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BEFORE THE
SURFACE TRANSPORTATION BOARD

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January 9, 2024
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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

**UNION PACIFIC RAILROAD COMPANY'S
REPLY TO MOTION TO COMPEL**

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The Board should deny the motion to compel filed by Amtrak on December 20, 2023. Union Pacific expects to produce certain documents responsive to two of the three categories of documents that Amtrak requested by January 15, 2024, so there is no need to compel their production. The Board should deny Amtrak's request for the third category of documents—Union Pacific's contracts with customers.

Union Pacific has worked cooperatively and diligently to respond to Amtrak's discovery requests. Union Pacific expects to complete its production of responsive material in essentially the same amount of time Amtrak took to respond to Union Pacific's discovery requests.

Union Pacific addresses Amtrak's specific complaints below.

I. Dispatching Records.

In response to Amtrak's request for Dispatching Records, Union Pacific is producing (i) dispatcher's records of movement of trains for Amtrak's Sunset Limited trains, and (ii) activity data from its computer-aided dispatching system. Union Pacific has already produced signal lining data reflecting dispatching decisions for the portions of the Sunset Limited Route dispatched by Union Pacific in response to investigative requests by the Board.

When Amtrak requested Dispatching Records, Union Pacific understood Amtrak was seeking the ability to “replay” past train movements on systems used by dispatchers (to which Amtrak has access). Union Pacific’s systems have some replay capability, but only for the most recent 99 hours of data. Union Pacific cannot produce what it does not have. However, Union Pacific’s systems retain the data underlying the activities shown on its dispatching systems. Union Pacific will produce the data to Amtrak. The amount of data being produced is substantial. Union Pacific has worked to divide the data into 17 Microsoft Access database files totaling nearly 20 gigabytes of data—the smallest database file contains nearly 1.5 million rows of data.

Amtrak’s motion also refers to train dispatching records that Union Pacific is required to retain under rules established by the Federal Railroad Administration. Union Pacific will produce train dispatching records for Amtrak’s Sunset Limited trains for the October 1, 2021, through December 8, 2022, period requested by Amtrak. Production of records for all trains that moved over any portion of the Sunset Limited route during that period would be unduly burdensome. Union Pacific does not have an automated process for retrieving these records: Union Pacific employees would need to retrieve records one train at a time for the nearly 42,000 non-Amtrak trains that moved over all or part of the Sunset Limited route from October 1, 2021, through December 8, 2022. Retrieving just the 366 dispatching records for the Amtrak trains that moved over the Sunset Limited route took Union Pacific employees more than two full business days. Union Pacific estimates it would take two to three weeks of time for an employee to develop a special computer program to automate the record retrieval process—time that would be taken away from other critical business responsibilities. Especially in light of Union Pacific’s

production of its actual activity data from its dispatching system, Union Pacific should not be required to undertake the costly, time-consuming effort required to retrieve train dispatching records. If Union Pacific is required to produce those records, Amtrak should be required to compensate Union Pacific for the costs.

II. Communications.

In response to Amtrak’s requests for “communications,” Union Pacific has been gathering and reviewing email—as the parties’ counsel discussed on several occasions. Amtrak complains about the pace of production, but it did not *itself* produce any documents responsive to Union Pacific’s requests for “communications” until December 8, 2023—108 days after Union Pacific first served its requests. When Amtrak filed its motion to compel, only 100 days had passed since it served its requests. Union Pacific will produce the requested communications, so there is no need to compel production.

III. Contracts.

The Board should deny Amtrak’s motion to compel Union Pacific to produce all agreements with customers using any portion of the Sunset Limited Route from October 1, 2021, through December 8, 2022, “for which UP’s compensation varies depending on the time or timeliness of the delivery of products or commodities, or depending on availability of loaded cars for unloading or empty cars for loading of customer products or commodities.” Amtrak Request No. 15. Complying with Amtrak’s contract request would impose an undue burden on Union Pacific, far outweighing the limited value of the information sought. When requested discovery is plainly burdensome, the Board “require[s] a substantial showing of relevance and need to outweigh the burden of producing [the] evidence.” *FMC Wyo. Corp. v. Union Pac. R.R.*, STB Docket No. 42022, slip op. at 5 (served Feb. 5, 1998). Here, the requested discovery is especially

burdensome because Union Pacific does not maintain contract information in a manner that would allow it to respond to Amtrak's request without conducting a special study to ascertain the specific information requested. That Union Pacific would need to conduct a special study to respond to Amtrak's request provides an additional ground for denying discovery. *See PPL Mont., LLC v. The Burlington N. & Santa Fe Ry.*, STB Docket No. 42054, slip op. at 3 (served Nov. 9, 2000) ("Our discovery rules, however, require parties to furnish information in their possession, not to prepare special studies.").

As Union Pacific explained to Amtrak, identifying and producing responsive contracts would involve a burdensome special study. Union Pacific would have to develop computer programming to identify all the rail cars that moved over the Sunset Limited Route, tie the car movement data to billing data residing in a second database, then use the billing data to retrieve rate documents residing in a third database. Union Pacific would then have to review each rate document to determine whether "Union Pacific's compensation varies depending on the time or timelines of the delivery of products or commodities, or depending on availability of loaded cars for unloading or empty cars for loading of customer products or commodities." Amtrak Document Request No. 15.

Even if Union Pacific went through the burden of identifying and producing the requested rate documents, they would have little or no relevance. Amtrak says it wants the rate documents to explore whether Union Pacific "has powerful financial or other commercial incentives to dispatch certain freight trains ahead of [Amtrak's] *Sunset Limited*." Amtrak Mot. at 14. However, Amtrak does not identify any examples of circumstance in which Union Pacific "dispatched certain freight trains ahead of the

Sunset Limited.” Moreover, even if Amtrak identified freight trains it believes were “dispatched . . . ahead of the *Sunset Limited*,” it could not determine whether the trains were moving freight under the contracts Amtrak requested: identifying a freight train is generally not sufficient to identify the freight cars or containers moving on the train, and identifying the cars and containers is generally not sufficient to identify the contract under which cars and containers moved.

In sum, Amtrak’s request would require Union Pacific to engage in a complex process to identify freight moving over certain lines during a certain period of time, then tie that traffic back to contracts with specific characteristics and produce those highly sensitive commercial documents. Amtrak then would have no specific ability to use those documents. At most, Amtrak would learn Union Pacific has certain contracts that provide various types of incentives for Union Pacific to meet various types of service commitments—a fact to which Union Pacific would be willing to stipulate.

IV. Conclusion

For the reasons stated above, the Board should deny Amtrak's motion to compel.

Respectfully submitted,

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January 9, 2024

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of January, 2024, 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