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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 UNION PACIFIC RAILROAD COMPANY’S
PETITION TO REVISE PROCEDURAL SCHEDULE**

The National Railroad Passenger Corp. (“Amtrak”) files this reply to Union Pacific Railroad Company’s (“UP”) December 19, 2023 Petition to Revise Procedural Schedule (“Petition”). For the reasons set forth below, setting a briefing schedule would be premature, and UP’s request for 90 days to answer Amtrak’s opening evidence should be denied. UP’s arguments are without merit, and UP’s request for relief is especially unwarranted in light of its continued delay in producing responsive documents to Amtrak.

I. Issuing a Briefing Schedule Would Be Premature

Immediately issuing a briefing schedule would significantly condense the time for Amtrak to review important evidence, impeding its ability to provide the Board with a complete investigative record. Party-led discovery has concluded.¹ However, UP has yet to begin producing critical materials, including communications concerning dispatching policies, procedures, practices and decisions. Moreover, UP very recently reversed course on making dispatch playbacks available to Amtrak representatives for review, has not produced other dispatching records, and continues to resist the production of contracts with shippers that use the same lines traveled by *Sunset Limited* Trains. Amtrak has sought relief concerning each of these important issues in a

¹ See November 20, 2023 Order.

Motion to Compel now pending before Judge McCarthy.² Until the pending Motion to Compel has been resolved and Amtrak has had time to evaluate any additional materials and its need for further relief, setting a briefing schedule for this proceeding is premature.

The evidence in dispute concerns fundamental issues in this proceeding. As an example, Amtrak seeks the production of all dispatching tapes, dispatching playbacks, and other documents logging or recording dispatching decisions, including dispatching decisions related to the dispatching of all trains entering, exiting, continuing, or otherwise traversing the rail lines dispatched by UP, and on which any *Sunset Limited* Train travelled during the Relevant Period. UP either exclusively or jointly owns and controls nearly all of the 1,977-mile *Sunset Limited* route. Accordingly, documents responsive to this request (“Dispatching Records”) would bear heavily on (i) the extent to which delays or the failure to achieve minimum standards are due to causes that could reasonably be addressed by the primary rail carrier over whose tracks the trains operate, (ii) whether delays or failures to achieve minimum standards are attributable to the failure to provide *Sunset Limited* Trains with preference over freight transportation, and (iii) recommendations regarding reasonable measures to improve service.³

As another example, Amtrak seeks agreements between UP and freight customers that reflect variable compensation based on the time or timeliness of delivery, or certain other conditions.⁴ The production of those agreements will enable Amtrak and this Board to test the power of commercial incentives in dispatching traffic over its network. This is particularly important because of the narrow interpretation that UP has adopted regarding its statutory

² See Amtrak’s Motion to Compel Production of Documents from UP (filed Dec. 20, 2023) (“Motion to Compel”). Amtrak has also reserved the right to seek additional relief, as it evaluates the sufficiency of Union Pacific’s continuing document productions. Until last week, UP had produced just 23 total documents. After a December 21, 2023 production, that number has risen to 47 total documents.

³ Amtrak elaborates on the importance of these records in its Motion to Compel. *Id.* at 8-9.

⁴ Amtrak only seeks UP agreements with shippers who used lines traversed by *Sunset Limited* Trains. *Id.* at 13.

obligation to provide Amtrak trains with preference over freight transportation. UP has already asserted to the Board that the preference requirement involves weighing delays to the *Sunset Limited* against impacts on freight traffic and its network as a whole.⁵ Although the Board should reject that erroneous interpretation, the evidence that Amtrak seeks is, in all events, material to the Board's investigation and to testing the validity of UP's assertions.

By foreclosing the meaningful opportunity to review evidence produced in response to any order compelling production and dispatching communications that UP has not yet produced, immediate issuance of a briefing schedule would reward UP's dilatory discovery tactics⁶ and impede Amtrak's effort to provide the Board with briefing that further develops its investigative record. Accordingly, the Board should defer issuance of a briefing schedule.

II. UP's Request for a Briefing Extension is Premature and Lacks Merit

UP's request for additional time for its response brief is premature and lacks merit. UP asks to triple its time to answer Amtrak's opening statement, from 30 to 90 days. As Amtrak previously explained in response to UP's prior request for an extension, such a request is premature because the Board has not yet issued a procedural schedule, and any procedural schedule may provide information that affects whether proposed modifications to the schedule are necessary or appropriate.⁷ Ordering the parties to meet and confer about any concerns with the Board's procedural schedule would be more efficient than the Board resolving successive adversarial motions.⁸

⁵ See Union Pacific Railroad Company's Response to Appendix A, Part IV (filed Sept. 25, 2023), at 32.

