

SERVICE DATE – AUGUST 18, 2023

SURFACE TRANSPORTATION BOARD

DECISION

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

Digest:¹ The Board grants in part and denies in part a Union Pacific Railroad Company (UP) motion seeking to extend the due dates for certain filings and denies Canadian National Railway Company’s related motion to modify the procedural schedule. The Board also issues a show cause order directing UP to explain why certain information should be designated as confidential.

Decided: August 18, 2023

By decision issued on July 11, 2023 (July 2023 Decision), the Board initiated an investigation under section 213 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), Pub. L. No. 110-432, 122 Stat. 4848, codified at 49 U.S.C. § 24308(f)(1), to examine the cause(s) of substandard on-time performance on Amtrak’s *Sunset Limited* service. The *Sunset Limited* is a 1,997-mile-long Amtrak passenger train service that runs three times weekly, in each direction, between New Orleans, La., and Los Angeles, Cal. The route travels mostly over track hosted by Union Pacific Railroad Company (UP), as well as track owned or operated by Amtrak; BNSF Railway Company (BNSF); Canadian National Railway Company (CN) (operating through its subsidiary Illinois Central Railroad Company); the New Orleans Public Belt Rail Corporation (NOPB); and the Southern California Railroad Authority (SCRRA), all of which are considered necessary parties to the investigation. See July 2023 Decision, NOR 42175, slip op. at 10.

In the July 2023 Decision, the Board also set forth a procedural framework for the investigation, under which the Board (among other things) would conduct an initial round of fact-finding by directing the parties to answer interrogatories and produce documents. Id. at 12-13. The complete list of interrogatories and document submission requirements was set forth in Appendix A of the July 2023 Decision.² The Board set a due date for parties to file

¹ 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).

² Appendix A was divided into separate parts, as follows: Part I – Definitions and Instructions for All Parties; Part II – Document Requirement for All Parties; Part III –

responses to Appendix A, Parts III, IV, and V, of August 25, 2023 (45 days). July 2023 Decision, NOR 42175, slip op. at 17. The Board also established a 120-day discovery period and stated that afterward it would issue a procedural schedule for the submission of pleadings. The Board provided approximate due dates of 45 days for an opening statement from Amtrak, followed by 30 days for replies, followed by 15 days for Amtrak's rebuttal. Id. at 13.

On July 27, 2023, UP filed a pleading captioned as a "Motion for Reconsideration." In the motion, UP requests that its responses to the requests for information be extended to October 9, 2023 (90 days). (UP Mot. for Recons. 1.) UP also requests that the Board extend the due date for replies to Amtrak's opening statement from 30 days to 60 days. (Id.) Amtrak filed a reply to UP's motion on August 9, 2023. On August 15, 2023, CN filed a motion to modify the procedural schedule, in which it also requests that all parties be given 60 days to reply to Amtrak's opening statement. (CN Mot. to Modify 1.) That same day, Amtrak filed a reply to CN's motion, stating that it opposes the motion for the same reasons provided in Amtrak's reply to UP's motion.³

For the reasons discussed below, the Board grants UP's motion to extend the due date for responses to the Board's requests for information, but only to September 25, 2023 (a 31-day extension) and denies UP's and CN's request to extend the due date for replies to Amtrak's opening statement as premature. The Board also issues a show cause order regarding UP's designation of certain information as confidential.

BACKGROUND

UP argues that the extension of time to submit its responses to the Board's requests for information is needed because the technical and logistical demands of responding will require significantly more time than the 45 days the Board provided. (UP Mot. for Recons. 4.) Specifically, UP states that: (1) it will need to develop special programming to extract and analyze data from systems not designed to produce data in the manner specified by the July 2023 Decision and (2) that its legal team will need to work with the employees providing responsive material to ensure confidential information is appropriately designated and protected. (Id. at 4-5.) UP states that its ability to respond is also impacted by the fact that many of the same employees will necessarily be involved in responding to multiple requests and that some employees critical to the process have pre-existing business and personal commitments in July and August. (Id. at 5.) UP argues that a 90-day due date would still allow for the requested information to be provided a month before the discovery period ends and is akin to the response period in a recent proceeding, Oversight Hearing Pertaining to Union Pacific Railroad Company's Embargoes, Docket No. EP 772. (UP Mot. for Recons. 6.)

