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SURFACE TRANSPORTATION BOARD

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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 REBUTTAL BRIEF AND EVIDENCE

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GLOSSARY

Term/Abbreviation	Definition
AAR	Association of American Railroads
AIPRO	Association for Innovative Passenger Rail Operations
Amtrak	National Railroad Passenger Corporation
BNSF	BNSF Railway Company
CN	Canadian National Railway Company and/or its subsidiary Illinois Central Railroad Company
CPKC	Canadian Pacific Kansas City Limited
Complaint Period	October 1, 2021 through September 30, 2022
COTP	Customer On-Time Performance
CRC	Commuter Rail Coalition
FRA	Federal Railroad Administration
FTI	Freight Train Interference
ICC	Interstate Commerce Commission
MBTA	Massachusetts Bay Transportation Authority
NICTD	Northern Indiana Commuter Transportation District
NOPB	New Orleans Public Belt Rail Corporation
PRIIA	Passenger Rail Investment and Improvement Act of 2008
PSR	Precision Scheduled Railroading
RCA	Root Cause Analysis
RPA	Rail Passengers Association
Relevant Period	October 1, 2021 through December 8, 2022
SCRRA	Southern California Regional Rail Authority
Section 213	Section 213 of the Passenger Rail Investment and Improvement Act of 2008, Pub. L. 110-432, 122 Stat. 4848, 4925-27 (2008) (codified at 49 U.S.C. § 24308(f))
SEPTA	Southeastern Pennsylvania Transportation Authority
STB	Surface Transportation Board
Train 1	Amtrak's <i>Sunset Limited 1</i>
Train 2	Amtrak's <i>Sunset Limited 2</i>
UP	Union Pacific Railroad Company
WLF	Washington Legal Foundation

INTRODUCTION

The record in this investigation overwhelmingly demonstrates that the delays and failures to achieve minimum on-time performance standards for National Railroad Passenger Corporation (“Amtrak”) *Sunset Limited* Trains 1 and 2 during the Complaint Period (October 2021 to September 2022) are due to causes that could reasonably be addressed by Union Pacific Railroad Company (“UP”). The record likewise shows that these delays are attributable to UP’s failure to provide Amtrak with preference over freight transportation, both when making individual dispatching decisions and when establishing and implementing its policies and practices for railroad operations. The Surface Transportation Board (“Board”) should therefore adopt Amtrak’s proposed recommendations for improvements on the *Sunset Limited* and proceed to the second phase of this proceeding to decide the appropriate remedies to award to Amtrak.

UP’s contrary arguments are meritless. Confronted with overwhelming evidence, UP mounts a surprising defense. It argues primarily that the Board need not concern itself with the unacceptably poor service UP provided to Amtrak during the period under investigation because UP provided unacceptably poor service to *everyone*.¹ That is no excuse. Indeed, that UP has improved its performance with regard to the *Sunset Limited* in the time since the Board initiated its investigation proves the point that “delays or failure to achieve minimum standards” on the *Sunset Limited* “are due to causes that could reasonably be addressed by” UP.² In any event, UP’s failures to meet the minimum standard for on-time performance for the *Sunset Limited* are not confined to the pandemic-impacted era encompassed by the Complaint Period, as UP argues. UP had a long history of imposing excessive delays on Amtrak well before the pandemic started,

¹ See, e.g., Union Pac. R.R. Co.’s Reply Statement & Evidence (“UP Reply”) 3, 21–23 (Dec. 23, 2024).

² 49 U.S.C. § 24308(f)(1).

making the *Sunset Limited* one of Amtrak's worst-performing long-distance services.³ It is only with Board oversight due to this investigation that UP's and the *Sunset Limited*'s performance has improved.

UP also argues that it has no responsibility for the *Sunset Limited*'s on-time performance under the metrics and standards promulgated by the Federal Railroad Administration ("FRA") pursuant to the congressional mandate in the Passenger Rail Investment and Improvement Act of 2008 ("PRIIA"), including the Customer On-Time Performance ("COTP") Minimum Standard.⁴ That position flies in the face of PRIIA's statutory scheme "authorizing or requiring that freight railroads be subjected to federal investigations—and potential civil damages awards—if Amtrak trains do not achieve certain on-time performance results," to quote UP's own prior description of PRIIA.⁵ UP and the other host railroads in this proceeding are unquestionably bound by the federal Metrics and Minimum Standards for Intercity Passenger Rail Service.⁶

UP also blames the *Sunset Limited*'s schedules, arguing that they must be lengthened to accommodate the very UP operating practices that regularly impose excessive amounts of delay on Amtrak passengers.⁷ But this argument also fails, and in all events, real-world experience shows that the existing schedules are achievable. With the Board now watching, UP has demonstrated that it is fully capable of running the *Sunset Limited* to meet the minimum standard when it actually tries to do so. Adding more time to schedules that already incorporate more recovery time than

³ See *infra* Part I.C (Table 1).

⁴ See, e.g., UP Reply 71.

⁵ Pet'r's Joint Op. Br. at 4, *Union Pacific R.R. Co. v. Surface Transp. Bd.*, Nos. 16-3307 et al. (consolidated) (8th Cir. Oct. 14, 2016), 2016 WL 6122761 (complaining that PRIIA Sections 207 and 213 were "coercing or compelling the freight railroads to improve Amtrak's on-time performance").

⁶ See 49 C.F.R. Part 273; see also 85 Fed. Reg. 72971-02 (Nov. 16, 2020).

⁷ See UP Reply 45.

that on almost any other long-distance route is unnecessary and ultimately harms the very people Congress was trying to protect through the enactment of PRIIA—Amtrak’s passengers.

At bottom, all of UP’s arguments fail because they ignore Congress’s clear mandate: “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.”⁸ In UP’s view, this mandate is merely a suggestion that dispatchers should try to give “greater weight” to “Amtrak’s interests” when “resolving conflicts between freight trains and Amtrak trains.”⁹ UP’s atextual, ahistoric, and ultimately unworkable interpretation of Amtrak’s preference rights is not even shared by all Class I carriers in this proceeding. For example, BNSF appropriately recognizes that preference means that “[a]s a matter of first principle . . . all operations related to the movement of trains both prioritize Amtrak and minimize delays to passenger service to the fullest extent possible.”¹⁰ As BNSF has described it, this requires that “Amtrak’s right to preference” be the “core tenet serving as the foundation” for a freight railroad’s “dispatching protocols” as well as its “schedule-building systems.”¹¹

By contrast, UP has admitted that Amtrak’s preference rights are not a core tenet or a foundation of its approach to dispatching protocols and schedule-building systems. Indeed, UP expressly assigns its premium intermodal trains equal priority to Amtrak trains and—saying the quiet part out loud—frankly proclaims that in its view of preference, UP’s “contractual obligation to provide on-time service to Amtrak does not trump its obligations to freight customers.”¹² That

⁸ 49 U.S.C. § 24308(c).

⁹ UP Reply 4.

¹⁰ BNSF Reply to Amtrak’s Opening Statement (“BNSF Reply”) 33 (Dec. 23, 2024).

¹¹ *Id.*

¹² UP Reply 109 n.341.

statement sums up the entire basis for this proceeding. Congress said moving people trumps moving freight. UP believes the opposite.

Based on this misconception, UP asserts that there is not a single violation of Amtrak's preference rights among the almost 1,000 delays investigated by the Board in this proceeding, including 42 delays of more than 90 minutes.¹³ That position is absurd. Nor is it helpful for UP to caricature Amtrak's position on preference as something it is not. Amtrak does not believe that "host carriers must avoid imposing a minute of delay to a passenger train."¹⁴ Amtrak *does* believe that preference requires—as BNSF has stated¹⁵—prioritizing Amtrak and minimizing delays to Amtrak passengers to the fullest extent possible. Applying the correct interpretation, Amtrak identified numerous violations of its preference rights from the investigative record, both in UP's individual dispatching decisions as well as in its policies and procedures.¹⁶ Contrary to UP's assertions, nothing in the statute places the burden on Amtrak to go further and identify what UP dispatchers could have done differently to provide Amtrak with preference while maintaining "network fluidity."¹⁷ But in any event, there is much UP could and should have done differently, as Amtrak sets forth herein. Indeed, the record contains numerous examples of delays that were caused by UP preference violations under any reasonable interpretation. The circumstances here are egregious, resulting in Amtrak COTP that hovered around 10% during the quarter preceding this Complaint.

The record in this investigation is appropriately focused on UP. Among the parties, there is near unanimity that the Board should use the regulatory definition of "host railroad" for purposes

¹³ *Id.* at 76 ("Amtrak does not identify any delays to the *Sunset Limited* resulting from preference violations.").

¹⁴ *Id.* at 68.

¹⁵ BNSF Reply 33.

¹⁶ See Amtrak Opening Statement ("Op. Br.") 31–32 (Oct. 7, 2024).

¹⁷ UP Reply 28.

of this investigation, and there is no dispute as to which “host railroad” is responsible for most of the delays and each of the preference violations at issue.¹⁸ Although future investigations might involve more difficult questions as to which host to hold responsible for delays and failures to achieve minimum standards, here there is no question. It is UP.

Because the investigative record compiled by the Board and the parties clearly shows that the delays and failures to achieve minimum on-time performance standards for Amtrak trains are due to causes that could reasonably be addressed by UP, the Board should promptly conclude Stage One of this investigation by making the recommendations to improve the service, quality, and on-time performance of the *Sunset Limited* that Amtrak set forth in its Opening Statement.¹⁹ And because the record also clearly shows that delays and failures to achieve on-time performance standards are attributable to UP’s failure to provide Amtrak with preference over freight transportation, the Board should quickly proceed to Stage Two of this investigation to determine damages and prescribe relief to deter UP from continuing to take actions to delay Amtrak passengers.

This brief proceeds as follows. In Part I, Amtrak explains that the delay and failures to meet minimum standards for on-time performance for the *Sunset Limited* are due to causes that can reasonably be addressed by UP, as UP admits by blaming deficient on-time performance on its own unacceptably poor service during the Complaint Period. In Part I, Amtrak also explains that the causes of delay are not due to the *Sunset Limited*’s schedules, which are clearly attainable based on the parties’ real-world experience. In Part II, Amtrak addresses the meaning of its statutory right to preference, and details how the investigative record conclusively shows that the

¹⁸ See *infra* Part III.

¹⁹ Op. Br. 113.

delays and failures to meet minimum standards for on-time performance in this proceeding are attributable to UP's failure to provide preference to Amtrak over freight transportation, both in its individual dispatching decisions and in its systemic policies and practices. In Part III, Amtrak responds to the Board and other parties on how to define the "host railroads" for the *Sunset Limited*. In Part IV, Amtrak addresses the Board's authority to issue damages and other relief for the preference violations at issue in this proceeding. In Part V, Amtrak reiterates that the Board should conclude Stage One of this investigation by issuing Amtrak's recommendations and proceed promptly to Stage Two.²⁰

²⁰ In their Reply Briefs, the other parties in this investigation each were responding to a single filing from Amtrak. In contrast, in this Rebuttal Brief, Amtrak is attempting to respond to almost 600 pages of briefs, verified statements, and exhibits from six parties, as well as an additional 139 pages of filings from nine non-parties. In the time allotted—mindful of the Board's commitment to concluding Stage One of its investigation by early summer 2025, *see* Press Release, Surface Transportation Board, *Statement from the Chairman Regarding the Sunset Limited Investigation* (Jan. 13, 2025)—Amtrak has attempted to address all points raised in the filings as comprehensively as possible. Amtrak expressly preserves and does not intend to waive response to any of the points raised in the filings of parties or non-parties. Should the Board believe any point needs to be further addressed, Amtrak respectfully requests that the Board direct any additional questions to Amtrak, much as the Board did in its August 19, 2024 Order, and Amtrak will promptly answer them.

Amtrak objects to the attempt by non-party the Association of American Railroads ("AAR") to introduce purported "evidence" into the investigative record by submitting verified statements from two industry witnesses and an academic. Amtrak understands and appreciates that the Board solicited views from non-parties on the legal questions raised in this proceeding, much as a court might solicit the views of amici on legal questions. However, it is inappropriate and contrary to the Board's rules for non-parties to introduce purported "evidence" into the investigative record in this Board-initiated investigation. Indeed, the Board already held that "under the Board's rules only parties to the proceeding will be permitted to ... submit substantive arguments," so non-parties certainly should not be permitted to submit substantive evidentiary materials. *See 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*, 2023 WL 4487158, at *3 n.5 (S.T.B. July 9, 2023) (holding that "under the Board's rules only parties to the proceeding will be permitted to ... submit substantive arguments"); *cf. Vanda Pharms., Inc. v. FDA*, 436 F. Supp. 3d 256, 277 (D.D.C. 2020) (denying leave to file amicus brief seeking to introduce extra-record evidence).

Moreover, the AAR verified statements should be disregarded by the Board for the independently sufficient reason that the affiants are not qualified to offer a legal conclusion on the definition of preference and their purported "testimony" cannot be considered for that purpose. *See United States v. DynCorp Int'l LLC*, 715 F. Supp. 3d 45, 56 (D.D.C. 2024) (expert "may not testify as to whether the legal standard has been satisfied" (citation omitted)); *see also Weston v. Washington Metro. Area Transit Auth.*, 78 F.3d 682, 684 n.4 (D.C. Cir. 1996) ("An expert witness may not deliver legal conclusions on domestic law, for legal principles are outside the witness' area of expertise under Federal Rule of Evidence 702."); *United States v. Slade*, 627 F.2d 293, 305 (D.C. Cir. 1980) (same for lay witnesses). None of the affiants has personal knowledge of conditions on the *Sunset Limited* route during the Complaint Period and therefore cannot provide this Board with any useful information about whether the delays that UP imposed on *Sunset Limited* Trains during the Complaint Period are attributable to a failure to provide passenger transportation with

I. UP IS RESPONSIBLE UNDER THE GOVERNING STATUTE FOR THE *SUNSET LIMITED*'S FAILURE TO MEET THE FEDERAL MINIMUM STANDARD FOR ON-TIME PERFORMANCE.

In this proceeding, the Board has compiled a robust investigative record that confirms that *Sunset Limited* Trains did not achieve the COTP Minimum Standard due primarily to causes that could reasonably be addressed by UP, as set forth in PRIIA Section 213. Confronted with this record, UP concedes that its service levels for the *Sunset Limited* during the Complaint Period were “unacceptably poor,”²¹ and that its unacceptable service was a primary cause of the disastrous on-time performance for *Sunset Limited* Trains.²²

After acknowledging its service failures, UP attempts to evade accountability for them. *First*, UP claims that it is not bound by the congressionally enacted on-time performance standard.²³ *Second*, UP argues that its service levels have improved as pandemic-era pressures have subsided, so there is no need for the Board to address its egregious history of delays.²⁴ *Third*, UP points to the *Sunset Limited* schedules, complaining that schedules with extraordinary amounts of recovery time, already distributed across intermediate stations with heavy ridership, are somehow misaligned with the COTP Minimum Standard.²⁵ None of these arguments has merit.

preference over freight transportation. In any event, the affiants rely almost entirely on speculative, unsupported, and/or non-falsifiable assertions or hypotheticals that provide no useful information about how properly preferencing Amtrak would impact the rail network. And, in particular, the Verified Statement of C. Tyler Dick—which purports to set forth Rail Traffic Controller analysis—does not provide any supporting materials or workpapers that would permit testing of its assumptions and conclusions. *See* 49 C.F.R. § 1112.6 (“A verified statement should contain all the facts upon which the witness relies, and to the extent that it contains arguments, they should be based only on those facts.”); *see also Zenith Elecs. Corp. v. WH-TV Broad. Corp.*, 395 F.3d 416, 419 (7th Cir. 2005) (“An expert must offer good reason to think that his approach produces an accurate estimate using professional methods, and this estimate must be testable. Someone else using the same data and methods must be able to replicate the result.”); *Evans v. Aramark Sports & Ent. Servs., LLC*, No. 19-CV-2092-RMM, 2022 WL 19520781, at *14 (D.D.C. Nov. 22, 2022) (expert unreliable if he “move[s] from A to C without explaining the link in his logic”). For all of these reasons, among several others, the Board should disregard the AAR verified statements. If the Board intends to consider them, Amtrak respectfully requests the opportunity to respond.

²¹ UP Reply 3, 20.

²² *Id.* at 20.

²³ *Id.* at 2, 44–45.

²⁴ *Id.* at 20–28.

²⁵ *Id.* at 45–57.

A. UP Concedes That Its Service Levels During The Complaint Period Were Unacceptable And Were A Primary Cause Of The *Sunset Limited's* Failure To Achieve COTP.

In its submission to the Board, UP concedes its role in delaying *Sunset Limited* Trains during the Complaint Period. UP does “not dispute that the *Sunset Limited's* on-time performance suffered” during that period.²⁶ UP admits that its unacceptable service was a primary cause of the delays and failures to achieve COTP Minimum Standards.²⁷ And UP describes its overall service during the Complaint Period as “unacceptably poor.”²⁸ UP says that its network congestion caused “progressively poorer service” that impacted crew availability and delays.²⁹ According to UP, crew shortages during the Complaint Period compounded congestion and “degrad[ed] network fluidity.”³⁰

After offering these admissions, UP attempts to minimize the impacts to Amtrak by pointing to UP’s broader failure to provide adequate service to nearly everyone, including shippers.³¹ However, Congress enacted PRIIA to zero in on the causes of delay to Amtrak passenger trains, so that they can be remedied.³² To satisfy its statutory obligation, the Board must assess precisely how UP treated Amtrak during this period of inconsistent and unreliable rail service. Indeed, the whole point of this proceeding is to address how UP’s concededly poor service affected the performance of *Sunset Limited* Trains and identify the reasonable measures UP can take to address those issues and prevent their recurrence. The Board is also statutorily charged

²⁶ *Id.* at 20.

²⁷ *Id.* at 2–3, 19–20.

²⁸ *Id.* at 3, 20.

²⁹ *Id.* at 21 (citing Written Testimony of Eric J. Gehringer, *Urgent Issues in Freight Rail Service*, STB Docket No. EP 770 at 1 (filed Mar. 3, 2022)).

³⁰ *Id.* (citing Written Testimony of Eric J. Gehringer, *Urgent Issues in Freight Rail Service*, STB Docket No. EP 770 at 2 (filed Mar. 3, 2022)).

³¹ *Id.* at 20–22.

³² *See* 49 U.S.C. § 24308(f)(1).

with assessing whether UP disregarded the federal obligation to provide Amtrak passenger transportation with preference over freight transportation.³³

The record demonstrates that UP did just that.³⁴ UP concedes that it:

- failed to plan efficient meets and overtakes with *Sunset Limited* Trains;³⁵
- failed to make efficient and effective use of infrastructure to combat delays;³⁶
- failed to maintain sufficient crew resources, thus causing delay to *Sunset Limited* Trains;³⁷ and
- allowed congestion and crew shortages to affect dispatching priorities, an issue more fully addressed below.³⁸

These concessions confirm what Amtrak alleged in its Complaint and what Amtrak told the Board in its Opening Statement.³⁹ In identifying reasonable measures and making recommendations to improve the on-time performance of *Sunset Limited* Trains, it is critical that the Board focus not only on ensuring that these service failures are fully resolved, but also on ensuring that UP has implemented measures to prevent their recurrence.

³³ See 49 U.S.C. § 24308(f)(2); Op. Br. 97–100.

³⁴ UP Reply 2–3, 19–20.

³⁵ *Id.* at 22 (“[F]reight trains were often operating far behind schedule, so they were interacting with the *Sunset Limited* where such interactions normally would not occur, increasing the difficulties in planning efficient meets and overtakes.”)

³⁶ UP Reply 22 (“Freight trains were also spending more time tied down in terminals and in other locations, which limited planning options available to dispatchers.”)

³⁷ UP Reply 22 (“Congestion and crew shortages also affected Union Pacific’s ability to recover from incidents that delayed *Sunset Limited* trains.”)

³⁸ UP Reply 22 (“When a freight train stopped on a main line or siding for any reason, the crew was more likely to be short on time. If the crew expired, the train remained tied down for longer than usual. Congestion and crew shortage concerns also affected dispatching priorities, as dispatchers attempt to avoid the additional impacts on network fluidity and crew resources that would result if crews expired and trains were tied down far from crew change point.”)

³⁹ Op. Br. 34–39, 42–46 (using Root Cause Analysis to show that use of non-fitting freight trains, as well as meeting and following freight trains, caused substantial delay to Amtrak passengers in the Complaint Period); *accord* Verified Statement of Robert Mulholland and Timothy Crowley (“Peabody V.S.”) at 17–20, 38–47; Op. Br. 51–52 (showing UP’s operational decisions and failures caused delays for Amtrak passengers); *accord* Peabody V.S. at 47–51; Op. Br. 46–50; *accord* Peabody V.S. at 5, 50–51.

B. Host Railroads Are Bound By The On-Time Performance Standard Congress Enacted In PRIIA.

UP argues that the Board need not concern itself with UP's failure to meet the COTP Minimum Standard because that standard purportedly does not bind UP.⁴⁰ UP claims that host carriers' on-time performance obligations are governed only by their agreements with Amtrak, not "Congress's standard for on-time service."⁴¹ According to UP, host railroads can therefore disregard the on-time performance expectations that Congress established under PRIIA.⁴² UP does not offer a single authority in support of that extraordinary claim, which cannot be squared with the plain text of PRIIA, its purpose, its implementing regulations, or with common sense. Contrary to UP's argument, the fact that Congress told the parties to incorporate the federal standard into their Operating Agreements "to the extent practicable" does not mean that "Congress recognized host carriers' on-time performance obligations are governed by their agreements with Amtrak, not the new metric and standard."⁴³

First, Congress obviously intended to bind host railroads when it enacted a federal on-time performance standard and made host railroads subject to investigation for failure to satisfy it.⁴⁴ Congress enacted PRIIA precisely to address freight railroad interference with Amtrak passenger trains.⁴⁵ PRIIA Sections 207 and 213 require that host railroads achieve a minimum 80% on-time

⁴⁰ UP Reply 1, 44–45.

⁴¹ *Id.* at 1 ("Under 49 U.S.C. § 24308(a), Congress left Amtrak and host carriers to negotiate on-time performance obligations, requiring only that their contracts include a penalty for untimely performance.").

⁴² *Id.* at 44–45.

⁴³ *Id.* at 2.

⁴⁴ See 49 U.S.C. § 24308(f); *see also* Op. Br. 65–68.

⁴⁵ See *Union Pac. R.R. Co.*, 863 F.3d at 820 (observing that PRIIA was enacted to address dispatching practices that advantaged freight operations); *see also On-Time Performance Under Section 213 of the Passenger Rail Investment and Improvement Act of 2008*, 81 Fed. Reg. 51343, 51344 (Aug. 4, 2016) (observing that Section 213 was enacted to address, among other things, the concern that host railroads' failure to honor Amtrak's preference right was causing unreliable on-time performance).

performance.⁴⁶ Where host railroads fail to do so for any two consecutive quarters, they are subject to federal investigation and—depending on the cause of substandard on-time performance—various remedies.⁴⁷ The statute nowhere excuses host railroads from investigation, damages, or equitable relief based on incentive or penalty provisions in private contracts executed between Amtrak and its host railroads, and UP cannot append such an exception to the text.⁴⁸ *See, e.g., Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 677 (2020) (“It is a fundamental principle of statutory interpretation that absent provision[s] cannot be supplied by the courts.” (internal citations omitted)). Indeed, Amtrak has been a party to Operating Agreements with its host railroads since the company’s inception, and if Congress had meant for those agreements to govern the Board’s investigation here it could have said so.

Second, PRIIA Sections 207 and 213 are inexorably intertwined and must be interpreted harmoniously. CN has recognized as much in this proceeding, asserting that the COTP Minimum Standard adopted pursuant to Section 207 “provides the *sole basis* for STB investigations of substandard Amtrak performance under Section 213.”⁴⁹ Because Section 207 was meant to provide the trigger for a Section 213 investigation, excusing hosts from compliance with the COTP Minimum Standard would render this “interdependent statutory scheme”⁵⁰ totally incoherent, *see United Savs. Ass’n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (recognizing that sections of a statute cannot be read in isolation because statutory interpretation is a holistic endeavor), and fatally undermine Congress’s effort to address excessive freight train interference with intercity passenger rail. *See Union Pac. R.R. Co. v. Surface Transp. Bd.*, 863

⁴⁶ *See* 49 U.S.C. § 24308(f)(1).

⁴⁷ *See Id.* § 24308(f)(1)-(2).

⁴⁸ *See Id.* § 24308(f)(1)-(4).

⁴⁹ Reply of Illinois Central Railroad Company to Opening Statement of National Railroad Passenger Corporation (“CN Reply”) 5 (Dec. 23, 2024).

⁵⁰ *Id.* (recognizing that statutory scheme is interdependent).

F.3d 816, 820 (8th Cir. 2017) (observing that PRIIA was enacted to address dispatching practices that advantaged freight operations); 153 Cong. Rec. 28704 (2007) (emphasizing that PRIIA would reduce train delays by allowing the STB to impose damages based on certain delays to Amtrak passenger trains).

Finally, Congress, in enacting PRIIA, required the FRA to commit substantial resources to addressing the on-time performance of intercity passenger rail. The FRA was required to promulgate metrics and standards to effectuate Section 213, which took more than a decade, and involved two unsuccessful appeals by the AAR to the U.S. Supreme Court. *See Dep't of Transp. v. Ass'n of Am. R.R.s*, 575 U.S. 43, 47 (2015); *see also Ass'n of Am. R.R.s v. U.S. Dep't of Transp.*, 896 F.3d 539 (D.C. Cir. 2018), *cert. denied*, 139 S. Ct. 2665 (2019). Congress could not conceivably have intended to invest these considerable agency resources on the investigation of an optional on-time performance standard. And if the metrics and minimum standards were meant to be optional, it is hard to understand why AAR spent more than a decade litigating to keep them from being promulgated. AAR devoted considerable resources to this litigation precisely because it believed that Section 207 of PRIIA was binding. *See, e.g., Resp. Br. 14, Dep't of Transp. v. Ass'n of Am. R.R.*, No. 13-1080 (D.C. Cir. Sept. 22, 2014), 2014 WL 4726501.

C. UP Cannot Evade Accountability For Unacceptable Service Based On Post-Complaint Performance, Which Remains Deficient.

Although UP recognizes that the *Sunset Limited* did not come close to achieving the COTP Minimum Standard during Fiscal Year 2024,⁵¹ UP next asserts that the Board need not take any action here because UP has “resolved” the service issues that drove deficient on-time performance during the Complaint Period.⁵² According to UP, its unacceptable service resulted exclusively

⁵¹ *See* UP Reply 26.

⁵² *Id.* at 20.

from challenges related to the COVID-19 pandemic.⁵³ However, the investigative record does not support that claim, and UP cannot evade accountability for its unacceptable service based on post-complaint performance.

First, permitting UP to avoid scrutiny based on performance that postdates the Complaint Period would be inconsistent with the text and purpose of Section 24308(f)(1), which requires the Board to identify reasonable measures and make recommendations to improve on-time performance based on the causes of delay identified in its investigative record during two quarters of performance. *Second*, UP's recent performance and ability to obtain contractual incentive payments says nothing informative about what caused UP's failure to provide *Sunset Limited* Trains with an unacceptable level of performance during the Complaint Period, nor about whether UP has done anything to prevent a recurrence of such substandard performance. Even if *Sunset Limited* Trains were now satisfying the COTP Minimum Standard (they are not), UP has offered no evidence that any performance improvements will be sustained.

1. PRIIA requires that this investigation focus on the Complaint Period.

Under the plain text of Section 24308(f)(1), the Board must determine the specific issues that caused delay or failures to achieve minimum standards during the two or more quarters at issue.⁵⁴ Additionally, the Board must determine whether those delays can reasonably be addressed by the pertinent rail carriers, Amtrak, or other intercity passenger rail operators.⁵⁵ Finally, the Board must identify reasonable remedial measures and make recommendations to improve service.⁵⁶ Congress made each of these obligations mandatory. The statute does not contemplate

⁵³ *Id.*

⁵⁴ 49 U.S.C. § 24308(f)(1)

⁵⁵ *Id.*

⁵⁶ *Id.* Congress also contemplated that the Board would complete investigations expeditiously, as evidenced by its intent to remedy deficiencies based on just two consecutive calendar quarters of substandard performance. *Id.*

that the Board may disregard them based on what transpires during the pendency of a Board investigation under the statute, and rightly so. Permitting host rail carriers to evade meaningful scrutiny through some period of post-complaint performance would frustrate the remedial purpose of PRIIA and waste Board resources.

