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BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. NOR 42175

ENTERED
Office of Proceedings
July 27, 2023
Part of
Public Record

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

**UNION PACIFIC RAILROAD COMPANY'S
MOTION FOR RECONSIDERATION**

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FEE RECEIVED
July 27, 2023
SURFACE TRANSPORTATION BOARD

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FILED July 27, 2023
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Union Pacific Railroad Company ("Union Pacific") seeks reconsideration of two parts of the Board's July 11, 2023 Order in the captioned proceeding: (a) the requirement that Union Pacific respond to the requests in Appendix A—Part IV, by August 25, 2023; and (b) the requirement that Union Pacific file its reply approximately 30 days after Amtrak files its opening statement. Union Pacific asks the Board to extend the deadline for its responses to Appendix A—Part IV until October 9, 2023, and to allow Union Pacific 60 days to file a reply to any opening statement filed by Amtrak.¹

As explained below, Union Pacific cannot feasibly search for or create, and then review and produce, the extensive material required to respond to Appendix A—Part IV by August 25. In addition, 30 days is too short a period to prepare Union Pacific's reply to an opening statement that Amtrak will have months to prepare. Union Pacific's motion

¹ Union Pacific is not seeking reconsideration of the Board's decision to structure this proceeding as a Board-led investigation, but it is not waiving any arguments that the Board's investigation structure violates the Due Process guarantee of the U.S. Constitution. Nor is Union Pacific waiving any arguments regarding constitutional issues that would arise were the Board to award Amtrak damages in this proceeding.

is supported by the verified statement of Grant Janke, Union Pacific’s Assistant Vice-President of Network and Capital Planning (“Janke VS”).²

I. Background

On December 8, 2022, Amtrak filed a “Complaint and Petition” invoking the Board’s authority under Section 213 of the Passenger Rail Investment and Improvement Act of 2008 (“PRIIA”) (codified at 49 U.S.C. § 24308(f)) to initiate an investigation into the customer on-time performance of Amtrak’s Sunset Limited trains and award Amtrak damages and other relief. Union Pacific and other railroads filed replies on January 27, 2023.

As part of the Order, the Board directed Union Pacific and other parties to respond to a list of interrogatories and document requirements, including detailed data requests. The Board acknowledged the challenges and complexities of its requests by appointing an “investigation liaison” and scheduling a technical conference with all involved parties. Order at 13.

The Order requires Union Pacific to respond to 30 detailed interrogatories and document requirements in 45 days. The 30 requests seek a wide range of detailed information about Union Pacific’s practices relating to scheduling, dispatching, and operations of freight and passenger trains.

Responding to the Board’s requests will require Union Pacific to search its files for and produce specified types of materials, including but not limited to operating

² Union Pacific asked the other parties whether they would support this motion. Amtrak opposes extending the time to reply to the Board’s requests to October 9 and believes the request for more time to file a reply statement is premature. BNSF does not oppose the motion. Union Pacific did not receive a response from CN, NOPB, or SCRRA before filing this motion.

procedures, employee training manuals, guidelines, instructions, and plans, relating to freight and passenger train scheduling, dispatching, and operations. Responding to the requests will also require Union Pacific to extract and produce data from the company's various systems, and to submit narrative responses, ranging from a description of the division of responsibilities among carriers on the Sunset Limited route to an explanation of Union Pacific's planning for freight crew expiration.

II. Argument

A. The Board should extend the deadline for Union Pacific's responses to Appendix A—Part IV until October 9, 2023.

The deadline for Union Pacific to comply with the Board's Appendix A—Part IV requests should be extended to October 9, 2023, because the technical and logistical demands of responding will require significantly more time than 45 days. Responding to the Board's requests for documents will require employees whose responsibilities involve day-to-day management and operations of freight and passenger services on Union Pacific's network to find time to search their files for the requested material. *See* Janke VS at 1. Responding to the Board's requests for data will require employees to take time from their other responsibilities to develop special programming to extract and analyze data from systems not designed to produce data in the manner specified by the Order. *See id.* at 2. Responding to the Board's requests for narrative responses will require a multistep, iterative process involving Union Pacific's legal team and Union Pacific employees with responsibilities for the many areas implicated by the requests—*e.g.*, train scheduling, dispatching, freight and passenger operations, and crew planning. Union Pacific's legal team will ultimately need to work with all the employees providing responsive material to ensure confidential information is appropriately designated and

protected. *See id.*; *see also* Order at 21. In sum, the process of responding to the Board's requests will take more than 45 days because of the volume of the requests, the broad scope of the requests, and the fact that Union Pacific's employees cannot reasonably devote the time needed to comply with the Order while simultaneously carrying out the railroad's business of serving customers. *See Janke VS* at 2.

Union Pacific's ability to complete its responses to the Board's requests under the current deadline is complicated by two additional factors. First, many of the same employees will necessarily be involved in responding to multiple requests. For example, many of the employees required to search for documents will be the same as those needed to help address the data requests or develop the narrative responses. *See id.* at 2-3. Second, some employees critical to the process have pre-existing business and personal commitments in July and August. *See id.* at 3.

