
BEFORE THE
SURFACE TRANSPORTATION BOARD
DOCKET NO. NOR 42175

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August 9, 2023
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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

AMTRAK’S REPLY TO UNION PACIFIC RAILROAD COMPANY’S
MOTION FOR RECONSIDERATION

The National Railroad Passenger Corp. (“Amtrak”) files this reply to Union Pacific Railroad Company’s (“UP”) July 27, 2023 Motion for Reconsideration (“Motion”). In the Motion, UP asks that the Board reconsider two aspects of its July 11, 2023 Order (“Order”). First, UP asks for reconsideration of the requirement that it respond to requests in Appendix A Part IV by August 25, 2023. Second, UP asks for reconsideration of the requirement that it respond to Amtrak’s opening evidence within 30 days. For reasons set forth below, UP’s motion should be denied. Amtrak does not oppose a modest extension of the time for *all* parties to respond to requests set out in Appendix A, but an extension to October 9, 2023 is unwarranted, and UP’s efforts to extend the briefing deadline are premature. UP has been on notice of the issues in this proceeding for several months, and the Board should reject UP’s unpersuasive arguments about the burden of responding to the Board’s investigative requests.

I. Doubling the Time to Address Initial Board Inquiries Would Needlessly Delay the Investigation.

Congress envisioned that investigations conducted pursuant to Section 213 would proceed expeditiously. Under the statute, Amtrak may file a complaint to initiate a Board-led investigation if “the on-time performance of any intercity passenger train averages less than 80 percent for any

two consecutive calendar quarters.”¹ Consistent with the congressional intent to remedy deficiencies based on just two consecutive calendar quarters of substandard performance,² the Board Order initiating this investigation recognized the importance of conducting it efficiently,³ and noted the Board’s intent to evaluate how to conduct future 213 proceedings even *more* expeditiously.⁴

Against that backdrop, Amtrak has been working diligently to meet the August 25, 2023 deadline for responses to the Board’s initial inquiries, including identifying responsive documents, pulling responsive data, and preparing narrative responses to the Board’s interrogatories. Like UP and other parties, Amtrak must rely upon personnel who also have management and operational responsibilities to fulfill in the ordinary course of business. Also like UP, Amtrak must respond to requests that require special programming, either to extract and prepare responsive information or to provide that information in the manner requested by Board staff. Nonetheless, Amtrak is proceeding on schedule to meet the Board’s August 25 deadline, despite having many more requests to address than UP or any other party in this proceeding.

By contrast, UP’s arguments in support of its extension motion are unpersuasive. First, UP’s arguments relating to its Board embargo proceeding are inapposite.⁵ The embargo proceeding was conducted pursuant to different statutory authority, concerned different subject matter, and involved different requests. The Board has correctly recognized that it “has significant

¹ See 49 U.S.C. § 24308(f)(2).

² See *id.* § 24308(f)(1); see also 49 C.F.R. § 1111.8.

³ See Order at 12 (noting favorably the efficiency gains from combining initial fact findings, receipt of evidence, presentation of arguments, and a Board determination of delay causes).

⁴ *Id.* at 14 (“The Board will use this proceeding to inform future on-time performance cases and will look for opportunities to make such proceedings more expeditious. The Board will also remain open to input from litigants in future proceedings to increase efficiency and shorten the investigative and decisional timelines, if practicable.”).

⁵ Motion at 6.

discretion regarding how to structure its investigation” in this very different proceeding.⁶ In all events, there is no basis for UP’s argument that every incremental request requires an incrementally larger length of time to respond.

Second, UP’s argument that its extension would not affect the overall timeline established for this proceeding is dubious,⁷ particularly at this early stage. While Amtrak certainly defers to the Board on the time required to complete its investigation, deferring submissions for more than six weeks could result in a commensurate extension of the investigation. After all, Appendix A only contains the Board’s initial investigatory questions; the Board has made clear that it may issue additional requests for data, documents, or information. Unless the Board can complete any follow-up within the 120-day period provided for adversarial discovery, any extension of the time to respond could have a corresponding effect on the length of the proceeding.

Finally, UP does not provide adequate justification for the length of its proposed extension. For example, nothing in the “initial assessment” conducted by UP justifies more than doubling the time for UP to respond to initial inquiries.⁸ And UP nowhere explains how it arrived at the proposed six week extension or why it requires that extension as to each request it received. As UP has long been on notice about the subject matter of this investigation, it should be able to furnish some of the requested materials by the existing deadline.

Notwithstanding these objections, Amtrak understands and appreciates some of the

⁶ Order at 11.

⁷ Motion at 6.

