

BEFORE THE
SURFACE TRANSPORTATION BOARD

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April 30, 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 PETITION FOR A SHOW CAUSE ORDER**

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INTRODUCTION

The Board should deny the petition for a show cause order filed by Amtrak on April 10, 2024. Contrary to Amtrak's claim, the Board's July 11, 2023, order does not require Union Pacific to retain dispatch playback records relating to operations on the *Sunset Limited* route after the Relevant Period defined by the Board.

Furthermore, Amtrak appears to misunderstand the nature of dispatch playbacks, at least as Union Pacific uses the term. Union Pacific does not create and store "videos" or "game tapes" showing dispatching decisions. Union Pacific has developed and uses a proprietary computer application that allows it to save, retrieve, and recompile a stream of electronic messages so it can reproduce ("play back") how the actual data regarding operation of its computer aided dispatch system ("CADX") are rendered visually on dispatcher display screens. Because substantial processing and storage capabilities are required to perform this function given the massive amount of data involved, Union Pacific's application provides playback capability only for the most recent 99 hours of message data. Using its current systems, Union Pacific could not retain the electronic messages for a longer period of time while continuing to save new data—it would lose even its existing playback capability.

Additionally, Union Pacific’s playback application is integrated with its current technology for storing and retrieving electronic messages. As a result, even if it were to acquire technology capable of *storing* data from its playback application for a longer period of time, Union Pacific would need to develop an essentially new application at a high cost before it could retrieve and recompile the stored data to create playbacks for longer periods.

Finally, Union Pacific already retains dispatching information for much longer than 99 hours. Union Pacific retains the actual granular data regarding operation of its CADX system—that is, records showing commands to change the status of field devices (*e.g.*, switches, signals); records of devices receiving the messages; records of devices executing the commands; records of train movements past control points—that are rendered visually on dispatcher display screens. Union Pacific has produced those granular records—called “CADX logs”—to Amtrak in this proceeding.

Union Pacific developed its playback application to analyze incidents in their immediate aftermath. When Union Pacific needs to analyze an incident after 99 hours have passed, it uses CADX logs, which contain the actual data regarding the operation of its dispatch system. Amtrak’s petition is essentially asking Union Pacific to develop, at great cost and for purposes of this one proceeding only, a system to retain data that is derivative of the more granular data Union Pacific already retains. Amtrak is not entitled to any relief.

ARGUMENT

I. The Board did not require Union Pacific to retain playback data created after the Relevant Period.

Amtrak's petition asks the Board to order Union Pacific to "comply" with a requirement the Board never imposed in the first place. Amtrak filed its complaint on December 8, 2022, alleging Union Pacific provided substandard on-time performance of Amtrak's *Sunset Limited* train during the period before it filed its complaint. The Board subsequently initiated an investigation and directed the parties to respond to a series of interrogatories and document requests. In issuing those discovery requests, the Board expressly defined the Relevant Period for its investigation as the period from "October 1, 2021 through December 8, 2022." *See* July 11 Order at 20 (Def. 10). The Board also ordered the parties to "preserve[]" all "documents and/or data that relate to the subject matter of this investigation." *See id.* at 18. Union Pacific complied with the Board's Order by taking steps to preserve existing documents and data relating to the subject matter of this investigation—the performance of Amtrak's *Sunset Limited* during the Relevant Period. Amtrak's claim that the Order obligates parties to retain documents and data relating to the *Sunset Limited*'s performance after the Relevant Period is inconsistent with the Order itself.

Amtrak's own conduct during this proceeding—until it filed its petition—shows Amtrak understood the subject matter of this Board's investigation is the *Sunset Limit*'s performance *during* the Relevant Period. When Amtrak served discovery requests on Union Pacific, including a request for dispatching records, Amtrak expressly stated the requests covered only "the time period from October 1, 2021 through and including December 8, 2022"—that is, the Relevant Period. Exhibit A, p. 5 (Instruction No. 2).

Similarly, in responding to Union Pacific’s discovery requests, Amtrak said it would produce information from *before* the Relevant Period in certain specific instances, but stated it would generally “limit its response (if any) to the Relevant Period established in the Order.” Exhibit B, p. 5 (Obj. to Instruction No. 4). Also, in correspondence objecting to the scope of Union Pacific’s discovery requests, Amtrak noted that “[t]he Relevant Period established by the Board already expands the Board’s investigation beyond the relevant period set by the statute, which requires the Board to institute an investigation based on just two quarters of substandard performance.” Exhibit C, p. 6 n.10 (Letter from A. Trepp to M. Rosenthal, Oct. 5, 2023).

Even the timing of Amtrak’s petition shows Amtrak understood the Board’s Order did not require parties to retain data relating to the *Sunset Limited*’s performance after the Relevant Period. As Amtrak acknowledges in its petition, Amtrak has known about the 99-hour limitation for dispatch playbacks since early January. *See* Pet. at 7.

Amtrak claims it is acting now because it needs access to dispatching playbacks created *after* the Relevant Period to “obtain context” for the massive cache of data that Union Pacific produced regarding dispatching *during* the Relevant Period—more than 20 gigabytes of CADX logs and 100,000 Trainsheets covering dispatching of all trains on the *Sunset Limited* route during the Relevant Period. But if Amtrak believes reviewing dispatch playbacks from after the Relevant Period would help it understand the CADX logs and Trainsheets from the Relevant Period, Amtrak does not need help from Union Pacific: as Amtrak acknowledges, “Amtrak has real-time access to UP dispatch screens in the ordinary course of business” Pet. at 5 n.16. Amtrak personnel can view the dispatch screens from any computer using a web-based platform.

Nothing prevents Amtrak from recording the screens to create its own playbacks, if it needs them for “context.” Indeed, nothing has prevented Amtrak from recording and preserving the screens all along.

II. Union Pacific cannot retain playback data for more than 99 hours using its current technology.

Even if the Board were to order Union Pacific to retain all playback data on an ongoing basis for the rest of this proceeding, Union Pacific could not feasibly comply. As explained in the accompanying Verified Statement of James D. Fenn, a Senior Systems Consultant for Union Pacific, Union Pacific’s cannot retain more than 99 hours of data used to create playbacks using its current technology, and expanding its playback capability would be costly and time consuming. Moreover, Union Pacific has no business or operational need to expand its playback capacity beyond 99 hours, so it would be creating a new system solely for purposes of this proceeding.

Amtrak appears to misunderstand the nature of dispatch playbacks, or at least the technology used by Union Pacific. Amtrak describes playbacks as “videos” or a “game tape for a sporting event.” Pet. at 5. However, as Mr. Fenn explains, Union Pacific’s playback system does not capture videos or store images. Union Pacific’s CADX captures records of every dispatching command to change the status of field devices (*e.g.*, switches, signals), receipt of commands by devices, and execution of commands by devices, as well as records of train movements. All this information is recorded in CADX logs. CADX also includes a function that renders visual images of the captured records on the monitors used by dispatchers. And CADX also includes a function that decomposes those visual images into small building blocks called Linkable Graphics Blocks (“LGBs”). When CADX detects a change within an individual LGB—*e.g.*, a

switch move, signal change, or train movement—it generates a message and sends the message to Union Pacific’s playback system for storage in an LGB message packet. Each LGB message packet contains information the playback system can later use to reproduce the original image. This process creates a tremendous volume of message packets—one message packet every time CADX detects any change anywhere across Union Pacific’s network. Union Pacific uses a proprietary computer application to save, retrieve, and recompile the stream of message packets so it can recreate how CADX data were rendered visually on dispatcher display screens. *See Fenn VS at 1–2.*

Union Pacific’s playback application provides playback capability for only the most recent 99 hours of message packets. The 99-hour limitation is driven by the limits on the technology needed to store the massive amount of data that is continuously being generated by CADX, as well as to retrieve message packets from among the mass of stored data, and then compile them in the correct order, whenever someone requests a “playback.” The limited storage is a trade-off for the speed required to write, query, and read the data from storage. To avoid exceeding the maximum limits of the technology, Union Pacific’s playback application is limited to 99 hours of playback capability. If Union Pacific were to reprogram its application to require it to retain message packets indefinitely, its storage and retrieval technology would quickly reach capacity: no new packets could be saved, thus destroying playback functionality entirely (except with respect to the first 99 hours of LGB message packets retained). *See Fenn VS at 3.*

Even if Union Pacific acquired and implemented new technology capable of storing LGB message packets more than 99 hours old, the ability to query, retrieve, and recompile the stored message packets to create playbacks would need to be developed.

Developing this critical capability would require substantial work to modify Union Pacific's playback application. Mr. Fenn estimates the development process could take up to a year, and the costs could approach \$1 million. *See Fenn VS at 3–4.*

Further, Union Pacific has no business or operational need to expand its playback capacity beyond 99 hours. The only reason to create a new system would be to fulfill a new regulatory obligation to retain playback capability for a longer period. *See Fenn VS at 4.*

III. Union Pacific already retains dispatching data more granular than playback records requested by Amtrak.

Union Pacific's underlying dispatch data are preserved in CADX logs. As discussed above, playbacks are not dispatching data Union Pacific routinely creates and saves. Union Pacific creates playbacks as needed, using stored LGB message packets, which reflect visual information displayed on dispatch screens created using data captured by CADX. Union Pacific retains the actual data regarding operation of CADX in CADX logs. Union Pacific developed its playback application to analyze incidents in their immediate aftermath. When Union Pacific needs to analyze an incident after 99 hours have passed, it uses CADX logs.

As Amtrak acknowledges, Union Pacific has already produced CADX logs for the relevant period to Amtrak. *See Pet. at 7.* If necessary, Union Pacific could produce CADX logs for the period after the Relevant Period. However, Amtrak never requested the production of CADX logs from after the Relevant Period, and neither has the Board.

CONCLUSION

The Board should deny Amtrak's petition because it never ordered Union Pacific to preserve data relating to the *Sunset Limited's* performance after the Relevant Period.

To the extent Amtrak seeks a new order requiring Union Pacific to preserve the LGB message packets that can be used to create playbacks, the Board should also deny that request, rather than require Union Pacific to develop a system to retain data that is derivative of the more granular dispatching data it already retains.

Respectfully submitted,

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April 30, 2024

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of April 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

VERIFIED STATEMENT

OF

JAMES D. FENN

My name is Jim Fenn. I am a Senior Systems Consultant for Union Pacific Railroad Company. I have been a Senior Systems Consultant for nine years. My responsibilities include providing business analytics and requirements for Union Pacific's CADX project. Previously, I worked at Union Pacific as a System Developer for ten years. In all, I have worked for Union Pacific for nineteen years. Prior to my time at Union Pacific, I worked for ten years as a lead architect and as head of an Information Technology department for a truck company. I also worked as a computer architect and consultant at Hewlett Packer.

Amtrak has asked the Surface Transportation Board to find Union Pacific must preserve dispatch playback records for however long the Board needs to investigate Amtrak's complaint. I am submitting this statement to explain why Union Pacific, given the limitations of the system used to retain and access the data, cannot retain the data used to create dispatch playbacks for more than 99 hours. Even if it acquired and implemented a new storage mechanism to retain the data, Union Pacific would still need to devote a lot of employee time and spend a lot of money to develop an application capable of retrieving the stored data and creating playbacks.

Amtrak misunderstands the nature of Union Pacific's dispatch playback capabilities. Amtrak has described dispatch playbacks as "videos" and "game tape." That description is incorrect. Union Pacific's system does not capture videos or store images. Union Pacific creates dispatch playbacks as needed from stored message packets reflecting decomposed visual images originally rendered from data captured by Union Pacific's computer aided dispatch system ("CADX").

CADX captures records of every dispatching command to change the status of field devices (switches, signals), receipt of commands by those devices, and execution of commands by those devices, as well as records of train movements past control points on Union Pacific's network. CADX saves this information in records called CADX logs. CADX also includes a function that renders visual images of the records on monitors used by dispatchers. And CADX includes a function that decomposes the visual images appearing on train dispatchers' displays into small building blocks called Linkable Graphic Blocks ("LGBs"). Each LGB is a graphical representation of a single control point or multiple control points on Union Pacific's network.

Every time CADX detects a change within an individual LGB—e.g., a switch move, signal change, or train movement—CADX generates a message packet and sends it to Union Pacific's Web Playback system for storage. Each packet contains a timestamp, basic lookup data (e.g., control point, dispatcher position), static information that the Web Playback system can interpret into drawing instructions to recreate the LGB graphic, and dynamic information that is applied to the graphic representing the status of switches, signals, trains, etc. Each packet is a single XML structure.

Union Pacific's Web Playback engine can then pull LGB message packets based on search criteria and a playback interval provided by a user. For each LGB packet found for a time range, the Web Playback engine will pull the most recent version of the LGB for the playback interval. For example, if the playback is 30 seconds, and a switch is reversed and returned to normal position in less than 30 seconds, the user would not notice a change in state. If the user adjusts the playback interval to 1 second, then the user would see the state change showing the reverse switch position.

Union Pacific’s Web Playback engine relies on a product called Coherence. Coherence provides low-latency storage for frequently accessed data. Using Coherence, Union Pacific can write to storage, query, and read large amounts of data in milliseconds. This performance is necessary for Union Pacific to store the massive amount of data constantly being generated by CADX—again, a message packet is generated and stored every time CADX detects a change within any individual LGB across Union Pacific’s entire network—as well as to retrieve relevant message packets from among the mass of stored packets and compile them in the correct order when a “playback” is requested.

The storage mechanism for Coherence is limited. The storage limitation is a necessary trade-off for the speed at which data are written, queried, and read. The configured maximum for storage of data used for dispatch playbacks is 288 GB. To avoid exceeding that maximum, Union Pacific’s Web Playback engine contains a hardcoded limit of 99 playback hours. If Union Pacific needs to review dispatching information after 99 hours have passed, it can always use CADX logs, which contain the actual dispatching data underlying playbacks.

If Union Pacific needed to retain much more than 99 hours of LGB message packets, it could neither use Coherence nor the Web Playback engine to retrieve and review the retained data. If Union Pacific reprogrammed the Web Playback engine to instruct Coherence to retain message packets indefinitely, Coherence would reach its 288 GB capacity and refuse to write the new data. Union Pacific would lose playback functionality entirely for all but the first 99 or so hours of LGB message packets retained.