Interrogatories and Document Requirements for Amtrak; Part IV – Interrogatories and Document Requirements for UP and BNSF (individually); and Part V – Interrogatories and Document Requirements for CN, SCRRRA, and NOPB (individually).

³ Amtrak incorporates by reference all of the arguments from its reply to UP's motion in Amtrak's reply to CN's motion. (Amtrak Reply to CN Mot. 1.)

UP also requests an extension of the due date for replies to Amtrak's opening statement, arguing that fundamental fairness requires that the Board adopt a schedule giving UP more than 30 days. (*Id.* at 8.) UP argues that the Board's procedural schedule gives Amtrak an unfair advantage, as Amtrak can use the months between the July 2023 Decision and the due date for its opening statement to develop its submission to the Board. (*Id.* at 7-8.) UP states that, by contrast, it cannot feasibly review every delay to a *Sunset Limited* train to show why each delay does not constitute a preference violation, especially without knowing what the Board or Amtrak may consider a preference violation to be. (*Id.*) UP argues that a 60-day due date is also consistent with other proceedings. (*Id.* at 8.) It also states that it cannot wait until it receives Amtrak's opening statement to request an extension, as there would not be enough time to file an extension request and wait for the Board to rule. (*Id.* at 7 n.3.)

In its motion, CN argues that the 30 days stated in the Board's July 2023 Decision is insufficient given the "novel issues of critical importance to the freight railroad industry" and that, as a matter of fundamental fairness, all parties should be given 60 days to submit replies. (CN Mot. to Modify 2.) CN argues that there are no meaningful events that will occur prior to Amtrak's filing its opening statement that would affect the Board's decision to act now. (*Id.* at 2 n.4.) Like UP, CN also argues that the Board should modify the due date now to avoid the inefficiency and uncertainty of CN not knowing until after the reply period begins to run how much time it will have to respond. (*Id.*)⁴ CN states that NOPB, SCRRA, and UP each consent to CN's motion and that BNSF does not oppose it. (*Id.* at 1 n.1).⁵

In its reply to UP's motion, Amtrak states that it opposes UP's request to extend the due date for responses to the July 2023 Decision by 45 days, as the Board stated that its intent is to conduct this investigative proceeding efficiently. (Amtrak Reply to UP Mot. 1-2.) Amtrak states that it has the same difficulties and constraints as UP in terms of employee conflicts and the need to develop special programming, but that it nonetheless is on schedule to meet the current due date, even though it has more requests to respond to than UP. (*Id.* at 2.) Amtrak further argues that UP's comparison of the timeline for gathering information to Docket No. EP 772 is inapposite, that an extension would leave the Board with little time to make additional requests for information before the end of the discovery period, and that UP has not provided any explanation of how it arrived at setting the extension at 45 days. (*Id.* at 2-3.)

Notwithstanding these objections, Amtrak states that it does not oppose a modest extension of two weeks. (*Id.* at 4.) Additionally, Amtrak states that such an extension should be afforded not just to UP, but to all the parties, so that UP does not have an opportunity to review

⁴ CN makes these last two arguments in response to Amtrak's assertion in its reply that UP's request is premature. (CN Mot. to Modify 2 n.4.) Under 49 C.F.R. § 1104.13(c), a reply to a reply is not permitted and CN has not sought leave to respond to Amtrak's reply. However, in the interest of a complete record, the Board will accept this portion of CN's motion as well as Amtrak's reply to CN's motion. See City of Alexandria, Va.—Pet. for Declaratory Ord., FD 35157, slip op. at 2 (STB served Nov. 6, 2008) (allowing a reply to a reply "[i]n the interest of compiling a full record").