Union Pacific is actively engaged in the process of responding to the Board's requests. Employees are collecting documents, developing narrative responses, and exploring methods for extracting and creating responsive data. *See id.* at 3. However, Union Pacific cannot feasibly search for or create, then review and produce, and finally appropriately classify and prepare, all the materials required to accurately respond to the Board's requests by August 25. *See id.*

Union Pacific does not make this extension request lightly. Union Pacific appreciates that the Board has devoted substantial time and resources to developing "data expertise" and "specific data requirements, questions, and instructions to guide development of the record." Order at 11. But Union Pacific asks the Board to appreciate that Union Pacific's systems were not designed to capture and produce information and

data conforming to the Board's specific data requirements, questions, and instructions, and that the employees whose efforts will be critical to producing responsive information and data also have critical responsibilities for managing and operating the railroad. Union Pacific respectfully submits that a manageable deadline for responding to the Board's requests would be October 9, 2023.

A three-month response period would not affect the overall timeline established for this proceeding. The three-month response period would end one full month before the Board's 120-day deadline for completion of party-led discovery. *See* Order at 13. In addition, a three-month response period would be proportionate to the response period established for a recent, similar proceeding. Just two months ago, the Board gave Union Pacific 30 days to respond to nine requests for information relating to the railroad's use of embargoes in *Oversight Pertaining to Union Pacific Railroad Company's Embargoes*, EP 772 (STB served May 15, 2023). Union Pacific undertook extraordinary efforts to respond within the 30-day deadline. Here, the Board not only seeks responses to three times the number of requests as in Ex Parte No. 772, but the requests seek information about a far wider range of functional areas than those in Ex Parte No. 772. Moreover, unlike the requests in Ex Parte No. 772, many of the requests in this proceeding require Union Pacific to extract operating data from internal systems and analyze the data to produce it in a specified format or to respond to specific questions. Although responding to the Board's requests in this proceeding will require much more than three times the effort required to respond to the Board's requests in Ex Parte No. 772, Union Pacific is merely seeking an increase in the time to respond that is proportionate to the increased number of requests issued by the Board.

B. The Board should extend the deadline for Union Pacific to reply to any opening statement by Amtrak to 60 days.

The Order contemplates giving Amtrak approximately 45 days after the end of discovery to submit an opening statement and gives Union Pacific approximately 30 days to submit a reply. *See* Order at 13. In other words, Amtrak will have the entire period from the date the Board issued the Order, until the date its opening statement is due, to prepare its opening statement, including supporting verified statements from its fact and expert witnesses. By contrast, Union Pacific will have only 30 days to reply. The proposed schedule gives Amtrak an exceptionally unfair advantage. Union Pacific respectfully requests the Board reconsider the schedule and modify it to give Union Pacific 60 days to reply to Amtrak's opening statement.³

The novelty of the issues and substantial volume of data involved in this proceeding warrant granting Union Pacific more than 30 days to file a reply. This case centers on allegations that Union Pacific violated Amtrak's statutory "preference over freight transportation." 49 U.S.C. § 24308(c). The Order requires both Amtrak and Union Pacific to produce vast quantities of data regarding train delays and freight and passenger operations to address that issue. However, Board precedent does not define what constitutes a preference violation, nor does it identify the evidence the Board believes would establish such a violation. Further, the Order is silent as to how the Board plans to use the requested data to determine whether a preference violation has occurred. Amtrak's

³ While Amtrak believes this request is premature, Union Pacific cannot reasonably wait until it receives Amtrak's opening statement, then use the first part of its 30-day reply period to request an extension and await a decision.

Complaint similarly fails to set forth with specificity the acts or evidence it believes constitute a preference violation.

Under the current schedule, Amtrak can spend the many months between the date of the Order and the date its opening evidence is due reviewing the extensive data in its possession to identify what it considers evidence of a violation and to develop its submission to the Board. By contrast, Union Pacific cannot feasibly review every delay to a Sunset Limited train to prove the negative—*i.e.*, to show why each delay does not constitute a violation—especially without knowing what the Board or Amtrak may consider to be a violation. Realistically, Union Pacific will have just 30 days to review Amtrak’s analysis and prepare a reply. The disparity in time to prepare evidence is inequitable, and it is inconsistent with the Board’s asserted interest in “further develop[ment of] the record through the submission of evidence and the presentation of arguments.” Order at 11. If the Board does plan to use the parties’ evidentiary submissions in its decision-making process, fundamental fairness requires that it adopt a schedule giving Union Pacific more than 30 days to prepare its reply.