This case illustrates the problem with permitting host rail carriers to evade accountability based on post-complaint performance. According to UP, the COVID-19 pandemic is to blame for its unacceptably poor operations.⁵⁷ However, historical *Sunset Limited* performance makes clear that UP's substandard service during the pandemic was not an aberration. Although the COTP Metric and Standard did not take effect for the *Sunset Limited* until October 1, 2021, Amtrak had been measuring COTP for several prior years, including fiscal years 2017-2021. During that time, the *Sunset Limited* never even came close to satisfying the minimum standard, as illustrated in Table 1 below.

Table 1: Historic *Sunset Limited* COTP⁵⁸

Year	Date	COTP
FY 2021	Oct. 1, 2020-Sept. 30 2021	27.1%
FY 2020	Oct. 1, 2019-Sept. 30 2020	29.5%
FY 2019	Oct. 1, 2018-Sept. 30 2019	19.8%
FY 2018	Oct. 1, 2017-Sept. 30 2018	45.1%
FY 2017	Oct. 1, 2016-Sept. 30 2017	55.1%

These unmistakable trends show that the *Sunset Limited's* performance was poor and declining well before the pandemic. Indeed, COTP for *Sunset Limited* Trains was *worse* before the onset of the COVID-19 pandemic. The evidence therefore confirms that substandard on-time performance during the Complaint Period was not solely due to pandemic-era pressures, as UP suggests. Instead, substandard on-time performance during the Complaint Period is consistent with

⁵⁷ UP Reply 20.

⁵⁸ Rebuttal Verified Statement of Yoel Weiss ("Weiss Rebuttal V.S.") ¶ 2.

UP's broad and persistent failures in operating the *Sunset Limited*. Although service has improved since the pandemic, UP has not given the Board or Amtrak enough evidence to show a meaningful and lasting shift in UP's dispatching and operating practices.

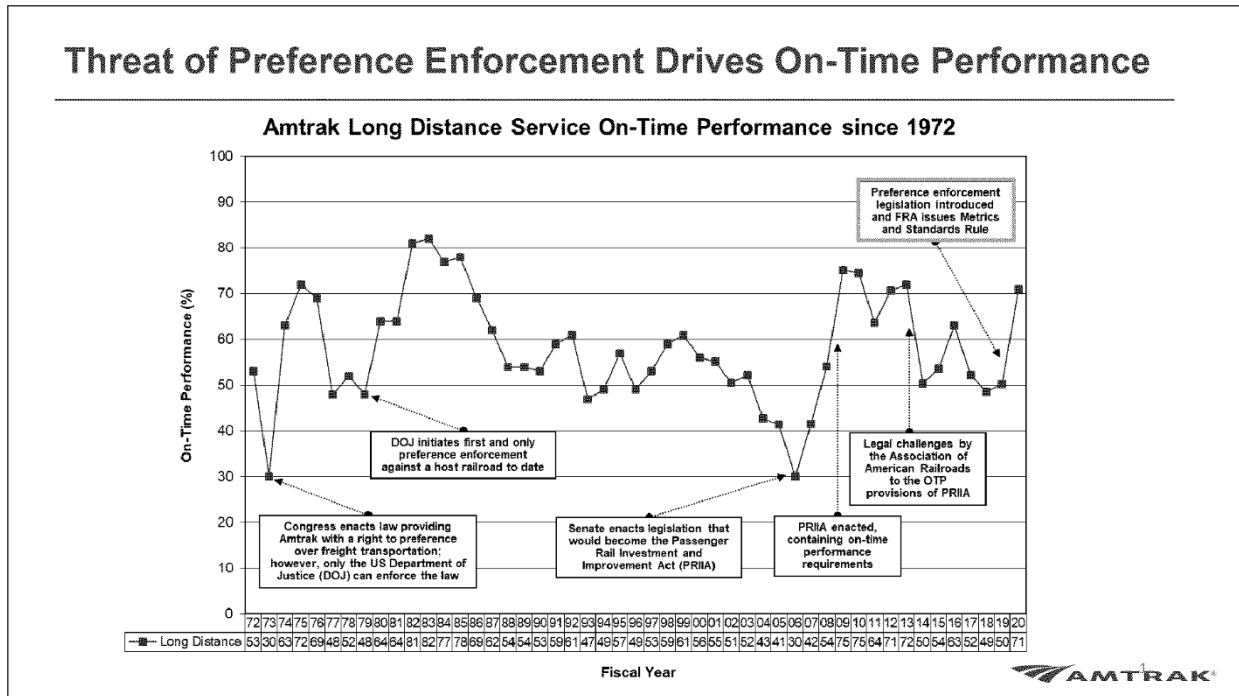
There are additional reasons to be skeptical about the longevity of performance improvements that occurred after the commencement of this investigation.⁵⁹ Amtrak has historically observed that government action, enforcement, or oversight drives only short-lived improvements in on-time performance, as occurred when Congress enacted Amtrak's statutory right to preference in 1973, the Department of Justice initiated its first (and, until recently, only) preference enforcement action in 1979, the U.S. Senate approved the legislation that would become PRIIA in 2006, Congress enacted PRIIA in 2008, and the FRA issued its Metrics and Standards rule in 2020.⁶⁰ This unmistakable trend is illustrated in Figure 1 below.⁶¹

⁵⁹ UP has not provided Amtrak or the Board with the full data required to verify its assertions regarding service improvements. That means the Board cannot validate assertions about daily car miles, trains per day, traffic mix percentages, network performance, network trains held, route performance, or *Sunset* trains held. *See* Peabody Reply V.S. at 5. UP repeatedly resisted Amtrak's attempts to timely obtain further information about its analyses and workpapers, including in one case informing Amtrak there was no documentary support and the analysis was instead based on "judgment and experience."

⁶⁰ *See* Exhibit A. This data is not a perfect reflection of customer on-time performance because it relies on endpoint arrival times, a metric that was in place during the period covered by the Exhibit. Nevertheless, the data illustrates the historical trends Amtrak has experienced when federal attention has been paid to host railroads' deficient performance. Amtrak produced this table during the party-led discovery process and before the Department of Justice initiated its recent preference enforcement action against Norfolk Southern Railway involving the *Crescent* service.

⁶¹ *See id.*

Figure 1: Preference Enforcement and On-Time Performance



This graphic is reproduced as Exhibit A. As it makes clear, on-time performance improvements are often temporary and unreliable. As the threat of government action, oversight, or enforcement recedes, so too does on-time performance for Amtrak passenger trains. This proceeding is meant to reverse that trend. Indeed, robust findings from the Board about the causes of delay to Amtrak and equally robust recommendations will be critical to avoid backsliding for at least four reasons. *First*, without Board action, nothing precludes UP from reversing any operational decisions that drove improved performance during the investigation. *Second*, the existence of service improvements now does not establish that UP has fully addressed the operational issues that caused delays during the Complaint Period. *Third*, any existing service improvements have not driven performance to levels consistent with the COTP Minimum

Standard, as UP acknowledges.⁶² *Fourth*, UP has presented no evidence that existing service improvements can be sustained in challenging operating environments.

This is not to say that post-Complaint Period performance is *irrelevant* in an investigation under Section 24308(f)(1). For example, information concerning *how* COTP improved during the pendency of an investigation could assist the Board with recommendations about how to address UP's substandard on-time performance during the Complaint Period. That information could also assist the Board in crafting remedies for preference violations against Amtrak. But UP has provided little concrete information about the operational steps it has taken more recently to mitigate its admittedly deficient service through the Complaint Period, or to ensure that any service improvements endure after this investigation. Accordingly, information about recent service improvements does nothing to aid the Board in fulfilling its statutory mandate.

2. Evidence concerning recent performance says nothing informative about causes of delay during the Complaint Period.

UP argues that recent incentive payments earned under its Operating Agreement with Amtrak illustrate that service issues have been resolved,⁶³ and that improved performance now means that certain of its policies, practices, and procedures could not have presented an issue during the Complaint Period.⁶⁴ These arguments are predicated on a mischaracterization of the parties' Operating Agreement and on speculative claims for which UP provides no evidence.⁶⁵ Moreover, UP's contention that recent performance is probative of what caused delay during the

⁶² UP Reply 26.

⁶³ *Id.* at 3, 24–26.

⁶⁴ *See Id.* at 26, 29–30; *see also Id.* at 41.

⁶⁵ UP's contention that recent performance is probative of what caused delay during the Complaint Period is also inconsistent with its prior contention that the “subject matter of this investigation ... encompasses only the relevant period,” made when that position suited UP's desire to refrain from preserving data essential to an efficient analysis of its services failures. *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*, at 8 (Aug. 19, 2024).

Complaint Period is inconsistent with its prior contention that the “subject matter of this investigation ... encompasses only the relevant period” and therefore evidence from beyond that period was not relevant.⁶⁶

Incentive Payments. According to UP, operational issues have been resolved because UP has recently begun receiving incentive payments from Amtrak.⁶⁷ However, incentive payments do not govern the federal on-time performance obligation.⁶⁸ That obligation is governed by PRIIA and by the COTP Metric and Minimum Standard.⁶⁹ Until *Sunset Limited* Trains achieve that federal standard, there is no basis for UP’s assumption that service levels are sufficient.

Moreover, under the parties’ Operating Agreement, incentive payments are only meant to encourage improved performance, not define its sufficiency.⁷⁰ As a result, earning incentive payments only shows that UP’s performance has improved enough for UP to avoid the “penalt[ies] for untimely performance” that Congress required as part of the parties’ Operating Agreement.⁷¹ It does not tell the Board whether UP is satisfying the federally imposed statutory and regulatory requirements governing its on-time performance obligations.

In any event, incentive payments are based on a small number of checkpoints heavily negotiated by UP. Aligning dispatching decisions with contractual checkpoints during the pendency of this proceeding does not mean UP has resolved operational issues affecting its ability to provide Amtrak with acceptable service.⁷² And even if incentive payments were probative as to

⁶⁶ 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 Tains 1 and 2*, at 8 (Aug. 19, 2024).

⁶⁷ UP Reply 3.

⁶⁸ See *infra* Part II,

⁶⁹ See *infra* Part I.E.2.

⁷⁰ See *infra* Part I.E.

⁷¹ 49 U.S.C. § 24308(a).

⁷² As discussed below, UP’s own scheduling proposals, and {{[REDACTED]}}, confirm that it has not resolved operational issues affecting other portions of the route. See *infra* Part I.E; see Peabody Reply V.S. at 18

UP's improved operations, there is no assurance that any performance improvements would endure once this investigation concludes. It is no coincidence that UP's improved collection of incentive payments has coincided with the period of Board oversight in this proceeding.⁷³

Policies, Practices, and Procedures. UP next argues that its policies, practices, and procedures could not have presented an issue during the Complaint Period because performance has improved while those same policies, practices, and procedures are still in place. This claim is misleading and incorrect.

Take train length as an example. UP says that train length could not have caused the failure to achieve on-time performance standards during the Complaint Period because, in the years since, average train length has increased while performance has improved.⁷⁴ This argument flies in the face of undisputed evidence that UP's operation of trains too long to fit in most sidings in proximity to the *Sunset Limited* resulted in numerous, lengthy FTI delays. UP never meaningfully disputes the manner in which long trains drove specific delays.⁷⁵ Nor does UP even attempt to explain whether its acknowledged service failures were compounded by the insistence on running non-fitting trains in territory proximate to the *Sunset Limited*.⁷⁶ UP's failure to dispute those delays or explain their relationship to service failures is not surprising. The investigative record confirms that dispatching long trains in fact caused and compounded delay to Amtrak and its passengers.

In any event, UP's performance remains deficient. To the extent UP continues to run trains too long to fit into sidings in proximity to the *Sunset Limited*, refuses to deviate from directional

(noting UP has failed to {{ [REDACTED] }}).

⁷³ UP's argument, *see* UP Reply 6, 22, that it has adequate commercial incentives to avoid delays to the *Sunset Limited* also lacks merit, as evidenced by the dreadful historical performance of this service, *see supra* Part I.C.1 & Table 1.

⁷⁴ UP Reply 29–30.

⁷⁵ *Id.* at 30–31.

⁷⁶ *Id.* at 20–24, 30.

operating practices when dispatching the *Sunset Limited*, refuses to adequately train dispatchers on operating Amtrak passenger trains, and refuses to address its failure to give Amtrak trains preference over freight trains in its computer-aided dispatching system, those continued policies, procedures, and practices may explain why *Sunset Limited* Trains are not actually achieving the COTP Minimum Standard, even today. Fundamentally, the issue remains that UP's obligations to Amtrak passengers are not incorporated into its practices, policies, and operations from the outset, leading to delays that are not sufficiently addressed by the tangential benefits Amtrak receives from UP's improved service for its own freight traffic.

Once UP's attempt to redirect attention to recent performance is cast aside, the parties appear to agree on several of the issues that caused delay to the *Sunset Limited* during the Complaint Period. For example:

- As to Amtrak's claim that UP operated non-fitting trains that blocked or delayed the *Sunset Limited*,⁷⁷ UP concedes that it did not use its infrastructure efficiently, limiting the options available to dispatchers.⁷⁸
- As to Amtrak's claim that UP's operation of non-fitters, dispatching decisions, and other operational issues led to lengthy delays during meets and overtakes,⁷⁹ UP acknowledges that it did not plan meets and overtakes efficiently.⁸⁰
- As to Amtrak's claim that UP failed to adequately manage its crews such that UP then prioritized freight trains with crews expiring on hours of service over

⁷⁷ Op. Br. 36–39.

⁷⁸ UP Reply 22 (“Freight trains were also spending more time tied down in terminals and in other locations, which limited planning options available to dispatchers.”); *Id.* at 13 (“when a freight train stopped on a main line or a siding for an incident, inspection, or repair, the crew was more likely already short on time, and if the crew expired, the train would remain tied down longer than usual waiting to be recreated. These tied-down trains, whether on main line or sidings, reduced the options available to dispatchers in arranging efficient meets and overtakes.”).

⁷⁹ Op. Br. 34–39, 42–46.

⁸⁰ UP Reply 22 (“As a result of congestion and crew shortages, freight trains were often operating far behind schedule, so they were interacting with the *Sunset Limited* where such interactions normally would not occur, increasing the difficulties in planning efficient meets and overtakes.”).

Amtrak,⁸¹ UP acknowledges that it did not maintain enough crew members and that it instructed dispatchers to prioritize freight trains with expiring crews.⁸²

UP claims that since the Complaint Period, it has taken steps to promote the more efficient use of infrastructure, plan more efficient meets and overtakes, and *perhaps* mitigate some of its crew availability issues.⁸³ But these more recent developments simply confirm that the causes of delays and failures to meet the COTP Minimum Standard are entirely “due to causes that could reasonably be addressed” by UP.⁸⁴ The Board is charged by statute with making recommendations to ensure that UP continues to address its operational deficiencies even after this proceeding is concluded.

D. UP’s Other Attempts To Defend Its Operating Practices Miss The Mark.

UP “acknowledges its share of responsibility for the *Sunset Limited*’s substandard performance during the Complaint Period,”⁸⁵ and admits that its unacceptable service was a primary cause of the *Sunset Limited*’s failure to meet the COTP Minimum Standard. UP nevertheless attempts to dismiss portions of Amtrak’s delay analysis. For reasons set out below, its arguments lack merit.⁸⁶

⁸¹ Op. Br. 46–50.

⁸² UP Reply 22 (“Congestion and crew shortage concerns also affected dispatching priorities, as dispatchers attempted to avoid the additional impacts on network fluidity and crew resources that would result if crews expired and trains were tied down far from crew change points.”).

⁸³ *But see* Peabody Reply V.S. at 18 (noting UP has failed to meaningfully address crew management as the recrow rate on the *Sunset Limited* Route is {{[REDACTED]}}).

⁸⁴ 49 U.S.C. § 24308(f)(1).

⁸⁵ UP Reply 27.

⁸⁶ At many points throughout its submission, UP relies on its dispatchers’ lack of intent to delay Amtrak trains in order to dismiss Amtrak concerns regarding delays. *See Id.* at 102–107. Those arguments are irrelevant. PRIIA does not include a *mens rea* requirement, and the intent to more effectively dispatch Amtrak passenger trains is no substitute for doing so. The arguments are also incorrect. The act of imposing delay evinces intent.

1. UP wrongly believes lengthy and significant delays should be expected.

First, UP argues that delays identified in Amtrak’s Opening Statement are delays one would expect to encounter on a busy long-distance route.⁸⁷ If UP believes that is true, it confirms the problem: UP has allowed operational failures to become “normal.”

The investigative record illustrates precisely why treating delays to the *Sunset Limited* as typical would contravene the national interest in running effective and efficient intercity passenger rail service.⁸⁸ As one example, the record demonstrates that UP adopted a pattern and practice of running *Sunset Limited* Trains behind slow and non-fitting freight trains, as when { [REDACTED]

[REDACTED] } As another example, the record also reflects that UP adopted a pattern and practice of forcing Amtrak trains into sidings for extended periods of time, as when { [REDACTED]

[REDACTED] }.⁹⁰ And as a third example, the record reflects that UP adopted a pattern and practice of holding Amtrak for extended periods of time to mitigate UP crew management issues, as when { [REDACTED]

[REDACTED] }.⁹¹

⁸⁷ *Id.* at 26–27.

⁸⁸ See 49 U.S.C. § 24101(a) (providing that (1) Public convenience and necessity require that Amtrak, to the extent its budget allows, provide modern, cost-efficient, and energy-efficient intercity rail passenger transportation throughout the United States; (2) Rail passenger transportation can help alleviate overcrowding of airways and airports and on highways; (3) A traveller in the United States should have the greatest possible choice of transportation most convenient to the needs of the traveller; ... (5) Modern and efficient intercity passenger and commuter rail passenger transportation is important to the viability and well-being of major urban and rural areas and to the energy conservation and self-sufficiency goals of the United States; ... (9) Long-distance routes are valuable resources of the United States that are used by rural and urban communities); *accord* 49 U.S.C. § 24101(c)(4), (6), (7), (13).

⁸⁹ UP Train 1 RCA at 436 (9/02/2022; 168-minute delay); *accord* Op. Br. 37.

⁹⁰ UP Train 1 RCA at 380 (7/12/2022; 102-minute delay); *accord* Op. Br. 46.

⁹¹ UP Egregious Delay RCA at 42 (11/06/2022; 90-minute delay); *accord* Op. Br. 48.

UP believes that these illustrative delays are “the types of delays ones would expect to encounter” when operating intercity passenger service.⁹² However, this misguided statement simply illustrates that UP’s policies, practices, and procedures for dispatching Amtrak trains are deficient and inconsistent with federal law. Like with other types of government-imposed regulatory obligations, such as environmental requirements or labor requirements, UP’s and other host railroads’ federal obligations to Amtrak passengers should not be an afterthought, considered only after freight needs have been met. UP’s belief appears to reflect its admitted view that UP’s negotiated and voluntary obligations to shippers “trump” its statutory obligations to Amtrak and the traveling public.⁹³ That must change, and Congress authorized investigations like this one for precisely that reason.

2. The frequency and duration of UP FTI is extraordinary and inconsistent with federal law.

In its Reply Brief, UP attempts to dismiss the staggering amount of freight train interference (“FTI”) that it imposed on the *Sunset Limited* during the Complaint Period by constructing a straw man: That Amtrak insists on eliminating *all* FTI to *Sunset Limited* Trains.⁹⁴ UP offers no citation for that claim because Amtrak never made it.⁹⁵ In fact, portions of the considerable recovery time built into *Sunset Limited* schedules are meant to account for delays that result from host capacity constraints and comport with Amtrak’s statutory right to preference,⁹⁶ as

⁹² UR Reply 27.

⁹³ See UP Reply 109 n.341.

⁹⁴ *Id.* at 27, 29, 35–37.

⁹⁵ UP also attempts to minimize the amount of FTI that *Sunset Limited* Trains experience by noting that Amtrak conductors must report 300 minutes of delay on UP-hosted segments. *See Id.* at 28. That claim is misleading. UP fails to mention that Amtrak delay coding contains an Amtrak-Responsible Delay code to account for delays that occur when trains run without delay and therefore over-dwell at stations. *See* Amtrak’s Resp. to the Bd.’s Interrogs. & Doc. Requirements; App’x A – Part II (“Amtrak’s Sept. 2023 Resp.”) 6–9 (Sept. 25, 2023). To the extent UP ran trains without any host-responsible delay, none would be reported.

⁹⁶ *Id.* at 10 (noting that “Amtrak builds a considerable amount of Recovery Time into its existing schedules so that it can mitigate the operational impact of [unplanned and unanticipated] delays”).

UP recognizes.⁹⁷ It is with the impact of these and similar delays in mind that Amtrak has suggested host railroads target 900-minutes of Host-Responsible Delay per 10,000 Train Miles in operating passenger trains over their respective networks.⁹⁸

The problem for *Sunset Limited* Trains during the Complaint Period was not, as UP claims, delays of “a few minutes” for meets with freight trains or slight delays when *Sunset Limited* Trains had to “slow down briefly” to cross over to another track.⁹⁹ Rather, the problem was that UP subjected *Sunset Limited* Trains to a sustained and extraordinary number of long FTI delays because UP deliberately chose to prioritize its freight trains over Amtrak. ***On average, Sunset Limited Trains encountered more than 15 instances and four hours of FTI per trip.***¹⁰⁰ Put simply, this is not a close case: throughout the Complaint Period, UP flagrantly and repeatedly violated the law requiring UP to give Amtrak trains “preference” under any reasonable definition of the term.

UP complains that sometimes it could not do anything about FTI because “incidents” occurred before the *Sunset Limited* arrived and took significant time to resolve.¹⁰¹ Among these “incidents” were mechanical delays and crew expirations. But UP makes no effort to quantify the number of mechanical incidents that drove delays, no effort to explain whether those mechanical incidents were driven by train length, and no attempt to prove that resulting delays to the *Sunset Limited* were unavoidable. Nor should UP be permitted to disclaim accountability for its own failure to manage crew hours of service—an “incident” that was concededly compounded by UP’s

⁹⁷ UP Reply 29 (“Amtrak schedules also incorporate an expectation that trains will be delayed by FTI.”)

⁹⁸ See Compl. & Pet. For Bd. Investigation & Other Relief ¶ 91 (Dec. 8, 2022); *accord* AMTRAK_STB_0008359.

⁹⁹ UP Reply 27.

¹⁰⁰ Op. Br. 32.

¹⁰¹ UP Reply 35.

broader failure to maintain adequate crew levels. In any event, the investigative record confirms that the overwhelming majority of delays were driven by avoidable FTL.

UP also complains that Amtrak never identified a train for which its schedule was designed to interfere with the *Sunset Limited*.¹⁰² But whether UP intentionally designed schedules to interfere with *Sunset Limited* Trains is the wrong question. The right one is whether UP designed its freight schedules to comply with its preference obligations and enable Amtrak to achieve the COTP Minimum Standard. It did not. Indeed, UP says that Amtrak's recommendations that UP account for Amtrak's right to preference in building schedules "makes no sense."¹⁰³ Unlike BNSF—which notes that its schedules are "uniquely built to preserve Amtrak's requested arrival and departure times" and ensure that "Amtrak's priority status services as the baseline for ... the schedule-building process"¹⁰⁴—UP admits that the UP Train Schedule Builder does nothing to account for Amtrak's on-time performance obligations (or preference rights) *at all*.

Finally, UP complains that many delays occur when its freight traffic, the *Sunset Limited*, or both are running substantially behind schedule.¹⁰⁵ But UP is ordinarily the *reason* trains are running behind schedule. UP cannot evade accountability for its poor service by blaming its own poor service.¹⁰⁶

3. UP acknowledges that long trains delayed the *Sunset Limited*.

UP admits that, during the Complaint Period, *Sunset Limited* Trains were delayed too much by long trains.¹⁰⁷ UP does not dispute that *Sunset Limited* Trains suffered regular and significant

¹⁰² *Id.* at 85–86.

¹⁰³ *Id.* at 143.

¹⁰⁴ BNSF Reply 35–36.

¹⁰⁵ UP Reply 26.

¹⁰⁶ *See* Peabody Reply V.S. at 3.

¹⁰⁷ UP Reply 30 ("During the Complaint Period, the *Sunset Limited* was delayed too much by longer and shorter trains.").

delays when forced to follow non-fitting trains past short sidings; that *Sunset Limited* Trains suffered regular and significant delays when non-fitting freight trains were dispatched onto segments where they would inevitably interact with the *Sunset Limited*; and that the *Sunset Limited* suffered regular and significant delays while forced to wait for non-fitting freight trains to clear single track. In fact, UP does not provide *any* analysis about how non-fitting trains interacted with the *Sunset Limited*. UP nevertheless contends that train length did not meaningfully impact on-time performance during the Complaint Period. Its arguments lack merit.¹⁰⁸

First,¹⁰⁹ UP claims that it has “no incentive” to operate trains longer than appropriate for its network because delays attributable to train size would negatively affect its own operations more than Amtrak.¹¹⁰ That claim is misleading and wrong.

- The investigative record confirms that UP regularly resolved meets between non-fitting freight trains and the *Sunset Limited* in a manner that delayed Amtrak passengers for extended periods while the non-fitting freight proceeded.¹¹¹
- The investigative record confirms that UP regularly operated non-fitting trains in a manner that caused the *Sunset Limited* to follow or stop behind the slower non-fitting train.¹¹²

¹⁰⁸ Compare Op. Br. 34–42 (explaining how UP’s operation of long train delayed the *Sunset Limited*), with UP Reply 83–84 (declining to dispute that operation of long trains imposed significant delays on *Sunset Limited* Trains).

¹⁰⁹ For reasons already explained above, UP’s argument that train length could not have affected on-time performance during the Complaint Period because—during a subsequent period—train length increased, performance improved, and FTI declined is also wrong. See *supra* Part I.D.2.

¹¹⁰ UP Reply 30.

¹¹¹ See, e.g., UP Train 1 RCA at 399 (7/12/2022; 42-minute delay); UP Train 1 RCA at 43–44 (9/23/2022; 13-minute delay); UP Train 1 RCA at 80 (3/08/2022; 12-minute delay); UP Train 1 RCA at 176 (4/08/2022; 30-minute delay); UP Train 2 RCA at 45–46 (4/03/2022; 26-minute delay); UP Train 2 RCA at 158–59 (5/25/2022; 46-minute delay); UP Train 2 RCA at 160–61 (5/25/2022; 30-minute delay); UP Train 2 RCA at 256 (8/03/2022; 61-minute delay); UP Train 2 RCA at 265 (8/03/2022; 13-minute delay). See also Op. Br. 34–39.

¹¹² See, e.g., UP Train 1 RCA at 70–71 (9/25/2022; 50-minute delay); UP Train 1 RCA at 62 (3/08/2022; 30-minute delay); UP Train 1 RCA at 436 (9/02/2022; 168-minute delay); UP Train 2 RCA at 260 (8/03/2022; 46-minute delay); UP Train 2 RCA at 211 (6/19/2022; 35-minute delay).

