules. These procedures ... provide a complete and ascertainable structure for the parties in moving forward in this type of litigation.”).

⁵ See 49 C.F.R. § 1112.1 (explaining the procedures are utilized “when it appears that substantially all material issues of fact can be resolved through submission of written statements, and efficient disposition of the proceeding can be accomplished without oral testimony.”).

⁶ See 49 C.F.R. § 1112.2 (“A decision directing that modified procedure be used will set out the schedule. ... The filing of motions or other pleadings will not automatically stay or delay the established procedural schedule. Parties will adhere to this schedule unless the Board issues an order modifying the schedule.”).

AAR's host members remain committed to a safe and efficient railroad network that benefits shippers, passengers, and the American public. Thank you for your consideration of these important matters.

Respectfully,

A handwritten signature in blue ink, appearing to read 'JFM', with a stylized flourish at the end.

J. Frederick Miller Jr. (*admitted in MD*)
Counsel for the Association
of American Railroads

cc: Parties of Record

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of May 2023, I caused to be served **by electronic**

mail a copy of the foregoing on the following:

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