Union Pacific submits 60 days is the minimum amount of time the schedule should provide for it to prepare its reply submission. A 60-day period is consistent with the time provided to railroads to file reply comments in other complex, data-intensive cases, such as stand-alone cost and Simplified-SAC cases.⁴ The Board has also adopted schedules providing 60 days for railroads to prepare reply evidence in non-rate cases involving uncommon legal issues and significant factual discovery. For example, in a case

⁴ See 49 C.F.R. § 1111.9(a); see also *id.* § 1111.10(a)(1)(i).

challenging a tariff addressing railcar contamination, the Board adopted a schedule providing Union Pacific 61 days to submit reply evidence.⁵ The Board's past practice confirms 60 days is a reasonable minimum period of time for parties to prepare reply submissions in complex proceedings.

III. Conclusion

For the reasons discussed above, the Board should grant this Motion to (a) extend the deadline for Union Pacific's responses to Appendix A—Part IV, until October 9, 2023, and (b) allow Union Pacific 60 days to file a reply to any opening statement filed by Amtrak.

Respectfully submitted,

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⁵ See *N. Am. Freight Car Ass'n v. Union Pac. R.R.*, NOR 42119 (STB served Sept. 26, 2011); see also *BNSF Ry—Terminal Trackage Rights—Kansas City S. Ry. & Union Pac. R.R.*, FD 32760 (Sub-No. 46) (STB served Dec. 1, 2014) (allowing 61 days); see also *North America Freight Car Ass'n v. Union Pac. R.R.*, NOR 42144 (STB served Feb. 1, 2019) (allowing 63 days).

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of July, 2023, I caused a copy of the foregoing document to be served by email on Administrative Law Judge McCarthy and all parties of record in Docket No. NOR 42175.

/s/ Michael L. Rosenthal

**VERIFIED STATEMENT
OF
GRANT JANKE**

My name is Grant Janke. I am the Assistant Vice-President of Network and Capital Planning for Union Pacific Railroad Company (“Union Pacific”). I have held my current position for eight years. My team assesses the resources needed to handle present and future demand, including crews, locomotives, freight cars, mainline capacity, and terminal infrastructure. My team also develops, produces, and assesses Union Pacific’s operating metrics. I am submitting this statement in support of Union Pacific’s request to extend the August 25, 2023, deadline for responses to the interrogatories and document requests in the Board’s Order served July 11, 2023, until October 9, 2023. While Union Pacific recognizes its employees must necessarily take on additional workload in responding to the Order, they cannot produce the material requested by August 25 and fulfill their day-to-day responsibilities for managing and operating the railroad.

The Board has ordered the production of a large quantity of documents, data, and narrative responses relating to Union Pacific’s dispatching and operation of freight and passenger trains. Responding to each type of request involves significant challenges and will substantially increase the workloads of Union Pacific employees.

First, the Order requires Union Pacific to produce many different types of material relating to freight and passenger operations, including documents relating to infrastructure, train scheduling, dispatching, and train characteristics and performance. The employees likely to have the requested documents are employees whose responsibilities involve day-to-day management and operation of freight and passenger services on Union Pacific’s network. These employees will have to find time to search their files for the requested materials and, in consultation with Union

Pacific's legal team, ensure the documents are appropriately designated and redacted to protect confidential information.

Second, the Order requires Union Pacific to extract and produce a variety of data from the company's systems, and in several instances, to develop new programming to produce information in the specified format and in response to specific questions. Union Pacific appreciates the Board's interest in receiving specific data, and in receiving the data in a uniform format. However, Union Pacific faces significant challenges in attempting to produce data from systems not designed to produce the requested data, nor designed to produce the data in the manner specified in the Order. Responding to the Board's Order will require employees to develop special programming to extract, process, and validate the data. Developing that programming, and extracting, processing, and validating the data will take more than the time allotted because the employees with the expertise needed to perform these data-related tasks cannot reasonably devote the time needed over the next three weeks to comply with the Order while simultaneously carrying out the railroad's business of serving customers.

Third, the Order requires Union Pacific to provide narrative responses to questions about a variety of issues relating to freight and passenger operations. Developing full and accurate responses to those questions will require Union Pacific employees with management and operating responsibilities to work closely with Union Pacific's legal team to provide necessary information, review and correct draft responses, and address confidentiality concerns. Completing this process will also take more time than was allotted due to the volume and challenge of devoting sufficient time to these new requirements without suspending their normal activities.

Union Pacific's ability to meet an August 25 deadline is complicated by two additional factors. First, many Union Pacific employees involved in the search for documents will

necessarily be the same employees addressing the data requests and developing the narrative responses. Second, some employees who are essential in responding to the requests have pre-existing business and personal commitments scheduled for July and August. These commitments reduce their availability before late August.

Union Pacific is fully committed to responding promptly to the Board's requests and has already begun collecting documents, exploring data issues, and developing narrative responses to questions. But given the above limitations and challenges, Union Pacific cannot complete its response by August 25. Given our initial assessment, Union Pacific will need approximately twice the time allotted to complete its responses.

VERIFICATION

I, Grant Janke, Assistant Vice-President of Network and Capital Planning of Union Pacific Railroad Company, declare under penalty of perjury that the foregoing statement is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on July 26, 2023.

/s/ Grant Janke