- The investigative record confirms that UP regularly ran non-fitting trains over single-track segments when the *Sunset Limited* already was or soon would be occupying those segments.¹¹³

In each of these instances, the decision was made to dispatch a non-fitting train onto a track segment where it would inevitably impose delay on Amtrak but allow UP to move freight more quickly. UP's response is to state that it is simply "not addressing Amtrak's specific claims of preference violations regarding longer trains."¹¹⁴

Second, UP contests certain analyses presented in Amtrak's Opening Statement. However, UP's objections often mischaracterize the record, attack straw men, or are contradicted by its own evidence. As one example, UP complains that "Amtrak and its consultants generally ignore the presence of double-main track in their statistics regarding train lengths and sidings."¹¹⁵ But UP concedes that it uses double-main track for directional running and expressly directs dispatchers to refrain from authorizing double-track overtakes when there is any oncoming traffic.¹¹⁶ That instruction means that passenger trains are forced to wait as opposing freight traffic clears because there are no means to overtake slow moving non-fitters.¹¹⁷

As another example, UP argues that there is no correlation between train length and delay.¹¹⁸ That analysis is not informative because it asks the wrong question. As UP concedes, "the *Sunset Limited* was delayed too much by longer and shorter trains," during the Complaint

¹¹³ See, e.g., UP Train 1 RCA at 399 (7/12/22; 42-minute delay); UP Train 1 RCA at 400 (7/12/22; 62-minute delay); UP Train 1 RCA at 70-71 (9/25/22; 50-minute delay); UP Train 2 RCA at 160 (5/25/2022; 30-minute delay); UP Train 2 RCA at 160 (5/25/2022; 30-minute delay).

¹¹⁴ UP Reply 84 n.278.

¹¹⁵ *Id.* at 31.

¹¹⁶ *Id.* at 41.

¹¹⁷ See Peabody Reply V.S. at 4.

¹¹⁸ UP Reply 29–30.

Period.¹¹⁹ The fact that long and short trains caused delays does not mean they caused delays for the same reason.

Third, UP relies on the National Academies' Long Train Study to assert that long trains are beneficial.¹²⁰ But that reliance is misplaced.¹²¹ As UP acknowledges, the NASEM study only finds that long trains have a positive impact on network fluidity when used "on corridors designed to handle [them]."¹²² UP has not demonstrated that the *Sunset Limited* route is such a corridor. The NASEM study specifically refrained from making any definitive findings regarding the impact of long trains on passenger rail performance because there was insufficient data to determine the predominant siding lengths on passenger corridors. However, the study did acknowledge that "[i]ntroducing even a small number of long trains on a corridor without any long sidings creates a significant amount of additional train delay."¹²³ Although UP is apparently making investments to facilitate its desire to operate very long trains, the investigative record contains no evidence that "the predominant siding length along the corridor" is appropriately calibrated to the length of the trains UP routinely runs on the segment.¹²⁴ In fact, the investigative record conclusively establishes the opposite. For example:

- UP does not contest that *Sunset Limited* Trains were regularly delayed because UP ran non-fitting trains on segments that lacked sufficient long sidings to accommodate them.¹²⁵
- UP does not contest that it lacked even one siding long enough to accommodate all trains that travelled past it.¹²⁶

¹¹⁹ *Id.* at 30.

¹²⁰ *Id.*

¹²¹ *See* Peabody Reply V.S. at 13.

¹²² UP Reply 30.

¹²³ Long Trains Study at 91.

¹²⁴ UP Reply 31 (citing Long Trains Study at 91).

¹²⁵ *See* Op. Br. 36, Table 2 & n.121.

¹²⁶ UP Reply 31.

- UP does not contest that [REDACTED]
[REDACTED]}
- And UP does not contest that [REDACTED]
[REDACTED]}

Those undisputed facts, and the broader investigative record, confirm that predominant siding length along the *Sunset Limited* route was insufficient to support UP's preferred operating strategy, at least without imposing recurring and significant delays on *Sunset Limited* Trains.

4. UP does not dispute that its crew management caused meaningful delay to the *Sunset Limited*.

Again, UP does not dispute that the *Sunset Limited* experienced an unacceptable number of delays during the Complaint Period because of UP's problems with managing its crews, including challenges in managing crew hours-of-service. For example, UP concedes that a significant number of crews were permitted to expire on and block the main track;¹²⁷ that UP failed to timely execute recrews;¹²⁸ that crews were permitted to enter single-track areas shortly before their expiration;¹²⁹ and that dispatchers were instructed to and did prioritize the movement of freight trains with crews nearing their maximum hours of service over Amtrak trains.¹³⁰

Notwithstanding those concessions, UP claims that its crew management practices did not contribute to delays.¹³¹ That argument is nonsensical. UP never explains why congestion and crew shortages rendered it unable to make operational adjustments that appropriately accounted for obligations to Amtrak.¹³² To the extent any delays based on crew hours-of-service issues were

¹²⁷ *Id.* at 22, 101, 131, 185.

¹²⁸ *Id.* at 37–38, 100.

¹²⁹ *Id.* at 101.

¹³⁰ *Id.* at 99 (“Dispatchers are instructed to give priority treatment to trains with crews running short on hours of service[.]”)

¹³¹ *Id.* at 36–38.

¹³² UP's attempts to shift to Amtrak the burden for identifying alternatives and impose on Amtrak an obligation to demonstrate that alternatives were consistent with some undefined level of network fluidity have no basis in the statute. See *infra* Part II.C.1.

unavoidable, UP concedes that was the case because of its own service failures. All parties agree that “the *Sunset Limited* experienced an unacceptable number of delays caused by crew hours-of-service issues during the Complaint Period.”¹³³

5. UP’s directional running caused delays to the *Sunset Limited*.

UP asserts that directional operations on portions of the *Sunset Limited* route benefited Amtrak and its passengers.¹³⁴ The investigative record says otherwise.¹³⁵ During the Complaint Period, *Sunset Limited* Trains were regularly and significantly delayed while waiting for opposing freight traffic to clear double-tracked portions of the *Sunset Limited* route.¹³⁶ But that is simply the result of UP’s operational choices. UP acknowledges that its dispatchers were instructed *not* to use the second main line for freight or passenger train overtakes, unless there was no opposing traffic on the second main line.¹³⁷ That categorical instruction is inconsistent with any definition of preference, even the unsupported one that UP offers, and caused significant delay to *Sunset Limited* Trains.

UP’s attempt to rehabilitate that instruction relies on a straw man. Amtrak position is not that second mains should be used “solely as sidings for freight trains that might slow or stop the *Sunset Limited*.”¹³⁸ Rather, Amtrak argues that a precision scheduled railroad, employing

¹³³ UP also claims it had no incentive to allow crews to reach hours-of-service limits. UP Reply 36. This observation is irrelevant. Incentives notwithstanding, UP in fact allowed crews to reach their hours-of-service limit when occupying main lines or sidings from crew change points, causing significant delay to *Sunset Limited* Trains. See Op. Br. 46–50. The Board cannot ignore the existence of delays or the operational issues that caused them, just because UP had and failed to act on asserted commercial reasons to avoid them.

¹³⁴ UP Reply 38–41. Directional operating practices involve using one main line for all westbound traffic and another main line for all eastbound traffic.

¹³⁵ See, e.g., UP Train 1 RCA at 191 (4/08/2022; 20-minute delay); UP Train 1 RCA at 158 (4/03/2022; 7-minute delay); UP Train 1 RCA at 238 (5/01/2022; 51-minute delay); UP Train 1 RCA at 247 (5/01/2022; 49-minute delay); UP Train 1 RCA at 398 (7/12/2022; 15-minute delay); UP Train 2 RCA at 66 (4/10/2022; 52-minute delay); UP Train 2 RCA at 207 (6/19/2022; 39-minute delay); UP Train 2 RCA at 211 (6/19/2022; 35-minute delay).

¹³⁶ See Op. Br. 41 n.129.

¹³⁷ UP Reply 41.

¹³⁸ *Id.* at 40.

responsible dispatching practices and hosting a scheduled passenger service, should be capable of arranging service in a manner that ordinarily facilitates a timely overtake.¹³⁹ Indeed, Section 24308(c) requires that Amtrak trains be given preference “in using a *rail line*,” not just the particular *track* on a multi-track line on which they are operating.¹⁴⁰

For similar reasons, UP’s assertions about *Sunset Limited* operations between Beaumont and Houston—where UP has two separate lines and often chooses to run *Sunset Limited* Train 2 over the longer segment with slower maximum speeds—are misplaced.¹⁴¹ The fact that UP cannot adequately organize and meet its schedules and would therefore subject the *Sunset Limited* to comparable run-time if operating on a shorter track with higher maximum speeds, does not excuse the resulting delays to Amtrak and its passengers.

6. Other UP operational failures and freight mechanical issues imposed substantial delay on the *Sunset Limited*.

UP’s remaining efforts to resist Amtrak’s delay analysis are directed at another straw man. Amtrak does not argue that other operational failures and freight mechanical issues alone caused the *Sunset Limited*’s failure to achieve the COTP Minimum Standard. Amtrak argues that those issues caused substantial delays to *Sunset Limited* Trains during the Complaint Period and contributed to substandard COTP. UP does not dispute that evidence, because it cannot.

Mechanical Issues. UP recognizes that there was a “laundry list” of mechanical issues that delayed *Sunset Limited* Trains during the Complaint Period.¹⁴² It attempts to deflect focus from the number and length of delays by noting that Amtrak too experienced mechanical issues. But

¹³⁹ UP’s attempt to liken its tracks to a public highway only underscores that it should be capable of better organizing overtakes. After all, the difference between a public highway and private rail lines is in the amount of control exercised over the scheduling and use of each.

¹⁴⁰ 49 U.S.C. § 24308(c) (emphasis added).

¹⁴¹ UP Reply 39–42.

¹⁴² *Id.* at 42.

Amtrak mechanical issues constituted less than 3% percent of delay minutes during the Complaint Period.¹⁴³ Most of those were due to locomotive issues,¹⁴⁴ and Amtrak is making significant investments to mitigate those delays.¹⁴⁵ UP has not provided any evidence that it is making analogous commitments or otherwise taking meaningful steps to mitigate the frequency and duration of mechanical issues.

Station Platforms. UP admits that station platforms are sometimes blocked by freight trains.¹⁴⁶ UP claims that it has a policy prohibiting occupancy of station platforms when passengers are scheduled to arrive, then blames mechanical and other issues for deviations from that policy.¹⁴⁷ But UP does not explain what steps are taken to mitigate the risk that various issues will impede access to platforms. And its own root cause analysis indicates that operational decisions—like building freight trains on tracks required to access platforms or permitting crews to expire on the same¹⁴⁸—exacerbate that risk.

Maintenance of Way. UP recognizes that it allowed maintenance-of-way crews to overstay planned maintenance windows even when doing so meant imposing delay on the *Sunset Limited*.¹⁴⁹ In fact, UP argues that it actually *directed* overstays, and that delaying *Sunset Limited* Trains was appropriate because the alternative was scheduling an additional maintenance window and delaying freight operations.¹⁵⁰ That argument is inconsistent with Amtrak’s statutory right to preference, even under UP’s cramped definition of that right.

¹⁴³ See Amtrak_STB_Native_0002.

¹⁴⁴ See *id.*

¹⁴⁵ Amtrak’s Resp. to the Bd.’s Feb. 13, 2024 Questions, 5–6 (Apr. 15, 2024).

¹⁴⁶ UP Reply 43–44.

¹⁴⁷ *Id.*

¹⁴⁸ See, e.g., UP Train 1 RCA at 16 (9/20/2022; 99-minute delay); UP Train 2 RCA at 112 (5/06/2022; 125-minute delay); accord See Peabody Reply V.S. at 19.

¹⁴⁹ UP Reply 43.

¹⁵⁰ *Id.*

7. UP's disregard of Amtrak's right to preference over freight transportation caused delay to the *Sunset Limited*.

Finally, UP contests Amtrak's view of preference and therefore whether UP's implementation of preference impacted delays to the *Sunset Limited*.¹⁵¹ As set forth in Part II.A, below, UP is wrong about what Congress required when it provided Amtrak passenger transportation with preference over freight transportation. That Amtrak trains are given priority on some occasions—when it is convenient for UP and its freight traffic—does not satisfy statutory preference requirements. Because UP has an incorrect understanding of its legal obligations, its disregard for preference has been persistent and systematic, resulting in substantial delays and driving the *Sunset Limited*'s failure to achieve the COTP Minimum Standard during the Complaint Period.

E. The *Sunset Limited* Schedule Was Not A Cause Of Delay And Does Not Need To Be Extended Again.

UP attempts to evade accountability by manufacturing a second cause for substandard on-time performance: the *Sunset Limited*'s schedules. According to UP, extending schedules is the only way to assure that *Sunset Limited* Trains can achieve adequate on-time performance.¹⁵²

That argument is wrong. Recent performance illustrates that UP is fully capable of achieving the COTP Minimum Standard under existing schedules. During the first four months of this fiscal year, nearly 75% of *Sunset Limited* runs have achieved the COTP Minimum Standard.¹⁵³ And there remain obvious opportunities for improvement. The investigative record confirms that UP has not fully addressed service failures that occurred during the Complaint Period,¹⁵⁴ has not

¹⁵¹ *Id.* at 44–45.

¹⁵² *Id.* at 3, 45, 57.

¹⁵³ Weiss Rebuttal V.S. ¶ 5.

¹⁵⁴ See *supra* Parts I.A & C; see also *infra* Part I.E.1; Peabody Reply V.S. at 18 (noting UP has failed to meaningfully address crew management as the recrew rate on the *Sunset Limited* Route is {{[REDACTED]}}).

aligned its operations with the governing COTP Minimum Standard,¹⁵⁵ has not addressed congestion on key portions of the *Sunset Limited* route,¹⁵⁶ and has not meaningfully considered Amtrak's proposals to reallocate recovery time, which could boost on-time performance by shifting some recovery time relative to the locations of UP's operational and service failures.¹⁵⁷

As Amtrak explained in its Opening Statement, *Sunset Limited* schedules already contain an enormous amount of recovery time.¹⁵⁸ That recovery time is distributed across intermediate stations, including those with the heaviest ridership, and Amtrak has also agreed to excess dwell time that should prevent early route delays from causing cascading on-time performance issues.

Historical performance also underscores that lengthening schedules for the *Sunset Limited* at UP's request does not result in improved on-time arrivals for Amtrak passengers. Indeed, looking back two decades ago, Amtrak and UP agreed to add more than 200 minutes to each *Sunset Limited* schedule on March 1, 2005—***more than three hours of time per train***. During the two years before March 1, 2005, all stations on-time performance for the *Sunset Limited* was a dismal 13.1%. But even after adding well more than three additional hours to each schedule, all stations on-time performance for the *Sunset Limited* increased to only 16.2% during the two years following March 1, 2005.¹⁵⁹ Lengthening schedules did nothing to get Amtrak's passengers to their destinations on time back in 2005 and it is not the answer now.

The real issue here is simple: UP believes it is necessary to lengthen the schedules because UP would rather build into schedules than address the excessive delays it imposes on Amtrak and

¹⁵⁵ See *supra* Part I.B.

¹⁵⁶ See Reply Verified Statement of Katherine N. Novak ("Novak V.S.") at 18–21 (acknowledging continued congestion as basis for significant extensions to existing schedules, including at stations like El Paso, Del Rio Yuma, Maricopa, Benson, Lordsburg, Deming, San Antonio, and Beaumont).

¹⁵⁷ Op. Br. 102.

¹⁵⁸ *Id.*

¹⁵⁹ Weiss Rebuttal V.S. ¶ 10.

its customers, including delays attributable to continuing network congestion and operational issues. Permitting UP to continue degrading passenger service through progressively longer schedules that license ever more FTI with intercity passenger travel will make it more and more challenging for Amtrak to attract riders and operate services with high levels of farebox recovery. Because there is no evidence that *Sunset Limited* schedules contributed to substandard on-time performance during the Complaint Period—and because lengthening the schedules would entrench excessive FTI with passenger service, license UP to continue prioritizing freight trains over Amtrak trains, impose additional and unnecessary costs on Amtrak, and reduce *Sunset Limited* ridership and revenues—the Board should find that failure to achieve the COTP Minimum Standard was caused by UP’s admittedly unacceptable service levels, not by the current schedules.

1. UP is fully capable of running *Sunset Limited* Trains on time under the existing schedules.

As Amtrak explained in its Opening Statement, *Sunset Limited* schedules are already aligned with the COTP Metric and Standard.¹⁶⁰ The schedules for Trains 1 and 2 contain more than six and five hours of recovery time, respectively. That represents approximately 15% and 14%, for Trains 1 and 2 respectively, of all time in the Base Schedule,¹⁶¹ which exceeds the recovery time on almost every other long-distance route.¹⁶² Indeed, the *Sunset Limited* has been described by one commentator as “plod[ding] along, getting later and later despite a schedule that has more padding than a sumo wrestler.”¹⁶³ Although UP complains about misalignment between

¹⁶⁰ Op. Br. 110.

¹⁶¹ Weiss Rebuttal V.S. ¶ 6.

¹⁶² UP speculates that other long-distance *schedules* are not consistently achieving the COTP Minimum Standard. UP Reply 54–55. However, schedules do not achieve the COTP Minimum Standard, railroads do. UP provides no evidence about how operational issues affect COTP for other lines, how other railroads implement the preference obligation, or how deficient on-time performance on any other line can appropriately be attributed to the amount of recovery or miscellaneous time built into those schedules. For those reasons, the Board should disregard UP’s speculation.

¹⁶³ Bill Stephens, *Union Pacific Has Lost Its Way*, Trains.com (Jan. 11, 2023), <https://www.trains.com/trn/news-reviews/news-wire/union-pacific-has-lost-its-way-analysis/>.

the schedule and the COTP Minimum Standard, stations with the highest ridership already have substantial recovery time, which boosts COTP under the FRA's weighted metric.¹⁶⁴

Notwithstanding the amount and distribution of recovery time, and the excess dwell time that can help reset *Sunset Limited* Trains en route,¹⁶⁵ UP insists that it cannot achieve the COTP Minimum Standard under existing schedules. Again, UP is wrong. Even when UP's service levels were—in its own words—"unacceptably poor," *Sunset Limited* Trains still sometimes achieved the COTP Minimum Standard.¹⁶⁶ And since Amtrak filed its Complaint, the frequency of *Sunset Limited* runs that have met the COTP Minimum Standard have risen considerably. During the 12-month period that UP focuses on in its Reply (October 1, 2023-September 30, 2024), aggregate COTP was 60.1% and in two months exceeded 70%, even though UP has not fully addressed causes of continuing service failures, appropriately implemented Amtrak's right to preference over freight transportation, or meaningfully considered proposals that would mitigate deficiencies in its operations.¹⁶⁷

In recent months, and as illustrated in Tables 2 and 3 below, performance has been stronger. Indeed, COTP has improved to 71% this fiscal year to date.¹⁶⁸

¹⁶⁴ During the Complaint Period, stations with the highest ridership for Train 1 included Los Angeles, Houston, and Tucson. Weiss Rebuttal V.S. ¶ 7. These stations had between 29 and 50 minutes of recovery time immediately prior to scheduled arrival time (including the significant recovery time provided at El Monte, just thirteen miles from Los Angeles). See Amtrak Rebuttal Workpaper at Tab "1-Complaint Pd – Riders by Stat". Stations with the highest ridership for Train 2 included San Antonio, Tucson, and Houston, each of which benefited from between 21 to 34 minutes of recovery time. Weiss Rebuttal V.S. ¶ 8.

¹⁶⁵ See Op. Br. 102–03, 109–10.

¹⁶⁶ See *id.* 103; UP Reply 20.

¹⁶⁷ Weiss Rebuttal V.S. ¶ 5.

¹⁶⁸ *Id.* at 2–3.

Table 2: Train 1 COTP for Fiscal Year 2025 To Date

Month	COTP	Runs Achieving COTP Standard
October	76.9%	8 (of 13)
November	72.9%	7 (of 13)
December	74.9%	9 (of 13)
January	78.1%	5 (of 11)

Table 3: Train 2 COTP for Fiscal Year 2025 To Date

Month	COTP	Runs Achieving COTP Standard
October	57.4%	3 (of 13)
November	53.4%	4 (of 13)
December	80.0%	8 (of 13)
January	73.0%	7 (of 12)

As these figures demonstrate, UP is fully capable of achieving the COTP Minimum Standard under the existing schedule, when it tries. UP would be even more capable of meeting the published passenger schedule if its operations were aligned with federal expectations regarding on-time performance. UP admits that they are not.

2. *Sunset Limited* schedules did not cause substandard on-time performance during the Complaint Period.

UP argues that *Sunset Limited* schedules must explain substandard on-time performance because UP can receive incentive payments under the Operating Agreement without achieving the COTP Minimum Standard. That argument is a red herring. Whether UP qualifies for incentive payments does not indicate whether the existing schedule is achievable, or whether UP's performance and operations conform to federal law.

First, incentive and penalty provisions do not govern on-time performance obligations under federal law. As discussed above, UP is expected to meet the on-time performance standard

that Congress enacted in PRIIA.¹⁶⁹ All parties agree that—in accordance with the federal rule promulgated by the FRA—the COTP Minimum Standard is assessed based on arrival times for each passenger station on the *Sunset Limited* route. In contrast, UP and Amtrak have a negotiated incentive and penalty payment system, which is based on arrival times at a limited number of contractual checkpoints set forth in the parties’ Operating Agreement.¹⁷⁰ Precisely because performance incentives and penalties are based on arrival times for a small subset of stations, payments under those provisions do not provide sufficient information about UP’s ability to meet the federal COTP Minimum Standard, including information about what is causing delay at other passenger stations, whether UP can reasonably address those delays, or whether existing schedules are achievable.

Based on its mistaken belief that it is not bound by federal law, UP claims to have structured its operation of Amtrak trains around contractual incentives and penalties, rather than around compliance with federal law.¹⁷¹ For example, despite the fact that the federal standard measures COTP at each station, UP does not concern itself with where delays occur between two contractual checkpoints.¹⁷² Likewise, UP reviews potential schedule adjustments based on how they impact UP’s ability to earn incentive payments under the Operating Agreement, not on alignment with published passenger schedules.¹⁷³ Because UP has not even attempted to align the operation and dispatching of Amtrak trains with federal law, and because the federal COTP standard is different from the methodology for calculating incentive payments, the frequency with which UP receives

¹⁶⁹ See *supra* Part I.B.

¹⁷⁰ UP Reply 48; Op. Br. 108.

¹⁷¹ UP Reply 49 (“Union Pacific has told Amtrak it is willing to help Amtrak achieve Customer OTP[.]”)

¹⁷² *Id.* 52.

¹⁷³ *Id.* 46.

incentive payments for the *Sunset Limited* does not answer for the Board whether COTP can be achieved under the current *Sunset Limited* schedule.¹⁷⁴

Second, even if UP were right that the parties' Operating Agreement governs over federal law (it does not), UP would still be independently required to meet the published passenger schedules incorporated into the Operating Agreement, regardless of the financial terms governing incentives and penalties. In their Operating Agreement, UP and Amtrak incorporated published passenger schedules.¹⁷⁵ Moreover, UP agreed that those schedules are compatible with its network.¹⁷⁶ In doing so, UP agreed that published passenger schedules are achievable. And the Operating Agreement does not stop there. It requires that UP "make every reasonable effort" to "deliver Amtrak Trains to all scheduled passenger stops on UP by the scheduled time therefor."¹⁷⁷ In other words, UP should not be merely aiming for the more relaxed target subsequently established by the federal COTP Metric, which provides for trains to arrive up to 15-minutes late. Instead, the Operating Agreement requires that UP make every reasonable effort to achieve *actual* times in the published passenger schedule. It also requires that UP make every reasonable effort "to avoid excess delays to Amtrak Trains" and, to the extent consistent with safety, "make up delays incurred on Rail Lines of UP or on rail lines of other railroads."¹⁷⁸

UP acknowledges some of these provisions, but ignores their effect: UP has a duty to make every reasonable effort to meet published and achievable passenger schedules. The incentives and penalties provisions that UP elevates in its Reply Brief do not establish "contractual on-time

¹⁷⁴ UP's mistaken belief that on-time performance is governed by the Operating Agreement is addressed above. See *supra* Part I.B.

¹⁷⁵ Operating Agreement App'x. II.

¹⁷⁶ *Id.* at Art. III § 3.1.A ("The routes, schedules and consists of Amtrak Trains shall be compatible with the existing physical capabilities of UP."); UP Reply 74.

¹⁷⁷ *Id.* Art. III § 3.3; see UP Reply 46; Novak V.S. at 2.

¹⁷⁸ Operating Agreement Art. III § 3.3. UP agreed to "cooperate in good faith with Amtrak in providing service which will contribute to the success of Amtrak's Intercity Rail Passenger Service." *Id.*

performance.” Indeed, incentives and penalty provisions are just that, a commercial tool to encourage performance consistent with published passenger schedules. The provisions do not dictate appropriate levels of service,¹⁷⁹ even under the contract. For that reason, and because the Operating Agreement requires that UP make every reasonable effort to meet published arrival times for *all* passenger stations, securing incentive payments does not explain UP’s obligation and ability to achieve the COTP Minimum Standard under existing schedules.

Finally, the assertion that recent incentive payments demonstrate that service failures have been resolved is contradicted by UP’s own scheduling proposals. UP acknowledges that service during the Complaint Period was unacceptably poor. And UP claims that poor service levels were attributable—in significant part—to congestion. Yet in its scheduling proposals, UP seeks to lengthen schedules to accommodate this conceded source of failure to achieve the COTP Minimum Standard. For Train 1, UP demands thirty-one more minutes at El Paso and eighteen more minutes at Del Rio because of congestion.¹⁸⁰ For Train 2, UP seeks more time at Yuma, Maricopa, Benson, Lordsburg, Deming, San Antonio, and Beaumont because of congestion.¹⁸¹ These proposals belie any assertion that service issues have been resolved. In seeking to lengthen the schedule, UP asks the Board for license to accommodate these continuing service failures, and to require that Amtrak passengers endure them. The Board should reject that request.

For all of these reasons, UP’s ability to obtain incentive payments under the Operating Agreement without achieving the COTP Minimum Standard does not answer whether existing *Sunset Limited* schedules are achievable.

¹⁷⁹ Compare *id.* Art. III (Services), with Article V § 5.1(d) (Payments).

¹⁸⁰ Novak V.S. at 18–19.

¹⁸¹ *Id.* at 20–21.

3. UP's insistence on lengthening the schedule rather than redistributing recovery time is unsupported.

UP's assertion that Amtrak has frustrated efforts to renegotiate the schedule are incorrect.¹⁸² Even though UP can meet the COTP Minimum Standard under existing schedules—and even though UP has yet to align its operations with federal law regarding on-time performance or preference—Amtrak twice offered to redistribute time to help UP mitigate its continuing service issues. Amtrak's most recent proposal would have strengthened on-time performance by shifting time from (a) locations where service has recovered to (b) locations where UP has failed to resolve operational failures and continues to seek more time, such as El Paso for Train 1, and Yuma and Maricopa for Train 2.¹⁸³

UP rejected both Amtrak proposals. It insisted that redistributing time was insufficient and that lengthening schedules is the only solution. However, UP provided no support for that contention. Even now, UP does not contend that there have been any changes in rail infrastructure along the route that affect schedules.¹⁸⁴ Nor does UP contend that freight congestion cannot be cured through operational or other changes fully within UP's control. Instead, UP offers three theoretical reasons why *Sunset Limited* schedules should get longer. None has merit.

First, UP says lengthening *Sunset Limited* schedules is necessary because of “operational variability.”¹⁸⁵ According to UP, achieving the COTP Minimum Standard requires more recovery time because delays could arise between every set of adjacent stations, and current schedules were not meant to account for that.¹⁸⁶ That assertion is incorrect. As discussed above, on-time

¹⁸² UP Reply 4.

¹⁸³ See Novak V.S. at 19–20 (acknowledging continued congestion and operating challenges at El Paso for Train 1 and Yuma and Maricopa for Train 2).

¹⁸⁴ Compare Op. Br. 102, with UP Reply 56–57.

¹⁸⁵ UP Reply 52.

¹⁸⁶ See *id.*.

performance obligations under the Operating Agreement are based on UP efforts to deliver Amtrak passengers at their scheduled arrival time to every station on the route.¹⁸⁷ Amtrak has negotiated and evaluated existing schedules with those obligations—and related statutory goals¹⁸⁸—firmly in mind. For that reason, *Sunset Limited* schedules already contain significant and well-distributed recovery time.