⁸ UP’s supporting verified statement provides no specific details about the burdens on UP in providing a timely response to the Board. For example, Mr. Janke states that UP employees will have to “find time to search their files for the requested materials” and “develop new programming to produce information in the specified format and in response to specific questions.” Motion Ex. 1 at 1, 2 (Janke Statement). But Mr. Janke does not give an estimate for how long each of these processes will take or how many of the Board’s requests are affected. Aside from a general assessment that it will take “more than the time allotted” for UP to respond, UP does not provide any evidence to show that an additional six weeks is required.

scheduling issues raised by UP, including issues presented by the limited August availability of key personnel. Amtrak also recognizes that it is critical for the Board to obtain all of the information necessary for a thorough investigation. Thus, Amtrak does not oppose a modest extension for UP to submit data, documents, and information responsive to the Board's requests, so long as that extension does not exceed two (2) weeks, and applies uniformly to all parties to this proceeding.⁹ If there are particular requests that UP or other parties cannot complete with an additional two weeks, those requests should be evaluated on a case-by-case basis, without needlessly deferring the submission of all responsive documents and information.

For all those reasons, Amtrak opposes UP's request for a six-week extension, and suggests that a more modest, two-week extension for all parties would be more appropriate.¹⁰

II. UP's Request For A Briefing Extension is Premature.

UP also asks that the Board enlarge its time to respond to Amtrak's opening statement from 30 to 60 days. That request is premature, particularly before UP has provided even a single response to the Board's investigative requests. The Order provides that the Board "*will* issue a procedural schedule" after the close of party-led discovery. Order at 13 (emphasis added). Although the Board has provided some initial guidance about the anticipated schedule, it would be inefficient to address party concerns about that guidance now, particularly because the procedural schedule may provide additional information about the anticipated content or length of

⁹ When Amtrak met and conferred with UP about the motion for reconsideration, it expressly indicated that it would not oppose a modest extension of time applicable to all parties. However, Amtrak opposes any unilateral extension for UP because it would create material inequity in the proceedings, for example, by providing UP with considerable time to review and evaluate other parties' responses before submitting its own, and providing UP with significant informational advantages in connection with any adversarial discovery.

¹⁰ In future Section 213 proceedings, Amtrak anticipates that all parties will be able to respond more expeditiously to initial inquiries like those pending from the Board, as host railroads and Amtrak now have an indication of precisely how the Board anticipates receiving information and should have time to make appropriate preparations to internal systems, reporting, and other pertinent practices.

each brief. That may in turn affect the parties' views on whether proposed modifications to the schedule are necessary or appropriate. Addressing proposed modifications to the schedule at this stage, and through piecemeal motions from the parties, also does the Board a disservice. At the very least, the parties should be ordered to meet and confer about any concerns they have with the scheduling guidance and submit proposed modifications by a date certain. Doing so may allow the parties to identify common ground and will also enable the Board to work through procedural issues concurrently, rather than resolving them through successive motions.¹¹

In addition to being premature, UP's request for additional time lacks merit, at least at this stage in the investigation. UP first argues that the existing briefing schedule is "exceptionally" inequitable because Amtrak and only Amtrak can begin preparing its papers now.¹² Not so. Like UP and all other parties, Amtrak is in the process of responding to Board requests for data, documents, and information. Moreover, Amtrak requires information from other parties to the investigation in order to prepare its briefing. If anything, UP is *better* positioned to begin preparing its briefing than Amtrak. After all, Amtrak submitted a detailed complaint to initiate this investigation. While Amtrak certainly intends to submit additional information and offer additional argument about matters pertinent to the investigation, UP's access to the Complaint and its sole possession of data, documents, and information critical to the investigation means that it currently possesses superior information about matters to be briefed.¹³

¹¹ Contrary to UP's suggestion, neither of these proposals would require that UP or any other party wait until Amtrak submits its opening brief to seek modification of the schedule. See Motion at 7 &n.3. In either case, the parties could meet, confer, and submit their scheduling proposal(s) well in advance of that date.

¹² Motion at 7.

¹³ UP's conclusory assertion that it cannot evaluate whether delays constitute a preference violation is misplaced. As an initial matter, UP must have an existing and well-documented interpretation of the preference statute, given its obligation to ensure that personnel comply with the statute. While UP's interpretation of the preference statute may turn out to be incorrect, nothing precludes UP from evaluating whether it has violated the statute based on the considerable data and information in its possession, and the considerable data provided to UP by Amtrak.

Furthermore, UP directs the Board to procedural schedules issued under 49 C.F.R. § 1111.9(a) and § 1111.10(a), as well as non-rate cases.¹⁴ However, this case is not being conducted under the Part 1111 rules,¹⁵ and until the Board establishes parameters for the content and length of any briefing, there is no basis to conclude that the cited schedules are apposite. Rather than demonstrating the need for an extension, UP's reliance on those schedules illustrates that its arguments are speculative, premature, and best deferred until the Board and parties can better assess whether existing guidance on the briefing schedule requires modification.

III. Conclusion

For the forgoing reasons, Amtrak respectfully opposes UP's Motion for Reconsideration. However, for reasons set forth above, Amtrak is amenable to a more modest extension of the schedule if applied to all parties to this proceeding.

Dated: August 9, 2023

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¹⁴ See Motion at 8-9 & n.4-5.

¹⁵ See Order at 12.

CERTIFICATE OF SERVICE

I, Jessica Ring Amunson, certify that copies of this document are simultaneously being provided by email to all parties identified on the service list for this proceeding, Docket Number NOR 42175.

/s/ Jessica Ring Amunson
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