⁵ CN states that Amtrak had not responded to CN by the time of filing. As noted above, Amtrak filed a reply objecting to CN's motion on August 15, 2023.

and evaluate other parties' responses before submitting its own or obtain informational advantages in discovery. (*Id.* at 4 n.9.)

Amtrak also opposes UP's and CN's request to extend the due date for replies to Amtrak's opening statement. Amtrak argues that the request is premature, as the Board may provide further guidance on the content or length of the required filings in the future, which in turn could have bearing on whether more time is in fact needed. (*Id.* at 4-5.) Instead, Amtrak suggests that the Board order the parties to meet and confer about any concerns they have with the scheduling guidance and submit proposed modifications to the Board. (*Id.* at 5.) Amtrak also disputes UP's assertions that Amtrak has an advantage under the current procedural schedule and asserts that UP is actually in a better position to begin developing its reply. (*Id.*) Lastly, Amtrak disputes UP's assertion that it is hindered by uncertainty over what constitutes a preference violation. (*Id.* at 5 n.13.)

DISCUSSION AND CONCLUSIONS

As a preliminary matter, UP captions its filing as a "Motion for Reconsideration." Under 49 C.F.R. § 1115.3, parties may file "petitions" for reconsideration of Board decisions based on a claim of new evidence, changed circumstances, and/or material error. Here, UP neither argues that its motion should be granted under § 1115.3 nor addresses the § 1115.3 criteria; as such, it appears UP's intent was not for the filing to be treated as petition for reconsideration. The Board will therefore treat UP's motion as a request for an extension of time.⁶

UP's Request to Extend the Due Date for Responses.

Under 49 C.F.R. § 1104.7(b), the Board may, in its discretion, grant extensions of time "for good cause." The Board finds that there is good cause to grant an extension of time to provide responses to the Board's requests for information. UP provides reasonable justifications for why more time is needed for it to complete its responses and the Board has an interest in ensuring that the parties have sufficient time to gather and provide accurate, organized, and high-quality evidence. However, as Amtrak notes, the Board also has an interest in ensuring that this investigative proceeding moves efficiently. (Amtrak Reply to UP Mot. 2.) While the Board recognizes the volume and depth of the information it requested of the parties in the July 2023 Decision, UP provides little explanation why it needs an additional 45 days. The Board finds that a 30-day extension is reasonable (though the Board will make it a 31-day extension to avoid the due date falling on a weekend). A 31-day extension will provide UP additional time to comply with the July 2023 Decision while still ensuring that the investigative proceeding is not unduly delayed. In response to Amtrak's concern about providing UP with an informational advantage, the Board will also extend this due date for all parties. Accordingly, the parties' responses to requests for information set forth in Appendix A, Parts III, IV, and V, of the July 2023 Decision will now be due by September 25, 2023.

⁶ It appears that UP may have captioned the pleading as a Motion for Reconsideration because it considers its requests to extend the due date for replies to Amtrak's opening statement to be based on error more than on the need for more time. In any event, the Board addresses the merits of UP's request below.

UP's Request to Extend the Due Date for Replies to Amtrak's Opening Statement.

The Board finds that UP's and CN's request to extend the due date for replies to Amtrak's opening statement is premature. CN argues that the Board should grant the extension now because no meaningful events prior to the filing of Amtrak's opening statement that would affect the Board's decision are anticipated. (CN Mot. to Modify 2 n.4.) The Board disagrees. The parties have not yet provided their responses to the Board's requests for information, which will serve as an important component of the evidentiary record. Once these submissions have been made, both the parties and the Board will have a better sense of whether the due dates set forth in the July 2023 Decision are sufficient or need modification. The Board notes that there will also be time between when these evidentiary submissions are due (now September 25, 2023) and when the briefing schedule begins (after discovery is complete)⁷ during which parties can submit such extension requests. This will be far enough in advance to avoid UP's and CN's concern of having to wait until Amtrak's opening statement is filed before submitting any extension requests.