⁶ UP's Petition highlights the parties' disparate approaches to discovery and to facilitating the Board's investigation. UP has to date produced just 47 documents responsive to Amtrak's requests, while simultaneously demanding that Amtrak respond to 150 discovery requests. Although it is baseless for UP to seek that volume of discovery, see Motion to Compel at 3-4, Amtrak expended considerable resources to complete its production of documents by December 20, 2023 and produced more than 2,200 documents totaling nearly 46,000 pages.

⁷ See Amtrak's Reply to UP's Motion for Reconsideration (filed Aug. 9, 2023), at 4 (observing that procedural schedule may provide information about the anticipated content or length of each brief).

⁸ *Id.* at 5.

In addition to being premature, UP's request for additional time lacks merit, at least at this stage in the investigation.⁹ UP claims that the existing briefing schedule is "grossly inequitable" because Amtrak—and only Amtrak—has been able to prepare papers since the Board opened its investigation. This is incorrect. Like all parties, Amtrak has been responding to the Board's initial and supplemental requests for data, documents, and information. Amtrak has also been addressing UP's 150 additional discovery requests, which has required considerable time and cost. And Amtrak has been pursuing discovery from UP, which has already required filing one motion to compel the production of important evidence and could require further motion practice based on the continuing evaluation of UP's very recent productions.

Related arguments offered in support of UP's Petition also fall short. UP complains about the evidence Amtrak has provided to date and insists that UP requires more than thirty days to respond to evidence that Amtrak will submit in its opening brief. However, the only aspect of briefing that UP cites for this argument concerns violation of Amtrak's statutory right to preference over freight transportation, and UP has already been provided with more than enough evidence to consider and address preference issues. For example, Amtrak has in its Complaint and Petition provided ample notice of UP policies and practices that Amtrak considers to be preference violations.¹⁰ Amtrak also provides UP (and each host railroad) with real-time access to information

⁹ Should UP contend based on the substance of Amtrak's opening statement that more time is required to respond, Amtrak will certainly consider that request in good faith. Indeed, Amtrak may well require additional time to file its rebuttal brief, depending on the volume and substance of reply filings from UP and the five additional parties to this proceeding.

¹⁰ See e.g., Amtrak's Complaint and Petition for Board Investigation and Other Relief (filed Dec. 8, 2022), at 52-62 (detailing UP's patterns and practices including forcing *Sunset Limited* Trains to wait in sidings for freight traffic, follow freight traffic, wait on the main line during meets, stop because of freight congestion, or exposing *Sunset Limited* Trains to delays caused by cross-traffic, freight trains stopped to await repairs or fuel, and other forms of FTT). For the avoidance of doubt, Amtrak reserves the right to expand, supplement, modify, or otherwise develop the allegations and contentions, including based on information made available since the Complaint, and intends to submit additional information, evidence, and argument about matters pertinent to the investigation, including preference. As set out below, the Board can address whether that additional information, evidence, and argument requires extending the time for replies once Amtrak submits its opening statement, rather than deciding whether to extend the schedule in its investigation based on hypotheticals.

about delays attributed to that host railroad within Amtrak's delay database¹¹ and has submitted considerable delay and other data concerning *Sunset Limited* delays and operations to the Board and other parties.¹² Thus, UP has long been able to begin preparing its briefing.¹³ Indeed, as Amtrak has previously explained, UP is *better* positioned to begin preparing briefing than Amtrak, for example, based on its access to dispatching records that have not been provided to Amtrak.

In any event, the argument that UP requires more time to respond to evidence in Amtrak's forthcoming brief is speculative, and there is no reason for the Board to reach it now. Once Amtrak files its brief, all parties and the Board will be better positioned to evaluate whether an extension is necessary or appropriate. There is no reason that the parties and Board cannot move expeditiously to evaluate any requests for extension, whether in respect to reply deadlines or Amtrak's eventual rebuttal deadline, which will likely require Amtrak to address a wide range of issues presented by several parties. Put simply, the expeditious conduct of this investigation favors deferring requests for extensions until the need for such extensions can be evaluated based on actual rather than hypothetical submissions and arguments.

CONCLUSION

For the foregoing reasons, UP's Petition to Revise the Procedural Schedule should be denied.

¹¹ See Amtrak's Response to the Board's Interrogatories and Document Requirements (filed Sep. 25, 2023), at 35.

¹² See *e.g.*, *id.* at 19-33.

¹³ UP also complains about Amtrak's interrogatory objections, but its selective quotation conspicuously fails to mention that Amtrak based its prematurity objection in part on the fact that it had not yet received dispatching tapes, documents, and data. Petition, Ex. A, at 7.

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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.

December 26, 2023

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