If Union Pacific needed to retain LGB message packets for more than 99 hours, it would have to move those excess message packets from Coherence to another platform for long-term retention. While a long-term storage process would be technically feasible, it would come at a

significant cost. There are products on the market that would allow Union Pacific to store message packets that cannot be retained in Coherence. But using one of those products to store six months of message packets would cost about \$80,000, and storing two years of data would cost approximately \$320,000, all excluding the costs to acquire the system, set up the new system, and perform required system maintenance.

Even if storage were more economical, storing LGB message packets in a non-Coherence system would serve no functional purpose because Union Pacific could not create playbacks using the data. Storing message packets on a platform outside Coherence would be like deconstructing a sandcastle and storing the sand in a box. Union Pacific's Web Playback engine is designed to work with Coherence. It cannot pull data from other storage systems. Union Pacific would have to significantly modify its Web Playback engine to retrieve and reconstruct LGB message packets from the new system to create playbacks. A project of that magnitude would take many months (perhaps more than a year) and cost as much as \$1 million.

Even with a new storage system, Union Pacific could not retain LGB message packets indefinitely. The alternative storage system I have in mind would reach its storage limits as retention approached two years. Assuming a December 2022 start to that storage, Union Pacific would have been at or beyond its storage limits by the end of 2024.

Finally, Union Pacific has no business or operational need to expand its playback capacity beyond 99 hours. As I note above, if Union Pacific needs to review older dispatching data, it can use CADX logs. The only reason to create a new system would be to fulfill a new regulatory obligation to retain playback capability for a longer period.

VERIFICATION

I, James D. Fenn, declare under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on April 30, 2024.

/s/ James D. Fenn

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 FIRST SET OF REQUESTS FOR PRODUCTION
OF DOCUMENTS TO UNION PACIFIC RAILWAY COMPANY**

Pursuant to 49 C.F.R. §§ 1114.30 and the Surface Transportation Board's Order in the captioned matter served July 11, 2023, the National Railroad Passenger Corporation ("Amtrak") serves this First Set of Requests for Production of Documents on Union Pacific Railroad Company ("UP"). These Requests are to be interpreted and answered in accordance with the Definitions and Instructions below. Amtrak requests that UP provide its responses and objections to these Requests within fifteen (15) days of service of these Requests, unless otherwise agreed upon by the parties.

DEFINITIONS

1. The terms "UP," "You," or "Your" refer to Union Pacific Railroad Company, as well as its corporate affiliates, parents, subsidiaries, business units, divisions, predecessors, representatives, officers, agents, counsel, employees, consultants, and any person authorized to act or acting on its behalf.
2. The term "BNSF" refers to BNSF Railway Company, as well as its corporate affiliates, parents, subsidiaries, business units, divisions, predecessors, representatives, officers, agents, counsel, employees, consultants, and any person authorized to act or acting on it.
3. The term "CN" refers to Canadian National Railway Company, its subsidiary Illinois Central Railroad Company, as well as each of their corporate affiliates, parents, subsidiaries,

business units, divisions, predecessors, representatives, officers, agents, counsel, employees, consultants, and any person authorized to act or acting on its behalf.

4. The term “SCRRA” refers to the Southern California Railroad Authority, as well as its corporate affiliates, parents, subsidiaries, business units, divisions, predecessors, representatives, officers, agents, counsel, employees, consultants, and any person authorized to act or acting on its behalf.

5. The term “NOPB” refers to New Orleans Public Belt Rail Corporation, as well as its corporate affiliates, parents, subsidiaries, business units, divisions, predecessors, representatives, officers, agents, counsel, employees, consultants, and any person authorized to act or acting on its behalf.

6. The term “2000 Operating Agreement” means the Agreement dated January 1, 2000, between Amtrak and UP, including all amendments to that Agreement.

7. The term “algorithm” refers to any program, software, or set of rules used to determine an outcome based on one or more factors.

8. The term “communication” means any oral, written, or electronic transmission of information, including but not limited to meeting, discussions, conversations, telephone calls, memoranda, white papers, letters, email messages, and notes.

9. The term “Contractual OTP” means on-time performance of trains as calculated for purposes of determining compensation owed to Union Pacific under the 2000 operating agreement.

10. The term “Customer OTP” means on time performance of trains as calculated under the customer on-time performance metric and/or minimum standard promulgated by the Federal Railroad Administration, and has the same meaning as in the Complaint. *See, e.g., Complaint ¶¶ 48-51.*

11. The term “dispatcher” refers to an individual who directs the movement of trains

within a division of trackage and coordinates their movement from one division to another, whether individually or in conjunction with a joint desk.

12. The term “Dispatching” refers to the direction of trains within a division of trackage and/or the coordination of movement of trains from one division to another, whether individually or in conjunction with a joint desk.

13. The term “Dispatching Decisions” refers to decisions that involve Dispatching of any freight or passenger train on the UP Lines.

14. The term “documents” shall be construed broadly, to include all material subject to discovery under 49 C.F.R. § 1114.30(a)(1) or any other Board rule or regulation, and to include every copy of a document not identical to the original or any other copy. For the avoidance of doubt, the term “documents” includes every writing, recording, photograph, summary, spreadsheet, or other record in any form, whether handwritten, printed, typed, taped, electronic, or in any other graphic, digital, magnetic, optical, or mechanical form, however produced, reproduced, or recorded, and includes electronic documents (such as electronic mail messages and all attachments to mail messages).

15. The term “HRD” refers to host-responsible delay(s) and has the same meaning as in the Complaint. *See, e.g.*, Complaint ¶ 52.

16. The term “Investigative Period” means the period of time beginning October 1, 2021 through and including December 8, 2022.

17. The term “on-time performance” means on-time performance as determined, discussed, recorded, or reported for any purpose, including without limitation Contractual OTP or Customer OTP.

18. The term “Pending Board Requests” refers to interrogatories and document requirements for UP that are set out in Appendix A – Part IV of the Surface Transportation Board’s

July 11, 2023 Decision in the above-captioned proceeding.

19. The term “Preference” refers to the statutory requirement that, except in an emergency, intercity and commuter rail passenger transportation provided by or for Amtrak has preference over freight transportation in using a rail line, junction, or crossing unless the Surface Transportation Board orders otherwise under 49 U.S.C. § 24308(c).

20. The term “RPSA” means the Rail Passenger Service Act of 1970, Pub. L. No. 91-518, 84 Stat. 1327, including all amendments thereto (codified at 49 U.S.C. §§ 24101 *et seq.*).

21. The term “Sunset Limited Trains” refers to Amtrak Trains 1 and 2, as described more fully in Amtrak’s Complaint. Each of the Sunset Limited Trains is individually referred to as a Sunset Limited Train.

22. The term “UP Lines” means any rail line, junction, or crossing that is owned, dispatched, jointly dispatched, controlled, managed, directed, supervised, maintained, or administered by UP, and on which any Sunset Limited Train transited between October 1, 2021 and December 8, 2022.

INSTRUCTIONS

1. Amtrak has tried to minimize duplication between these Requests and the Pending Board Requests. If UP asserts that one or more of the following Requests is covered by a Pending Board Request, UP must identify the overlapping Pending Board Request in its response, and also produce all responsive documents not otherwise being produced to the Board.

2. Unless otherwise indicated, the Requests below cover the time period from October 1, 2021 through and including December 8, 2022.¹

3. Please provide separate written responses to all of the following Requests, and repeat each Request and the number of each Request with each response. If you object to any Request, identify the number of the Request to which you object, state the basis for your objection in sufficient detail so as to permit the adjudication of the validity of the objection, and produce any documents responsive to any portion or portions of the Request that you do not find objectionable.

4. Documents sought in these Requests include documents currently or previously within UP's possession, custody or control, as well as those documents which come into UP's possession subsequent to service thereof. Each of the following Requests is continuing in nature and Amtrak hereby requests that if you obtain any additional responsive documents at any later date, you promptly so inform Amtrak and produce those documents.

5. When any Request calls for the production of any portion of any document, the entire document containing any such portion must be produced.

6. Documents offered in response to these Requests must be furnished in as organized and usable form as possible, and should be produced in a manner organized and labeled to correspond to the following Requests. Electronically stored information shall be produced in a

¹ Amtrak reserves the right to revise this time period following any written decision from Judge McCarthy regarding the appropriate scope of discovery in this proceeding and/or following the parties' forthcoming meet and confer.

method and manner as agreed upon by the parties.

7. If any responsive document or communication has been destroyed, lost, or become beyond UP's possession, custody, or control, UP must provide a list identifying the document or communication as completely as possible, providing (1) the date the document or communication was destroyed, lost, or transferred beyond UP's control; (2) the manner of the destruction, loss, or transfer; (3) the reason for the destruction, loss, or transfer; (4) the person or entity authorizing the destruction, loss, or transfer; (5) the person or entity that destroyed, lost, or transferred the document or communication.

8. If UP asserts a claim of privilege regarding a document or communication, UP must provide a log identifying each document or communication as completely as possible, and UP must produce any portion of a document or communication that contains non-privileged and responsive material.

9. The present tense shall be construed to include the past and future tenses and the past and future tenses shall be construed to include the present tense as required by the context to elicit all information discoverable within the broadest scope of these Requests.

10. The singular shall be construed to include the plural and the plural shall be construed to include the singular, whenever context permits. The terms such as "and" and "or" have both conjunctive and disjunctive meanings, and shall be construed in the broadest and most inclusive manner, in order to bring into the scope of each Request all responsive information that might otherwise be construed to be outside the scope of the Request.

11. Words such as "include" and "including" are illustrative and not limitative, and shall be construed in the broadest and most inclusive manner, in order to bring into the scope of each Request all responsive information that might otherwise be construed to be outside the scope of the Request.

12. The terms “relating to,” “related to,” “concerning,” and “showing” are to be construed broadly, to include: addressing, referring to, concerning, showing, concerning, comprising, identifying, stating, consisting of, evidencing, alluding to, responding to, connected with, discussing, showing, describing, reflecting, analyzing, constituting, setting forth, in respect of, incorporating, mentioning, embodying, containing, studying, reporting on, commenting on, considering, recommending, constituting in any way, or having any logical or factual connection with the subject matter. Likewise, the terms “any” and “all” shall mean “each and every.”

13. Production must be made to outside counsel of record for Amtrak at Jenner & Block: Alex Trepp, 1099 New York Avenue N.W., Ste. 900, Washington, DC 20001, atrepp@jenner.com, with a copy to Albert Peterson, 1099 New York Avenue N.W., Ste. 900, Washington DC 20001 apeterson@jenner.com.

REQUESTS FOR PRODUCTION

1. All document management policies, retention policies, and/or retention schedules applicable to documents or communications relating or referring to (i) the On-Time Performance of Sunset Limited Trains, (ii) Dispatching Decisions, or (iii) policies, practices, and procedures that govern, affect, or apply to Dispatching Decisions, (iv) policies, practices, and procedures that govern, affect, or apply to the implementation of Preference.

2. All documents concerning UP policies, practices, and procedures relating to Dispatching Decisions, including but not limited to documents providing train or customer-specific instructions, or concerning or reflecting any modification of those policies, practices, and procedures during the Investigative Period.

3. All communications between or among current and/or former UP management, employees, or other personnel concerning policies, practices, and procedures applicable to Dispatching Decisions.

4. All communications between or among UP and BNSF, CN, NOPB, SCRRRA, any governmental entity, and/or any other third-party concerning policies, practices, and procedures applicable to Dispatching Decisions.

5. All documents constituting, concerning, or reflecting any Dispatching Decision that departed or deviated from the policies, practices, and procedures applicable to Dispatching Decisions, or otherwise failed to implement or comply with policies, practices, and procedures applicable to Dispatching Decisions.

6. All dispatching tapes, dispatching playbacks, and other documents logging or recording Dispatching Decisions, including but not limited to Dispatching Decisions related to the dispatching of all trains entering, exiting, continuing, or otherwise traversing the UP Lines.

7. All daily system, region, or division performance reports concerning any operations

on the UP Lines.

8. All documents concerning whether or under what circumstances a dispatcher responsible for Dispatching Decisions may override algorithmic Dispatching Decisions.

9. All communications between UP supervisors and dispatchers pertaining to Dispatching Decisions involved Sunset Limited Trains.

10. Documents sufficient to show any criteria used to evaluate or compensate dispatchers and all documents related to any evaluations, reviews, or other feedback provided to dispatchers responsible for Dispatching Decisions.

11. For the time period November 11, 2020 to Present, all documents relating to any investigations, audits, studies, reviews, analyses, or other similar evaluations conducted by UP regarding Dispatching Decisions, HRD, or Preference on the UP Lines.

12. All documents relating to any disciplinary actions taken or contemplated against a dispatcher and concerning one or more Dispatching Decisions.

13. All documents concerning any operational adjustment, scheduling adjustment, capital investment, or other similar action that UP has analyzed or considered to address, evaluate, or understand delays to freight or passenger trains traveling on the UP Lines, including all documents relating to the reason(s) UP did not implement any such adjustments, investment, or other similar actions.

14. All documents concerning UP efforts to obtain funds from federal, state, or other sources for capital expenditures on the UP Lines.

15. All agreements with freight customers using any portion of the UP Lines 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.

16. All documents constituting or concerning UP's current operating plan(s) for lines used by Sunset Limited Trains, and all documents constituting or concerning efforts to measure operational performance against UP's current operating plan(s) or operating schedule(s) for lines used by Sunset Limited Trains.

17. All corporate policies, protocols, guidance documents, or other materials related to the implementation of Preference, or used to evaluate the implementation of Preference.

18. Documents sufficient to show any procedures or systems used to implement or evaluate the implementation of Preference.

19. For the UP Lines, documents sufficient to associate locomotive numbers associated with each train that operated on a fixed schedule during the Investigative Period.

20. All documents analyzing, assessing, investigating, studying, reviewing or otherwise evaluating how the adoption and implementation of precision-scheduled railroading has affected the on-time performance of intercity passenger trains and/or affected the implementation of Preference.

21. All documents analyzing, assessing, investigating, studying, reviewing or otherwise evaluating how UP's network planning and design have affected, are affecting, or will affect the on-time performance of Sunset Limited Trains and/or implementation of Preference on the UP Lines, including but not limited to documents concerning any ongoing or anticipated capital investments that will affect UP's network capacity on the UP Lines.

22. All documents concerning policies, protocols, or procedures related to how You prioritize freight traffic on the UP Lines, or the dispatching of any intermodal or other trains carrying priority freight on the UP Lines.