In any event, Amtrak is a scheduled railroad and UP has purportedly implemented precision scheduled railroading. Instead of explaining why UP cannot meet its stated commitment to scheduled railroading, UP offers more misdirection, declaring that Amtrak does not understand service variability.¹⁸⁹ Amtrak is well aware that some variation in railroad operations is inevitable. That is precisely why: (1) *Sunset Limited* schedules contain recovery time, (2) recovery time is distributed to intermediate stations with heavy ridership, and (3) schedules include excess dwell time. The FRA also understood and accounted for service variability in the federal COTP Metric and Minimum Standard, which afford UP an *additional* 15 minutes of cushion at every single passenger station.¹⁹⁰ UP offers no empirical evidence indicating that still more recovery time is needed.

Next, UP argues that *Sunset Limited* schedules must be longer because delays imposed by other parties were “not a concern” when negotiating current schedules.¹⁹¹ However, Amtrak considered all delays when negotiating schedules. UP should have done the same under the Operating Agreement, which expressly requires that UP make every reasonable effort to both achieve actual times in the published passenger schedule, and, consistent with safety, make up

¹⁸⁷ See *supra* Part I.B.

¹⁸⁸ See 49 U.S.C. § 24101(c)(4).

¹⁸⁹ UP Reply 50–52.

¹⁹⁰ Although COTP is achievable at all intermediations stations, the few stations that lack significant recovery time also have very low ridership and therefore have limited impact on COTP.

¹⁹¹ UP Reply 52.

delays to Amtrak passenger trains, regardless of who imposes the delay or whether it occurs on UP rail lines.¹⁹² Indeed, UP's arguments read those obligations out of the contract. And, regardless of what UP had in mind when negotiating schedules, the existing ones are achievable and have in fact been achieved.¹⁹³

Finally, UP claims that it has an "incentive" to seek the shortest possible schedule for Amtrak.¹⁹⁴ That claim, belied by UP's position in this proceeding and in negotiations, strains credulity. Unnecessarily long schedules make it easier for host railroads to meet the 80% COTP Minimum Standard without preferencing Amtrak passenger trains, and therefore insulate host railroad dispatching decisions from this Board's scrutiny under Section 213. Moreover, UP's insistence about its incentives cannot be reconciled with its professed belief that its "contractual obligation to provide on-time service to Amtrak does not trump its obligations to freight customers."¹⁹⁵ Ultimately, UP offers no support or analysis for its claim that it has incentives to seek shorter schedules for Amtrak and its position in recent negotiations over the schedule has been exactly the opposite.¹⁹⁶

In short, Amtrak's efforts to help UP mitigate its service failures through the redistribution of existing recovery time has been unsuccessful because UP has demanded needless extensions of the bloated *Sunset Limited* schedules. UP's attempts to manufacture support for those longer

¹⁹² Operating Agreement Art. III § 3.3; UP Reply 46; Novak V.S. at 2. UP provides no support (and there is none) for its position that a doption of the COTP Metric requires lengthening schedules whenever a route happens to operate over more than one host railroad.

¹⁹³ *See supra* Part I.E.1.

¹⁹⁴ UP Reply 56–57.

¹⁹⁵ *Id.* at 109 n.341.

¹⁹⁶ Op. Br. Part VII.A.1.

schedules have no merit and the investigative record confirms that UP service failures were the cause of substandard on-time performance during the Complaint Period.¹⁹⁷

4. UP's scheduling proposals entrench existing causes of delay and increase costs to Amtrak.

UP's ever-evolving scheduling proposals provide still more confirmation that UP's service failures caused the *Sunset Limited's* deficient COTP during the Complaint Period. UP has offered four separate scheduling proposals. Each demands a significant extension of existing schedules, but the length of extensions has varied considerably. So have purported justifications for them. As one example, UP initially told the Board it needed more recovery time at Beaumont because Amtrak operates over drawbridges where river traffic has priority, which introduces service variability.¹⁹⁸ When Amtrak observed that purported variability drove just 34 minutes of delay over a calendar year,¹⁹⁹ UP abandoned that justification. As another example, UP initially told the Board it required more time for handoffs with CPKC over the Neches River Bridge.²⁰⁰ When Amtrak observed that handoffs are coordinated one hour before they occur and can therefore be executed without delay,²⁰¹ UP abandoned that justification.

In its Reply Brief, UP acknowledges that it has been "reevaluating" schedule modifications as its service improves.²⁰² The need for continued "reevaluation," not just following the Complaint

¹⁹⁷ Notwithstanding UP's unreasonable requests to lengthen the schedules, Amtrak will continue to engage in collaborative efforts to make improvements to operations and consider issues UP raises that may have an impact upon timing efficiencies, as has been done in the past. For example, Amtrak and UP agreed to restructure fueling in Santa Teresa after this proceeding started. *See* Op. Br. 112; *see also* Amtrak's Sept. 2023 Resp. at 60.

¹⁹⁸ UP Resp. to App'x A, Part IV ("UP Sept. 2023 Resp.") 14, 18, (Sept. 25, 2023).

¹⁹⁹ Op. Br. 107.

²⁰⁰ *See* UP Sept. 2023 Resp. at 14.

²⁰¹ Op. Br. 107.

²⁰² UP Reply 16; *see* Novak V.S. at 15. UP also tells the Board that further reevaluation of its proposal may be required *See* Novak V.S. at 16 ("Union Pacific will continue to evaluate the average times of Train 1's arrival at Iowa Jct. to determine whether re-establishment of some negative adjustment may be needed to avoid circumstances in which an early-arriving Train 1 holds at its passenger platform at Lake Charles, Louisiana, which is on the single-track main line, for an extended dwell before its scheduled departure."). There is no doubt that UP's proposal to

Period but also during the pendency of this proceeding, illustrates that UP operations remain inconsistent and unreliable.²⁰³ Lengthening the schedules will not solve that.

UP's current scheduling proposals also confirm that substandard on-time performance remains attributable to UP service failures. UP acknowledges that congestion drove substandard on-time performance during the Complaint Period and its current scheduling proposals acknowledge that lingering congestion continues to cause delay. Indeed, UP's proposal for Train 1 focuses significantly on alleviating congestion at Del Rio and El Paso, and its proposal for Train 2 focuses significantly on addressing congestion at Yuma, Maricopa, Benson, Lordsburg, San Antonio, and Beaumont.²⁰⁴ UP should be able to address congestion through its precision scheduled railroading system, without imposing longer schedules on Amtrak and its passengers.

In proposing to lengthen schedules, UP seeks authority to entrench rather than address its own operational inefficiencies. That would shift the cost of UP's inefficiencies to Amtrak and Amtrak passengers. For example, longer schedules increase labor costs for Amtrak conductors, engineers, onboard service, mechanical, and station personnel. Longer schedules also increase Amtrak fuel costs and create additional strain on assets, imposing additional maintenance and fuel obligations. In addition to these immediate costs, longer schedules also impose reputational costs,

eliminate the negative adjustment at Iowa Junction requires "reevaluation." Under the proposal, an on-time Train 1 would block the single main track at the next station, Lake Charles, for approximately half an hour until its scheduled departure time.

²⁰³ UP does not supply a shred of evidence to suggest that accommodating existing *Sunset Limited* schedules is materially impacting its freight operations, which it claims have significantly improved.

²⁰⁴ Novak. V.S. at 17–20. For Train 2, other host railroads do not meaningfully contribute to congestion because the *Sunset Limited* is on UP track from virtually the moment it leaves Los Angeles.

making it more difficult for Amtrak to attract riders,²⁰⁵ or offer service that is trip-time competitive.²⁰⁶

Longer schedules also reduce Amtrak's ridership and revenues. Lengthening the schedule of Train 2 by 80 minutes as UP has proposed would require either elimination of its 49-minute zconnection at Los Angeles from the *Coast Starlight* from Seattle or pushing back Train 2's *scheduled* arrival time at New Orleans to 11pm, which means that passengers would be getting off the train after midnight if it was more than an hour late.

Amtrak's experience suggests that all of these costs will be compounded by further delay. Very rarely does lengthening schedules promote more timely service.²⁰⁷ Instead, lengthening schedules permits freight railroads to operate with less precision and affords dispatchers more opportunity to delay Amtrak trains for the convenience of freight operations. The Board should refuse to license the degradation of passenger service that results.

II. RAIL CARRIERS ARE REQUIRED TO PROVIDE AMTRAK WITH PREFERENCE OVER FREIGHT TRANSPORTATION AND THE RECORD CONCLUSIVELY DEMONSTRATES THAT UP HAS FAILED TO DO SO.

Rather than engage seriously with the statutory obligation to provide Amtrak with preference over freight transportation, UP and others caricature Amtrak's position as demanding "presidential motorcade"²⁰⁸ treatment where "host carriers must avoid imposing a minute of delay

²⁰⁵ UP contends that Amtrak "recognizes" that its "long-distance trains are not focused on trip time," based on a single advertisement that states: "When you travel on an Amtrak train, it's about more than just getting from place to place." UP Reply 56. That is nonsensical. The ad has nothing to do with trip time, and it is certainly not an acknowledgement that trip time does not matter to Amtrak and its passengers, who rely on timely service for travel to work or business appointments, family gatherings, sporting events, and funerals, among other things. The statement simply alludes to the other unique benefits of Amtrak travel, beyond simply getting from place to place, of which there are many. Cf. Novak V.S. at 13 (quoting language concerning features and amenities).

²⁰⁶ UP also states that the length of a *Sunset Limited* trip is not competitive with a air travel between New Orleans and Los Angeles. UP Reply 55–56. That argument is misleading because it inaccurately presumes that most *Sunset Limited* passengers are traversing the entire route. They are not. During the Complaint Period, less than 8% of *Sunset Limited* passengers travel from the beginning to the end of the route. See Weiss Rebuttal V.S. at ¶ 9.

²⁰⁷ See Op. Br. 104–05; Amtrak Sept. 2023 Resp. at 58.

²⁰⁸ CN Reply 29.

to a passenger train.”²⁰⁹ That is not Amtrak’s position. As noted above, Amtrak’s passenger schedules already anticipate and, particularly in the case of the *Sunset Limited*, have substantial recovery time to accommodate, significant amounts of delay encountered in day-to-day operations.²¹⁰ However, what Amtrak is not required to anticipate and accommodate are UP’s practices that regularly prioritize moving freight over moving people. Saying the quiet part out loud, UP candidly concedes in its Reply Brief that, in its view of preference, UP’s “contractual obligation to provide on-time service to Amtrak does not trump its obligations to freight customers.”²¹¹ That statement explains the reason for this case. Congress told host railroads to prioritize people over freight and UP has ignored that simple directive, resulting in *Sunset Limited* Trains encountering—on average during the Complaint Period—more than four hours of delay per trip solely from freight train interference.²¹²

The text and history of Section 24038(c) are clear that UP’s conception of preference is wrong. Identifying a “failure to provide preference” under Section 24308(f)(2) requires no vague balancing tests or weighing of interests.²¹³ Nor does it put the burden on Amtrak to show that providing preference was convenient for the host railroad, or that other viable alternatives exist. Whether making an individual dispatching decision or structuring systemic operating practices and procedures, a host railroad fails to provide preference if it does not prioritize moving people over moving freight. Thus, as BNSF has stated, host rail carriers must ensure, “[a]s a matter of first principle ... *all operations related to the movement of trains* both prioritize Amtrak and minimize

²⁰⁹ UP Reply 68; *see also* Br. of the Ass’n of Am. R.R.s (“AAR Reply”) 1, 8 (Jan. 22, 2025).

²¹⁰ *See* Op. Br. Part VII; *see supra* Part I.E.

²¹¹ UP Reply 109 n.341.

²¹² Op. Br. 32.

²¹³ UP sometimes implies that its balancing test is subjective. That would make it nearly impossible to prove a preference violation, as evidence of intent is extraordinarily difficult to obtain. That is particularly true for UP given that UP systematically destroys dispatch playbacks and that UP has no policy requiring documentation of decisions to delay Amtrak trains.

delays to passenger service to the fullest extent possible.”²¹⁴ As to any practical concerns that may arise from this obligation, Congress provided specific avenues for host railroads to seek relief, and those avenues are not at issue here.

UP does not meaningfully dispute that—if Amtrak is correct about what its statutory right to preference over freight transportation requires—UP has violated that right. For example, UP does not dispute that:

- it dispatched freight trains ahead of the *Sunset Limited* after allowing freight crews to approach their hours-of-service limits;
- it dispatched freight trains ahead of the *Sunset Limited* only for crews to expire;
- its operation of non-fitting trains regularly resulted in long delays on the *Sunset Limited*;
- it dispatched freight trains instead of Amtrak onto the faster track on double-tracked lines;
- it instructed dispatchers to provide opposing freight traffic with priority access to second main lines on double-tracked segments of the route;
- it directed maintenance crews to extend their curfew window and delay the *Sunset Limited* in order to avoid delaying freight trains; and
- it dispatched freight trains onto track before the *Sunset Limited* approached, obstructing any access to UP rail lines in the area.²¹⁵

²¹⁴ BNSF Reply 33 (emphasis added); *see id.* (noting that the “core tenet serving as the foundation” for all of BNSF’s dispatching protocols and schedule-building systems “is Amtrak’s right to preference across BNSF’s trackage”).

²¹⁵ UP Reply 99 (“Dispatchers are instructed to give priority treatment to trains with crews running short on hours of service to get them to a crew change or tie-down point that creates the least risk of disruption to the network.”); *Id.* at 101 (“[T]he crew of ILBNS-21 reached their hours-of-service limit and stopped on the single-main track just west of the crew change point at Yuma.”); *compare* Op. Br. 76–81 (explaining how UP’s operation of long trains preferred freight over the *Sunset Limited*), with UP Reply 83–84 (declining to dispute that operation of long trains imposed significant delays on *Sunset Limited* Trains and resting on Amtrak’s purported failure to identify alternative courses of action at point of conflict); UP Reply 103 ({} [REDACTED] {}).

{}); *Id.* at 43 (“Allowing maintenance-of-way crews to overstay their planned maintenance windows is often the most efficient way to complete maintenance that for whatever reason takes longer than expected, thereby avoiding greater delay than would stem from an additional maintenance window than the extended window creates.”); *Id.* at 41 (“[D]ispatchers are therefore instructed not to use the second main track for freight or passenger train overtakes unless there is no opposing traffic on the other line.”); *Id.* at 92 (acknowledging situation where track {} [REDACTED] {})).

Because Amtrak advances the appropriate definition of preference under Section 24308(c), the Board's factual analysis of potential preference violations should end here.

The interpretation of preference that UP advances is calculated to accommodate each of these problematic practices. However, Congress had good reasons to avoid limiting the preference right to individual dispatching decisions, to avoid vague and inadministrable balancing tests, and to avoid imposing UP's manufactured burdens on Amtrak.²¹⁶ The investigative record confirms that limiting the preference right to individual dispatching decisions would permit UP to nullify the statute through systemic practices that preclude dispatchers from providing Amtrak and its passengers with priority access to UP rail lines. The investigative record also confirms that UP's inadministrable balancing test would insulate individual dispatching decisions from meaningful scrutiny, licensing rampant freight train interference. And this investigation illustrates that UP's attempt to manufacture evidentiary burdens for Amtrak would shield its practices from meaningful review and discourage further preference enforcement actions, including by making it prohibitively time-consuming and costly to demonstrate violations of the preference right.

When Congress codified a "straightforward" preference right for Amtrak,²¹⁷ it did not contemplate that—to enforce that right—the Department of Justice would be required to seek an enormous amount of information held exclusively by host railroads or build a complex capacity analysis. And when Congress authorized this Board to investigate and remediate violations of Amtrak's preference rights, it did not introduce those obligations for Amtrak. In seeking to impose such obligations now, UP attempts to de-risk its own operations at the expense of a clearly defined congressional objective to enhance the on-time performance of intercity passenger rail.

²¹⁶ *Id.* at 77–78.

²¹⁷ *See* CPKC Reply Statement ("CPKC Reply") 9 (Dec. 23, 2024).

In addition to making unfounded arguments about how to evaluate potential violations of Section 24308(c), UP argues that its broader policies, practices, and procedures are consistent with UP's obligations under that statute. Yet UP admits that it does not reflect Amtrak's preference right in its algorithmic scheduling tool,²¹⁸ does not formally evaluate whether dispatchers comply with Amtrak's preferencerights in doing their work,²¹⁹ and does not have any compliance program to ensure it is meeting its federal obligation to provide Amtrak with preference.²²⁰ These admissions demonstrate that UP does not take seriously its federal obligation to provide Amtrak passenger trains with preference over freight transportation.

A. The Text And History Of Section 24308(c) Are Clear As To The Mandatory Nature Of Amtrak's Preference Rights.

1. The plain text of Section 24308(c) requires preferencing Amtrak "over" freight operations.

The text of Section 24308(c) does not support UP's interpretation of preference. As Amtrak set forth in its Opening Statement, Section 24308(c) unambiguously requires host railroads to prioritize Amtrak passengers transportation over freight transportation while using any rail line, junction, or crossing.²²¹ Further, the text of Section 24308(c) "does not authorize any balancing tests or extratextual limitations on the scope of Amtrak's preferenceright" and thus, "[a]ny attempt to narrow the preference right—for example, to consider only aggregate delays of a passenger train across the host railroad's network or to prioritize impacts on network fluidity—would be contrary to the statute's use of singular and specific points at which preference must be afforded."²²²

²¹⁸ UP Reply 109 ("Advanced Movement Planner's a lgorithm is not currently designed to address the legal issue of preference.").

²¹⁹ Reply Verified Statement of Erin Batt ("Batt V.S.") at 19 ("Union Pacific does not formally evaluate dispatchers based specifically on their handling of Amtrak Trains.").

²²⁰ *Compare* Op. Br. 96, *with* UP Reply 112.

²²¹ *See* Op. Br. 61–65.

²²² *Id.* at 64.

UP's interpretation is that preference "means dispatchers should give an advantage to Amtrak when weighing Amtrak's interests against the interests of freight railroads and shippers, but the final balance can shift depending on the facts and circumstances of each case."²²³ And UP has specifically instructed its dispatchers as to what facts and circumstances matter for UP: "schedule, crew hours of service, and impacts on other trains."²²⁴ UP prizes "fluidity of the network" above all.²²⁵ In practice, that means UP prioritizes the ability to keep its freight trains moving.²²⁶ Accordingly, in its dispatcher training document, UP tells dispatchers: {{ [REDACTED] [REDACTED] [REDACTED] }}²²⁷ UP likewise trains dispatchers that {{ [REDACTED] [REDACTED] [REDACTED] }}²²⁸

While other parties offer their own interpretations of the statute, many recognize that Amtrak's preference right under Section 24308(c) is not contingent on the sort of vague and inadministrable balancing test UP suggests. As CPKC states, "the 'preference' obligation is quite straightforward. Absent emergency conditions, Amtrak trains are entitled to a *higher dispatching priority* than ... freight movements."²²⁹ And as BNSF recognizes, preference means that

²²³ UP Reply 61. Other parties and non-parties echo UP's call for balancing. *See* CN Reply 27 ("[P]reference means that when a dispatcher's decision could affect an Amtrak train and a freight train, the dispatcher must place a greater weight on avoiding delays to an Amtrak train than on avoiding delays to a freight train."); AAR Reply 1 ("[T]he preference obligation simply requires that dispatching decisions be weighted in Amtrak's favor.").

²²⁴ UP Reply 78.

²²⁵ *See id.* at 60, 77, 83.

²²⁶ *See, e.g., id.* at 109 n.31.

²²⁷ *Id.* at Exhibit F at 5–6.

²²⁸ *Id.* at 3.

²²⁹ CPKC Reply 9.

“Amtrak’s priority status serves as the baseline” for all dispatching protocols and schedule-building systems.²³⁰

UP’s position on preference is untethered from the text of Section 24308(c), as illustrated by UP’s inapt hypothetical. UP posits that “a driver might prefer country roads over interstate highways, but after weighing timing, traffic, and other considerations, might decide to make a particular trip using a highway.”²³¹ Here, it is not as if Amtrak “prefers” using a “rail line, junction, or crossing” over sitting in a siding. It is that Congress mandated that Amtrak (one driver) has preference “over freight” (the other drivers) in using the enumerated infrastructure. UP’s analogy would make more sense if (i) its country road were privately owned, (ii) its private owner diverted the driver to the highway over the driver’s objection, and (iii) the private owner diverted the driver because of the *owner’s* concerns for timing, traffic, and other considerations. By identifying two kinds of transportation—Amtrak passenger transportation and freight transportation—and determining unequivocally that “Amtrak *has* preference *over* freight transportation,” the statute leaves no room for the type of “weighing” envisioned in UP’s “country roads” example.²³²

Beyond claiming that there have been no “failures to provide preference” here, UP never offers its view on what actually would constitute a “failure to provide preference” under UP’s atextual reading of the statute. Given Section 24308(c)’s mandate that Amtrak “has preference over freight transportation in using a rail line, junction, or crossing,” the meaning of “failure to

²³⁰ BNSF Reply 33.

²³¹ UP Reply 60–61.

²³² UP’s reliance on *Brannan v. Elder*, 341 U.S. 277 (1951) for the definition of preference is likewise misplaced. UP Reply 61 & n.198. Although the provision at issue required simply that “preference shall be given” for veterans in various federal employment and retention practices, the Court noted that the subsection at issue did not “delineate what that preference shall be.” *Id.* The Court contrasted the preference at issue in *Brannan* with that in *Hilton v. Sullivan*, 334 U.S. 323 (1948), where the Court held that statutory language mandating that certain veterans “shall be retained in preference to all other competing employees,” created “absolute retention preference[]” for those veterans over nonveterans. 334 U.S. at 335, 339.

provide preference” under Section 24308(f)(2) is straightforward. If a host railroad resolves an individual dispatching decision at a rail line, junction, or crossing in favor of freight transportation, then the host has failed to provide preference. Further, if the host’s systemic policies, practices, or procedures preclude Amtrak from receiving priority over freight in the use of a rail line, junction or crossing, the host has failed to provide preference.²³³

To be clear, Amtrak agrees that delays that are not caused by a host railroad’s failure to prioritize Amtrak movements over freight movements may not be actionable under Section 24308(f),²³⁴ that the Board has discretion with respect to awarding damages for failures to provide preference, and that the Board must take into account, among other things, the extent to which Amtrak has suffered monetary losses.²³⁵ But these limits on potential *remedies* available for preference violations do not limit the meaning and scope of Amtrak’s preference *right* under Section 24308(c).²³⁶

²³³ Non-party AAR’s accusation that Amtrak used dictionary definitions in “a misleading way” because Amtrak cited dictionaries that defined “preference” using its synonym “priority” is puzzling. AAR Reply 9–10. Amtrak cited five contemporary dictionaries on the meaning of “preference” and its root word “prefer,” and three of those five definitions used the word “priority” to define the term. Op. Br. 62–63. AAR does not (and cannot) explain why the definitions Amtrak quotes are inaccurate. And several members of AAR (beyond Amtrak) also emphasize that implementing preference involves giving Amtrak trains “priority.” See CPKC Reply 9; BNSF Reply 33.

²³⁴ Contrary to the concerns expressed by non-party commuter rail agencies, Amtrak is not arguing that Amtrak’s statutory right to preference over freight transportation under Section 24308(c) also provides Amtrak with statutory preference rights over commuter rail. See Reply of the Commuter Rail Coal. (“CRC Reply”) 2–4 (Jan. 22, 2025); Reply Comments of Mass. Bay Transp. Auth. (“MBTA Reply”) 1–2 (Jan. 22, 2025); Reply of the S.E. Pa. Transp. Auth. (“SEPTA Reply”) 1–2 (Jan. 21, 2025); Reply of the N. Ind. Commuter Transp. District (“NICTD Reply”) 2 (Jan. 22, 2025).

²³⁵ See 49 U.S.C. § 24308(f).

²³⁶ NOPB argues that the Board should “abstain from defining preference” in this proceeding given that the Department of Justice has brought an enforcement action against Norfolk Southern in federal district court involving Norfolk Southern’s failures to provide the *Crescent* with preference over freight transportation. New Orleans Public Belt R.R. Comm’n for the Port of New Orleans Reply to Nat’l R.R. Passenger Corp. Opening Statement (“NOPB Reply”) 13–14 (Dec. 23, 2024). In PRIIA, Congress mandated that the Board must open an investigation upon the filing of a complaint and then determine whether delays are attributable to preference violations. At the time of PRIIA’s passage, Congress was well aware of the Attorney General’s separate enforcement power over Amtrak’s preference (and other) rights. The Board may not abstain from conducting a congressionally mandated investigation simply because the Attorney General is separately pursuing an enforcement proceeding involving another host railroad and another Amtrak service. And NOPB’s baseless speculations about “forum-shopping,” NOPB Reply 14 n.12, make no sense as Amtrak did not bring the federal district court action—the Attorney General did.

2. The history of Section 24308(c) reinforces the text’s mandatory preference requirement.

UP’s arguments are largely based on its (mistaken) view of legislative history rather than text. But as a preliminary matter, when the ordinary meaning and structure of the statute itself “yields a clear answer, judges must stop.” *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 436 (2019). In any event, as Amtrak explained in its Opening Statement, the historical record also bolsters the text, evincing Congress’s choice to provide Amtrak passengers with preference over freight transportation.²³⁷

The whole point of the Amtrak Improvement Act in 1973 was to rein in freight practices that were impeding the newly formed Amtrak from becoming successful. As the then Chairman of the National Association of Rail Passengers testified in the hearings before the law’s passage, the law was necessary because “there is too much evidence that some railroads are not allowing Amtrak trains to operate on dependable, fast schedules. The railroads are giving preference to freight trains” and therefore “a mechanism [must] be put into the law to give Amtrak some relief” such that there would be “a presumption of preference for passenger trains and let the railroads come in then and make a case for adjustments.” *Financial Assistance to Amtrak: Hearings on H.R. 8351 Before the Subcomm. on Transp. & Aeronautics of the H. Comm. on Interstate and Foreign Commerce*, 93d Cong. at 335 (1973) (“1973 *Financial Assistance to Amtrak Hearings*”) (statement of Anthony Haswell, Chairman, National Association of Rail Passengers).²³⁸

²³⁷ Op. Br. 65–68. As the Rail Passengers’ Association also correctly noted in its filing: “It is a bundantly clear through legislative history ... that Amtrak’s preference over freight transportation is a crucial part of ensuring that Amtrak remains a viable alternative for travel,” and “that any weakening or diminishing of that codified and continuously reaffirmed legal right would go directly against Congress’ expressed intent.” See Reply of the Rail Passengers’ Ass’n (“RPA Reply”) 5 (Jan. 22, 2025).

²³⁸ Specifically, the legislative history showed that the amendment to add a preference right for Amtrak was “made necessary by the continuing efforts of the Southern Pacific, Missouri Pacific, and others to impede the expeditious and dependable movement of Amtrak trains.” 1973 *Financial Assistance to Amtrak Hearings* at 288; accord *Southern Pacific Company Discontinuance of Trains No. 1 and 2 Between Los Angeles Calif. And New Orleans, La.*, 333 I.C.C.

Ignoring that context, UP and others play “gotcha” by repeatedly quoting back a statement made at that same hearing from Amtrak’s first President, Roger Lewis, opining that a mandate saying, “‘You will always give preference to the passenger train, or ‘never let a freight train interfere,’ just is not a real-world approach.”²³⁹ But UP and others leave out the rest of the colloquy between Mr. Lewis and Congressman Shoup. Immediately following Mr. Lewis’ statement, he was asked:

Mr. SHOUP. Didn’t you earlier, speaking to Mr. Podell, state you think there should be top priority for passenger trains, and that is the only way to successfully run them?

Mr. LEWIS. It is a matter of priority, and I think priority is a good thing, yes; but I would like to just say that I think the important thing is to tell the railroad to run the train on time. Now there is sufficient slack in most schedules to take care of some freight train interference. The interference we are talking about is the extraordinary or unusual type. We don’t think there is any excuse for that. We think that the schedules are sufficient to take care of the normal train operations.