Accordingly, UP's and CN's request to extend this due date will be denied. This decision is without prejudice to UP or CN to request an extension of this or any other due dates as the investigative proceeding progresses.

Show Cause Order.

As the Board stated in the July 2023 Decision, it has an interest in ensuring that this investigative proceeding is transparent and, therefore, has decided to make the record public. July 2023 Decision, NOR 42175, slip op. at 15. On July 18, 2023, UP submitted to the Board a list of all the stations and corresponding milepost numbers on its portion of the *Sunset Limited* route, in accordance with Appendix A, Part II of the July 2023 Decision. UP subsequently filed an amended list on July 27, 2023. In both instances, UP submitted public and confidential versions of the list. In the public versions, UP provided milepost numbers but redacted the station names.

In the July 2023 Decision, the Board established definitions for the parties in this investigative proceeding to follow. The Board defined "Confidential" materials as "any information, data, documents, or other material produced in discovery to another party to this proceeding, or submitted material in pleadings, that the submitting party in good faith believes reflects proprietary or confidential information." July 2023 Decision, NOR 42175, App. A, Part I. The Board questions whether UP's station names were properly designated confidential

⁷ In the July 2023 Decision, the Board established a 120-day period for discovery from the effective date of that decision, meaning discovery would close on November 8, 2023. However, the Board noted that the investigation liaison would reach out to the parties after the evidentiary submissions to determine whether party-led discovery was expected to be completed sooner than 120 days. July 2023 Decision, NOR 42175, slip op. at 13.

given that station names are generally publicly accessible⁸ and none of the other parties to this proceeding redacted this information. Accordingly, the Board will direct UP to show cause by August 25, 2023, why this information should be designated “Confidential.”⁹

It is ordered:

1. UP’s motion is granted in part and denied in part as set forth in this decision.
2. CN’s motion to modify the proposed briefing schedule is denied.
3. The Board’s July 2023 Decision is modified as follows:
 - Amtrak is directed to respond to Appendix A, Part III, by September 25, 2023,
 - UP and BNSF, individually, are directed to respond to Appendix A, Part IV, by September 25, 2023, and
 - CN, NOPB, and SCRRRA, individually, are directed to respond to Appendix A, Part V, by September 25, 2023.
4. UP is directed to show cause by August 25, 2023, why the confidential information it submitted in response to the July 2023 Decision, Appendix A, Part II, should remain confidential.
5. This decision is effective on its date of service.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.

⁸ UP has included station names in public filings in other dockets before the Board, including for some lines over which the *Sunset Limited* service operates. See, e.g., Union Pac. Reply Ex. 3 at Ex. A, Feb. 14, 2014, U.S. EPA Region IX—Pet. for Declaratory Ord., Docket No. FD 35803; Union Pac. Reply Ex. A at 20, Apr. 25, 2022, Union Pac. Corp.—Control & Merger—Southern Pac. Rail Corp., Docket No. FD 32760. Station names and milepost locations are also generally shown on the Federal Railroad Administration’s Safety Map of the rail network. See FRA Safety Map <http://fragis.fra.dot.gov/GISFRASafety/> (last visited Aug. 17, 2023).

⁹ The Board notes that it usually addresses concerns over the designation of information as “Confidential” or “Highly Confidential” only upon motion by a party. However, as noted in the July 2023 Decision, the Board has significant discretion regarding how to structure its investigation. July 2023 Decision, NOR 42175, slip op. at 11. Additionally, the Board has an interest in ensuring that this investigative proceeding is transparent, as it will serve as a model for future cases and involves the public interest. Accordingly, issuing the show cause order in this instance is warranted. The Board notes that, going forward, it will rely on parties to bring any concerns about improper designation to the Board, as permitted under the protective order governing this proceeding.