23. For the time period November 11, 2020 to Present, all documents relating to any modeling, studies, reviews, analyses, investigations, or other similar evaluations conducted by UP regarding the Sunset Limited schedule or freight schedules on lines used by Sunset Limited Trains.

24. All documents reflecting or relating to UP's consideration of Sunset Limited Trains in determining, assessing, evaluating, studying, or otherwise considering freight volumes for lines used by the Sunset Limited Trains.

September 12, 2023

Respectfully submitted:

/s/ Jessica Ring Amunson

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CERTIFICATE OF SERVICE

I, Jessica Ring Amunson, certify that I have this day caused a copy of this document to be served upon UP by email to counsel for UP at the following email address:

Mrosenthal@Cov.Com

September 12, 2023

/s/ Jessica Ring Amunson
Jessica Ring Amunson

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 RESPONSES AND OBJECTIONS TO FIRST SET OF INTERROGATORIES
FROM UNION PACIFIC RAILROAD COMPANY**

GENERAL OBJECTIONS

1. Amtrak objects to the Interrogatories, including all Definitions and Instructions, to the extent they seek to impose obligations beyond, exceeding, or otherwise inconsistent with discovery obligations under 49 C.F.R. § 1114.

2. Amtrak objects to the Interrogatories, including all Definitions and Instructions, to the extent any Interrogatory would require Amtrak to spend an unreasonable amount of time, effort, and resources in order to respond when balanced against the potential probative value (if any) of the information requested, and to the extent that full compliance with any Interrogatory is not possible in the time permitted by the governing Board regulations, the governing Board Order,¹ or the governing Board discovery schedule.

3. Amtrak objects to the Interrogatories, including all Definitions and Instructions, to the extent they seek information not relevant to the claim of any party and not reasonably calculated to lead to the discovery of admissible evidence.

4. Amtrak objects to the Interrogatories, including all Definitions and Instructions, to the extent they call for information that is already in the possession of Union Pacific Railroad

¹ See Decision, *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*, Docket No. NOR 42175 (July 11, 2023) ("Order").

Company (“UP”), for information that is publicly available, and for information already produced to UP or the Board in this proceeding. Such Interrogatories are overbroad, unduly burdensome, duplicative, cumulative, and would needlessly increase the cost of this proceeding.

5. Amtrak objects to the Interrogatories, including all Definitions and Instructions, to the extent they seek information or documents protected from discovery under any statute, regulation, agreement, protective order, or privilege, including but not limited to the attorney-client privilege and work-product protection. Any inadvertent disclosure of such information shall not be deemed a waiver of the applicable privilege or protection.

6. Amtrak objects to the Interrogatories, including all Definitions and Instructions, to the extent any Interrogatory contains factually inaccurate information or statements, is argumentative, is predicated on erroneous assumptions, or states legal conclusions. The statements and omissions in Amtrak’s responses and objections do not indicate and should not be construed as meaning that Amtrak agrees, admits, or otherwise acknowledges the characterization of fact or law or the factual expressions or assumptions contained in the Interrogatory, that the scope of the Interrogatory is consistent with the discovery permitted in this proceeding, or that the information or documents are relevant and admissible.

7. Amtrak objects to the Interrogatories, including all Definitions and Instructions, to the extent they seek information or documents that are not in the possession, custody, or control of Amtrak.

8. Amtrak objects to the Interrogatories to the extent they mischaracterize, misquote, or excerpt the Complaint and Petition.

9. Amtrak objects to the Interrogatories, including all definitions and Instructions, to the extent they seek information or documents that do not exist or are not maintained in the

ordinary course of business. Amtrak further objects to the Interrogatories, including all Definitions and Instructions, to the extent they seek to require the creation of documents or the compilation of information or documents in a manner different from the manner in which they are maintained in the ordinary course of business.

10. Amtrak objects to the number of Interrogatories that UP has propounded, which is inconsistent with the governing Board Order and discovery schedule and exceeds the number of interrogatories permitted under the Federal Rules of Civil Procedure. Amtrak reserves the right to seek a protective order relieving it from the obligation to respond to the unduly burdensome, disproportionate, and otherwise impermissible number of interrogatories that UP has propounded.

11. Amtrak reserves any and all objections to the use or admissibility of any information, material, documents, or communications identified, produced, or disclosed in response to these Interrogatories.

OBJECTIONS TO DEFINITIONS

Objection to Definition No. 8. Amtrak objects to the definition of “Communications” as unduly burdensome and disproportionate to the needs of this proceeding. As the parties have agreed, neither will collect and produce text messages.

Objection to Definition No. 13. Amtrak objects to the definition of the phrase “Describe with particularity” because it purports to require that Amtrak draw legal conclusions about the purported relevance or materiality of facts. Amtrak further objects to the definition because the investigation is ongoing. Amtrak’s objections and responses are based on current and reasonably available information gathered since UP serves its discovery requests. Amtrak reserves the right to at any time supplement, clarify, or otherwise amend any response, and to at any time supplement, clarify, or otherwise amend its objections, as more information becomes available.

Amtrak likewise reserves the right to rely on facts, documents, information, and events that it may subsequently identify or develop.

Objection to Definition No. 14. Amtrak objects to the definition of “Document” to the extent it purports to require that Amtrak produce documents not within its possession, custody, or control, and to the extent inconsistent with the parties’ agreement to modify certain requests to seek only “Analyses.”

Objection to Definition No. 19. Amtrak objects that the definition of Host Railroad is unduly burdensome and disproportionate to the needs of this investigation because it purports to require that Amtrak search for and provide information about railroads and entities that are not party to this proceeding and about routes that are not at issue in this proceeding. Unless otherwise indicated, Amtrak will limit its responses to entities that host a portion of the *Sunset Limited* route.

Objection to Definition No. 26. Amtrak objects that the definition of “Operating Agreement” in Definition 26 is unduly burdensome and disproportionate to the needs of this investigation because it purports to require that Amtrak search for and provide information about routes not at issue in this proceeding. Unless otherwise indicated, Amtrak will limit its responses to the *Sunset Limited*.

OBJECTIONS TO INSTRUCTIONS

Objection to Instruction No. 1. Amtrak objects to this instruction because it purports to require that Amtrak obtain information from an unreasonably wide array of sources, and is therefore unduly burdensome and disproportionate to the needs of the proceeding. For the same reason, Amtrak objects to this instruction to the extent that full compliance is not possible in the time permitted by the governing Board regulations, Order, or discovery schedule.

Objection to Instruction No. 3. Amtrak objects to this instruction as unduly burdensome and disproportionate to the needs of the proceeding because it purports to require that Amtrak provide information that is cumulative and duplicative.

Objection to Instruction No. 4. Amtrak objects to this instruction because it purports to require that Amtrak obtain information for time periods irrelevant to this proceeding, not reasonably calculated to lead to the discovery of admissible evidence, and significantly more expansive than the default time period for Board requests.² For those reasons, this instruction is also unduly burdensome and disproportionate to the needs of the proceeding. Amtrak objects to the request to the extent that full compliance is not possible in the time permitted by the governing Board regulations, Order, or discovery schedule, and incorporates objections articulated in its Motion for Protective Order. Unless otherwise indicated, Amtrak will limit its response (if any) to the Relevant Period established in the Order.

Objection to Instruction 5. Amtrak objects to this Instruction to the extent it seeks to impose obligations that supplement, exceed, or are inconsistent with obligations under C.F.R. § 1114, and as unduly burdensome and disproportionate to the needs of the proceeding.

² In its Order, the Board issued requests for documents, data, and information to the parties. For purposes of responding to its requests, the Board defined the “Relevant Period” as October 1, 2021 through December 8, 2022. *See* Order at 20.

Objection to Instruction 6. Amtrak objects to this Instruction to the extent it seeks to impose obligations that supplement, exceed, or are inconsistent with obligations under C.F.R. § 1114, and as unduly burdensome and disproportionate to the needs of the proceeding, including because it purports to require that Amtrak associate documents with requests that are duplicative, overlapping, and cumulative. Amtrak will not sort its production by Request or otherwise produce an index associating documents to the duplicative, overlapping, and cumulative Requests propounded by UP unless otherwise agreed by the parties.

RESPONSES AND OBJECTIONS

Request No. 17. For any delay to any Sunset Limited Train that occurred from October 1, 2021, through December 8, 2022, that Amtrak contends was attributable to a failure to give Amtrak Preference, provide the following information in a Machine-Readable table:

- a. The train number of the Amtrak train affected, as recorded by Amtrak;
- b. Surrogate train number used by another party for the Amtrak train affected, if applicable;
- c. The Train Index Date of the train affected;
- d. The train ID date assigned by the host railroad;
- e. The delay ID number employed by Amtrak for the train involved;
- f. Date and time that the delay began;
- g. Date and time that the delay ended;
- h. Duration of the delay in minutes;
- i. Railroad to which Amtrak assigned responsibility for the delay;
- j. Delay cause (code) as found in Appendix B the Complaint;
- k. Other causation information (i.e., any additional causation information supplied by the conductor or other personnel);
- l. Location of the delay:
 1. Host Railroad Subdivision name;
 2. Uniform Milepost Number;
 3. Delay location type; and
 4. Amtrak crew district name
- m. Latitude and longitude data;
- n. Indicate if the delay was disputed at any time;
- o. For delays that were disputed:
 1. Whether the delay was resolved or unresolved;
 2. An explanation of the dispute that includes a description of any revisions made. If the dispute was unresolved, explain why;
 3. Date of the revision, if applicable;
 4. Host Railroad's concurrence or nonconcurrence in revision, if applicable; and
 5. Status as of the date of submission of this response, if applicable;

- p. Action the Host Railroad should have taken to avoid the alleged failure to give Amtrak Preference.

Response: Amtrak objects to this request as premature, including because the Board is continuing to investigate the failure to provide *Sunset Limited* Trains with their statutory right to preference over freight transportation in using a rail line, junction or crossing, because Amtrak is still reviewing documents, data, and information submitted to the Board, because Amtrak will need to review any additional documents, data, and information submitted to the Board, and because Amtrak has yet to receive and will need to review dispatching tapes, documents, data, and information requested from UP in party-led discovery. Amtrak further objects to this request because it invades the attorney-client privilege and/or work product protection, including by purporting to require the premature disclosure of legal judgments about whether a particular delay was attributable to a failure to comply with Amtrak's statutory right to preference over freight transportation in using a rail line, junction, or crossing, and about what alternative course of action would comply with Amtrak's statutory right to preference over freight transportation.

Amtrak further objects to this request to the extent UP seeks information that is in its own possession, custody, and control or is not within Amtrak's possession, custody, and control. Amtrak further objects to this request as unduly burdensome because it purports to require that Amtrak complete an analysis of the 22,615 delays to *Sunset Limited* Trains that occurred within the Relevant Period, and further objects to the request to the extent that compliance with that purported requirement is not possible within the time permitted for party-led discovery in this proceeding. Additionally, Amtrak objects to the request to the extent that it calls for legal conclusions and objects to the request as both unduly burdensome and disproportionate to the needs of this proceeding to the extent it requires that Amtrak re-produce material also provided in response to Board requests. Amtrak further objects to the request because it seeks information not kept in the

ordinary course of business and to the extent it purports to require that Amtrak conduct a special study or create any documents.

Subject to its general and specific objections—and reserving the right to modify, amend, or supplement this response based on its continuing review and on materials that have been or will be produced to the Board or in party-led discovery—Amtrak respectfully directs UP to the document Bates Stamped AMTRAK_STB_Native_0030, which identifies delays that Amtrak may contend were attributable to a failure to provide Amtrak with its statutory right to preference over freight transportation in using a rail line, junction or crossing, and also includes detailed information about each delay. To be clear, Amtrak reiterates that its review of documents, data, and information concerning the failure to provide Amtrak with preference is ongoing and may be affected by information that is in the sole possession of UP, has been produced to the Board or Amtrak in this investigation, or will be produced to the Board or Amtrak in this investigation.

Request No. 23: Describe with particularity the reasons why the notation “insufficient run time” would appear in a CDR, to the extent the information is not provided in response to Request No. 22.

Response: Amtrak objects to the definition of the phrase “Describe with particularity” because it purports to require that Amtrak draw legal conclusions about the purported relevance or materiality of facts. Subject to its general and that specific objection, Amtrak responds as follows: Amtrak permits conductors to enter explanations when reporting train delays. Conductors may enter “insufficient run time” when trains experience a delay during one segment of the route, the reason for that delay is not apparent to the conductor, and the conductor in the absence of other information concludes that the delay segment has been completed under optimal or near-optimal conditions. A more formal and comprehensive evaluation of Pure Run Time may or may not confirm a conductor’s perception that there is insufficient run time for a particular segment.

Request No. 24: Describe with particularity the reasons why the notation “lost time no apparent reason” would appear in a CDR, to the extent the information is not provided in response to Request No. 22.

Response: Amtrak objects to the definition of the phrase “Describe with particularity” because it purports to require that Amtrak draw legal conclusions about the purported relevance or materiality of facts. Subject to its general and that specific objection, Amtrak responds as follows: The phrase “lost time no apparent reason” may appear in a conductor delay narrative when a conductor is unable to identify the cause of a delay based on information available to the conductor. When time is lost for reasons not apparent to the conductor, the conductor is instructed to record the delay as an Amtrak-responsible delay, even though the true cause of that delay may be attributable to a host or third-party.

Request No. 25. Describe with particularity the processes, procedures, and criteria employed by Amtrak to determine (a) how an individual delay to an Amtrak train or a type of delay to an Amtrak train should be categorized for purpose of calculating the COTP Metric; and (b) how an individual delay to an Amtrak train or a type of delay to an Amtrak train should be categorized for purpose of calculating the Train Delay Metric.

Response: Amtrak objects to the definition of the phrase “Describe with particularity” because it purports to require that Amtrak draw legal conclusions about the purported relevance or materiality of facts. Amtrak further objects to this Request as unduly burdensome, including because it is duplicative and cumulative of Board Requests 12 and 13. Amtrak further objects to subpart (a) of this Request because the COTP Metric is calculated as set forth in 49 C.F.R. § 273.5(a). Amtrak also objects to this request because it purports to require that Amtrak obtain information for time periods irrelevant to this proceeding, not reasonably calculated to lead to the discovery of admissible evidence, and significantly more expansive than the default time period for Board Requests. Indeed, for those reasons, this request is also unduly burdensome and disproportionate to the needs of the proceeding. Subject to its general and specific objections, and consistent with

49 C.F.R. § 1114.26(b), Amtrak respectfully directs UP to Amtrak’s Response to Board Request Nos. 12-13 and the documents cited therein.