1973 Financial Assistance to Amtrak Hearings at 32. The same reasoning applies here. It is not as if the *Sunset Limited* was running at 79% COTP during the Complaint Period and the parties are fighting over whether one or two instances of marginal FTI constitute a preference violation. In this proceeding, the Board charged UP with explaining the reasons for almost *1,000 UP-responsible delays* on the *Sunset Limited* route, including 42 delays of *more than 90 minutes*.²⁴⁰ During the Complaint Period, the *Sunset Limited* was running at between 7% and 40% COTP and

783 (1968) (rejecting application for discontinuance of *Sunset Limited* based on finding that Southern Pacific had deliberately downgraded service by, among other things, giving freight trains priority over the *Sunset Limited*). Mr. Haswell likewise cited “what the Missouri Pacific and Southern Pacific have done by restricting speeds,” in support of his testimony to the Senate that “[w]e must get legislation to give Amtrak a legally enforceable preference over freight trains on its different routes, allowing the railroads, of course, to come in and get an exception if they can show that it’s really going to harm their service to shippers.” *Amtrak Oversight and Authorization: Hearings on S. 1763 Before the Surface Transp. Subcomm. of the S. Comm. on Commerce*, 93d Cong. at 46 (1973).

²³⁹ UP Reply 59, 62–63, 66, 71–72, 83; CN Reply 33 & n.79; AAR Reply 11–12.

²⁴⁰ *Complaint & Pet. of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. § 24308(f)—for Substandard Performance of Amtrak’s Sunset Ltd. Trains 1 & 2*, NOR 42175, slip op. at 3, 8, App’x Parts I–II (S.T.B. served Feb. 13, 2024) (“February 2024 Decision”). These 1,000 delays were not all the delays the host railroad-responsible delays *Sunset Limited* incurred. Rather, the Board limited its request to certain delays from the 40 train runs that incurred the greatest number of host-responsible delay minutes during the Complaint Period.

the average train encountered *four hours* of delay from FTI. This is exactly the type of “extraordinary or unusual” freight train interference for which there is not “any excuse.”²⁴¹

UP also argues that “preference for passenger trains was never absolute,” citing pre-Amtrak ICC decisions.²⁴² The ICC decisions do not support UP’s argument, nor do they cast doubt on the mandatory nature of Amtrak’s preference right that Congress enacted in 1973. For example, UP asserts that the ICC recognized a general principle “that ‘discretion must be given to the dispatcher’ in ‘day-to-day operation[s]’ to delay passenger trains ‘to permit prompt movement of freight trains,’ and thus ‘delays of passenger trains because of [a] carrier’s freight traffic’ do not establish a ‘carrier policy to give freight traffic preference over passenger trains.’”²⁴³ But the ICC did not endorse the principle that dispatchers have discretion to delay passenger trains, as UP misleadingly suggests. Instead, it made a fact-specific determination that the record before it at that time did not demonstrate a policy of preferencing freight over passengers. *See Penn Cent. Transp. Discontinuance of 34 Passenger Trains*, 338 I.C.C. 380, 464 (1970). Moreover, immediately following this decision, the ICC proposed a rule that “[s]chedules shall be designed so as to provide expeditious service and *the sidetracking of passenger trains for freight trains shall not be permitted* except in [an] emergency.” *Adequacy of Intercity Rail Passenger Service*, 36 Fed. Reg. 23636, 23638 (proposed Dec. 11, 1971) (emphasis added).²⁴⁴ Finally, UP’s unsupported assertion that “Congress’s intent in enacting the preference requirement was to incorporate pre-Amtrak industry practice into the Rail Passenger Service Act[,]”²⁴⁵ fails to even engage with railroads’

²⁴¹ Even the then-president of AAR acknowledged that there is no excuse for not following a policy of prioritizing Amtrak trains, stating that: “It is the policy of all participating [rail]roads to give preference to Amtrak passenger trains, *even at the cost of delay to freight service.*” *1973 Financial Assistance to Amtrak Hearings* at 203 (statement of Stephen Ailes, President, AAR) (emphasis added).

²⁴² UP Reply 63–64.

²⁴³ *Id.* at 63–64 (quoting *Penn Cent. Transp. Discontinuance of 34 Passenger Trains*, 338 I.C.C. 380, 464 (1970)).

²⁴⁴ *See also* Op. Br. 67.

²⁴⁵ UP Reply 64.

dramatic failures after 1970 to provide Amtrak with preference,²⁴⁶ which was the primary impetus for Congress codifying Amtrak’s mandatory preference right into law in 1973.

To justify its view of preference, UP also relies on the practice of a UP predecessor—the St. Louis Southwestern Railway (“SSW”)—of giving some freight trains “equally high priority.”²⁴⁷ This “historical[] example,” as UP calls it,²⁴⁸ of a pre-Amtrak railroad failing to give passenger trains priority over all freight trains is actually the exception that proves the rule. The SSW—popularly known as the “Cotton Belt”—was “the *only* main line railroad where passenger [trains] are rated as second-class trains[.]”²⁴⁹ Thus, the record leading up to and through the enactment of the Amtrak Improvement Act of 1973 demonstrates that Congress was focused on ensuring priority for passenger trains on the infrastructure owned by freight railroads.

Fast forwarding to 2008, PRIIA was passed specifically to provide additional avenues for enforcing Amtrak’s right to preference. Yet UP invokes a single statement of Senator Patty Murray during a 2007 hearing, where she noted that “[i]t is simply not realistic to expect our freight railroads to put every coal and container train on a siding so passenger trains can breeze through.”²⁵⁰ Again, UP leaves out the rest of the statement where Senator Murray continued: “But right now, more than half of Amtrak’s long distance trains arrive late - many of them extremely late. When you review the data as to why these trains are late - there is one factor that out-weighs all the others - interference with freight trains.” *Amtrak Reform and FY 2008 Budget: Hearing Before the Senate Appropriations Subcomm. On Transportation, Housing, and Urban Development*, 2007 WL 614849 (Feb. 28, 2007) (statement of Sen. Murray). Accordingly, PRIIA

²⁴⁶ See Op. Br. 66–68.

²⁴⁷ UP Reply 109, n.341.

²⁴⁸ *Id.*

²⁴⁹ Lucius Beebe, *Mixed Train Daily* (1961 ed.), p. 85 (emphasis added).

²⁵⁰ UP Reply 67.

was passed to provide Amtrak with the additional mechanism of a Board investigation to enforce its right to preference.²⁵¹

UP and others cite the U.S. Department of Transportation's Office of Inspector General's 2008 Report ("IG Report") to argue that Amtrak admitted that absolute preference "could cause rail traffic in certain areas of high traffic volume and chokepoints to shut down."²⁵² UP's selective quotation suggests that Amtrak offered a different view of its preference right in 2008, but the IG Report demonstrates the consistency of Amtrak's position on preference.²⁵³ And the IG recommended the very changes PRIIA enacted: "legislative changes to provide Amtrak with the same right as the host railroads to appeal to the Secretary [now the Board] on preference issues."²⁵⁴ If anything, the IG Report demonstrates that the host railroads like UP, not Amtrak, now offer an interpretation of preference different from their views in 2008:

"The host railroads acknowledge their statutory obligation to grant priority access to Amtrak trains, under what they term to be an outmoded law. According to the AAR, '[b]y law, Amtrak trains operating over freight lines must be given priority; this means that when Amtrak trains meet or overtake freight trains, the freight trains are shunted to sidings or parallel lines until the passenger train has passed.' This does not mean that an Amtrak train will run unimpeded, but, for example, that a freight train must get out of the way at the next available opportunity when overtaken by a faster Amtrak train."²⁵⁵

Importantly, the IG Report also observed in 2008 that "[t]here is no specific allowance in the preference statute giving host railroads the option of deciding to deny an Amtrak train preference to maintain network fluidity."²⁵⁶

²⁵¹ See *Union Pac. R.R. Co.*, 863 F.3d at 820.

²⁵² UP Reply 67 (quoting Office of Inspector General, U.S. Dep't of Transp., Report No. CR-2008-076, Root Causes of Amtrak Train Delays at 5 (Sept. 8, 2008) ("IG Report")); see also CN Reply 33; AAR Reply 17–18.

²⁵³ IG Report at 3 (describing Amtrak's position).

²⁵⁴ *Id.* at 4–5.

²⁵⁵ *Id.* at 4.

²⁵⁶ *Id.* at 5.

The legislative history surrounding both the Amtrak Improvement Act in 1973 and PRIIA in 2008 thus supports the basic proposition that undergirds this proceeding: Congress has repeatedly said that moving people is more important than moving freight. UP believes the opposite.

3. Congress provided specific procedures for relief from the preference requirement, which the railroads have never sought, and which are not at issue here.

UP claims that providing Amtrak with the preference that Congress mandated is “unreasonable and unworkable” because it “would undisputably reduce the fluidity of the rail network, lowering the quantity and quality of freight service.”²⁵⁷ But when interpreting a statute, “[t]he people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration.” *Bostock v. Clayton Cnty.*, 590 U.S. 644, 674 (2020).²⁵⁸

Here, Congress has provided a mechanism in Section 24308(c) for relieving host railroads of their preference obligations when practical concerns outweigh Amtrak’s rights—the railroad must either demonstrate that an emergency exists or convince the Board to order, “after an opportunity for a hearing under” the Administrative Procedure Act (“APA”), that “preference for intercity and commuter rail passenger transportation materially will lessen the quality of freight transportation provided to shippers.”²⁵⁹ These exceptions do not apply as UP has not shown that any emergency exists nor petitioned the Board for relief from its preference obligation.²⁶⁰

²⁵⁷ UP Reply 68.

²⁵⁸ Various non-parties express their disagreement with the statutory preference requirement on various policy grounds. *See, e.g.*, Comments of Reason Found. 6–9 (Jan. 22, 2025); Non-Party Reply of AIPRO 2 (Jan. 22, 2025). But the Board must follow Congress’s directives.

²⁵⁹ 49 U.S.C. § 24308(c).

²⁶⁰ *See* Op. Br. 70–73. Indeed, no railroad has ever sought this relief from the Board.

UP does not claim otherwise. Rather, it complains that the “Board-ordered” exception “does not address the practical concerns confronting dispatcher facing the daily challenges of resolving individual dispatching conflicts in real time.”²⁶¹ UP’s objection to Congress’s mechanism for modifying Amtrak’s preference rights is irrelevant to the meaning of the statute. UP thus attempts to twist the statute, arguing that “Congress’s inclusion of the Board-ordered exception shows Congress did not intend the preference requirement to be applied in such a way that would ‘materially ... lessen the quality of freight transportation provided to shippers.’”²⁶² This reference to Congress’s intent is divorced from the text of the statute and must be disregarded. Section 24308(c) unambiguously establishes preference as the default rule. To be relieved from preference obligations, Congress outlined a mandatory process through which host railroads must go before the Board-ordered exception can apply.²⁶³ Congress did not “intend” for host railroads to ignore its default rule, ignore its chosen process for adjudicating departures from the default rule, and then evade the consequences of their decisions.

The law puts the burden on the host rail carrier—not Amtrak—to (i) apply to the Board, (ii) show that it is affected by the preference obligation, and, (iii) after a hearing under the APA, convince the Board to find “that preference for intercity and commuter rail passenger

²⁶¹ UP Reply 69.

²⁶² *Id.*; see AAR Reply 7, 9 (making the same argument).

²⁶³ This mandatory process is also enshrined in regulations (which date to when the Secretary of Transportation rather than the Board was charged with administering 49 U.S.C. § 24308(c)). Pursuant to 49 C.F.R. § 200.5(c): “Any railroad adversely affected by the preference requirement of subsection 402(e) of the Act may apply to the [FRA] Administrator for an order altering that requirement. Each application shall: (1) List by endpoints the routes that are so affected; and (2) Explain for every route listed how the preference requirement of subsection 402(e) will materially lessen the quality of freight service afforded by the applicant to its shippers, including information, data or documents sufficient to support that explanation; and (3) Include an analysis of whether and by how much Amtrak’s compensation to the railroad should be reduced if the preference requirement is altered.” Then under 49 C.F.R. § 200.7(a), “Amtrak or any other party shall have 30 days from the date an application is received by FRA pursuant to section 402(e) of the Act to object to the proposed alteration of the preference requirement. Such objections shall be in writing and shall reference, by date, railroad, and former passenger routes, the application to which it pertains.” No such application has ever been submitted.

transportation materially will lessen the quality of freight transportation provided to shippers,” after which the Board must “establish the rights of the carrier and Amtrak on reasonable terms.”²⁶⁴ None of that has happened here. If there was any merit to UP’s (and other parties’) contention that complying with Section 24308(c)’s preference requirement would undermine the national rail policy of promoting an efficient rail system under 49 U.S.C. § 10101,²⁶⁵ then the Board-ordered exception provides the mechanism for making such a showing. Where—as here—Congress expressly mandates a particular procedure for a “hearing” pursuant to the APA, the Board must follow that procedure. *See Union Pac. R.R. Co. v. Surface Transp. Bd.*, 113 F.4th 823, 834–36 (8th Cir. 2024) (vacating Board rule after finding that the Board failed to follow proper APA procedures for statutorily required “full hearing”). That UP believes it would be inconvenient to follow the process outlined by Congress is no basis to read it out of the statute.

UP’s argument regarding the emergency exception is even thinner. UP says it disagrees with Amtrak that none of the alleged preference violations at issue in this proceeding involved an emergency,²⁶⁶ but it does not offer anything to suggest otherwise. Indeed, UP does not claim that *any* of the preference violations it addresses in its Reply Brief were the product of an “emergency.” And for good reason. As set forth *infra*, UP cannot possibly show that the repeated, deliberate

²⁶⁴ 49 U.S.C. § 24308(c). *See* Op. Br.72–73. Other parties similarly make this same error, invoking the “materially ... lessen” provision of the § 24308(c) to imply that preference must be balanced against freight interests, while omitting the procedural requisites (embedded in the statute) for any balancing to occur. *See e.g.*, BNSF Reply 26 (“Accordingly, while both the plain meaning of the term ‘preference’ and the surrounding language of the statute support the argument that Amtrak trains are entitled to priority over freight trains in the context of dispatching trains, that priority is circumscribed by a comparable requirement that preference may not materially lessen the quality of freight transportation.”); CN Reply 28 n.65 (“[I]n the context of the statutory provisions governing host-Amtrak relations, Congress has conditioned Amtrak’s rights on not materially or unreasonably impairing freight transportation.”). Non-party AAR goes even further, reading the out of the statute the requirement that a rail carrier must “apply to the Board for relief[]” from its preference obligations. 49 U.S.C. § 24308(c). AAR contends that rail carriers can ignore their preference obligations, shift any enforcement burden to Amtrak or the Board, then seek a Board exception in a Section 24308(f) proceeding, despite clear statutory language that relief from preference must proceed through the process outlined under Section 24308(c). AAR Reply 16 (“[T]here is no requirement for a carrier to request relief from the Board in advance.”).

²⁶⁵ *See* UP Reply 76; CN Reply 28 & n.65.

²⁶⁶ UP Reply 69.

choices it made to prioritize freight transportation over Amtrak were the result of an emergency. UP also baldly asserts that “if Amtrak’s position is correct, the emergency exception would do almost nothing to mitigate the practical concerns in enforcing absolute preference.”²⁶⁷ But UP does not explain what this means, and regardless, UP’s disagreement with the mechanisms Congress has provided to relieve it from its preference obligations carry no weight.

Moreover, Congress has further accounted for practical concerns in enforcing Amtrak’s right to preference by providing the Board with discretion at the remedial stage.²⁶⁸ The Board “may” award damages as a result of the relevant preference violations, as well as prescribing other relief that the Board “determines to be reasonable and appropriate.”²⁶⁹ The Board can therefore exercise its discretion as to damages and other relief.²⁷⁰ UP calls this potential limitation on preference remedies “science fiction,”²⁷¹ because Section 24308(f)(2) was enacted in PRIIA, 35 years after the Amtrak Improvement Act.²⁷² But Amtrak has never argued that the Board’s remedial-stage flexibility informs the meaning of Section 24308(c)’s right to preference. The text of subsection (c) settles that question. Rather, Section 24308(f)(2) is but one example of Congress addressing practical concerns.

UP’s claims (joined in part by others) that complying with the preference requirement would shut down the entire rail network or impose staggeringly high costs on Amtrak are

²⁶⁷ UP attempts to collapse the difference between delays and alleged preference violations. *See* UP Reply 69. To be clear, Amtrak does not and has never asserted that every delay identified by the Board or addressed in its brief constitutes a preference violation. Instead, Amtrak specifically identified particular delays that constitute preference violations. *See* Op. Br. Part V.C. & App’x 1.

²⁶⁸ Op. Br. 74.

²⁶⁹ 49 U.S.C. § 24308(f)(2).

²⁷⁰ In such circumstances, other equitable relief still may be appropriate depending on the facts and host practice that resulted in the preference violation.

²⁷¹ UP Reply 69.

²⁷² *Id.* at 68–69

completely unfounded.²⁷³ As is demonstrated by those host railroads that typically earn high grades on Amtrak’s “Host Railroad Report Card,” complying with the preference requirement and running a successful freight railroad are not mutually exclusive.²⁷⁴ Requiring host railroads to comply with the law governing Amtrak’s preference rights will not bring the rail system to a halt. UP offers no evidence to back up that assertion, and the unsupported suggestion that the costs of complying with preference would be staggering only signals that UP has systematically failed to provide Amtrak with preference over freight transportation.²⁷⁵

B. The Preference Right In Section 24308(c) Applies To Both Individual Dispatching Decisions And Policies And Practices That Constrain Dispatchers.

To the extent UP believes Section 24308(c) even applies to it, UP contends that the statute only applies to individual dispatching conflicts—a position joined by others.²⁷⁶ However, the text of Section 24308(c) does not limit preference to one-off dispatching decisions. Instead, Congress chose broad terms, providing that “intercity and commuter rail *passenger transportation* provided by or for Amtrak has preference over *freight transportation* in using a rail line, junction, or crossing.”²⁷⁷ By using the broader term “transportation,” Congress elevated “passenger transportation” as a category over “freight transportation,” without limiting the preference right to individual dispatching decisions involving individual trains. Congress could have confined the preference right to a decision between one “train” and another. But Congress opted instead to

²⁷³ *Id.* at 70; CN Reply 34–35; AAR Reply 8, 17.

²⁷⁴ The Host Railroad Report Cards for 2019–2023 can be found at: <https://www.amtrak.com/reports-documents>. UP is usually at or near the bottom of the class (a C- in 2023).

²⁷⁵ UP’s additional argument that Section 24308(c) does not require host railroads “to implement operating strategies to guarantee Amtrak trains operate on time,” UP Reply 59, is a red herring. Preference is a mechanism for advancing on-time performance. While the preference right does not guarantee on-time arrival, it does preclude freight railroads from making operating decisions that would impede it. Amtrak has never argued otherwise.

²⁷⁶ UP Reply 59, 71; *see also* CN Reply 26–27 (making same argument); AAR Reply 12–14 (same).

²⁷⁷ 49 U.S.C. § 24308(c) (emphasis added).

create a general hierarchy requiring hosts to give Amtrak “passenger transportation” preference over “freight transportation.” Moreover, there is no express or implied limitation to individual dispatching decisions based the phrase “in using a rail line, junction, or crossing.” That part of the sentence describes where the preference right applies, not the types of decision-making to which it extends.

Without a textual hook, UP and other parties resort to the same purported “legislative history” to support limiting preference to dispatching decisions.²⁷⁸ But again, the legislative history supports Amtrak’s view. Indeed, the legislative history shows that it was not individual dispatching decisions, but the systemic practices of UP’s predecessors (Southern Pacific and Missouri Pacific) that were the impetus for the Amtrak Improvement Act. *See Amtrak Oversight and Authorization: Hearings on S. 1763 Before the Surface Transp. Subcomm. of the S. Comm. on Commerce*, 93d Cong. at 46 (1973).

In addition to lacking any legal merit, UP’s argument that Amtrak’s statutory right to preference applies only to individual dispatching decisions would frustrate the very purpose of the statute, as illustrated by UP’s own submission. In its Reply Brief, UP repeatedly argues that dispatchers had “no choice” but to prioritize freight trains over Amtrak trains.²⁷⁹ To the extent that is true,²⁸⁰ dispatchers did not find themselves in that situation by happenstance. The absence of immediate alternatives was often attributable to UP’s operating decisions. In other words, UP itself created situations where dispatchers had “no choice” but to provide freight trains with priority

²⁷⁸ UP Reply 71–72; *see also* CN Reply 33–35.

²⁷⁹ *See, e.g., id.* at 82 (“Amtrak’s complaints about Union Pacific’s individual dispatching decisions almost all involve interactions between the *Sunset Limited* and freight trains in which dispatchers had no choice but to slow or stop the *Sunset Limited*. Most of Amtrak’s complaints involve freight trains that could not fit into all sidings along their route.”)

²⁸⁰ *But see infra* Part II.C.2.

access to its rail lines, and now takes the position that federal law has nothing to say about that denial of preference.

Take UP's operation of non-fitting trains on track where UP knows the *Sunset Limited* is or soon will be running. UP does not dispute that *Sunset Limited* Trains regularly were forced to incur lengthy delays as non-fitting freight trains operated past several successive sidings that were too short to facilitate a meet or overtake.²⁸¹ Nor does UP dispute that its operation of non-fitters sometimes forced the *Sunset Limited* to hold before entering territory because non-fitters could not fit into sidings on that territory and were therefore directed to clear before the *Sunset Limited* Trains entered.²⁸² The investigative record conclusively demonstrates that "predominant siding length" along the *Sunset Limited* corridor is not sufficient to facilitate the simultaneous operation of long, non-fitting freight trains and Amtrak passenger trains. These circumstances are precisely what the National Academy of Sciences had in mind when it observed that corridors must be designed to handle long-trains *in order to comport with the preference requirement*.²⁸³

UP takes the position that Amtrak's right to preference has nothing to say about these circumstances. In UP's view, it has no obligation to consider the *Sunset Limited* when dispatching non-fitting trains unless and until the non-fitter and the *Sunset Limited* come into conflict. And at that point of conflict, UP says there can be no preference violation because the absence of sufficient sidings leaves a dispatcher no choice but to impose delay on the *Sunset Limited*.²⁸⁴ In practice, this interpretation licenses UP to continue operating non-fitters without any regard for delay to

²⁸¹ See, e.g., UP Reply 83 ("When resolving conflicts between trains, dispatchers must account for the fact that all trains will not fit into all sidings.")

²⁸² See, e.g., *id.* at 82.

²⁸³ Long Freight Trains Study at 91; see also Op. Br. Exhibit 2; accord Peabody Reply V.S. at 13.

²⁸⁴ UP Reply 83–84.

Amtrak and its passengers, and to do so with total impunity. That would eviscerate Amtrak's mandatory preference right.

As another example, take UP's approach to completing track maintenance. UP freely admits that maintenance-of-way crews are directed to overstay and delay Amtrak passenger trains when UP believes scheduling a second window would cause greater aggregate delay for freight trains.²⁸⁵ That is precisely what happened on January 20, 2022. That day, UP acknowledges that it { [REDACTED] }²⁸⁶ Improperly narrowing the preference right to individual dispatching decisions would license UP to continue imposing these maintenance-of-way delays on Amtrak and its passengers and frustrate Congress's intent to ensure that passenger transportation provided by Amtrak has priority access to rail lines.

As a third example, take UP's frequent references to congestion. Even now, UP often fails to provide any explanation for *why* freight trains were occupying relevant track as the *Sunset Limited* approached, instead treating the track conditions that UP itself created as a given. Indeed, UP's purported explanation for its failure to provide *Sunset Limited* Trains with access to rail lines is frequently that freight congestion limited available alternatives.²⁸⁷ But UP's service failures do not obviate federal law, and the preference right does not contain an exception for freight obstructions resulting from UP's own dispatching decisions.

Restricting the preference right to individual dispatching decisions would shield circumstances like these from review. The text of Section 24308(c) makes clear that Congress

²⁸⁵ *Id.* at 43 ("Allowing maintenance-of-way crews to overstay their planned maintenance windows is often the most efficient way to complete maintenance that for whatever reason takes longer than expected.").

²⁸⁶ *Id.* at 105.

²⁸⁷ See, e.g. *id.* at 94 (blaming { [REDACTED] }); *id.* at 96 (blaming { [REDACTED] }).

intended no such thing. UP cannot evade accountability for conduct that denies preference to Amtrak passenger trains by manufacturing a limitation on the operating decisions that are scrutinized under federal law. If UP's view of the law were correct, UP could have a policy of parking freight trains on the main line and allowing them to remain there when the *Sunset Limited* is scheduled to transit through. It could regularly schedule freight trains too long to fit into any siding exactly when it knows those trains will be meeting the *Sunset Limited*. It could plan maintenance for exactly when the *Sunset Limited* is supposed to run. According to UP, none of this would be a violation of Amtrak's preference rights. That is not and cannot be the law.

In sum, host rail carriers must prioritize Amtrak passengers over freight transportation both when making individual dispatching decisions about access to a line, junction, or crossing, and when defining and implementing policies, practices, and procedures that dictate access to a line, junction, or crossing. This reading of Section 24308(c) adheres most faithfully to the text Congress chose by giving meaning to every word.

C. UP Invents Burdens That Do Not Exist For Amtrak To Prove A Preference Violation.

1. There is no requirement that Amtrak show dispatchers had alternatives available that would maintain "network fluidity."

UP attempts to dismiss evidence of preference violations by arguing that Amtrak did not identify what dispatchers should have done differently. Moreover, in UP's view (joined in part by others), Amtrak is required to come forward with evidence that available alternatives "would not have compromised the overall fluidity of the network for both freight and passenger transportation."²⁸⁸ These burdens are manufactured from whole cloth. Because both lack a textual basis in Section 24308(c) or Section 24308(f), both must be disregarded.

²⁸⁸ *Id.* at 83; *see also* CN Reply 27–28; AAR Reply 19–20.

First, in arguing that Amtrak must present evidence that alternative dispatching maneuvers were available, UP gets the law precisely backwards. Section 24308 requires the identification of instances in which host railroads prioritized the movement of freight trains over passenger trains when using rail lines, crossings, or junctions. Once that showing is made, the burden shifts and a host railroad must demonstrate some basis for excusing the violation. There are two ways that a host railroad can accomplish that—demonstrating that the Board has relieved it from compliance obligations pursuant to a petition under Section 24308(c) or demonstrating that the emergency exception applied.²⁸⁹ Requiring Amtrak to demonstrate the availability of alternative maneuvers would place an additional burden—nowhere to be found in the statute—on Amtrak.

Second, to the extent either statute makes “network fluidity” cognizable, both statutes place the burden to demonstrate any network effects squarely on the host railroad. As set forth above, Congress provided UP with two ways to advance any concerns about how the preference requirement might impact network fluidity. First, UP can petition the Board for a hearing and an order finding that providing preference for Amtrak passenger trains “materially will lessen the quality of freight transportation for shippers.”²⁹⁰ Second, UP can present its concerns at the remedial stage of this investigation, after the Board has determined whether delays or the failure to achieve on-time performance standards were attributable to UP’s preference violations.²⁹¹ Nothing permits UP to shift that invented burden to Amtrak.

As a practical matter, the extra statutory obligations UP seeks to impose on Amtrak would allow host railroads to frustrate the preference right, including by requiring that Amtrak marshal

²⁸⁹ See *supra* Part II.A.3.

²⁹⁰ See 49 U.S.C. § 24308(f); see *supra* Part II.A.3. In such a proceeding, the burden to demonstrate that compliance with Amtrak’s statutory right to preference would materially less the quality of freight transportation falls unequivocally on the petitioning railroad. See 49 U.S.C. § 24308(f); see *supra* Part II.A.3.

²⁹¹ See *supra* Part II.A.3.

evidence held exclusively by host railroads and not available to Amtrak in the ordinary course of business.²⁹² Indeed, throughout this proceeding, UP has resisted Amtrak's efforts to obtain evidence concerning network conditions at every turn.²⁹³ When UP eventually provided some of the underlying data that would be required to evaluate network conditions, it designated the material highly confidential so that Amtrak itself could not review it and was instead required to expend significant resources to retain independent experts to analyze the information. UP also provided the information in a format that made conducting analysis extraordinarily arduous and difficult.²⁹⁴ Put simply, UP has attempted to make it so time-consuming and prohibitively expensive to evaluate conditions on its network that shifting the burden to demonstrate whether and how particular dispatching decisions *might* affect network fluidity would frustrate the Board's ability to effectuate its statutory mandate. Perhaps because preparing the analysis that UP demands is so expensive and time consuming, UP itself offers precisely *zero* evidence about "network fluidity" in this proceeding. Instead, UP rests on vague assertions, made all the more inscrutable by its unwillingness to define what "network fluidity" even means or how the Board should measure it.