Request No. 26. Describe with particularity the processes, procedures, and criteria employed by Amtrak to determine whether a CDR should be corrected.

Response: Amtrak objects to the definition of the phrase “Describe with particularity” because it purports to require that Amtrak draw legal conclusions about the purported relevance or materiality of facts. Amtrak further objects to this Request as unduly burdensome, including because it is duplicative and cumulative of Board Requests 14-16. Amtrak also objects to this request because it purports to require that Amtrak obtain information for time periods irrelevant to this proceeding, not reasonably calculated to lead to the discovery of admissible evidence, and significantly more expansive than the default time period for Board Requests. Indeed, for those reasons, this request is also unduly burdensome and disproportionate to the needs of the proceeding. Subject to its general and specific objections, and consistent with 49 C.F.R. § 1114.26(b), Amtrak respectfully directs UP to Amtrak’s Response to Board Request Nos. 14-16 and the documents cited therein.

Request No. 36: Describe with particularity Amtrak’s policies, procedures, and practices relating to (a) the recording, coding, measurement, reporting, and description of delays to Amtrak trains as Host-Responsible Delay; (b) the recording, coding, measurement, reporting, and description of delays to Amtrak trains as Amtrak-Responsible Delay; (c) the recording, coding, measurement, reporting, and description of delays to Amtrak trains as Third-Party Responsible Delay; (d) the recording, coding, measurement, reporting, and description of delays to Amtrak trains as FTI; and (e) the recording, coding, measurement, and reporting of the COTP Metric.

Response: Amtrak objects to the definition of the phrase “Describe with particularity” because it purports to require that Amtrak draw legal conclusions about the purported relevance or materiality of facts. Amtrak further objects to this Request as unduly burdensome, including because it is duplicative and cumulative of Board Requests 1, 12-13. Consistent with the parties’ agreement, Amtrak will confine its response to the Relevant Period. Subject to its general and

specific objections, and consistent with 49 C.F.R. § 1114.26(b), Amtrak respectfully directs UP to Amtrak's Response to Board Request Nos. 1, 12-13 and the documents cited therein.

Request No. 37: Describe with particularity how the policies, procedures, and practices described in response to Request No. 36 are communicated to Amtrak's conductors, assistant conductors, engineers, and second engineers.

Response: Amtrak objects to the definition of the phrase "Describe with particularity" because it purports to require that Amtrak draw legal conclusions about the purported relevance or materiality of facts. Consistent with the parties' agreement concerning this request, Amtrak will confine its response to the Relevant Period. Subject to its general and specific objections, Amtrak responds as follows: When hired, assistant conductors receive information about delay coding during their new-hire training. As part of the delay coding training session, assistant conductors also receive a manual that contains information about the reporting and recording delays on host railroads, which is provided to personnel involved in recording, reporting, or otherwise assisting in the preparation, maintenance, and evaluation of delay data. *See* Amtrak_STB_0000061; Amtrak_STB_0000017. Assistant conductors are also partnered with a promoted Conductor to receive On Job Training ("OJT") and gain experience with delay reporting. Only after being elevated from an assistant conductor to a conductor do personnel become responsible for delay reporting. Upon promotion, personnel receive further training on delay coding, as well as recurrent training. Amtrak further responds that engineers and second engineers are not responsible for delay reporting. To the extent engineers and second engineers assume positions that require managing conductors (*i.e.*, Trainmaster or, in some cases, Road Foremen), those personnel attend a delay coding training session, where they receive materials described in Amtrak's response to Board Request No. 16.

Request No. 38: Identify all changes to any policies, procedures, or practices described in response to Request No. 36 and describe with particularity the nature of each such change.

Response: Amtrak objects to the definition of the phrase “Describe with particularity” because it purports to require that Amtrak draw legal conclusions about the purported relevance or materiality of facts. Amtrak further objects to this Request as unduly burdensome, including because it is duplicative and cumulative of Board Requests 1, 12-13. Consistent with the parties’ agreement, Amtrak will confine its response to the Relevant Period. Subject to its general and specific objections, and consistent with 49 C.F.R. § 1114.26(b), Amtrak respectfully directs UP to Amtrak’s Response to Board Request Nos. 1, 12, and 13, as well as the May 10, 2021 Delay Manual (Amtrak_STB_0000061) and October 10, 2022 Delay Manual (Amtrak_STB_0000017).

Request No. 39: Describe with particularity Amtrak’s policies, procedures, and practices relating to Communications with dispatchers and other employees of Union Pacific.

Response: Amtrak objects to the definition of the phrase “Describe with particularity” because it purports to require that Amtrak draw legal conclusions about the purported relevance or materiality of facts. Amtrak objects to the phrase “other employees” as ambiguous, overbroad, and unduly burdensome. Amtrak interprets this request to seek information concerning communications between individuals responsible for the day-to-day operation of *Sunset Limited* Trains on UP rail lines. Also, and consistent with the parties’ agreement, Amtrak will confine its response to the Relevant Period.

Subject to its general and specific objections, Amtrak responds as follows: Amtrak communications with UP dispatchers occur pursuant to rules and instructions issued by UP, including the UP rulebook, employee timetables, and any special instructions issued to the operating crew. Additional rules and instructions governing the day-to-day communications between Amtrak personnel and UP dispatchers are provided in the Service Standards Manual AMTRAK_STB_0000906. *See, e.g.,* Manual at 1-32 (communications concerning immediate

threats to the safety and security of customers or train crews); *id.* at 2-1 (communications concerning emergency medical assistance).

Request No 40. Describe with particularity how the policies, procedures, and practices described in response to Request No. 39 are communicated to Amtrak's conductors, assistant conductors, engineers, and second engineers.

Response: Amtrak incorporates by reference its objections to Request No. 39. Amtrak interprets this request to seek information concerning policies, procedures, and practices related to communications between individuals responsible for the day-to-day operation of *Sunset Limited* Trains on UP rail lines. Also, and consistent with the parties' agreement, Amtrak will confine its response to the Relevant Period. Subject to its general and specific objections, Amtrak responds as follows: Amtrak communications with UP dispatchers occur pursuant to rules and instructions issued by UP, including the UP rulebook, employee timetables, and any special instructions issued to the operating crew, which are disseminated by Union Pacific, posted in the crew base, and also accessible through credentials assigned by Union Pacific. Rules and instructions governing the day-to-day communications between Amtrak personnel and UP dispatchers are also communicated to personnel through the Service Standards Manual (AMTRAK_STB_0000906) and in trainings conducted upon hiring and promotion.

Request No. 41. Identify all changes to any policies, procedures, or practices described in response to Request 39 and describe with particularity the nature of each such change.

Response: Amtrak incorporates by reference its objections to Request No. 39. Amtrak interprets this request to seek information concerning policies, procedures, and practices related to communications between individuals responsible for the day-to-day operation of *Sunset Limited* Trains on UP rail lines. Also, and consistent with the parties' agreement, Amtrak will confine its response to the Relevant Period. To the extent this Request seeks information about changes to the UP rulebook, employee timetables, or any special instructions issued to the operating crew,

Amtrak respectfully objects to the Request because that information is within the possession, custody, or control of UP. Subject to its general and specific objections, and consistent with 49 C.F.R. § 1114.26(b), Amtrak respectfully directs UP to the Service Standards Manuals Bates Stamped AMTRAK_STB_0000906; AMTRAK_STB_0001539; AMTRAK_STB_0001228.

Request No. 42. State whether any Amtrak employees are or have been evaluated, compensated, supervised, or disciplined based in whole or part on information they recorded or failed to record in CDRs, and if so, identify the basis for this statement.

Response: Amtrak objects to this request as irrelevant, unduly burdensome, and disproportionate to the needs of this proceeding to the extent it purports to require information about whether Amtrak employees have been evaluated, compensated, supervised, or disciplined for the act of recording or omitting information in CDRs, rather than the substance of information recorded or omitted. Amtrak also objects to the phrases “supervised,” “evaluated,” and “in whole or in part” as vague and ambiguous. Consistent with the parties’ agreement, Amtrak will confine its response to the Relevant Period and to formal disciplinary processes. Subject to its general and specific objections, Amtrak responds that, based on its reasonable and diligent review, it has not identified any Amtrak employee responsible for recording or revising delays that has been compensated or disciplined based on the substance of the information they recorded or failed to record in CDRs.

Request No. 44. Identify all sources and stores of data maintained by Amtrak relating to the performance of Sunset Limited Trains, including but not limited to data regarding On-Time Performance and Train Delays. For each data set, describe what it contains, how it was collected, when it was collected, and who collected it.

Response: Amtrak objects to this request as unduly burdensome, including because it is duplicative and cumulative of Board Requests 7-14. Amtrak objects to the phrase “relating to the performance of Sunset Limited Trains” as vague and ambiguous. Amtrak objects to the phrase “On-Time Performance” to the extent it is intended to encompass measures of on-time

performance other than Customer On-Time Performance and Contractual On-Time Performance. Amtrak will respond to this request by providing information with respect to On-Time Performance and Train Delays. Subject to its general and specific objections, and consistent with 49 C.F.R. § 1114.26(b), Amtrak respectfully directs UP to Amtrak Response to Board Request Nos. 7-14 and the documents cited therein.

Request No. 49: Identify and describe with particularity all sources of funding available or potentially available to Amtrak for investment in Infrastructure on the Sunset Limited Route.

Response: Amtrak objects to the definition of the phrase “Describe with particularity” because it purports to require that Amtrak draw legal conclusions about the purported relevance or materiality of facts. Amtrak further objects to the request as unduly burdensome because it purports to require that Amtrak identify “all” sources of funding. Amtrak objects to the request to the extent it assumes that Amtrak should use or seek funding for investment in infrastructure on the *Sunset Limited* route, which is owned or hosted primarily by UP. Amtrak objects to the request as unduly burdensome to the extent it duplicates UP requests 45-47. Subject to its general and specific objections, and based on its reasonable and diligent investigation, Amtrak responds that sources of funding potentially available to Amtrak for investment in certain types of infrastructure³ on the *Sunset Limited* route include:

- The Consolidated Rail Infrastructure and Safety Improvements Program
- The Railroad Crossing Elimination Program
- Restoration & Enhancement Grants
- The FRA Federal-State Partnership for Intercity Passenger Rail Program
- Amtrak’s National Network Grant
- Department of Transportation Megaproject Program

Request No. 51: Describe with particularity any measures or plans Amtrak has to reduce Amtrak-Responsible Delays and produce all documents relating to such measures or plans.

³ Amtrak interprets the term infrastructure to include, among other things, stations, new rolling stock, and other railroad assets.

Response: Amtrak hereby responds exclusively to the request that it describe with particularity any measures or plans it has to reduce Amtrak-Responsible Delays.⁴ Amtrak objects to the definition of the phrase “Describe with particularity” because it purports to require that Amtrak draw legal conclusions about the purported relevance or materiality of facts. Amtrak objects to the request as unduly burdensome, including because it is duplicative and cumulative of Board Request 43. Subject to its general and specific objections, Amtrak respectfully directs UP to Amtrak Response to Board Request No. 43.

Request No. 52: Describe with particularity any measures or plans Amtrak has to reduce Third-Party Responsible Delays and produce all documents relating to such measures or plans.

Response: Amtrak hereby responds exclusively to the request that it describe with particularity any measures or plans it has to reduce Third-Party Responsible Delays.⁵ Amtrak objects to the definition of the phrase “Describe with particularity” because it purports to require that Amtrak draw legal conclusions about the purported relevance or materiality of facts. Amtrak objects to the request as unduly burdensome, including because it is duplicative and cumulative of Board Request 43. Subject to its general and specific objections, Amtrak respectfully directs UP to Amtrak Response to Board Request No. 43

Request No. 77: Identify and describe with particularity the “policies” referenced in Paragraph 8 of the Complaint that allegedly deny Sunset Limited Trains their statutory right to preference.

Response: Amtrak objects to the definition of the phrase “Describe with particularity” because it purports to require that Amtrak draw legal conclusions about the purported relevance or materiality of facts. Amtrak objects to this request to the extent it selectively quotes and excerpts

⁴ To avoid confusion, Amtrak and UP have separately negotiated modifications of the request that it produce “all documents” concerning such measures or plans. Amtrak will separately meet and confer about this document request.

⁵ To avoid confusion, Amtrak and UP have separately negotiated modifications of the request that it produce “all documents” concerning such measures or plans. Amtrak will separately meet and confer about this document request.

the Complaint and Petition. Amtrak objects to the request because the Board's investigation is ongoing, because Amtrak is still reviewing documents, data, and information submitted to the Board, and because Amtrak will need to review additional documents, data, and information submitted to the Board. Amtrak reserves the right to modify or amend its Complaint and Petition, and reserves its right to expand, supplement, modify, or otherwise develop its allegations and contentions as more information becomes available. Amtrak likewise reserves the right to rely on facts, documents, information, and events that it may subsequently identify or develop during the course of the investigation. Subject to its general and specific objections, Amtrak further responds that the dispatching policies and/or practices so referenced are identified and described in Paragraphs 127-140 of its Complaint and Petition.

Request No. 79: Identify and describe with particularity the "practices" referenced in Paragraph 8 of the Complaint that allegedly deny Sunset Limited Trains their statutory right to preference.

Response: Amtrak objects to the definition of the phrase "Describe with particularity" because it purports to require that Amtrak draw legal conclusions about the purported relevance or materiality of facts. Amtrak objects to this request to the extent it selectively quotes and excerpts the Complaint and Petition. Amtrak objects to the request because the Board's investigation is ongoing, because Amtrak is still reviewing documents, data, and information submitted to the Board, and because Amtrak will need to review additional documents, data, and information submitted to the Board. Amtrak reserves the right to modify or amend its Complaint and Petition, and reserves its right to expand, supplement, modify, or otherwise develop its allegations and contentions as more information becomes available. Amtrak likewise reserves the right to rely on facts, documents, information, and events that it may subsequently identify or develop during the course of the investigation. Subject to its general and specific objections, Amtrak further responds

that the dispatching policies and/or practices so referenced are identified and described in Paragraphs 127-140 of its Complaint and Petition.

Request No. 81: Identify and describe with particularity the “operational practices” referenced in Paragraph of the Complaint that allegedly result in systematic violations of Amtrak’s rights.

Responses: Amtrak objects to the definition of the phrase “Describe with particularity” because it purports to require that Amtrak draw legal conclusions about the purported relevance or materiality of facts. Amtrak objects to this request to the extent it selectively quotes and excerpts the Complaint and Petition. Amtrak objects to the request because the Board’s investigation is ongoing, because Amtrak is still reviewing documents, data, and information submitted to the Board, and because Amtrak will need to review additional documents, data, and information submitted to the Board. Amtrak reserves the right to modify or amend its Complaint and Petition, and reserves its right to expand, supplement, modify, or otherwise develop its allegations and contentions as more information becomes available. Amtrak likewise reserves the right to rely on facts, documents, information, and events that it may subsequently identify or develop during the course of the investigation. Subject to its general and specific objections, Amtrak further responds that the “operational practices” so referenced are identified and described in Paragraphs 127-140 of Amtrak’s Complaint and Petition.

Request No. 84: Identify each instance in which Amtrak alleges Union Pacific “prioritized freight trains over Sunset Limited Trains” when “resolving meets and passes.” *See* Complaint ¶ 9.

Response: Amtrak objects to this request as premature, including because the Board is continuing to investigate the failure to provide Amtrak with its statutory right to preference over freight transportation in using a rail line, junction, or crossing, because Amtrak is still reviewing documents, data, and information submitted to the Board, because Amtrak will need to review any additional documents, data, and information submitted to the Board, and because Amtrak has yet

to receive and will need to review dispatching tapes, documents, data, and information requested from UP in party-led discovery. Amtrak further objects to this request because it invades the attorney-client privilege and/or work product protection, including by purporting to require the premature disclosure of legal judgments about whether a particular delay was attributable to a failure to comply with Amtrak's statutory right to preference over freight transportation.

Amtrak further objects to this request to the extent UP seeks information that is in its own possession, custody, and control or is not within Amtrak's possession, custody, and control. Amtrak further objects to this request as unduly burdensome because it purports to require that Amtrak complete an analysis of the 22,615 delays to *Sunset Limited* Trains that occurred within the Relevant Period, and further objects to the request to the extent that compliance with that purported requirement is not possible within the time permitted for party-led discovery in this proceeding.

Amtrak objects to this request to the extent it selectively quotes and excerpts the Complaint and Petition. Amtrak reserves the right to modify or amend its Complaint and Petition, and reserves its right to expand, supplement, modify, or otherwise develop its allegations and contentions as more information becomes available. Amtrak likewise reserves the right to rely on facts, documents, information, and events that it may subsequently identify or develop during the course of the investigation.

Subject to its general and specific objections, and reserving the right to modify, amend, or supplement this response based on its continuing review and based on materials that have been or will be produced to the Board or in party-led discovery, Amtrak respectfully directs UP to UP delays coded FTI (Meet), FTI (Cross Over), FTI (Blocked), FTI (Freight Train in the Way), FTI

(Other), RTE, and DCS in the document Bates Stamped Amtrak_STB_Native_0030,⁶ which identifies delays that Amtrak may contend that UP “prioritized freight trains over Sunset Limited Trains” when “resolving meets and passes.” To be clear, Amtrak reiterates that its review of documents, data, and information concerning the failure to prioritize *Sunset Limited* Trains in resolving meets and passes is ongoing and may be affected by information that is in the sole possession of UP, has been produced to the Board or Amtrak in this investigation, or will be produced to the Board or Amtrak in this investigation.

Request 85: Identify each instance in which Amtrak alleges Union Pacific “prioritized freight trains over Sunset Limited Trains” when “determining access to main lines.” *See* Complaint ¶ 9.

Response: Amtrak objects to this request as premature, including because the Board is continuing to investigate the failure to provide Amtrak with its statutory right to preference over freight transportation in using a rail line, junction, or crossing, because Amtrak is still reviewing documents, data, and information submitted to the Board, because Amtrak will need to review any additional documents, data, and information submitted to the Board, and because Amtrak has yet to receive and will need to review dispatching tapes, documents, data, and information requested from UP in party-led discovery. Amtrak further objects to this request because it invades the attorney-client privilege and/or work product protection, including by purporting to require the premature disclosure of legal judgments about whether a particular delay was attributable to a failure to comply with Amtrak’s statutory right to preference over freight transportation.

Amtrak further objects to this request to the extent UP seeks information that is in its own possession, custody, and control or is not within Amtrak’s possession, custody, and control. Amtrak further objects to this request as unduly burdensome because it purports to require that

⁶ Amtrak reserves the right to contend that delays occurring between El Monte and Yuma Junction should also be attributed to UP.

Amtrak complete an analysis of the 22,615 delays to *Sunset Limited* Trains that occurred within the Relevant Period, and further objects to the request to the extent that compliance with that purported requirement is not possible within the time permitted for party-led discovery in this proceeding.

Amtrak objects to this request to the extent it selectively quotes and excerpts the Complaint and Petition. Amtrak reserves the right to modify or amend its Complaint and Petition, and reserves its right to expand, supplement, modify, or otherwise develop its allegations and contentions as more information becomes available. Amtrak likewise reserves the right to rely on facts, documents, information, and events that it may subsequently identify or develop during the course of the investigation.

Subject to its general and specific objections, and reserving the right to modify, amend, or supplement this response based on its continuing review, Amtrak respectfully directs UP to UP delays coded FTI (meet), FTI (follow), FTI (cross over), FTI (cross-traffic), FTI (blocked), FTI (congestion), FTI (freight congestion), FTI (freight train in the way), FTI (other), RTE, and DCS in the document Bates Stamped Amtrak_STB_Native_0030,⁷ identifying delays for which Amtrak may contend that UP “prioritized freight trains over *Sunset Limited* Trains” when “determining access to main lines.” To be clear, Amtrak reiterates that its review of documents, data, and information concerning the failure to prioritize *Sunset Limited* Trains in determining access to main lines is ongoing and may be affected by information that is in the sole possession of UP, has been produced to the Board or Amtrak in this investigation, or will be produced to the Board or Amtrak in this investigation.

⁷ Amtrak reserves the right to contend that delays occurring between El Monte and Yuma Junction should also be attributed to UP.

Request 86: Identify each instance in which Amtrak alleges Union Pacific “prioritized freight trains over Sunset Limited Trains” when “otherwise failing to ensure that tracks are available for the Sunset Limited Trains.” *See* Complaint ¶ 9.

Response: Amtrak objects to this request as premature, including because the Board has only just begun its investigation of the failure to provide Amtrak with its statutory right to preference over freight transportation in using a rail line, junction, or crossing, because Amtrak is still reviewing documents, data, and information submitted to the Board, and because Amtrak will need to review additional documents, data, and information submitted to the Board. Amtrak further objects to this request because it invades the attorney-client privilege and/or work product protection, including by purporting to require the premature disclosure of legal judgment about whether Amtrak will contend that a particular delay was attributable to a failure to comply with Amtrak’s statutory right to preference. Amtrak further objects to this request as unduly burdensome because it purports to require that Amtrak complete an analysis of the 22,615 delays to *Sunset Limited* Trains that occurred within the Relevant Period, and further objects to the request to the extent that compliance is not possible within the time permitted for party-led discovery in this proceeding.

Amtrak objects to this request to the extent it selectively quotes and excerpts the Complaint and Petition. Amtrak reserves the right to modify or amend its Complaint and Petition, and reserves its right to expand, supplement, modify, or otherwise develop its allegations and contentions as more information becomes available. Amtrak likewise reserves the right to rely on facts, documents, information, and events that it may subsequently identify or develop during the course of the investigation.

Subject to its general and specific objections, and reserving the right to modify, amend, or supplement this response based on its continuing review, Amtrak respectfully directs UP to UP

delays coded FTI (meet), FTI (follow), FTI (cross over), FTI (cross-traffic), FTI (blocked), FTI (congestion), FTI (freight congestion), FTI (freight train in the way), FTI (other), FTI (emergency, derailment, disabled, breakdown), FTI (pick up/drop off freight crew), RTE, DCS, and DMW in the document Bates Stamped Amtrak_STB_Native_0030,⁸ which identifies instances in which Amtrak may contend that UP prioritized freight trains over Sunset Limited Trains” by “otherwise failing to ensure that tracks are available for the Sunset Limited Trains.” To be clear, Amtrak reiterates that its review of documents, data, and information concerning the failure to ensure that tracks were available for *Sunset Limited* Trains is ongoing and may be affected by information that is in the sole possession of UP, has been produced to the Board or Amtrak in this investigation, or will be produced to the Board or Amtrak in this investigation.

Request 87: Identify Amtrak’s system-wide average train speed for each year beginning in 2016, excluding Amtrak’s average train speed for Sunset Limited Trains, as Amtrak calculates system-wide average train speed for purposes of 49 U.S.C. § 24101(c), and as referenced in Paragraph 12 of the Complaint.

Response: Amtrak objects to this request because it purports to require that Amtrak obtain information for time periods irrelevant to this proceeding, not reasonably calculated to lead to the discovery of admissible evidence, and significantly more expansive than the default time period for Board Requests. Indeed, for those reasons, this instruction is also unduly burdensome and disproportionate to the needs of the proceeding. Amtrak further objects to the request to the extent it mischaracterizes the Complaint. Subject to its general and specific objections, Amtrak respectfully directs UP to the document Bates Stamped Amtrak_STB_Native_0031, which provides the average train speed for each of Amtrak’s long distance routes based on scheduled arrivals and departures for each of the years 2019, 2020, 2021, and 2022.

⁸ Amtrak reserves the right to contend that delays occurring between El Monte and Yuma Junction should also be attributed to UP.

Request 91: Identify and describe in detail what “host status” means, as the term “host status” is used in Paragraph 37 of the Complaint.

Response: As used in Paragraph 37 of the Complaint, the term “host status” refers to the determination that CN serves as the host railroad for the *Sunset Limited* over a 2.2-mile segment of track between Southport Junction and East Bridge Junction.

Request 106: Identify and describe with precision the actions Amtrak alleges Union Pacific could take to “reasonably” address the “substandard performance of Sunset Limited Trains.” See Complaint ¶ 84.

Response: Amtrak objects to this request as premature, including because the Board is continuing to investigate the failure to provide *Sunset Limited* Trains with their statutory right to preference over freight transportation in using a rail line, junction or crossing, because Amtrak is still reviewing documents, data, and information submitted to the Board, and because Amtrak will need to review additional documents, data, and information submitted to the Board. Amtrak further objects to this request because it invades the attorney-client privilege and/or work product protection, including by purporting to require the premature disclosure of legal judgment about what constitutes a “reasonable action.”

Amtrak objects to this request to the extent it selectively quotes and excerpts the Complaint and Petition. Amtrak reserves the right to modify or amend its Complaint and Petition, and reserves its right to expand, supplement, modify, or otherwise develop its allegations and contentions as more information becomes available. Amtrak likewise reserves the right to rely on facts, documents, information, and events that it may subsequently identify or develop during the course of the investigation. Subject to its general and specific objections, and while reserving the right to modify, amend or supplement this response based on its continuing review, Amtrak respectfully directs UP to Amtrak’s Response to Board Request No. 43.

Request No. 114: For each of Amtrak’s current published schedules for intercity trains, identify the route mileage, Pure Running Time, scheduled running time, Dwell Time, Excess Dwell Time, Recovery Time, and Miscellaneous Time, and the most recently quarterly average actual running time reported to the FRA.

Response: Amtrak also objects to this request because it purports to require that Amtrak provide information for time periods irrelevant to this proceeding, not reasonably calculated to lead to the discovery of admissible evidence, and significantly more expansive than the default time period for Board Requests. Indeed, for those reasons, this instruction is also unduly burdensome and disproportionate to the needs of the proceeding. Amtrak further objects to this request because it purports to require that Amtrak provide information a significant number of intercity train routes that have no relevance to this proceeding and is in that respect unduly burdensome and disproportionate to the needs of the proceeding. Amtrak further objects to this request because it purports to require that Amtrak provide information that is publicly available, including information reported to and published by the FRA.

Consistent with the parties’ agreement regarding this request, Amtrak will confine its response to the Relevant Period and to published schedules for its long-distance routes. Subject to its general and specific objections, Amtrak respectfully refers UP to the following schedule skeletons: Auto Train Amtrak_STB_Native_0032; California Zephyr Amtrak_STB_Native_0033; Capitol Limited Amtrak_STB_Native_0034; Cardinal Amtrak_STB_Native_0035; City of New Orleans Amtrak_STB_Native_0036; Coast Starlight Amtrak_STB_Native_0037; Crescent Amtrak_STB_Native_0038; Empire Builder Amtrak_STB_Native_0039; Lake Shore Limited Amtrak_STB_Native_0040; Silver Service Amtrak_STB_Native_0041; Southwest Chief Amtrak_STB_Native_0042; Texas Eagle Amtrak_STB_Native_0043.

Request No. 122: Identify and describe with particularity the “operational adjustments” Amtrak alleges it identified in Paragraph 120 of the Complaint.

Response: Amtrak objects to the definition of the phrase “Describe with particularity” because it purports to require that Amtrak draw legal conclusions about the purported relevance or materiality of facts. Amtrak objects to this request to the extent it purports to require that Amtrak identify every operational adjustment that Amtrak has identified for UP. Amtrak reserves the right to modify or amend its Complaint and Petition, and reserves its right to expand, supplement, modify, or otherwise develop its allegations and contentions as more information becomes available. Amtrak likewise reserves the right to rely on facts, documents, information, and events that it may subsequently identify or develop during the course of the investigation.

Subject to its general and specific objections, Amtrak responds that it has identified several operational adjustments to address performance concerns on the *Sunset Limited*, such as

{{ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] } }.

Request No. 124: Identify and describe with particularity the “additional recovery time” Amtrak alleges it identified in Paragraph 120 of the Complaint.

Response: Amtrak objects to the definition of the phrase “describe with particularity” because it purports to require that Amtrak draw legal conclusions about the purported relevance or materiality of facts. Amtrak objects to this request to the extent it mischaracterizes or misquotes the Complaint and Petition. Subject to its general and specific objections, Amtrak responds that

Amtrak agreed during a 1998 renegotiation of the Amtrak-UP operating agreement to increase the amount of Recovery Time in the *Sunset Limited* schedule. Amtrak further responds that in 2005, at a time when the *Sunset Limited* was arriving (on average) eight hours late at each of its endpoints, Amtrak based on certain assurances by UP agreed to add approximately 3.5 hours to the Train 1 and Train 2 schedules.