2. Although Amtrak has no burden to show dispatching alternatives, the investigative record repeatedly shows that UP had alternatives available.

For reasons set out above, Amtrak's preference right is not confined to individual dispatching decisions and Amtrak has no burden to demonstrate that UP dispatchers ignored

²⁹² Transient access to dispatcher screens does not provide the information required to conduct a reliable assessment of network fluidity or capacity.

²⁹³ *See, e.g.*, Amtrak Mot. to Compel Production of Documents from Union Pac. R.R. Co. (Dec. 20, 2023).

²⁹⁴ *See* Peabody Reply V.S. at 6–7. UP's gamesmanship in this regard did not end during party discovery. For example, in producing workpapers for its Reply Brief, UP failed to provide the data required to replicate certain analysis, or produced the data in a manner calculated to make analysis and replication prohibitively time-consuming and costly. *See id.*

alternative dispatching options when resolving individual dispatching conflicts between *Sunset Limited* Trains and freight trains.²⁹⁵

That said, UP admits that dispatchers sometimes disregarded or did not consider alternatives in making dispatching decisions that disadvantaged *Sunset Limited* Trains. As one example, UP admits that its dispatcher could have { [REDACTED]

[REDACTED] }.²⁹⁶

As another example, UP acknowledges that it { [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] }²⁹⁸ As still another example, UP admits that it { [REDACTED]

[REDACTED] }²⁹⁹ { [REDACTED]

[REDACTED] }.³⁰⁰

As to other dispatching decisions discussed in Amtrak's Opening Statement, UP often denies that alternatives existed. In so doing, UP frequently mischaracterizes the investigative record. However, even to learn of these mischaracterizations, Amtrak had to engage independent experts to analyze the highly confidential information that UP eventually produced in this proceeding. As discussed below, the failure to adopt alternatives frequently denied Amtrak its right to preference.³⁰¹

²⁹⁵ See *supra* Part II.C.1.

²⁹⁶ UP Reply 103; *accord* Peabody Reply V.S. Exhibit 11 § 18.

²⁹⁷ Compare Op. Br. 86, with UP Reply 101.

²⁹⁸ Peabody Reply V.S. Exhibit 11 § 17 (analyzing UP Egregious Delay at 12; 4/06/22; 105-minute delay).

²⁹⁹ UP Reply 89.

³⁰⁰ See, e.g., *id.* at 89 (analyzing September 9, 2022 delay); *id.* at 97 (analyzing June 19, 2022 delay); *accord* Peabody Reply V.S. Exhibit 11 §§ 4, 12.

³⁰¹ To avoid any confusion, the failure to adopt some of the alternatives discussed below compounded other violations of Amtrak's right to preference. Moreover, Amtrak does not contend that adopting each of the alternatives identified

Alternatives for Follows. UP claims that its dispatchers had no alternatives available when they forced *Sunset Limited* Trains to follow certain freight trains.³⁰² That is not the case. As one example, rather than requiring the *Sunset Limited* to spend 43 minutes following a freight train on the Valentine Subdivision, UP could have { [REDACTED] }
{ [REDACTED] }
{ [REDACTED] }.³⁰³ As another example, rather than requiring the *Sunset Limited* to twice follow an eastbound auto train on the Yuma subdivision, UP dispatchers could have { [REDACTED] }
{ [REDACTED] }.³⁰⁴ And as a third example, rather than requiring the *Sunset Limited* to spend thirty minutes trailing a long intermodal train, UP dispatchers { [REDACTED] }
{ [REDACTED] }.³⁰⁵ In each case, UP dispatchers ignored these available alternatives in resolving conflicts between the *Sunset Limited* and freight trains in violation of Amtrak's statutory right to preference.³⁰⁶

Alternatives for Meets. UP claims that its dispatchers had no alternatives available when they imposed significant delays on *Sunset Limited* Trains during certain meets.³⁰⁷ Again, that is not the case. As one example, UP dispatchers could have resolved a meet on the Glidden Subdivision by { [REDACTED] }
{ [REDACTED] }. Instead, UP { [REDACTED] }

below would have been sufficient to provide Amtrak with preference over freight transportation, or to cure preference violations imposed by broader UP operating practices and procedures.

³⁰² UP Reply 86–89.

³⁰³ See *id.* § 1 (analyzing UP Train 1 RCA at 156; 4/06/2022; 43-minute delay).

³⁰⁴ See *id.* § 3 (analyzing UP Train 2 RCA at 11; 3/13/2022; 15-minute delay).

³⁰⁵ *Id.* § 4 (analyzing UP Train 2 RCA at 371; 9/9/2022; 60-minute delay).

³⁰⁶ In another instance, UP acknowledges that its own root cause analysis and supporting documentation contain contradictory information about whether { [REDACTED] } UP Reply 87.

³⁰⁷ UP Reply 89–94.

{REDACTED}, with a resulting 102-minute delay to Amtrak and its passengers.³⁰⁸ As another example, UP could have avoided or mitigated a delay on the Alhambra Subdivision by

{REDACTED}

{REDACTED}

{REDACTED}³⁰⁹ In these cases, and others, UP ignored available alternatives in resolving meets between the *Sunset Limited* and freight trains in violation of Amtrak's statutory right to preference.

Alternatives to Early Route Delays. UP claims that its dispatchers had no alternatives available when they imposed certain delays on *Sunset Limited* Train 2 shortly after it entered UP territory at the beginning of its route. UP is mistaken.³¹⁰ As one example, UP dispatchers should have {REDACTED}

{REDACTED}. Instead, and even though the *Sunset Limited* was operating on-time, UP {REDACTED}

{REDACTED} and imposing delay on the *Sunset Limited*.³¹¹ As another example, UP required Train 2 to follow an intermodal train {REDACTED}

{REDACTED}

{REDACTED}³¹² In each of these cases, UP ignored available alternatives in resolving conflicts between the *Sunset Limited* and freight trains, in violation of Amtrak's statutory right to preference

³⁰⁸ See *id.* § 8 (analyzing UP Train 1 RCA at 380; 7/13/2022; 102-minute delay).

³⁰⁹ See *id.* § 7 (analyzing UP Train 2 RCA at 278; 8/7/22; 22-minute delay).

³¹⁰ See Peabody Reply V.S. at Exhibit 11 § 11-14.

³¹¹ See *id.* § 11 (analyzing Train 2 RCA at 256; 8/03/2022; 61-minute delay). To make matters worse, the {REDACTED} {REDACTED} As a result, UP forced the *Sunset Limited* to hold at El Monte, {REDACTED} {REDACTED}. See *id.* (analyzing Train 2 RCA at 256; 8/03/2022; 61-minute delay). UP does not dispute that, once the *Sunset Limited* cleared, {REDACTED} {REDACTED}. See

Op. Br. 84 n.217.

³¹² Peabody Reply V.S. Exhibit 11 § 13 (analyzing UP Train 2 RCA at 5; 3/13/2022; 20-minute delay).

Alternatives to Freight Expirations. UP claims that its dispatchers had no alternatives available when they chose to let freight trains expire on the main line.³¹³ As an initial matter, that claim defies common sense. Freight crews can work for up to twelve hours per shift.³¹⁴ However, they are not required to do so. UP begins monitoring the risk of expiration after just eight and a half hours.³¹⁵ The assertion that UP dispatchers could not identify a single operational alternative to expiration on the main line during the four hours between when monitoring begins and when crews expire strains credulity.

The investigative record confirms that alternatives existed. For example, UP acknowledges that it dispatched a freight train with an expiring crew onto a short-single track main line west of Yuma.³¹⁶ Rather than dispatching the expiring train onto single track, UP dispatchers could have (among other things) { [REDACTED] } [REDACTED] } As another example, UP also acknowledges that it { [REDACTED] } [REDACTED] },³¹⁸ And in another case, UP { [REDACTED] } [REDACTED] },³¹⁹ UP cannot and does not explain why { [REDACTED] } in these cases.³²⁰

³¹³ UP Reply 99–102.

³¹⁴ See 49 U.S.C. § 21103(a)(2).

³¹⁵ See UP Reply 37; Op. Br. 50.

³¹⁶ UP Reply 101.

³¹⁷ Peabody Reply V.S. Exhibit 11 § 16 (analyzing UP Train 1 RCA at 25; 9/3/2022; 63-minute delay); see also *id.* § 15 (analyzing UP Train 1 RCA at 37; 9/24/2022; 124-minute delay) (permitting freight train to expire on single track in similar location the very next day).

³¹⁸ Compare Op. Br. 86, with UP Reply 101.

³¹⁹ Peabody Reply V.S. Exhibit 11 § 17 (analyzing UP Egregious Delay at 12; 4/06/22; 105-minute delay).

³²⁰ UP claims these decisions were consistent with a policy to advance freight trains to a crew change point or tie-down point that created the least risk of disruption to the network. See UP Reply 99. UP represents that this policy requires dispatchers to advance freight trains as close to the crew change point as possible if trains cannot reach a crew change point or available siding before crews expire. But UP begins monitoring trains for expiration *four hours* before crews reach the end of their shift. UP never explains why freight trains would be unable to locate a single crew change or tie down point within those four hours.

Alternatives to Dispatching Over Slow Trackage. UP claims that its dispatchers had no alternatives available when dispatching *Sunset Limited* Trains over slower track.³²¹ Those claims are disingenuous and incorrect. According to UP, dispatchers were forced to dispatch the *Sunset Limited* over slower track because faster routes were {REDACTED}. But in each case, the faster route was {REDACTED}

{REDACTED}.³²² And in each case, UP dispatchers could have {REDACTED} {REDACTED} {REDACTED}.³²³ UP dispatchers chose instead to {REDACTED} {REDACTED}, in violation of Amtrak's right to preference over freight transportation.³²⁴

In sum, the investigative record is clear. UP regularly failed to identify and implement dispatching alternatives and denied *Sunset Limited* Trains preference over freight transportation. Where immediate or acceptable alternatives could not be identified, their absence was frequently attributable to UP operating decisions or service failures that themselves violated the obligation to provide *Sunset Limited* Trains with preference. Although Amtrak had no burden to identify these alternatives, it has done so in these examples to illustrate that UP's position is baseless.

³²¹ UP Reply 104–105.

³²² Peabody Reply V.S. Exhibit 11 § 19-20 (analyzing UP Train 2 RCA at 312; 8/11/22; 33-minute delay); (analyzing UP Train 1 RCA at 53; 2/11/22; 16-minute delay).

³²³ *Id.*

³²⁴ UP also suggests that its dispatcher had no alternatives available when a freight train {REDACTED} {REDACTED}. UP Reply at 106. According to UP, the dispatcher had no alternatives because {REDACTED}

{REDACTED} *Id.* But UP never explains {REDACTED} {REDACTED}. UP's dispatcher could have {REDACTED} {REDACTED} See Peabody Reply V.S. Exhibit 11 § 22.

D. UP's Other Arguments About Preference Are Irrelevant, Misleading, And Mischaracterize The Investigative Record.

UP asserts that Amtrak “identified only ‘illustrative’ examples” of preference violations in its Opening Statement.³²⁵ That is not accurate. In addition to *discussing* illustrative examples of preference violations in its Opening Statement,³²⁶ Amtrak also *identified* a significant number of additional preference violations in the Appendix to its filing.³²⁷ UP has nothing at all to say about even a single one of those additional violations. However, UP does offer several additional arguments in attempting to evade accountability for the illustrative preference violations discussed in Amtrak’s Opening Statement. None of those arguments has merit.

First, UP claims that the illustrative preference violations turn on an asserted right to absolute preference under which *any* delay establishes a preference violation.³²⁸ That is not the case. The Board identified almost 1,000 UP FTI delays for root cause analysis.³²⁹ Amtrak’s Appendix of additional preference violations identifies a subset of those delays that constituted preference violations.³³⁰ Amtrak does not contend that every instance of FTI delay is a violation of its statutory right to preference.

Second, UP implies that its resolution of unanticipated train conflicts—namely, those arising from its failure to run freight and passenger trains to schedule—cannot be preference violations.³³¹ That is a non-sequitur. When off-schedule operations generate a conflict, UP must resolve that conflict in a manner consistent with federal law. The requirements of Section 24308(c)

³²⁵ UP Reply 83 (emphasis added).

³²⁶ See Op. Br. 76–88.

³²⁷ See *id.* at App’x 1.

³²⁸ UP Reply 77.

³²⁹ See February 2024 Decision, slip op. at 3, App’x Parts I-II.

³³⁰ Op. Br. App’x 1.

³³¹ UP Reply 85.

do not fall away because a host railroad fails to operate trains on schedule, as UP frequently failed to do during the Complaint Period.

Third, UP implies that prioritizing a freight train over Amtrak does not violate Section 24308(c) where the relevant dispatching decision also delays another freight train. UP provides no authority for that claim because there is none. The text of Section 24308(c) is clear and, absent an emergency or Board order, a violation occurs whenever UP chooses to provide a freight train with priority over Amtrak in the use of rail lines.

Fourth, in attempting to explain away individual preference violations, UP notes the Amtrak-Responsible Delay incurred on each run. But UP relies on the total amount of delay incurred over an entire run, even when all or most of those delay minutes were incurred *after* the FTI at issue, and therefore had no meaningful role in operating conditions.³³² Furthermore, *Sunset Limited* schedules are built to account for some Amtrak-Responsible Delay, and UP omits its role in driving Amtrak-Responsible Delays, many of which can be traced to underlying FTI.³³³ As explained in Amtrak's Opening Statement, Amtrak is continuing to take proactive steps to address Amtrak-Responsible Delay, but even if Amtrak eliminated *every minute* of Amtrak-Responsible Delay during the Complaint Period, the *Sunset Limited* would still have failed to achieve the COTP Minimum Standard solely because of UP-Responsible Delay.

Finally, UP contends that *Sunset Limited* Trains received better dispatching treatment than freight trains during the Complaint Period.³³⁴ That claim is misleading in several respects. For example, UP asserts that the *Sunset Limited* made up time during at least one segment on each run

³³² See, e.g., *id.* at 96–97 (analyzing August 3, 2022 delay and declining to mention that *Sunset Limited* was running on-time and had only incurred 1 minute of Amtrak-Responsible Delay when preference violation occurred); *id.* at 97 (analyzing June 19, 2022 delay and declining to mention that *Sunset Limited* was running on-time and had only incurred 10 minutes of Amtrak-Responsible Delay when preference violation occurred).

³³³ See Op. Br. 60.

³³⁴ UP Reply 6.

during the Complaint Period.³³⁵ But that assertion provides the Board with no useful information, including because it obscures the magnitude of delays imposed on Amtrak and the magnitude of any time recovered. If UP had consistently recovered *Sunset Limited* Trains to schedule, then the average late time per late passenger would have remained steady or declined over the course of a trip. That did not happen.³³⁶ Instead, passengers saw arrival times get steadily farther from published passenger schedules over the course of the run. And even if UP had made up meaningful time during *Sunset Limited* runs, that would have no bearing on the preference analysis. Section 24308(c) does not authorize host railroads to preference freight trains and then attempt to mitigate the resulting delay to Amtrak trains, and with good reason. Passengers traveling to intermediate stations would see no benefit if host railroads mitigated delays after the passenger disembarked.

As another example, UP asserts that dispatching treatment must be favorable because Train 1 consistently outperformed Z trains. UP's analysis is wrong. UP used a flawed methodology that purposefully excluded pertinent portions of the study segment and relied on inconsistent parameters to evaluate schedule adherence.³³⁷ The investigative record demonstrates that UP dispatchers treated Z trains more favorably than Amtrak trains,³³⁸ as evidenced by the fact that

{ [REDACTED] }

³³⁵ *Id.* at 78–79.

³³⁶ Compl. & Pet. ¶¶ 110–11.

³³⁷ See Peabody Reply V.S. at 30–31. UP's apples-to-oranges comparison of schedule adherence is also flawed because one would expect Z trains to exhibit a difference between their fastest and average run times, even when they run unimpeded. For example, Z trains vary in length and weight, affecting everything from the duration of speed restrictions to the speed at which trains operate on grade. As another example, it appears that UP freight trains do not

[REDACTED] }. See "Improving Fuel Efficiency" at https://www.up.com/aboutup/esg/building-america-report/2015/preserve_environment/index.htm.

³³⁸ See Peabody Reply V.S. at 30.

³³⁹ See *id.* at 31 (Table 3 and accompanying text).

}}. ³⁴⁰

Put simply, the investigative record demonstrates that dispatching treatment for *Sunset Limited* Trains during the Complaint Period was not favorable, in either the relative sense³⁴¹ or the absolute sense,³⁴² and therefore supports a finding that UP has engaged in systematic violations of Amtrak's preference right.

E. UP Policies, Practices, And Procedures Confirm Its Disregard For Amtrak's Right To Preference Over Freight Transportation.

UP also tries to rehabilitate its policies, procedures, and practices that evidence disregard for the preference right. Those efforts fail.

Freight Scheduling. UP's scheduling practices do not prioritize Amtrak. In its Opening Statement, Amtrak identified deficiencies in UP's scheduling practices,³⁴³ which stand in stark contrast to the approach articulated by BNSF in this proceeding.³⁴⁴ As BNSF explained, the "core tenet serving as the foundation" for BNSF's schedule-building system "is Amtrak's right to preference across BNSF's trackage."³⁴⁵ Thus, BNSF's "schedule-building practices prioritize Amtrak trains with the highest ranking amongst all trains" and "Amtrak's priority status serves as the baseline for BNSF's schedule-building process."³⁴⁶ Accordingly, the very first "building blocks for BNSF's train schedules are Amtrak's arrival and departure times."³⁴⁷ "[E]ach Base

³⁴⁰ See *id.* at 34 (Table 5 and accompanying text).

³⁴¹ See *id.* at 30–31.

³⁴² See *id.* at 35.

³⁴³ See Op. Br. 91–93.

³⁴⁴ See BNSF Reply 35–36. Although BNSF's approach to scheduling highlights just how little regard UP has for Amtrak preference rights, Amtrak does not concede that in practice the BNSF approach to scheduling is sufficient. The investigative record does not contain the information required to reach that question, including because UP hosts the overwhelming majority of the *Sunset Limited* route.

³⁴⁵ BNSF Reply 33.

³⁴⁶ *Id.* at 2, 33.

³⁴⁷ *Id.* at 35.

Train Schedule is uniquely built to preserve Amtrak’s requested arrival and departure times” and “Base Train Schedules for all non-passenger trains, therefore, are constructed to facilitate and ensure those arrival and departure times.”³⁴⁸ In short, “BNSF builds schedules that prioritize Amtrak.”³⁴⁹ By contrast, UP contends that federal law does not require any consideration of Amtrak when building freight schedules.³⁵⁰ That is obviously wrong. Building schedules that regularly bring Amtrak and freight trains into conflict, and that cannot be resolved by providing Amtrak with preferential access to rail lines, is inconsistent with Section 24308(c).³⁵¹

Next, UP complains that it has no obligation to develop a scheduling algorithm that builds schedules that avoid all conflicts between freight trains and Amtrak.³⁵² That argument is a straw man. UP is free to adopt whatever scheduling process it wants, but UP must account for Amtrak’s preference rights in that process. In doing so, UP does not need to avoid all conflicts between freight trains and Amtrak, but UP does need to ensure that its schedules and scheduling system allow dispatchers to resolve those conflicts in a manner consistent with the preference obligation.

UP also contends that conflicts between *Sunset Limited* Trains and freight trains are inevitable.³⁵³ That argument is a red herring. Amtrak—and Congress—recognize that conflicts between passenger and freight trains will arise during the course of service. The preference statute was enacted to ensure that such conflicts can be and are resolved in favor of passenger trains.

Finally, UP complains that perfect adherence to schedules is impossible.³⁵⁴ As an initial matter, that attempt to reframe what has transpired on the *Sunset Limited* route is misleading.

³⁴⁸ *Id.* at 36.

³⁴⁹ *Id.* at 35.

³⁵⁰ UP Reply 85.

³⁵¹ *See supra* Part I.E.

³⁵² UP Reply 111.

³⁵³ *Id.*

³⁵⁴ *Id.*

Sunset Limited Trains did not experience abysmal on-time performance because of occasional departures from the schedule, but rather because UP service levels were systematically and unacceptably poor. In any event, the preference statute governs how railroads address the unanticipated conflicts that arise when host railroads fail to run trains according to schedule, and it requires that host railroads ensure that passenger trains continue to receive priority access to rail lines under those circumstances. UP cannot evade the preference statute based on its inability to adhere to its own schedules.

Computer-Aided Dispatching. UP has previously admitted that its Advanced Movement Planner Algorithm “does not contain a set of rules that account for Amtrak’s trains’ legal preference” and that its system provides Amtrak passenger trains with the same priority as UP’s premium intermodal trains.³⁵⁵ UP has also admitted that most of its trains are set to “automatic mode,” which means that Advanced Movement Planner Algorithm supplies the default route for most trains operating over its network.³⁵⁶

Those key facts remain undisputed.³⁵⁷ And even though the Advanced Movement Planner Algorithm supplies the default route for most trains operating over the network, UP now concedes that it is {{ [REDACTED] }}
{{ [REDACTED] }}³⁵⁸ It even concedes that {{ [REDACTED] }}

³⁵⁵ UP’s Sept. 2023 Resp. at 34.

³⁵⁶ Batt V.S. at 9.

³⁵⁷ UP Reply 109 (“Advanced Movement Planner’s algorithm is not currently designed to address the legal issue of preference.”); Batt V.S. at 9 (averring that “automatic mode” allows CADX to automatically control signals and switches and that “[m]ost trains are set to automatic”); Batt V.S. at 10 (“Further, the Advanced Movement Planner algorithm does not contain a set of rules that account for Amtrak’s preference.”); Batt V.S. at 10 (“In the Advanced Movement Planner algorithm, Amtrak Trains and Union Pacific’s premium intermodal trains are assigned the highest numeric priority.”).

³⁵⁸ UP Reply 110.

[REDACTED]

[REDACTED] }}. ³⁵⁹

UP nevertheless attempts to explain away the impact that its Advanced Movement Planner Algorithm had on Amtrak’s preference rights during the Complaint Period. *First*, UP says it had no obligation to develop a train optimizing algorithm.³⁶⁰ That is true but irrelevant. Again, UP can adopt any lawful dispatching algorithm that it wants, but one of the legal obligations that UP must account for is compliance with Amtrak’s right to preference, something UP admits the Advanced Movement Planner algorithm does not do.³⁶¹

Next, UP {{ [REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }} ³⁶⁴

Finally, UP argues that human dispatchers remain fully responsible for monitoring and directing train movements and can depart from algorithmic recommendations.³⁶⁵ But that just means human dispatchers sometimes relied on route recommendations that admittedly did not

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ UP’s Sept. 2023 Resp. at 34; UP Reply 109.

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ *Id.*; Batt V.S. at 10.

³⁶⁵ UP Reply 110.

account for Amtrak's preference rights and does nothing to mitigate the legal issues with relying on a routing algorithm that does not account for preference.

Dispatching Training and Evaluations. In its Opening Statement, Amtrak explained that UP does not appropriately train its dispatchers on Amtrak's preference rights or hold them appropriately accountable for failing to honor them.³⁶⁶ UP cannot dispute that—if Amtrak is correct about the interpretation of preference—it has not been adequately training its dispatchers.³⁶⁷ While UP attempts to defend its failure to formally evaluate dispatchers on compliance with the preference right,³⁶⁸ its argument makes no sense.³⁶⁹

According to UP, {{{

³⁶⁶ Op. Br. 89–91.

³⁶⁷ UP does not adequately train dispatchers on its mistaken interpretation of preference either. Dispatching protocols enumerate a laundry list of considerations without providing meaningful guidance about how to weigh them. *See, e.g.*, Batt V.S. at 18 (noting that dispatchers are required to consider variables like train priority, schedule, crew hours of service, and network impact in resolving conflicts and offering no information about how dispatchers are meant to balance those and other factors); Batt V.S. at 18 (observing that dispatchers are instructed to avoid requiring *Sunset Limited* Trains to follow slower freight trains “unnecessarily” and providing no information about how dispatchers are instructed to evaluate necessity). UP’s failure to provide concrete instruction to dispatchers underscores the legal and practical reasons why its interpretation of preference lacks merit, and its emphasis on dispatching maneuvers that impose delay on Amtrak underscores that UP’s true priority is advancing freight. *See, e.g.*, UP Reply Exhibit F ({{{ _____ })); *see id.* at 109 n.341 (acknowledging belief that UP’s obligation to provide on-time service to Amtrak “does not trump its obligations to freight customers”).

³⁶⁸ Batt V.S. at 19.

³⁶⁹ UP claims that there exists an “expectation” that dispatchers will honor preference. *Id.* at 19. However, UP provides the Board no information about what those words mean, or how anyone could conceivably measure whether dispatchers are meeting its vague “expectation.”

³⁷⁰ Batt V.S. at 19.

████████████████████}}. Compliance with federal law is not optional. UP's apparently intentional decision to ignore compliance in evaluating personnel is not only inexplicable,³⁷¹ but also demonstrative of UP's broader disregard for Amtrak's preference rights.

Compliance Issues. In its Opening Statement, Amtrak observed that UP has not implemented a compliance program focused on its federal obligation to provide Amtrak passenger trains with preference over freight transportation. UP derisively describes as “Kafkaesque”³⁷² the audacious suggestion that host railroads should implement a formal program with measurable objectives and documented feedback to ensure compliance with their federal statutory and regulatory obligations to Amtrak. Contrast that flippancy with how UP approaches its compliance with environmental laws, which is evaluated based on programmatic review, by an independent auditor, and with subsequent attention to vulnerabilities. The difference illustrates that UP does not take seriously its federal obligation to provide Amtrak passenger trains with preference, a conclusion corroborated by the significant deficiencies in UP's dispatcher training and evaluation, and UP's repeated attempts to shift the burden for its own compliance to Amtrak.

III. THE HOST RAILROAD FOR THE VAST MAJORITY OF THE *SUNSET LIMITED* ROUTE REMAINS UNDISPUTED.

Essentially all parties and non-parties agree that the term “host rail carrier” under Section 24308(f)(2) means the same thing as “host railroad” under 49 C.F.R. § 273.3: “a railroad that is directly accountable to Amtrak by agreement for Amtrak operations over a railroad line

³⁷¹ UP's vague representation that personnel perform “periodic monitoring sessions” and provide dispatchers with feedback from those sessions offers no useful information about how UP conducts oversight. Moreover, UP has provided no documentation reflecting how frequently oversight occurs, what UP supervisors observe, what UP supervisors communicate, or how UP supervisors confirm that feedback is implemented. The failure to document monitoring efforts is consistent with broader failures to implement an appropriate compliance program, and to document intentional decisions to delay Amtrak passenger trains. *See* Op. Br. 90 n.240; *accord* Batt V.S. at 18 (confirming that decisions to delay Amtrak passenger trains are typically relayed through oral communications).

³⁷² UP Reply 112.

segment.”³⁷³ Although some parties attempt to narrow the circumstances that might render railroads directly accountable to Amtrak and contest whether they host particular small segments of the route under the rule, those disputes have no meaningful impact on this proceeding. All parties agree on the appropriate host railroad for all but twelve miles of the *Sunset Limited* route, meaning there is no dispute on the appropriate host railroad for approximately 94% of the delay minutes and more than 99% of the route miles at issue in this proceeding. And no party disputes that the overwhelming majority of those minutes occurred when *Sunset Limited* Trains were operating over UP-hosted segments of the route.³⁷⁴

Below, Amtrak explains why (1) limiting the agreements sufficient to support a host designation would be premature, and (2) more than one railroad can be an appropriate host for segments on intercity passenger service. Amtrak also addresses remaining disputes about the appropriate host for three short segments of the *Sunset Limited* route. None of those disputes alter the appropriate focus of this proceeding, which is the cause of delay to the *Sunset Limited* Trains on more than 1,774 route miles indisputably hosted by UP.

A. The Board Should Reject Efforts To Narrow The Circumstances Sufficient To Designate A Host Rail Carrier Under Section 24308(f).