Request No. 126: Identify and describe with particularity the “extended dwell time” Amtrak alleges it identified in Paragraph 120 of the Complaint.

Response: Amtrak objects to the definition of the phrase “describe with particularity” because it purports to require that Amtrak draw legal conclusions about the purported relevance or materiality of facts. Amtrak objects to the request to the extent it mischaracterizes or misquotes the Complaint and Petition. Subject to its general and specific objections, Amtrak responds that it provides more dwell time than the *Sunset Limited* requires to complete station operations at San Antonio, where the *Sunset Limited* 1 has 160 minutes of dwell time. For completeness, Amtrak further responds that in practice scheduled dwell frequently exceeds the time required for passenger activities during a *Sunset Limited* station stop.

Request No. 128: Identify and describe with precision the “operational procedures” that Amtrak alleges Union Pacific has failed to implement or enforce in Paragraph 120 of the Complaint.

Response: Amtrak objects to the definition of the phrase “Describe with particularity” because it purports to require that Amtrak draw legal conclusions about the purported relevance or materiality of facts. Amtrak objects to the request because the Board’s investigation is ongoing, because Amtrak is still reviewing documents, data, and information submitted to the Board, and because Amtrak will need to review additional documents, data, and information submitted to the Board. Amtrak reserves the right to modify or amend its Complaint and Petition, and reserves its right to expand, supplement, modify, or otherwise develop its allegations and contentions as more

information becomes available. Amtrak likewise reserves the right to rely on facts, documents, information, and events that it may subsequently identify or develop during the course of the investigation.

Subject to its general and specific objections, and while again reserving the right to modify, amend, or supplement this response based on its continuing review, Amtrak further responds that the “operational procedures” so referenced include maintaining sidings of sufficient length to accommodate all of its freight trains, ensuring that *Sunset Limited* trains are dispatched ahead of non-fitting freight trains, adequately planning for the expiration of freight crews, dispatching *Sunset Limited* trains on the Houston rather than Beaumont subdivision, adequately coordinating with other hosts and with railroads that control crossings about the location and handoff of Amtrak passenger trains, planning meets to minimize delays to Amtrak trains, and affording *Sunset Limited* Trains their statutory preference in use of rail lines, junctions, and crossing. *See generally* Complaint and Petition at 127-140.

Request No. 129: Identify and describe with precision the amount of time associated with each delay that Amtrak identifies in response to the Request 7 in Appendix A—Part III of the Board’s Order served July 11, 2023, would have been reduced by the “operational procedures” that Amtrak alleges Union Pacific has failed to implement or enforce in Paragraph 120 of the Complaint would have eliminated.

Response: Amtrak objects to this request as premature, including because the Board is continuing to investigate the failure to provide *Sunset Limited* Trains with their statutory right to preference over freight transportation in using a rail line, junction or crossing, because Amtrak is still reviewing documents, data, and information submitted to the Board, because Amtrak will need to review any additional documents, data, and information submitted to the Board, and because Amtrak has yet to receive and will need to review dispatching, documents, data, and information requested from UP in party-led discovery. Amtrak further objects to this request because it invades

the attorney-client privilege and/or work product protection, including by purporting to require the premature disclosure of legal judgments about whether a particular delay was attributable to a failure to comply with Amtrak's statutory right to preference, and about what alternative course of action would comply with Amtrak's statutory right to preference.

Amtrak further objects to this request to the extent UP seeks information that is in its own possession, custody, and control or is not within Amtrak's possession, custody, and control. Amtrak further objects to this request as unduly burdensome because it purports to require that Amtrak complete an analysis of the 22,615 delays to *Sunset Limited* Trains that occurred within the Relevant Period, and further objects to the request to the extent that compliance with that purported requirement is not possible within the time permitted for party-led discovery in this proceeding. Additionally, Amtrak objects to the request to the extent that it calls for legal conclusions and objects to the request as both unduly burdensome and disproportionate to the needs of this proceeding to the extent it requires that Amtrak re-produce material also provided in response to Board requests. Amtrak further objects to the request because it seeks information not kept in the ordinary course of business and to the extent it purports to require that Amtrak conduct a special study or create any documents.

Amtrak reserves the right to modify or amend its Complaint and Petition, and reserves its right to expand, supplement, modify, or otherwise develop its allegations and contentions as more information becomes available. Amtrak likewise reserves the right to rely on facts, documents, information, and events that it may subsequently identify or develop during the course of the investigation. Subject to its general and specific objections, and reserving the right to modify, amend, or supplement this response based on its continuing review, Amtrak respectfully directs UP to UP delays coded FTI (meet), FTI (follow), FTI (cross over), FTI (cross-traffic), FTI

(blocked), FTI (congestion), FTI (freight congestion), FTI (freight train in the way), FTI (other), FTI (emergency, derailment, disabled, breakdown), FTI (pick up/drop off freight crew), RTE, DCS, and DMW in the document Bates Stamped Amtrak_STB_Native_0030, which identifies delays that Amtrak may contend would have been reduced by implementation or enforcement of operational procedures referenced in Paragraph 120 of its Complaint and Petition, and provides available information about the length of time associated with those delays. To be clear, Amtrak reiterates that its review of documents, data, and information concerning operational procedures identified in Paragraph 120 of the Complaint is ongoing and may be affected by information that is in the sole possession of UP, has been produced to the Board or Amtrak in this investigation, or will be produced to the Board or Amtrak in this investigation.

Request No. 135: Identify and describe with particularity each of the delays that could have been addressed by advanced notification from Union Pacific, as alleged in Paragraph 139 of the Complaint.

Response: Amtrak objects to this request as premature, including because the Board is continuing to investigate the failure to provide *Sunset Limited* Trains with their statutory right to preference over freight transportation in using a rail line, junction or crossing, because Amtrak is still reviewing documents, data, and information submitted to the Board, because Amtrak will need to review any additional documents, data, and information submitted to the Board, and because Amtrak has yet to receive and will need to review dispatching, documents, data, and information requested from UP in party-led discovery. Amtrak further objects to this request because it invades the attorney-client privilege and/or work product protection, including by purporting to require the premature disclosure of legal judgments about whether a particular delay was attributable to a failure to comply with Amtrak's statutory right to preference, and about what alternative course of action would comply with Amtrak's statutory right to preference.

Amtrak further objects to this request to the extent UP seeks information that is in its own possession, custody, and control or is not within Amtrak's possession, custody, and control. Amtrak further objects to this request as unduly burdensome because it purports to require that Amtrak complete an analysis of the 22,615 delays to *Sunset Limited* Trains that occurred within the Relevant Period, and further objects to the request to the extent that compliance with that purported requirement is not possible within the time permitted for party-led discovery in this proceeding.

Amtrak objects to the request to the extent it excerpts or mischaracterized the Complaint and Petition. Amtrak reserves the right to modify or amend its Complaint and Petition, and reserves its right to expand, supplement, modify, or otherwise develop its allegations and contentions as more information becomes available. Amtrak likewise reserves the right to rely on facts, documents, information, and events that it may subsequently identify or develop during the course of the investigation. Subject to its general and specific objections, and reserving the right to modify, amend, or supplement this response based on its continuing review, Amtrak respectfully directs UP to UP delays coded FTI (cross-traffic), as well as delays occurring at Iowa Junction (XIJ), Live Oak (XLL), and East Bridge Junction (XEB), and delays relating to any other handoff or control point involving UP-hosted track, in the document Bates Stamped Amtrak_STB_Native_0030, which identifies delays that Amtrak may contend could have been reduced by implementation of advanced notification from Union Pacific. To be clear, Amtrak reiterates that its review of documents, data, and information concerning advanced notification by UP is ongoing and may be affected by information that is in the sole possession of UP, has been produced to the Board or Amtrak in this investigation, or will be produced to the Board or Amtrak in this investigation.

Request No. 137: Identify and describe with particularity the amount of the “financial loss” suffered by Amtrak, as alleged in Paragraph 141 of the Complaint.

Response: Amtrak objects to the definition of the phrase “describe with particularity” because it purports to require that Amtrak draw legal conclusions about the purported relevance or materiality of facts. Amtrak objects to this request as premature and inconsistent with the Board’s Order initiating this investigation, which established a two-stage procedural framework because “the fact finding, evidence, and argument required to assess damages and prescribe other relief would be a time-consuming process for both the parties and the Board,” and “it would be wasteful and premature for the Board to develop the record needed to assess damages and relief before it determines whether there is a violation of Amtrak’s statutory preference.” Order at 12. Amtrak further objects to this request as unduly burdensome to the extent that compliance is not possible within the time permitted for party-led discovery in Phase 1 of this proceeding. Amtrak objects to this request to the extent it requires Amtrak to perform a special study and as premature to the extent it purportedly requires Amtrak to provide documents or information it may submit during briefing in this proceeding. Amtrak also objects to this request as premature and inconsistent with the Board’s Order initiating this investigation for the additional reasons set out in its correspondence dated October 5, 2023. *See* Correspondence at 10-11.

Request No. 139: Identify and describe with particularity the amount of “reduced ticket sales” experienced by Amtrak, as alleged in Paragraph 142 of the Complaint, for (a) Sunset Limited Trains, and (b) other Amtrak services.

Response: Amtrak objects to the definition of the phrase “describe with particularity” because it purports to require that Amtrak draw legal conclusions about the purported relevance or materiality of facts. Amtrak objects to this request as premature and inconsistent with the Board’s Order initiating this investigation, which established a two-stage procedural framework because “the fact finding, evidence, and argument required to assess damages and prescribe other relief

would be a time-consuming process for both the parties and the Board,” and “it would be wasteful and premature for the Board to develop the record needed to assess damages and relief before it determines whether there is a violation of Amtrak’s statutory preference.” Order at 12. Amtrak further objects to this request as unduly burdensome to the extent that compliance is not possible within the time permitted for party-led discovery in Phase 1 of this proceeding. Amtrak objects to this request to the extent it requires Amtrak to perform a special study and as premature to the extent it purportedly requires Amtrak to provide documents or information it may submit during briefing in this proceeding. Amtrak also objects to this request as premature and inconsistent with the Board’s Order initiating this investigation for the additional reasons set out in its correspondence dated October 5, 2023. *See* Correspondence at 10-11.

Request No. 142: Identify and describe with particularity the amount of costs that delays to Sunset Limited Trains have imposed on Amtrak, as alleged in Paragraph 144 of the Complaint, separately with regard to: (a) labor costs for (i) conductors, (ii) engineers, (iii) onboard service personnel; (iv) mechanical personnel, and (v) station personnel; (b) engine idling costs; (c) alternative passenger transportation costs; (d) vouchers for missed connections; (e) additional maintenance costs; (f) additional equipment costs; and (g) any additional costs.

Response: Amtrak objects to the definition of the phrase “describe with particularity” because it purports to require that Amtrak draw legal conclusions about the purported relevance or materiality of facts. Amtrak objects to this request as premature and inconsistent with the Board’s Order initiating this investigation, which established a two-stage procedural framework because “the fact finding, evidence, and argument required to assess damages and prescribe other relief would be a time-consuming process for both the parties and the Board,” and “it would be wasteful and premature for the Board to develop the record needed to assess damages and relief before it determines whether there is a violation of Amtrak’s statutory preference.” Order at 12. Amtrak further objects to this request as unduly burdensome to the extent that compliance is not possible within the time permitted for party-led discovery in Phase 1 of this proceeding. Amtrak objects to

this request to the extent to requires Amtrak to perform a special study and as premature to the extent it purportedly requires Amtrak to provide documents or information it my submit during briefing in this proceeding. Amtrak also objects to this request as premature and inconsistent with the Board's Order initiating this investigation for the additional reasons set out in its correspondence dated October 5, 2023. *See* Correspondence at 10-11

Request No. 147: Identify and describe with particularity the amount of federal funding Amtrak has received, separately for each year from 2016 through the present, to pay for operating costs relating to delays to Sunset Limited Trains.

Response: Amtrak objects to the definition of the phrase “describe with particularity” because it purports to require that Amtrak draw legal conclusions about the purported relevance or materiality of facts. Amtrak objects to this request as premature and inconsistent with the Board's Order initiating this investigation, which established a two-stage procedural framework because “the fact finding, evidence, and argument required to assess damages and prescribe other relief would be a time-consuming process for both the parties and the Board,” and “it would be wasteful and premature for the Board to develop the record needed to assess damages and relief before it determines whether there is a violation of Amtrak's statutory preference.” Order at 12. Amtrak objects to this request to the extent to requires Amtrak to perform a special study. Amtrak also objects to this request as premature and inconsistent with the Board's Order initiating this investigation for the additional reasons set out in its correspondence dated October 5, 2023. *See* Correspondence at 10-11

Respectfully submitted,

Dated: November 21, 2023

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Corporation*

Interrogatory Response Verification

I, James A. Blair, declare that I am an employee of National Railroad Passenger Corporation (“Amtrak”) and authorized to execute this Interrogatory Response Verification. The matters stated within the above responses to UP’s First Set of Interrogatories are not all within my personal knowledge, and I am informed and believe that there is no single employee or officer of Amtrak who has personal knowledge of all such matters. However, to the extent not within my personal knowledge, Amtrak’s responses to the foregoing Interrogatories were prepared based on materials from sources including Amtrak’s records and files, and the facts stated in those responses and objections are true to the best of my knowledge, information and belief. I declare under penalty of perjury under the laws of the United States of America that statements in this Interrogatory Response Verification are true and correct to the best of my knowledge, information, and belief.

November 21, 2023
Dated



James A. Blair
Authorized Representative of Amtrak

CERTIFICATE OF SERVICE

I, Jessica Ring Amunson, certify that copies of this document have on this day been served via email on all parties of record.

November 21, 2023

/s/ Jessica Ring Amunson
Jessica Ring Amunson

October 5, 2023

Alex Trepp
(202)-637-6385
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By Email Only

Michael L. Rosenthal
One City Center
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Re: Discovery Requests Propounded on Amtrak by Union Pacific Railroad Company in
Complaint and Petition of the National Railroad Passenger Corporation under 49 U.S.C.
§ 24308(f) (STB Docket No. NOR 42175)

Mike:

On behalf of the National Railroad Passenger Corporation (“Amtrak”), I write to follow-up on the series of meet and confers conducted pursuant to Judge McCarthy’s Order between September 18, 2023 and September 21, 2023, during which Amtrak and Union Pacific Railroad Company (“UP”) discussed certain objections to each of the 150 discovery requests contained within UP’s First Set of Discovery Requests to Amtrak (“Discovery Requests”).

As set forth in our Motion for Protective Order and as mentioned during our discussion, Amtrak remains very concerned about UP’s approach to discovery in this proceeding. UP continues to press discovery that is overbroad, unduly burdensome, and fundamentally at odds with the procedure adopted by the Surface Transportation Board (“STB” or “Board”) for this Board investigation. UP has refused to withdraw or consolidate the 150 separate discovery requests that it propounded. And UP continues to compound burdens on Amtrak by insisting that discovery relate back to 2019, 2016, or 2008 for at least 50 of its requests, notwithstanding Judge McCarthy’s Order. UP has taken those positions while simultaneously objecting to the production of documents responsive to several of Amtrak’s much more targeted requests, on the basis of burden and proportionality.

Despite these and other concerns, elaborated below, Amtrak is working in good faith to provide UP with access to appropriate discovery. Based on the parties’ discussions, and subject to the terms set out in this letter, Amtrak will conduct a reasonable and diligent search for responsive and non-privileged documents for a very considerable number of UP’s 136 document requests. Indeed, Amtrak by this letter proposes:

- A compromise to resolve disputes about duplicative and cumulative requests

October 5, 2023
Page 2

- A compromise to resolve disputes about requests that extend to routes not at issue
- A resolution of certain disputes about requests relating back before November 16, 2020
- A resolution of disputes about certain Amtrak financials

We elaborate on these proposals and other outstanding discovery issues below. By addressing some but not all arguments, assertions, and objections, Amtrak does not accept or concede any arguments, assertions, or objections not specifically addressed herein. If a particular point or objection is not addressed in this correspondence, Amtrak anticipates discussing in subsequent conversations between the parties or motion practice, as needed. Furthermore, and to avoid any doubt, Amtrak reserves the right to interpose objections to the Discovery Requests on all available grounds, including if the parties cannot resolve outstanding points of disagreement. Amtrak also reserves the right to supplement this response and the arguments in this response during any continued discussions or motion practice.¹

CONTINUING OBJECTION TO THE OVERBREADTH OF UP’S DISCOVERY

As the Board explained in its July 11, 2023 Decision (“Decision”) instituting this investigation and establishing the governing procedures, the Board is well suited to develop the investigative record in this proceeding. *See* Decision at 11; *see also* Amtrak Motion for Protective Order (“Amtrak MPO”) at 3. Indeed, the Board made clear that access to detailed passenger train performance data and its increased capabilities regarding data analytics and passenger rail would “enable the Board to further focus the investigation.” Decision at 11. To precisely that end, the Board issued 43 discovery requests to Amtrak and 30 discovery requests to UP, and sought responses by August 25, 2023. After UP insisted that it could not possibly respond to 30 requests within that period, the Board extended the response date to September 25, 2023,² providing the parties with approximately 10 weeks to identify and prepare responsive information.

On August 23, 2023, and notwithstanding its representations about the challenges associated with responding to 30 Board discovery requests within less than 90 days, UP served 150 additional discovery requests on Amtrak and requested Amtrak’s responses within 15 days. In doing so, UP made no apparent effort to avoid duplication or significant overlap with requests issued by the Board and thereby “further” the Board’s focused investigation, as the Board required. *See* Decision at 11. Instead, UP served 150 scattershot requests, seeking to expand

¹ Amtrak continues to reserve all rights with respect to Amtrak’s position that any party-led discovery is inconsistent with the governing statute, which requires a Board-led investigation into substandard on-time performance.

² UP sought even more time to respond to the 30 Board requests. It asked for a response date of October 9, 2023, which would have provided it with 90 days to complete its responses.

October 5, 2023
Page 3

discovery beyond the Relevant Period established by the Board, beyond the *Sunset Limited*, and beyond issues appropriately considered in Phase 1 of the Board's investigation.

In addition to being inconsistent with the Decision, these discovery tactics are inconsistent with UP's own position on discovery in this proceeding. On the one hand, UP insisted that it required at least 90 days to respond to 30 Board Requests.³ On the other, it insists that Amtrak respond to 150 expansive requests within a much shorter period of time. For all of these reasons, Amtrak filed a Motion for Protective Order. On September 7, 2023, Judge McCarthy held a conference on the motion. After hearing from all parties, Judge McCarthy ordered Amtrak and UP to meet and confer, noting that duplicative discovery would not be required and that discovery must not relate back further than November 16, 2020 without good cause shown. *See* Order Memorializing September 7, 2023 Conference Call ("Discovery Order") at 2.

Amtrak hoped that, following the conference with Judge McCarthy, UP would take meaningful steps to align its discovery with the Board's Decision. Unfortunately, UP has not to date withdrawn or consolidated *any* of its discovery requests. Rather, UP has doubled down, expressing its intention to propound even more discovery in Phase 1 of this proceeding.

Amtrak continues to believe that the volume of discovery requests that UP propounded is disproportionate to the needs of this Board investigation, unduly burdensome, and inconsistent with the Board's Decision, which contemplated that parties would be permitted but not required to take discovery that furthered the Board's focused investigation. That UP has already served considerably more discovery than the Board, and plans to propound additional requests, is not only inconsistent with the Board's decision, but also at odds with the governing statute.

Accordingly, Amtrak reserves the right to seek limits on the number of document requests and interrogatories that parties may serve, and to contest the existing or any subsequent discovery on the above grounds. Please confirm whether UP is amenable to any limit on the

³ *See, e.g.*, UP Motion for Reconsideration at 1 ("[UP] 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."); *id.* at 4 ("[T]he technical and logistical demands of responding will require significantly more time than 45 days."); *id.* ("Responding to the Board's request 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."); *id.* ("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."); *id.* at 5 ("[T]he 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.").

October 5, 2023
Page 4

number of document requests that parties may serve during the limited time for party-led discovery in Phase 1 of the proceeding. If UP is amenable to such a limit, please let us know what you propose.

PARTICULAR OBJECTIONS ADDRESSED IN AMTRAK’S MOTION FOR PROTECTIVE ORDER

DUPLICATIVE OR CUMULATIVE DISCOVERY

The Board asked that Amtrak provide documents and/or detailed information in response to 43 separate discovery requests, many with several subparts. UP made no apparent effort to tailor its own discovery based on those requests. Some of the requests that UP propounded simply duplicate Board requests. Others significantly overlap with Board requests, for example by expanding a tailored Board request to seek all documents, by expanding a time-limited Board request to seek more material, or by seeking data already being provided to the Board. As Amtrak has previously explained, the needless burden and expense associated with this duplication and overlap justifies a protective order. *See, e.g., Nicholas v. Wyndham Int’l, Inc.*, 373 F.3d 537, 542-44 (4th Cir. 2004).

Consistent with Judge McCarthy’s Order, Amtrak identified for UP all of UP’s duplicative and cumulative discovery requests. In doing so, UP acknowledged that certain requests are duplicative of Board requests.⁴ *See* UP Requests 22, 26, 27, 97, 98. The parties also worked productively and collaboratively to address the duplicative or cumulative aspects of other requests, identifying the extent to which each one overlaps significantly or partially with a Board request. Consistent with Judge McCarthy’s Order, Amtrak and UP agreed that neither party would be required in this proceeding to re-produce documents provided to the Board. Subject to confirmation that UP will not insist that Amtrak provide an index or other document setting out precisely which previously produced documents are responsive to which of its 150 requests,⁵ and with the exception of UP Requests 7, 10-12, 22, 27, 29, 97, 98,⁶ Amtrak will not withhold documents or limit its search based on objections concerning duplicative or cumulative discovery.

⁴ UP also agreed to follow-up about whether it will press certain requests after completing its review of Amtrak’s September 25, 2023 response to the Board. *See, e.g.,* Responses 29, 36, 44, 61. Amtrak has not yet heard from UP on these matters but continues to believe that non-objectionable portions of each request are duplicative.

⁵ *See* UP Instruction 6.

⁶ Additionally, for reasons set out in this section and discussed during the meet and confer, Amtrak will not provide narrative responses to Requests 26, 36, 38, 44, 51, 52, 61.

October 5, 2023
Page 5

ROUTES NOT AT ISSUE IN THIS PROCEEDING.

Amtrak continues to believe, as indicated in its Motion for Protective Order and the parties' subsequent discussions, that requests purporting to require the production of documents related to routes other than the *Sunset Limited* are inconsistent with 49 C.F.R. § 1114.21(a)(1), including because they are disproportionate to the needs of this proceeding and improperly expand its scope. *See* Motion for Protective Order at 9-10.

During the meet and confer process, UP agreed to narrow the scope of certain requests to the *Sunset Limited*. *See, e.g.*, 42, 58, 61, 62, and 69. However, there remain a significant number of requests that purport to require the production of documents related to routes not at issue in this proceeding. Generally speaking, these requests fall into three categories: (1) requests concerning the presence or absence of a relationship between certain FRA metrics and identified variables or related to the coding of delays, *see* Requests 20, 21, 28, 55, 56, 57; (2) requests concerning schedules and scheduling negotiations for other routes, *see* Requests 53, 54, 59, 96; and (3) requests concerning Amtrak policies, procedures, and certain complaints, *see* Requests 37, 39, 40, 41, 43(b).⁷

With respect to category (1) above, the parties discussed a proposed compromise whereby Amtrak would limit its search, collection, and review to final and formal analyses of the subjects at issue, whether those final and formal analyses take the form of decks, studies, reports, presentations, memoranda, investigations, or other similar documents ("Analyses"). To avoid troubling Judge McCarthy with this issue, Amtrak is prepared to accept that compromise, subject to a final agreement on how to define the term Analyses.

With respect to category (2) above, Amtrak also hopes the parties can find common ground to permit a more expeditious resolution of their dispute. Notwithstanding its concern about efforts to expand the scope of this proceeding to routes not at issue, and for the sole purpose of resolving disputes for each of the three requests in this category, Amtrak proposes to do the following: (i) conduct a reasonable and diligent search for and produce schedule skeletons for each of its long-distance services, dating back to November 16, 2020; (ii) conduct a reasonable and diligent search for responsive and non-privileged Analyses concerning the principles used to evaluate on a system-wide basis the schedules for its long-distance routes (if

⁷ Amtrak has made a good faith effort to identify requests falling into each category based on its review and analysis of the 150 UP Requests and the parties' discussions. However, Amtrak reserves the right to notify UP should it identify other requests falling into these categories, based on its continuing review.

October 5, 2023
Page 6

any) and produce any that can be identified and reviewed in the time allowed by the discovery schedule in this proceeding.⁸

With respect to category (3), and with a view towards compromise, Amtrak will interpret each request as relating to long-distance and state-supported routes.⁹

EFFORTS TO EXPAND THE RELEVANT PERIOD

In its requests, the Board identified the Relevant Period for this investigation as October 1, 2021-December 8, 2022.¹⁰ Only a handful of the 43 requests to Amtrak seek information predating that time period. And only a handful of the 30 requests to UP seek information predating that period. This focus on the Relevant Period is not surprising. As Amtrak has explained, the governing statute contemplates an expeditious investigation, and the Board Decision contemplates a focused one. To the extent parties conduct any of their own discovery, it is meant to further the Board's focused investigation, and must be both relevant and proportional to the needs of this proceeding. For that reason, Amtrak has previously argued that there is limited need for discovery predating publication of the Customer OTP Rule on November 16, 2020,¹¹ and likewise argued that Discovery Requests seeking historic information must be justified with particularity. *See* Motion for Protective Order at 8. Judge McCarthy agreed. Discovery Order at 2. Accordingly, the default time period set by UP in its Discovery Requests dating back to October 1, 2016 is entirely inappropriate.

Consistent with Judge McCarthy's Order, the parties have since met and conferred on the applicable time period for any request relating back to before November 16, 2020. During those discussions, the parties discussed a compromise that would resolve the applicable time period for

⁸ To avoid any confusion, Amtrak is not offering to search for or collect any Analyses focused on an individual route, other than the *Sunset Limited*.

⁹ To avoid any confusion, and as discussed in *infra* at 12, the parties have agreed that Amtrak will interpose specific objections to interrogatories in responding to each individual interrogatory. Amtrak reserves the right to interpose all objections other than the scope objection addressed in the accompanying text.

¹⁰ The Relevant Period established by the Board already expands the Board's investigation beyond the relevant period set by the statute, which requires the Board to institute an investigation based on just two quarters of substandard on-time performance.

¹¹ Amtrak will refer to the time period between November 16, 2020-December 8, 2022 as the "Promulgation Period."

October 5, 2023
Page 7

certain requests expressly tied to allegations in Amtrak's Complaint.¹² More specifically, the parties discussed tailoring the time period applicable to the request based on the referenced allegation. Amtrak is prepared to adopt that approach. *See* Requests 70-86, 88-90, 92-94, 104-106, 109-113, 115-116, 119-135, 137, 140-142.¹³

For the remaining requests, UP continues to insist on applying an expansive time period, seeking material relating back to either July 1, 2019, October 1, 2016; January 1, 2016; or January 1, 2008.¹⁴ Generally speaking, UP says that broader discovery is needed to provide the Board with information about "patterns over time." But the Board has *already* made a judgment about the appropriate timeframe it must analyze to investigate the substandard on-time performance of *Sunset Limited* Trains and to make recommendations about improving on-time performance. It has determined, for the overwhelming majority of its requests, that the only information it requires is from the Relevant Period. The compromise that Judge McCarthy adopted already represents a material expansion of that Relevant Period, and the Relevant Period already represents an expansion of the relevant period set by statute. Because the Board is best positioned to determine what it requires, and the amount of information gathering proportionate to its needs, UP cannot simply substitute its own judgment about an appropriate lookback, then claim proportionality and good cause.¹⁵

UP also says a broader lookback is necessary to identify additional issues that must be fixed through Board recommendations. That argument has no merit. This proceeding is by statute about addressing the issues that drove poor performance during the quarters at issue, not about addressing issues dating back to 2019 or 2016. Attempting to identify and remedy dated causes of delay is inconsistent with the judgment of Congress, which determined that investigations into substandard on-time performance should be focused and expeditious.