The record reflects near-unanimity that host railroads under Section 24308(f) are railroads “directly accountable to Amtrak by agreement for Amtrak operations over a railroad line segment.”³⁷⁵ The Board should adopt that definition and reject efforts to narrow its application,

³⁷³ See 49 C.F.R. § 273.3; see e.g., Op. Br. 16; BNSF Reply 9–11; UP Reply 15–16; CPKC Reply 31–32; CN Reply 4–6.

³⁷⁴ See Op. Br. 19.

³⁷⁵ See 49 C.F.R. § 273.3. Rather than accepting the regulatory definition that all other parties embrace, NOPB proposes a two-pronged test to determine whether a rail carrier operates as a host under Section 24308(f), first asking “but for” which railroad’s agreement Amtrak would not be able to operate over a certain segment and, where that is not clear, next asking which railroad Amtrak compensates for its access. NOPB Reply 7, 10–13. The NOPB test needlessly complicates this analysis and obscures the possibility that Amtrak could reach agreements with and compensate more than one host railroad for a segment of track. See Op. Br. 17–24. The Board does not need to look beyond the agreements between Amtrak and rail carriers to determine whether a host designation is proper.

including arguments that would restrict the agreements sufficient to establish host status, limit Amtrak's right to secure multiple host railroads for a single segment of intercity passenger service, or exempt commuter rail carriers in particular circumstances. None of those limitations find any basis in the text, structure, or legislative history of PRIIA.

First, CN argues that the agreement required to establish host-status under Section 24308(f) must be an Operating Agreement executed under Section 24308(a), unless there is an emergency.³⁷⁶ As an initial matter, the Board does not need to reach CN's argument as to whether anything other than an Operating Agreement can confer host status because the asserted basis for each host designation in this proceeding already is an Operating Agreement executed under Section 24308(a).³⁷⁷ Because all parties agree that Section 24308(a) Operating Agreements support a host designation, and because those agreements make rail carriers directly accountable to Amtrak for Amtrak operations over a railroad line segment, the Board should defer any decision on the sufficiency of other agreements until that question is appropriately presented and developed in some future proceeding. Foreclosing the use of other agreements to support a host designation would be premature.

In any event, CN's proposed limitation on the agreements sufficient to support a host designation is flawed for multiple reasons. First, the FRA definition of host railroad does not require that contracts contain the provisions enumerated in Section 24308(a).³⁷⁸ Second, restricting the agreements sufficient to support a host designation would also be inconsistent with

³⁷⁶ CN Reply 9.

³⁷⁷ See Op. Br. 19-25.

³⁷⁸ See 49 C.F.R. § 273.3. CN's contrary assertion—that the FRA definition of host railroad requires an agreement with penalty provisions—has no basis in the plain text of the Final Rule. See *Metrics and Minimum Standards for Intercity Passenger Rail Service* ("Final Rule"), 85 Fed. Reg. 72971 (Nov. 16, 2020). Had the FRA intended to limit the scope of agreements sufficient to support host status, it could have referenced host "Operating Agreements" or "agreements executed pursuant to Section 24308(a)." Its decision to use a more general term—and the resulting scope of its regulation—must be respected.

the text of Section 24308(f), which requires accountability for operations over rail lines and nothing more.³⁷⁹ Finally, the proposed restrictions on agreements sufficient to support a host designation would be contrary to congressional intent and public policy. Congress enacted PRIIA to help address freight railroad interference with passenger trains.³⁸⁰ The proposed extra-textual restrictions on the agreements sufficient to support application of PRIIA to rail carriers would frustrate that objective and insulate host rail carriers from scrutiny based on semantic differences between contractual arrangements.

Second, CN argues that Amtrak should not enter multiple agreements sufficient to support a host-designation for a single segment.³⁸¹ This proceeding illustrates why CN's view is misguided. Between Live Oak and West Bridge Junction, Amtrak can be dispatched over rail lines owned by either UP or BNSF.³⁸² Entering agreements that permit Amtrak to travel over either segment is sensible because it accomplishes two things. First, it ensures Amtrak can operate over whichever rail line has more capacity during a given run. Second, it allows Amtrak to hold both rail carriers accountable for operations over the segment, which is particularly important because Amtrak has no say in the dispatching decisions made for this segment. Nothing in Section 24308(f)(1) forecloses Amtrak from executing multiple agreements with carriers to operate over a given segment. And, as CPKC observes, nothing in Section 24308(f)(1) forecloses Amtrak from executing agreements with landlord and tenant railroads for a single line; to the contrary, allowing Amtrak to enter multiple agreements supporting multiple host-railroad designations "is the only

³⁷⁹ CN offers no authority for its assertion that particular contractual provisions are required to avoid potential constitutional questions.

³⁸⁰ See *Union Pac. R.R. Co.*, 863 F.3d at 820; see also *On-Time Performance Under Section 213 of the Passenger Rail Investment and Improvement Act of 2008*, 81 Fed. Reg. at 51344.

³⁸¹ CN Reply 10–11.

³⁸² See Op. Br. 22–23.

[approach] consistent with the statutory framework, and it also makes sense as a matter of policy.”³⁸³

Finally, the Commuter Rail Coalition (“CRC”) proposes that the definition of host rail carrier under Section 24308(f) exclude passenger railroads where a freight railroad dispatches or effectively controls the train movements on the passenger railroad’s lines.³⁸⁴ Amtrak understands the impact that freight railroad-controlled dispatching and operational decisions can have on commuter rail lines, particularly where decisions shift avoidable freight-caused delays onto commuter rail. However, Amtrak respectfully submits that Section 24308(f) does not contemplate an exemption like the one CRC proposes. It would be contrary to the text, structure, and purpose of Section 24308(f) to permit carriers to avoid their duty to provide Amtrak with preference over freight traffic by voluntarily contracting out their operational responsibilities. Moreover, CRC’s concerns are unlikely to manifest. If freight railroads with authority to dispatch or effectively control passenger rail lines cannot be designated as the host for a segment of track owned by a passenger rail carrier, Section 24308(f) provides that the Board can exercise its remedial discretion and determine that commuter services should not be subject to damages or equitable relief based on the circumstances that CRC describes.³⁸⁵

³⁸³ See CPKC Reply 33; *see also id.* (“As Amtrak’s Opening Statement contemplates, Amtrak could achieve such direct accountability by negotiating an Operating Agreement with the trackage-rights landlord, and in that circumstance, there would be two separate ‘host railroads’ for the segment in question. CPKC believes that this approach is the only one consistent with the statutory framework, and it also makes sense as a matter of policy.”) (footnote omitted).

³⁸⁴ See CRC Reply 8–9.

³⁸⁵ See 49 U.S.C. § 24308(f)(2) (providing the Board with discretion in awarding damages and prescribing other relief for delays or failures attributable to host violations of Amtrak’s right to preference).

B. Host Railroad Efforts To Evade Accountability For Eastern Segments Lack Merit.

During this investigation, parties have disputed the appropriate host railroad for 11.8 miles and three segments of the *Sunset Limited* route. The disputed segments are located between Southport Junction and Live Oak. For reasons explained in its Opening Statement, multiple rail carriers can appropriately be designated hosts for these segments. In their replies, the rail carriers over these segments attempt to circumvent their contractual obligations for at least one segment. Those arguments cannot be squared with the relevant Operating Agreements or with *Sunset Limited* operations, which commenced more than 70 years before Amtrak's formation, and have mostly proceeded along the same route since Amtrak assumed responsibility for operation of the *Sunset Limited* from Southern Pacific in 1971.

1. UP is directly accountable by agreement for Amtrak operations over each segment between Southport Junction and Live Oak.

In its Opening Statement, Amtrak explained that UP can be designated as the host railroad for each of the three segments between Southport Junction and Live Oak.³⁸⁶ That remains the case.

West Bridge Junction to Live Oak (4.4 miles). Amtrak has previously explained that *Sunset Limited* Trains can operate over UP or BNSF rail lines when transiting this segment.³⁸⁷ Amtrak has also identified the contractual provisions that make UP directly accountable to Amtrak for Amtrak operations in the area.³⁸⁸ After reviewing those arguments, UP now acknowledges that it can be designated the host for this segment.³⁸⁹ However, UP attempts to limit the scope of its designation as a host to when Amtrak actually operates over the line.³⁹⁰

³⁸⁶ Op. Br. 19–24.

³⁸⁷ *Id.* 22–24.

³⁸⁸ *Id.*

³⁸⁹ UP Reply 17.

³⁹⁰ *Id.* 15, 17–18.

That argument has no basis in the text of Section 24308(f), nor in the FRA’s definition of “host railroad.” Neither contemplate that rail carriers can evade their obligations to Amtrak and under federal law by dispatching Amtrak onto an alternative route, and rightly so. On this segment, as elsewhere, Amtrak engineers and conductors take instructions in real time from authorized dispatchers and have no practical ability to question the actual or apparent authority of those dispatchers to issue instructions. Narrowing the host designation based on those dispatching decisions could allow a rail carrier to evade accountability for delays it can reasonably address, and for its own violations of Amtrak’s statutory right to preference, including in circumstances where another rail carrier permits Amtrak passengers to transit its line as a courtesy.³⁹¹ That result would frustrate the statutory scheme.³⁹²

If UP or similarly situated rail carriers contend that delays can be reasonably addressed by another rail carrier with lines in a territory, the Board can appropriately address that contention when evaluating recommendations. Likewise, if UP or similarly situated hosts contend that delays or failures are attributable to another rail carrier’s failure to provide Amtrak passenger trains with preference over freight transportation, the Board can appropriately address that issue when exercising its discretionary authority to impose damages or equitable relief.

Remaining Segments (7.4 miles). Amtrak has previously explained that UP can be designated the host for other disputed segments, because the parties’ Operating Agreement provides Amtrak with a right to use UP trackage rights over NOPB track between West Bridge

³⁹¹ BNSF contends that this description applies to operation between West Bridge Junction and Live Oak. For reasons set out below, *see infra* Part III.B.3, BNSF is wrong.

³⁹² *See, e.g., Little Sisters of the Poor*, 591 U.S. at 677 (“It is a fundamental principle of statutory interpretation that absent provision[s] cannot be supplied by the courts.” (internal citations omitted)).

Junction and East Bridge Junction, and a right to use UP trackage rights over CN track between East Bridge Junction and Southport Junction.³⁹³

In its Reply Brief, UP does not dispute that those trackage rights exist.³⁹⁴ Instead, UP contends that Amtrak has no right to use them, because the parties did not include timetables or slow order information about the route.³⁹⁵ UP is mistaken. The parties agree that UP Rail Lines *can* include UP trackage rights under the Operating Agreement.³⁹⁶ And it is clear that UP Rail Lines do include these trackage rights under the Operating Agreement, which provides that UP must retain Rail Lines “used in the operation of regularly scheduled Amtrak Trains, as defined in Amtrak’s public timetables” for as long as Amtrak continues using those Rail Lines or the term of the Operating Agreement.³⁹⁷ There is no dispute—and both CN and NOPB recognize³⁹⁸—that Amtrak has been using trackage rights since well before it executed the Operating Agreement with UP, and has continued to do so since the Operating Agreement was executed. As a result, the Operating Agreement requires that UP continue to provide Amtrak with those trackage rights.

Complaints about UP’s host designation for trackage between West Bridge and East Bridge Junction should also be disregarded as untimely. Since federal on-time reporting obligations became effective, Amtrak has consistently designated UP as the contractual host for this segment. In other words, Amtrak has consistently taken the position for purposes of federally mandated reporting that UP is contractually accountable to Amtrak for operations over this segment. UP has been well-aware of that position because Amtrak identifies all delays attributed to UP as part of

³⁹³ Op. Br. 20–22.

³⁹⁴ *See* UP Reply 15–19.

³⁹⁵ *See id.* 17.

³⁹⁶ *See* Operating Agreement Art. I.

³⁹⁷ *See id.* IV. § 4.1

³⁹⁸ *See* CN Reply 11–12 & n.25; NOPB Reply at 3–4.

the requisite process for disputing and reporting to the FRA on host-responsible delays.³⁹⁹ UP engaged in that federally mandated process, which is meant to identify delays that host railroads contend have been misattributed under the parties' Operating Agreement.⁴⁰⁰ UP never disputed its designation as the host for this segment of track before Amtrak commenced this proceeding. Based on that course of dealing,⁴⁰¹ and having acquiesced to Amtrak's interpretation of the Operating Agreement in federally mandated discussions about the attribution of delays under the Operating Agreement, UP should not be heard on its belated attempt to escape accountability for the segment.

2. CN is directly accountable by agreement for Amtrak operations between East Bridge Junction and Southport Junction.

CN acknowledges that it owns the section of track between Southport Junction and East Bridge Junction, and that *Sunset Limited* Trains regularly operate over that trackage.⁴⁰² CN nonetheless contends that it cannot be directly accountable to Amtrak under the Operating Agreement because {{[REDACTED]}}⁴⁰³ However, the omission of {{[REDACTED]}} is hardly surprising, given that *Sunset Limited* Trains operate over CN trackage for just 2.2 miles. As Amtrak has explained, the CN Operating Agreement {{[REDACTED]}}⁴⁰⁴ Moreover, CN has long been aware that Amtrak interpreted the parties' agreement to require that CN host *Sunset Limited*

³⁹⁹ See 49 C.F.R. § 273.5(d).

⁴⁰⁰ See Final Rule, 85 Fed. Reg. at 72980–82.

⁴⁰¹ See *In Complaint of Moran Phil.*, 175 F.Supp.3d 508, 518 (E.D. Pa. 2016) (“Unless otherwise agreed, a course of dealing between the parties gives meaning to or supplements or qualifies their agreement. Evidence of a prior course of dealing can thus establish a party's awareness of a consent to intended contractual terms.” (citation omitted)); see also *New Moon Shipping Co., Ltd. v. MAN B & W Diesel AG*, 121 F.3d 24, 31 (2d Cir. 1997) (“Evidence of a prior course of dealing may establish a party's awareness of and consent to intended contractual terms” and has been extended “beyond prior dealings involving a actual disputes to include evidence that a party has ratified terms by failing to object.”).

⁴⁰² See CN Reply 11, 18 n.47, 25 n.60

⁴⁰³ *Id.* 13–14.

⁴⁰⁴ Op. Br. 20–22.

Trains, and did not dispute delays on the segment until after Amtrak filed its Complaint in this matter.⁴⁰⁵ CN's attempt to disclaim accountability for the segment now should be rejected. In any event, given that Amtrak has not alleged any violations of its preference rights by CN in this segment, CN's host status for this segment is not relevant in this proceeding.

3. BNSF is directly accountable by agreement for operations between Live Oak and West Bridge Junction.

Amtrak has a contractual right to transit BNSF lines between Live Oak and Westridge Junction.⁴⁰⁶ BNSF contests that right, arguing that {{[REDACTED]}}

{{[REDACTED]}}}, and that {{[REDACTED]}}

{{[REDACTED]}}⁴⁰⁷

Both arguments are mistaken. Although the parties {{[REDACTED]}}

{{[REDACTED]}}} subsequent correspondence between

the parties makes quite clear that BNSF agreed to be accountable to Amtrak for Amtrak operations

over the segment. In 1997 correspondence executed by its NRPC Operations Officer, {{[REDACTED]}}

[REDACTED]

[REDACTED]

[REDACTED]}}

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Seven years later, BNSF wrote Amtrak {{[REDACTED]}}

[REDACTED]

[REDACTED] }}. ⁴⁰⁹ BNSF's {{[REDACTED]}}

⁴⁰⁵ See *id.*; see also *supra* Part III.B.1 (explaining host obligation to dispute delays).

⁴⁰⁶ See Op. Br. 22–24.

407 BNSF Reply 15, 19.

⁴⁰⁸ See Amtrak STB 0001225.

⁴⁰⁹ See Amtrak STB 0001226.

{} further supported by nearly three decades of operating practice,⁴¹⁰ and by {} removing any doubt that BNSF can be appropriately designated a host railroad for this segment of track.

IV. THE BOARD HAS BROAD AUTHORITY TO AWARD DAMAGES AND PRESCRIBE OTHER RELIEF FOR ALL DELAYS ATTRIBUTABLE TO VIOLATIONS OF AMTRAK’S PREFERENCE RIGHTS.

As established in Amtrak’s Opening Statement, the Board has broad authority both to award damages and to prescribe other forms of relief to redress harms that are attributable to any and all preference violations the Board finds in investigating the delays at issue in this proceeding.⁴¹¹ UP and others misread the plain text of the statute to limit this broad authority. As to the Board’s specific questions, although the Board may be faced with difficult issues in future proceedings as to how to apportion liability and remedies among multiple hosts where no one host “standing alone”⁴¹² is responsible for the failure to achieve the 80% COTP Minimum Standard, here there is no such question. There is no dispute that UP-imposed delay “standing alone” is responsible for the *Sunset Limited*’s failure to achieve the 80% COTP Minimum Standard in the two consecutive quarters that were the trigger for this proceeding. And UP “standing alone” is responsible for *all* of the preference violations alleged herein. UP’s claim that due process nonetheless precludes UP from being subject to any liability or remedies for its pattern and practice of statutory violations is meritless.

⁴¹⁰ BNSF contends that it permits *Sunset Limited* Trains to operate over BNSF trackage between Live Oak and West Bridge Junction as a courtesy, but nowhere disputes that *Sunset Limited* Trains have consistently operated over that trackage for nearly thirty years. BNSF Reply 17.

⁴¹¹ See Op. Br. 96–100.

⁴¹² UP Reply 112.

A. The Board's Authority To Award Damages And Issue Other Relief Applies To All Delays At Issue In This Proceeding Attributable To Preference Violations.

Section 24308(f) establishes a clear sequence of events for the Board to arrive at its broad remedial authority in this proceeding: *First*, because of delays, the COTP of an Amtrak train averages less than the 80% COTP Minimum Standard for two consecutive calendar quarters; *second*, Amtrak files a complaint with the Board detailing these delays and alleging this failure to meet the 80% COTP Minimum Standard for two consecutive quarters; *third*, the Board opens an investigation to determine the causes of these “delays or failure to achieve minimum standards”; *and finally*, if the Board determines through its investigation that the “delays or failures to achieve minimum standards” at issue are “attributable to a rail carrier’s failure to provide preference to Amtrak over freight transportation,” then the Board “may award damages against the host rail carrier, including prescribing such other relief to Amtrak as it determines to be reasonable and appropriate.”⁴¹³ The only limit on such relief is that it be “reasonable and appropriate.”⁴¹⁴

The parties’ reply briefs offer three lines of attack against this straightforward reading of the text. *First*, BNSF (not joined by any other party) argues that the Board’s remedial authority in this proceeding is limited solely to an award of money damages against the responsible host railroad and that the Board’s authority to “prescribe[e] such other relief to Amtrak as it determines to be reasonable and appropriate” should be ignored.⁴¹⁵ *Second*, UP and others attempt to graft an additional constraint on the Board found nowhere in the statute, contending that the Board’s remedial authority is limited to instances in which a host carrier’s failure to provide preference would, standing alone, cause Amtrak’s COTP to fall below 80% percent for two consecutive

⁴¹³ 49 U.S.C. § 24308(f)(1)–(3).

⁴¹⁴ *Id.* § 24308(f)(2).

⁴¹⁵ BNSF Reply 48–50.

calendar quarters.⁴¹⁶ *Third*, some parties appear to argue that the Board’s remedial authority is also limited by the parties’ contractual incentive and penalty arrangements.⁴¹⁷ None of these arguments has merit.

1. The Board has authority to prescribe both damages and additional relief.

In contending that the Board is limited to an award of money damages, BNSF offers an atextual reading of the statute. Because Section 24308(f)(2) says the “Board may award damages against the host rail carrier, *including* prescribing such other relief to Amtrak as it determines to be reasonable and appropriate pursuant to paragraph (3) of this subsection,” BNSF argues that the use of the word “including” means that this “other relief” must be a subset of money damages.⁴¹⁸ That is not how to read the statute. The Board must “presume that Congress did not ‘include words that have no effect,’” and thus “‘avoid a reading that renders some words altogether redundant.’” *Mercy Hosp., Inc. v. Azar*, 891 F.3d 1062, 1068 (D.C. Cir. 2018) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 176–77 (2012)); *see TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” (internal quotation marks omitted)). BNSF’s reading violates that principle and would render the entire clause following the comma in subsection (f)(2) meaningless.

Moreover, BNSF’s reading ignores Congress’s specific statutory instruction to the Board that when “awarding damages *and* prescribing other relief under this subsection the Board shall consider such factors as ... what reasonable measures would adequately deter future actions which

⁴¹⁶ UP Reply 112–119; BNSF Reply 50–53.

⁴¹⁷ CN Reply 38; CPKC Reply 34–37.

⁴¹⁸ BNSF Reply 48–50.

may reasonably be expected to be likely to result in delays to Amtrak on the route involved.”⁴¹⁹ In giving meaning to the statute, this context cannot be ignored. After all, it is a “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 320 (2014) (citation omitted); *see also Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) (“A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme[.]” (citation omitted)). The use of “and” means that the Congress clearly contemplated *both* awarding damages *and* prescribing other relief.⁴²⁰ Congress could have, but did not, instruct the Board to consider what “amount of damages” would deter future host-responsible delay and preference violations. Instead, Congress instructed the Board to consider what “reasonable measures” would serve as a deterrent.⁴²¹ Congress clearly had something more than money damages in mind and BNSF is wrong to contend otherwise.

2. The Board has authority to award damages and prescribe other relief for all delays in this proceeding attributable to preference violations.

As Amtrak explained in its Opening Statement, pursuant to the plain text of Section 24308(f), the Board has authority to award damages and prescribe other relief for *all* delays that it finds—as a result of its investigation—are attributable to a failure to provide preference.⁴²² The Board need not determine whether those failures to provide preference, standing alone, would cause Amtrak COTP to fall below 80% for any two consecutive calendar quarters. The failure to meet the 80% COTP Minimum Standard is the trigger for initiating the Board’s investigation into

⁴¹⁹ 49 U.S.C. § 24308(f)(3)(B) (emphasis added).

⁴²⁰ *See also* Op. Br. 97–98 (explaining all other textual indications that the Board’s remedial authority includes more than awarding damages).

⁴²¹ 49 U.S.C. § 24308(f)(3)(B).

⁴²² *See* Op. Br. 98–100.

the delays at issue, not a limit on the Board’s authority to provide a remedy for those delays when they are found to be attributable to a failure to provide preference.⁴²³

UP and others disagree with this position.⁴²⁴ As applied to this proceeding, however, answering this question is largely an academic exercise. While there may be future proceedings in which the Board is faced with difficult choices as to how to apportion liability and remedies among multiple hosts—each of whom may have contributed in some form to a failure to meet the 80% COTP Minimum Standard for two consecutive quarters—here there is no difficulty in determining who is at fault. There is no genuine dispute that UP-responsible delay “standing alone” caused the *Sunset Limited* to fall below the 80% COTP Minimum Standard for the two consecutive quarters at issue in the Complaint Period.⁴²⁵

Nothing in Section 24308(f) contemplates that the Board needs to engage in some sort of complex mathematical calculation, adding up exactly how many UP-responsible delay minutes are attributable to preference violations such that the sum is enough “standing alone” to cause the *Sunset Limited* to fall below the 80% COTP Minimum Standard. Indeed, such an approach would invite exactly the type of “mini-trials” that UP says are not authorized by PRIIA.⁴²⁶ On this point, Amtrak agrees. “Mini-trials” over the number of delay minutes attributable to preference violations are not contemplated by the statute.

Instead, the statute contemplates an investigation triggered by a failure to meet the 80% COTP Minimum Standard for two consecutive quarters in which the Board examines the “causes” of delays—as it has here by asking UP to explain almost 1,000 UP-responsible delays, including

⁴²³ See *id.*

⁴²⁴ See UP Reply 112–18; BNSF Reply 50–53.

⁴²⁵ See Amtrak’s Sept. 2023 Resp., Detailed COTP, Lateness, and Arrival Data (AMTRAK_STB_NATIVE_0002); see also UP Reply 3, 20.

⁴²⁶ UP Reply 117–18.

42 delays of more than 90 minutes each.⁴²⁷ And where those delays are attributable to a host railroad’s failure to provide Amtrak with preference over freight transportation—as the delays at issue in this proceeding clearly are—the Board will fashion a remedy, guided by Congress’s instruction to find “reasonable measures [that] would adequately deter future actions which may reasonably be expected to be likely to result in delays” to Amtrak.⁴²⁸

3. The Board’s statutory remedial authority is not circumscribed by the parties’ contractual arrangements.

Contrary to some parties’ arguments, the Board’s statutory remedial authority cannot be limited by the parties’ contractual arrangements.⁴²⁹ It is true that—when exercising its remedial authority—the Board is charged with considering factors such as “the extent to which Amtrak suffers financial loss as a result of host rail carrier delays or failure to achieve minimum standards.”⁴³⁰ But consideration of that factor under Section 24308 does not curtail the scope of Board’s remedial authority, let alone confine it to the parties’ particular contractual incentive and penalty system arrangements. It is premature at this stage to brief the full scope of the Board’s remedial authority and the proper measure of damages, but the cramped and contractually bound view offered by some hosts is not correct.

B. UP’s Due Process Arguments Are Meritless.

Even if the Board determines—in accordance with the governing statute—that delays or failures to achieve the COTP Minimum Standard during the Complaint Period were attributable to UP’s failure to provide Amtrak with preference over freight transportation, UP argues that it nonetheless cannot be held responsible for such failures under the Due Process Clause because the

⁴²⁷ See 49 U.S.C. § 24308(f)(1).

⁴²⁸ *Id.* § 24308(f)(3)(B).

⁴²⁹ See CPKC Reply 35–36; *see also* CN Reply 38.

⁴³⁰ 49 U.S.C. § 24308(f)(3)(B).

Board purportedly has not provided UP (1) “fair notice of the standard it will apply in this proceeding,” or (2) “a fair opportunity for Union Pacific to rebut claims made against it in light of those standards.”⁴³¹ UP is wrong on both fronts.

1. Section 24308 provides fair notice of forbidden conduct.

The fundamental flaw in UP’s argument is that this is a case about statutory interpretation, and Section 24308 is not unconstitutionally vague. UP does not argue otherwise. Nor could it. “To provide ‘fair notice,’ ‘[g]enerally, a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply.’” *United States v. Bronstein*, 849 F.3d 1101, 1107 (D.C. Cir. 2017) (quoting *Texaco, Inc. v. Short*, 454 U.S. 516, 532 (1982)). A law is not unconstitutionally vague simply because “it requires a person to conform his conduct to an imprecise but comprehensible normative standard.” *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). Indeed, due process does not require Congress to craft laws with “perfect clarity and precise guidance.” *United States v. Williams*, 553 U.S. 285, 304 (2008). Rather, Congress must avoid enacting a law that is “so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.” *Johnson v. United States*, 576 U.S. 591, 595 (2015); *Bronstein*, 849 F.3d at 1107. Section 24308 does not come close to that standard.

The Board is statutorily charged with enforcing Amtrak’s right to preference and it is a fundamental principle of administrative law that agencies have broad discretion to decide whether to enforce governing statutes through rulemaking or adjudication. *See SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947). Because “[n]ot every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule[.]” agencies “must be

⁴³¹ UP Reply 120.

equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.” *Id.*; see also Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952, 1000 (2007) (“[It is] well-established doctrine (established, indeed, by *Chenery II*) that an agency generally has broad discretion to choose how to implement a statutory grant of power, whether through rulemaking or through adjudication.”). The Board is thus “not precluded from announcing new principles in an adjudicative proceeding and the choice between rulemaking and adjudication lies in the first instance within the [agency’s] discretion.” *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 294 (1974). And it follows that “[a]n administrative agency can rule on a question of first impression in an adjudicative context.” *NLRB v. Am. Can Co.*, 658 F.2d 746, 758 (10th Cir. 1981).