Amtrak has also carefully considered the more specific explanations that UP offered in support of particular time periods and responds as follows:

¹² The parties separately confirmed that the applicable time period for other Requests expressly referencing allegations in Amtrak's Complaint is limited to either the Relevant Period, *see* Requests 97-98, 100-103, 107, 114, 117-118, or Promulgation Period. *See* Requests 96, 99

¹³ To avoid any confusion, Amtrak emphasizes that it has other important objections to many of these requests. Amtrak does not withdraw or waive those objections. By this section, Amtrak agrees only to resolve a discrete dispute about the time period applicable to the referenced requests.

¹⁴ In several instances, UP asks that Amtrak apply different timeframes for the same requests, further complicating an already burdensome collection process.

¹⁵ *See, e.g.*, Requests 3, 7 (seeking material duplicative of Board requests for an expanded period)

October 5, 2023
Page 8

November 1, 2019-Present. For several requests concerning train delays, UP asserts that Amtrak should be required to search for documents dating back to the resumption of its work with FRA on the Metrics and Standards Regulations. *See, e.g.,* 1, 4, 5, 6, 7, 28, 55, 56, 57. UP does not explain why this expansion of the time period for discovery is appropriate, except to say that Amtrak must have studied, analyzed, or otherwise considered certain topics during work on the regulations. Even if UP offered some basis for that supposition, it would be insufficient to support a significant expansion of appropriate period for discovery because analyses of train delays dating back to November 1, 2019 have little or no relevance to the current proceeding, as the Board Requests illustrate.¹⁶

January or October 1, 2016-Present. Following the conference before Judge McCarthy, Amtrak expected that UP would revisit its discovery and propose more reasonable limitations on the time period applicable to its Requests. For more than 30 requests concerning issues like OTP, schedule, preference, pricing, revenue, and system-wide train speed, UP has refused to do so, instead insisting that Amtrak search for documents dating back more than seven years. *See, e.g.,* Requests 2, 3, 4, 7, 8, 10, 11, 12, 13, 16, 28, 31, 32, 33, 34, 35, 45, 46, 47, 48, 58, 59, 60, 69, 70, 87, 95, 115, 146, 147, 148.¹⁷ UP has not offered an adequate explanation for imposing those significant collection burdens on Amtrak. Worse yet, many of these requests purport to require that Amtrak search for communications, compounding the significant burden on Amtrak and creating demands that are unworkable within the limited time for party-led discovery.

UP has not provided adequate explanation for this expansive and onerous discovery. Broad arguments about an interest in evaluating trends over time do not provide sufficient basis to impose significant discovery burdens on Amtrak, not only because the Board has already made determinations about what it requires to complete its investigation,¹⁸ but also because information dating back to 2016 will in many cases have

¹⁶ As an example, UP asks that Amtrak search back to November 2019 for any analysis of train delays to the *Sunset Limited*, ignoring in its evaluation of relevance and proportionality that the Board has confined its requests for delay data to the Relevant Period. *See* Request 2. UP also demands that Amtrak search back to November 2019 for analyses concerning changes in train delays for *Sunset Limited* trains. *See* Request 4. Assuming that what UP seeks is analysis of trends over time, analyses dating back to 2019 would be looking at trends that *culminated* nearly five years ago. That information is irrelevant and searching for it is not proportional to the needs of this proceeding.

¹⁷ UP sometimes asks that Amtrak apply different time periods for different components of the same request, compounding burden further.

¹⁸ As an example, UP demands that Amtrak search back to October 1, 2016 for analyses concerning measures taken or proposed to improve OTP or reduce train delays for *Sunset Limited* Trains. *See* Request 7. That request would be

October 5, 2023
Page 9

little or no relevance to the proceeding, which by statute is triggered by two quarters of substandard performance.¹⁹

Other categorical arguments also fail to establish that the requested discovery is proportional to the needs of this litigation. For example, UP argues that Amtrak should look back to October 2016 for certain requests concerning OTP because, even if the COTP Metric and Standard was not in place yet, Amtrak may have analyses concerning contractual OTP. But this proceeding does not concern contractual OTP; it concerns compliance with the minimum standard for on-time performance set by federal law. Even if analyses concerning contractual OTP could shed some light on the causes of delay, for example by illustrating that a host railroad structures its operations based on contractual incentives instead of federal law, analysis dating back more than seven years is not sufficiently likely to assist the Board in evaluating *current* causes of delay to justify the collection burden on Amtrak.

As another example, UP has suggested that requests concerning infrastructure should relate back to October 1, 2016 because the Board propounded one request to UP concerning whether it removed or shorted passing sidings or double tracked segments on portions of the *Sunset Limited* that it hosts. *Compare, e.g.*, UP Requests 45-49, *with* Board Request 17. That argument has no merit. A single inquiry focused on a single type of infrastructure does not render proportional UP's expansive requests for documents concerning actual or potential capital improvements, documents related to the funding for those improvements, or the consideration of investments in infrastructure to improve on-time performance for or delays on the *Sunset Limited*. *See, e.g.*, UP Requests 45-48. That is particularly true because the Board's inquiry concerns action to *degrade or remove* a specific type of infrastructure. The targeted nature of this particular Board inquiry stands in stark contrast to the Board's other, much more time-limited, questions about the measures or plans that parties have to improve on-time performance for the *Sunset Limited*, *see* Board Request 21, which underscores precisely why UP's broad demands are not proportionate to the needs of this proceeding.

Likewise, UP has served several extraordinarily broad requests concerning preference, and continues to insist that Amtrak search for documents dating back to October 2016. For example, UP insists that Amtrak search back to October 2016 for documents that

entirely duplicative of one propounded by the Board, but for UP's insistence on expanding the time period applicable to the Request. *See also, e.g.*, Request 3.

¹⁹ *See, e.g.*, Request 4 (seeking analysis of trends that would have culminated more than seven years ago); Request 31 (same); Request 87 (seeking system-side average train speed excluding *Sunset Limited* trains for each year beginning in 2016).

October 5, 2023
Page 10

discuss, describe, or constitute communications with BNSF, CN, SCRRRA, NOPB, or UP concerning preference, and separately insists that Amtrak search the same time period for documents that discuss, describe, or constitute communication with any party in which Amtrak alleges a preference violation.²⁰ But this proceeding does not concern whether BNSF, CN, SCRRRA, NOPB, or UP implemented preference seven years ago. And it does not concern allegations of preference violations that date back to 2017. Demanding that Amtrak look back to 2016 for documents is therefore deeply disproportionate to the needs of this proceeding.

January 1, 2008-Present. UP continues to insist on this collection period for requests concerning the Performance Improvement Plan developed pursuant to Section 210 or PRIIA, as well as performance audits. *See, e.g.,* 64-68. Having carefully considered the justification for expanding the time period applicable to these discrete requests, and with a view towards compromise, Amtrak will conduct a reasonable and diligent search for responsive and non-privileged Analyses (if any) that can be identified and reviewed within the time allowed for discovery in this proceeding.

EFFORTS TO EXPAND SCOPE OF PHASE 1 DISCOVERY

As Amtrak has previously explained, the Board's Order instituting this investigation established a two-stage procedural framework because "the fact finding, evidence, and argument required to assess damages and prescribe other relief would be a time-consuming process for both the parties and the Board," and "it would be wasteful and premature for the Board to develop the record needed to assess damages and relief before it determines whether there is a violation of Amtrak's statutory preference." Decision at 12.

For precisely these reasons, several UP discovery requests are wasteful and premature. For example, Section 24308(f)(3) provides in a section titled "Damages and Relief" that in "awarding damages and prescribing other relief under this subsection the Board shall consider such factors as . . . the extent to which Amtrak suffers financial loss as a result of host rail carrier delays or failure to achieve minimum standards." *See* 49 U.S.C. § 24308(f)(3)(A). UP propounded requests related to allegations that concern precisely that issue.²¹ *See* Requests 137-

²⁰ These requests are also objectionable for other reasons, including (among other things) that they impose collection burdens flatly inconsistent with the condensed period for party-led discovery in this proceeding, that they seek documents in UP's possession, and that they seek privileged documents.

²¹ Amtrak and UP also met and conferred on Requests 33-35. Although Amtrak continues to view each of those requests as objectionable for various reasons, Amtrak will conduct a reasonable and diligent search for and produce non-privileged and responsive documents (if any) that can be identified and reviewed in the limited time permitted

October 5, 2023
Page 11

142, 146-47. These allegations appear in a portion of the Complaint and Petition titled “Amtrak Suffers Financially Because of UP-Responsible Delay” and provide notice about how “Amtrak suffers financial loss as a result of host rail carrier delays or failure to achieve minimum standards.” *See* Complaint and Petition Section D. In continuing to press these requests, UP disregards the plain nature of the allegations and the Board’s Decision, demanding that Amtrak accelerate to Phase 1 of the proceeding discovery that is time consuming, wasteful, and premature. *See* Decision at 12. Amtrak will not produce documents in response to these requests.

OTHER OBJECTIONS

REQUESTS FOR ALL DOCUMENTS

As discussed during our meet and confer, Amtrak objects to each of the UP Requests that seeks “all documents” or “all communications” on a certain subject or of a certain nature, as such requests are overbroad, unduly burdensome, and inconsistent with the extremely compressed time permitted for party-led discovery in Phase 1 of this proceeding. In conducting its search for documents, and of course subject to its other objections, Amtrak intends to make reasonable and diligent inquiries with the personnel who are reasonably and most likely to have responsive and non-privileged documents. Additionally, as discussed during our meet and confer and again in view of the limited time for party-led discovery in this investigation, Amtrak intends to limit its search for particular requests to Analyses, as that term is defined above. *See supra* at 5. During the meet and confer, Amtrak and UP agreed to so limit the search for responsive documents for the following requests, subject to agreement on the definition of Analyses: Requests 1-7, 10-14, 28, 30-33, 45-48, 50-52, 55-57, 60, 63-69, 99, 143-145.²²

REQUESTS FOR PRIVILEGE DOCUMENTS

As discussed during our meet and confer, Amtrak objects to the UP Requests to the extent they seek material subject to protection under the attorney-client privilege, work-product protection, or any other applicable privilege or immunity that protects a particular document from disclosure in discovery. Where Amtrak has agreed to conduct a reasonable and diligent

for party-led discovery, for the time period the 2020-2022 fiscal years. To avoid any doubt, by agreeing to search for document responsive to these requests, Amtrak is not representing that such documents exist.

²² The parties further agreed to limit the search for Requests 20-21 to policies, procedures, and Analyses concerning the same.

October 5, 2023
Page 12

search for documents, it will confine its production to documents that are responsive and non-privileged.²³ We appreciate that UP intends to do the same.

Any inadvertent disclosure of information that is protected under the attorney-client privilege, work-product protection, or any other privilege or immunity, is not intended to and does not effect a waiver of privilege or protection. Additionally, during our meet and confer UP raised the possibility of foregoing privilege logs in connection with party-led discovery. Because of the extremely abbreviated period provided for party-led discovery in this proceeding, and the considerable burden associated with preparation of privilege logs, Amtrak is amenable to this proposal, so long as all other parties agree to forego privilege logs should they serve discovery.

SPECIFIC OBJECTIONS TO INTERROGATORIES

UP propounded 36 separate interrogatories to Amtrak, which maintains specific objections as to each one. During the meet and confer, Amtrak emphasized that it reserves the right to interpose those objections in preparing responses and objections to the interrogatories, and the parties agreed to defer discussion on those specific objections until after UP reviews Amtrak's objections and any response to each individual interrogatory.²⁴ Amtrak also reserves all rights to object to the overall number of interrogatories, which significantly exceeds the limit on interrogatories set by the Federal Rules of Civil Procedure.

COMMUNICATIONS

Amtrak objects to the definition of Communications as overbroad, unduly burdensome, and disproportionate to the needs of this proceeding, for example to the extent UP purports to require that Amtrak collect text messages. During the meet and confer process, Amtrak proposed that the parties engage in further discussion regarding requests for communications, for example to address burden objections, or to negotiate the number and identity of custodians for each request. We suggest deferring that discussion until after Amtrak reviews the UP responses and objections to Amtrak's requests, so that the parties can conduct a consolidated discussion about how appropriately to scope searches for communications.

²³ Amtrak likewise objects to the production of documents to the extent they are protected from discovery or cannot be disclosed pursuant to statute, regulation, agreement, or protective order.

²⁴ As just one example, Amtrak explained during the meet and confer that certain of the interrogatories are objectionable because they are premature, invade protected work product, and impose undue burden. *See, e.g.*, Request 17. To avoid confusion, Amtrak reiterates that it also objects to document requests predicated on those objectionable interrogatories. *See, e.g.*, Request 18-19.

October 5, 2023
Page 13

ADDITIONAL OBJECTIONS

We reiterate that Amtrak does not intend in this correspondence to address or memorialize all of the arguments, assertions, objections addressed during the parties' lengthy meet and confers. Amtrak has instead prepared this streamlined letter in the hope it will expedite the parties' discussions. The letter is prepared based on information currently and reasonably available to Amtrak, and Amtrak reserves the right to rely on facts documents, information, and events that it may subsequently identify or develop. As mentioned during the meet and confer process, Amtrak objects to a number of the UP requests to the extent they purport to require that Amtrak create documents, summaries, analyses, or other special studies, and will not produce documents that are publicly available and readily accessible to Union Pacific.²⁵ Likewise, Amtrak objects to the UP requests to the extent they purport to require that Amtrak produce documents not in its possession, custody, and control, or otherwise purport to impose obligations that exceed or are otherwise inconsistent with applicable law. By meeting and conferring on the Discovery Requests, and where it has agreed to search for responsive documents, Amtrak is not admitting and does not intend to admit any facts or legal propositions that are implied or assumed by the requests. Amtrak of course reserves all objections as to authenticity, relevance, and admissibility.

As set out above, we appreciate that the parties have already complied with their obligation to meet and confer on these requests and made good faith efforts to narrow their differences. However, we are available for and would look forward to further discussions about how the parties can conform the discovery UP propounded to a more manageable set of document requests and interrogatories that is consistent with this Board-led investigation, and with the very compressed period for party-led discovery under the Decision. In the meantime, Amtrak will conduct reasonable and diligent searches for a considerable number of document requests,²⁶ as described above, and prepare specific objections and any responses for an appropriate number of interrogatories.

Sincerely,



Alex Trepp

²⁵ The production of any documents or information covered by objections in this paragraph is not intended to be and does not effect a waiver of this objection.

²⁶ Amtrak will be producing documents on a rolling basis.