The Board’s decision to resolve preference issues by adjudication is firmly grounded in these bedrock principles of administrative law. UP’s argument—that the Board was required to provide guidance regarding its interpretation of the statute before this proceeding—is not. The Board has authority to interpret Section 24308 in this proceeding and award relief consistent with the statute. This should not come as a surprise to UP given that, almost a decade ago, the Board put all parties on notice that it intended to proceed in precisely this way. See *Decision Withdrawing 2015 Policy Statement*, Dkt. No. EP 728 at 3 (S.T.B. served July 28, 2016) (concluding that Board’s “approach to preference issues can be developed and refined in the context of specific § 24308(f) cases”).

Nor does the fact that UP, Amtrak, and the parties have offered competing interpretations mean the statute fails to provide fair notice of proscribed conduct. See *Bronstein*, 849 F.3d at 1107 (“[A] statutory term is not rendered unconstitutionally vague because it does not mean the same

thing to all people, all the time, everywhere.” (cleaned up)); *Rose v. Locke*, 423 U.S. 48, 50 (1975) (“Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid.”). Rather, whether a “statute provides fair warning of its prohibitions must be made on the basis of the statute itself and other pertinent law, rather than on the basis of an ad hoc appraisal of the subjective expectations of particular [parties].” *See Bouie v. City of Columbia*, 378 U.S. 347, 355 n.5 (1964). The statute itself provides fair notice, and UP’s subjective expectations are irrelevant.

UP relies on inapposite cases addressing an administrative agency’s interpretation of its own ambiguous regulations.⁴³² But Section 24308 provides all the notice that is required under the Due Process Clause.⁴³³ Regardless of whether the Board is resolving an issue of first impression, it is charged with offering the best reading of the statute. A decision rejecting UP’s incorrect reading of the statute does not violate due process.⁴³⁴

⁴³² *See* UP Reply 120 & nn. 370–373, 122–23 & nn. 382–384. UP relies on *General Electric Co. v. EPA*, 53 F.3d 1324 (D.C. Cir. 1995), for example, for the proposition that “where the agency itself struggles to provide a definitive reading of the regulatory requirements, a regulated party is not ‘on notice’ of the agency’s ultimate interpretation of the regulations, and may not be punished.” *Id.* at 1334. Because the Board’s own regulations are irrelevant here, so is *General Electric*. UP also cites *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012), where the Supreme Court held that the FCC’s abrupt reversal of its long-held interpretation of a speech-based indecency rule failed to provide fair notice to broadcasters that agency’s position “had changed so the fleeting moments of indecency contained in their broadcasts were a violation” of the indecency law. *Id.* at 244. Again, an agency’s reversal of its previous interpretation has nothing to do with the issue here.

⁴³³ UP also contends that the Board’s procedures in this case are inconsistent with its regulations, codified at 49 C.F.R. Part 1122. *See* UP Reply 124. But those regulations govern Board investigations under a different statutory provision.

⁴³⁴ Non-party Washington Legal Foundation (“WLF”) makes the same flawed fair-notice arguments as UP, contending that imposing damages in this proceeding would violate UP’s due process rights because the Board has not previously interpreted the statute. *See* WLF Reply 3–4. Like UP, WLF cites no authority suggesting that fair notice requires the Board to first issue a rule or guidance announcing its interpretation *before* it can interpret the statute in an enforcement proceeding. WLF cites *Coinbase, Inc. v. SEC*, 126 F.4th 175, No. 23-3202, 2025 WL 78330 (3d Cir. Jan. 13, 2025), but the court there held that such a requirement would run headlong into *Chenery II* and that “an agency need not exhaustively catalog in a rule how a statute or regulation will apply in every circumstance.” *Id.* at 192; *see also Transp. Div. of the Int’l Ass’n of Sheet Metal, Air, Rail & Transp. Workers v. Fed. R.R. Admin.*, 10 F.4th 869, 875 (D.C. Cir. 2021) (“Agencies do not ordinarily have to regulate a particular area all at once.”).

2. The Board’s briefing schedule does not violate due process.

UP also contends that “[t]he Board’s procedures thus violate due process requirements because the Board could find Union Pacific and other host carriers committed preference violations without providing timely notice of the facts alleged to constitute violations—that is, notice at a time Union Pacific and other host carriers could defend themselves by offering evidence to rebut specific assertions.”⁴³⁵ But UP has, in fact, received notice of the “facts alleged to constitute violations”—namely, in Amtrak’s Complaint and Opening Statement. UP also has been afforded the opportunity to address all of the questions put to UP by the Board, to attempt to refute Amtrak’s legal arguments and factual allegations of preference violations, and to offer its own evidence to the contrary. In any event, all that the Board is doing in Stage One is determining whether the delays and failures to meet minimum standards are attributable to failures to provide preference. UP still will have ample opportunity to contest the imposition of damages or other relief in Stage Two of this proceeding. Because it has received notice and an opportunity to be heard, UP’s assertion that the briefing schedule violates the Due Process Clause is frivolous.

V. RECOMMENDATIONS

In its Opening Statement, Amtrak set out nineteen proposed recommendations for the Board to issue at the conclusion of Stage One of its investigation.⁴³⁶ UP does not contest that the Board has the statutory authority to “identify reasonable measures and make recommendations to improve the service, quality, and on-time performance” of the *Sunset Limited* at this point in the investigation.⁴³⁷ Although UP concedes that its “unacceptably poor service” caused deficient on-

⁴³⁵ UP Reply 123.

⁴³⁶ Op. Br. 114–117.

⁴³⁷ 49 U.S.C. § 24308(f)(1). CN likewise does not contest the Board’s statutory authority to issue recommendations. Although CN does not provide specific objections to Amtrak’s enumerated recommendations, CN imposes a general objection that the recommendations are not sufficiently “balanced” and that they should be “tailored to apply only to

time performance, and concedes that it is capable of improving that unacceptably poor service, UP urges the Board to reject *all* of Amtrak’s recommendations and instead issue just a single recommendation to “modify and extend *Sunset Limited* schedules.”⁴³⁸ In UP’s view, its operating practices and procedures should not be the subject of the Board’s recommendations at all.⁴³⁹ In contrast, CPKC agrees that a railroad’s “business decisions about railroad operational design—train schedules, train length, crew management practices, capacity investments, and freight solicitation efforts ... might form the basis for Board recommendations under 49 U.S.C. § 24308(f)(1).”⁴⁴⁰ And BNSF explicitly endorses “certain of the Amtrak-proposed recommendations” as “sensible approaches that BNSF already follows.”⁴⁴¹

UP’s blanket rejection of Amtrak’s recommendations rests upon UP’s mistaken views that it is not bound by federal regulations governing on-time performance; that UP’s contractual penalty and incentive provisions are the only obligations to Amtrak that matter; and that serving UP’s freight customers trumps ensuring Amtrak’s on-time performance. UP also erroneously argues that its preference obligation extends only to how a dispatcher resolves a particular conflict between an Amtrak train and a freight train; that the preference obligation has nothing to do with the railroad policies and practices that created that conflict in the first place; and that compliance would be costly.⁴⁴² And UP mistakenly argues that the Amtrak recommendations would require

the party-specific (whether Amtrak, a host, or third party) issues demonstrated to have a significant impact on the on-time performance of one or more of the *Sunset Limited* trains.” CN Reply 24. That contention is addressed *infra* note 508.

⁴³⁸ UP Reply 127.

⁴³⁹ *Id.* at 112.

⁴⁴⁰ CPKC Reply 10–11.

⁴⁴¹ BNSF Reply 3, 54. BNSF argues that “the Board should narrowly tailor any recommendations made in this Stage One to address the causes for delays or failures to achieve minimum standards that could be reasonably addressed by a host rail carrier on its portion of the *Sunset Limited* route, to the extent that the Board finds that host culpable in this proceeding.” *Id.* at 3; *see also id.* 55, 59. That contention is addressed *infra* note 508.

⁴⁴² UP Reply 127–137.

the elimination of all FTI on the route. Each of these views is wrong for the reasons Amtrak already has set forth herein. Below, Amtrak briefly responds to the specific objections to (and, where relevant, endorsements of) its recommendations.

(1) Except in the event of an emergency, rail carriers should not run trains that do not fit into available sidings on rail lines where the rail carrier knows or expects Amtrak trains are or will soon be operating.⁴⁴³

UP imposes boilerplate general objections to this recommendation, arguing that this would “impose significant delays on freight trains” and “unnecessary costs on freight customers.”⁴⁴⁴ In articulating these objections, UP speculates that the recommendation could increase the frequency of conflicts between *Sunset Limited* Trains and freight trains but provides no support for that assertion and—rather conspicuously—declines to opine on whether UP dispatchers would be better able to resolve those conflicts in favor of Amtrak passenger trains in the absence of non-fitters. In contrast to UP’s boilerplate objections, BNSF seriously engages with this recommendation, stating that it is not necessary for BNSF because BNSF already ensures that passenger trains “receive the highest priority status regardless of the length of freight trains operating on the same track,” and because its dispatchers already consider “the length of other trains – when planning a path for a passenger train.”⁴⁴⁵ “As a result, BNSF trains dispatchers to locate holding areas for longer trains so as to not delay passenger trains. If a passing siding is not long enough to accommodate a freight train, dispatchers use other techniques to minimize any passenger train delay, such as moving the passenger train in front of the freight train via a passing siding.”⁴⁴⁶

⁴⁴³ See *supra* Parts I.D.3 & II.B.

⁴⁴⁴ UP Reply 128.

⁴⁴⁵ BNSF Reply 57.

⁴⁴⁶ *Id.* at 57–58.

UP apparently has no such training for its dispatchers, judging by the inordinate number of times the *Sunset Limited* was delayed by non-fitters.⁴⁴⁷ In general, and as the investigative record illustrates, rail carriers should not be running trains that exceed the length of available sidings on rail lines where Amtrak is or soon will be operating because this is inconsistent with Amtrak's statutory right to preference. The Board should adopt this recommendation to address the egregious delays that have been imposed on Amtrak passengers by non-fitters.

(2) Except in the event of an emergency, rail carriers should not dispatch freight trains ahead of Amtrak trains on main tracks where there is a reasonable likelihood that an Amtrak train will “catch up” and be forced to follow the freight train, thereby delaying the Amtrak train.⁴⁴⁸

UP opposes this recommendation on the grounds that its dispatchers should “have discretion to make decisions that result in the *Sunset Limited* following freight trains when avoiding that outcome—*e.g.*, by stopping opposing freight trains on a double-main segment, holding freight trains for a lengthy period to avoid even a brief follow, or failing to advance trains with a crews approaching their hours-of-service limits—would compromise the overall fluidity of the network.”⁴⁴⁹ As explained above, Congress mandated a preference for Amtrak over freight transportation, not a preference for expiring freight crews, opposing freight traffic, or network fluidity over Amtrak. To be sure, Amtrak recognizes—as CPKC has stated—dispatchers often have to “juggle multiple factors to expedite the movement of Amtrak’s trains.”⁴⁵⁰ But the obligation is always to *expedite the movement of Amtrak’s trains*.⁴⁵¹ UP’s approach is exactly backward in preferencing the expedition of freight trains and freight crews over Amtrak to achieve

⁴⁴⁷ Op. Br. 53–55.

⁴⁴⁸ See *supra* Parts II & II.C.2.

⁴⁴⁹ UP Reply 129.

⁴⁵⁰ CPKC Reply 10.

⁴⁵¹ See *id.* (explaining that this obligation “always” exists).

its concept of “network fluidity.” This recommendation does not constrain dispatcher discretion beyond what the law already requires, and the Board should issue this recommendation.

- (3) Except in the event of an emergency, in the event of “meets” between Amtrak and freight trains, rail carriers should place freight trains in available sidings and make use of available crossovers in multi-track territory so as to avoid delays to Amtrak trains.**⁴⁵²

UP objects to this recommendation on the grounds that dispatchers should be able to “use their knowledge, experience, and judgment to determine the most efficient way to manage meets, aiming to minimize delays to the *Sunset Limited*.”⁴⁵³ But if UP’s dispatchers actually were “aiming to minimize delays to the *Sunset Limited*,” this investigation would not be taking place. Instead, UP’s dispatchers appear to believe the “most efficient way to manage meets” is to prioritize freight trains.⁴⁵⁴ Again, Amtrak does not dispute that dispatchers should be afforded some discretion in managing meets, but that discretion must actually be in service of minimizing delays to and expediting the movement of Amtrak trains. Because this recommendation likewise does not limit dispatcher discretion beyond what the law already requires, the Board should issue this recommendation.

- (4) Except in the event of an emergency, rail carriers should not make dispatching decisions that result in Amtrak trains meeting freight trains on main lines where no siding is available that can accommodate the freight train.**⁴⁵⁵

UP objects to this recommendation on the same grounds it objected to Amtrak’s first recommendation.⁴⁵⁶ UP misses the point. If UP is going to run trains that are longer than some sidings, UP must plan in advance to ensure that Amtrak does not encounter those trains on a

⁴⁵² See *supra* Parts II.A.1 & II.C.2.

⁴⁵³ UP Reply 130.

⁴⁵⁴ See *supra* Parts I.D.3 & II.C.2.

⁴⁵⁵ See *supra* Part II.A.1 & II.C.2.

⁴⁵⁶ UP Reply 130.

segment where no siding can accommodate them. Otherwise, unnecessary delay to Amtrak is inevitable. For the reasons set forth above, the Board should issue this recommendation.

(5) Except in the event of an emergency, rail carriers should not allow crews to reach their maximum allowable hours of service while their train is occupying a main line in advance of an Amtrak train and should not prioritize the forward movement of a freight train over an Amtrak train because the freight crew is approaching its maximum allowable hours of service.⁴⁵⁷

In response to this recommendation, UP baldly admits that it has a company-wide policy and procedure of preferencing freight transportation over Amtrak.⁴⁵⁸ As UP explains, “when unexpected events create a risk that crews will expire before reaching crew change points, *dispatchers are instructed to prioritize their trains.*”⁴⁵⁹ That policy—which caused numerous hours of delay to Amtrak passengers as detailed above and in Amtrak’s Opening Statement⁴⁶⁰—is a blatant violation of Amtrak’s right to preference over freight transportation. UP nonetheless objects that “[i]mplementing Amtrak’s recommendation would require prioritizing the *Sunset Limited* regardless of the impact on the quality of freight transportation.”⁴⁶¹ But it is federal law—not Amtrak’s recommendation—that requires “prioritizing the *Sunset Limited.*” If UP has evidence that providing this priority would materially impact the quality of freight transportation UP provides to shippers, Congress established a procedure for UP to come forward with such evidence and for the Board to hold a hearing.⁴⁶² UP cannot unilaterally decide for itself to ignore a federal statute so as to preference its own crews. The Board should implement this recommendation.

⁴⁵⁷ See *supra* Parts I.D.4 & II.E.

⁴⁵⁸ Additionally, UP’s references to crew management processes and incentives should be disregarded because both are demonstrably insufficient to redress delays that are of the focus of this recommendation. See *supra* Parts I.D.4 & II.C.2

⁴⁵⁹ UP Reply 131 (emphasis added).

⁴⁶⁰ See *supra* Part II.E; Op. Br. 46–50.

⁴⁶¹ UP Reply 131.

⁴⁶² 49 U.S.C. § 24308(c).

- (6) Except in the event of an emergency or when agreed to by Amtrak in advance, rail carriers should not route Amtrak trains on slower trackage or over slower routings when faster trackage or routings are or could be made available.**⁴⁶³

UP objects to this recommendation and in doing so, admits that its dispatchers are preferencing freight transportation over Amtrak by “rout[ing] the *Sunset Limited* over slower trackage to facilitate directional running between Houston and Beaumont.”⁴⁶⁴ UP claims that its directional running preference “minimizes delay from train meets and optimizes main line capacity.”⁴⁶⁵ But UP’s obligation is to prioritize the movement of Amtrak trains, not to optimize main line capacity for freight transportation. Where faster trackage or routings are or could be made available, it is UP’s obligation under federal law to provide them for Amtrak trains. Accordingly, the Board should issue this recommendation.

- (7) Except in the event of an emergency or when agreed to by Amtrak in advance, rail carriers should not reroute or delay an Amtrak train in order to adhere to the carrier’s directional operating preferences.**⁴⁶⁶

For the same reasons set forth in response to Amtrak’s sixth recommendation, this recommendation should be implemented. If—as UP claims—implementing this recommendation would “result in poorer service for freight traffic,”⁴⁶⁷ Congress established a specific process and procedure for raising such claims.⁴⁶⁸ Again, UP cannot unilaterally decide to ignore Congress’s instructions.

⁴⁶³ See *supra* Part II.C.2.

⁴⁶⁴ UP Reply 131.

⁴⁶⁵ *Id.*

⁴⁶⁶ See *supra* Part I.D.5.

⁴⁶⁷ UP Reply 131.

⁴⁶⁸ 49 U.S.C. § 24308(c).

- (8) Except in the event of an emergency or when agreed to by Amtrak in advance, rail carriers should ensure that rail lines are clear of maintenance crews or working trains in advance of the arrival of an Amtrak train.**⁴⁶⁹

While BNSF endorses this recommendation and states that it is already part of BNSF's operating practices and procedures,⁴⁷⁰ UP rejects it, insisting that UP has unfettered discretion under the parties' Operating Agreement to schedule track maintenance activities and only vaguely committing to "improv[e] its coordination efforts and minimize[e] such disruptions" from maintenance activities to Amtrak.⁴⁷¹ What Amtrak has set forth is a "sensible" recommendation that the Board should issue.⁴⁷² Amtrak understands that there may be rare occasions when a maintenance-of-way crew needs to overstay its window, for example to deal with unexpected track safety concerns. But as a standard practice, rail carriers should not be scheduling maintenance during times when carriers know or should know that Amtrak will or will soon be running. This is particularly easy to implement for each *Sunset Limited* Train, which runs just three times a week. Accordingly, the Board should issue this recommendation.

- (9) Except in the event of an emergency, rail carriers should not position freight trains in a manner that would block station platforms from being accessed by Amtrak trains.**⁴⁷³

UP claims that it "already has a policy that prohibits freight trains from occupying track at station platform locations when passenger trains are scheduled to arrive."⁴⁷⁴ If that is true, then it is hard to understand why UP objects to this recommendation. It is also hard to understand why

⁴⁶⁹ See *supra* Parts I.E.6, II, & II.B.

⁴⁷⁰ BNSF notes that this is a "sensible" recommendation that BNSF already follows. BNSF Reply 54. As BNSF explains, BNSF "meets with Amtrak quarterly to review maintenance activities on the network and potential impacts to passenger trains" and "works to minimize the disruption to Amtrak by scheduling routine windows outside of passenger schedules," including "program[ming] certain activities during the night to limit Amtrak delays." *Id.* at 55.

⁴⁷¹ UP Reply 132.

⁴⁷² BNSF Reply 54.

⁴⁷³ See *supra* Part I.D.6.

⁴⁷⁴ UP Reply 132–133.

the *Sunset Limited* repeatedly encountered excessive delays due to freight trains blocking station platforms during the Complaint Period. There is no reason to object to this recommendation, which merely restates what UP claims is already its policy.

(10) Rail carriers should require dispatchers to seek approval from supervisory personnel for any dispatching decision that is likely to delay an Amtrak train and should further require that such approval be provided only in the event of an emergency.⁴⁷⁵

UP objects to this recommendation, complaining that “[r]equiring dispatchers to obtain supervisory approval before implementing any decision likely to delay the *Sunset Limited* would hinder their ability to perform their jobs.”⁴⁷⁶ But UP previously informed the Board that whenever “a decision is made to delay an Amtrak train, dispatchers must inform their Corridor Manager, who in turn notifies Union Pacific’s Amtrak Corridor Desk.”⁴⁷⁷ Given that—according to UP—decisions to delay Amtrak already must be communicated from dispatchers to supervisors, it is hard to understand why UP objects to this recommendation to seek approval. UP’s objection underscores Amtrak’s earlier concern about UP’s failure to document communications about decisions to delay passenger trains, which may be calculated to avoid making a record about the basis for such decisions. In contrast to UP’s resistance to requiring dispatchers to seek approval to delay an Amtrak train, BNSF’s “dispatcher materials explicitly require that dispatchers ‘[d]o not delay passenger trains for freight trains or maintenance work *unless approved by the Chief Dispatcher.*’”⁴⁷⁸ The Board should issue this recommendation to impose some oversight and accountability over dispatching decisions that are made to delay Amtrak trains.

⁴⁷⁵ See *supra* Part II.E.

⁴⁷⁶ UP Reply 133.

⁴⁷⁷ UP Sept. 2023 Resp. 31–32.

⁴⁷⁸ BNSF Reply 34 (emphasis added).

- (11) Rail carriers should ensure that any computer-aided dispatching system for routes over which Amtrak operates is appropriately programmed to recognize and account for Amtrak’s statutory right to preference over freight transportation and that dispatchers are instructed to override the system when necessary to provide preference to Amtrak trains.**⁴⁷⁹

UP objects to this recommendation, claiming it would preclude UP from using its current computer-aided dispatching system, which UP admits does not account for Amtrak’s statutory right to preference over freight transportation.⁴⁸⁰ UP’s objection is exactly Amtrak’s point. UP should not be using a computer-aided dispatching system that—by definition and by default—does not give Amtrak preference over freight transportation in violation of a federal statute. The Board should issue this recommendation.

- (12) Rail carriers should ensure that computer-aided train-schedule-building systems for routes over which Amtrak operates are appropriately programmed to recognize and account for Amtrak’s statutory right to preference over freight transportation and that personnel are instructed to override the system when necessary to provide preference to Amtrak trains.**⁴⁸¹

UP complains that this recommendation “makes no sense” because “Amtrak’s preference involves the resolution of individual dispatching conflicts, not the process of scheduling trains.”⁴⁸² That statement illustrates UP’s profound misunderstanding of Amtrak’s preference rights. Contrasting UP’s conception of those preference rights with BNSF’s illustrates the depth of the problem. As BNSF explains, the “core tenet serving as the foundation” for BNSF’s schedule-building system “is Amtrak’s right to preference across BNSF’s trackage.”⁴⁸³ Thus, BNSF’s “schedule-building practices prioritize Amtrak trains with the highest ranking amongst all trains”

⁴⁷⁹ See *supra* Part II.E.

⁴⁸⁰ UP Reply 134.

⁴⁸¹ See *supra* Parts I.E & II.E.

⁴⁸² UP Reply 134.

⁴⁸³ BNSF Reply 33. As discussed above, Amtrak does not concede that BNSF’s approach is in practice sufficient to implement Amtrak’s preference rights. See *supra* note 344.

and “Amtrak’s priority status serves as the baseline for BNSF’s schedule-building process.”⁴⁸⁴ Accordingly, the very first “building blocks for BNSF’s train schedules are Amtrak’s arrival and departure times.”⁴⁸⁵ “[E]ach Base Train Schedule is uniquely built to preserve Amtrak’s requested arrival and departure times” and “Base Train Schedules for all non-passenger trains, therefore, are constructed to facilitate and ensure those arrival and departure times.”⁴⁸⁶ In short, “BNSF builds schedules that prioritize Amtrak.”⁴⁸⁷ In contrast, as is evident in its objection to this recommendation, UP believes that Amtrak’s priority rights are totally irrelevant to UP’s process of scheduling trains. That view, and the evident impact of UP’s failure to consider preference rights in its scheduling process, is precisely why it is so important for the Board to issue this recommendation.

(13) Rail carriers should minimize slow orders that impact Amtrak trains.⁴⁸⁸

UP (and others) generally agree with this recommendation and state that it reflects existing practices. Given that there do not appear to be any specific objections to this recommendation, the Board should issue it.

(14) Rail carriers should adequately maintain freight trains to avoid breakdowns that impact Amtrak trains.⁴⁸⁹

UP (and others) generally agree with this recommendation and state that it reflects existing practices. The Board may wish to probe precisely what UP does to ensure freight trains are adequately maintained and what it is currently doing to mitigate the significant number of lengthy mechanical delays that *Sunset Limited* Trains encountered during the Complaint Period. In any

⁴⁸⁴ BNSF Reply 2, 33.

⁴⁸⁵ *Id.* at 35.

⁴⁸⁶ *Id.* at 36.

⁴⁸⁷ *Id.* at 35.

⁴⁸⁸ *See* Op. Br. 58.

⁴⁸⁹ *See supra* Part I.D.2.

event, given that there do not appear to be any specific objections to this recommendation, the Board should issue it.

(15) Rail carriers should provide continuous training for all personnel with any responsibility for or over dispatching on the importance of Amtrak's right to preference over freight transportation in accordance with how that right is explained in Part V of Amtrak's Opening Statement.

UP objects to this recommendation on the grounds that UP's dispatchers purportedly already receive "appropriate, continuous training regarding Amtrak's right to preference."⁴⁹⁰ However, as explained in Amtrak's Opening Statement and above, UP is training its dispatchers to implement an incorrect view of preference that does not appropriately prioritize Amtrak in accordance with Congress's mandate.⁴⁹¹ Again, UP and the Board can look to BNSF for guidance on this point. As BNSF explains, the "core tenet serving as the foundation" for BNSF's dispatcher training and protocols "is Amtrak's right to preference across BNSF's trackage."⁴⁹² BNSF's dispatcher training materials "specifically instruct that passenger trains are to receive the highest priority in BNSF's priority grouping systems" and therefore "BNSF dispatchers must prioritize the movements of passenger trains above all other train types."⁴⁹³ BNSF's "dispatcher materials explicitly require that dispatchers '[d]o not delay passenger trains for freight trains or maintenance work unless approved by the Chief Dispatcher.'"⁴⁹⁴ The Board should issue this recommendation and provide oversight to ensure that dispatcher training reflects the correct interpretation of Amtrak's preference rights.

⁴⁹⁰ UP Reply 135.

⁴⁹¹ Op. Br. 53–55; *see supra* Part II.E.

⁴⁹² BNSF Reply 33.

⁴⁹³ *Id.*

⁴⁹⁴ *Id.* at 34.

(16) Rail carriers should establish systems to regularly evaluate all personnel with any responsibility for or over dispatching to monitor and measure their compliance with their federal statutory and regulatory obligations to Amtrak.⁴⁹⁵

UP objects to this recommendation on the basis that it purportedly is not “appropriate to establish specific systems to evaluate dispatchers whose territories include Amtrak operations” as opposed to dispatchers whose territories do not include Amtrak operations.⁴⁹⁶ However, as discussed above, UP presumably has an interest in ensuring that all of its dispatchers comply with all of the federal statutory and regulatory obligations that are applicable when doing their jobs, regardless of their territory. For example, some dispatchers might work in territory with trains that regularly transport hazardous materials, to which different federal statutory and regulatory obligations apply. That the applicable law may be different should not affect UP’s interest in keeping its dispatchers compliant with it. Yet it does not appear that UP has any formal system for evaluating dispatchers or holding them accountable with respect to Amtrak’s statutory right to preference. The Board should issue this recommendation to impose such accountability.

(17) Rail carriers should establish internal compliance programs with reporting up to a senior compliance officer to ensure compliance with their federal statutory and regulatory obligations to Amtrak.⁴⁹⁷

UP argues that “[t]he record in this proceeding does not support a recommendation to develop additional compliance programs because Amtrak has not identified any preference violations.”⁴⁹⁸ Plainly, as established in Amtrak’s Opening Statement and in this Rebuttal, that is not true.⁴⁹⁹ Amtrak has identified numerous preference violations both in UP’s individual dispatching decisions and in its policies, practices, and procedures.⁵⁰⁰ Just as UP has compliance

⁴⁹⁵ See *supra* Part II.E.

⁴⁹⁶ UP Reply 136.

⁴⁹⁷ See *supra* Part I.B

⁴⁹⁸ UP Reply 136.

⁴⁹⁹ See *supra* Part II.D.

⁵⁰⁰ See *supra* Parts II.D & II.E.

programs for its other federal statutory and regulatory obligations—such as for its environmental, workplace safety, and anti-corruption obligations—so too should UP have a company-wide compliance program for its federal statutory and regulatory obligations to Amtrak. The Board should issue this recommendation.

(18) Rail carriers should preserve dispatching playbacks for a minimum of two years.⁵⁰¹

UP claims that this recommendation is “not needed” and that its implementation would be “costly.”⁵⁰² Ironically, UP also argues in this proceeding that it is Amtrak’s burden to prove a violation of its preference rights by going back in time and attempting to reconstruct whether an alternative choice was available to a dispatcher that would have equally maintained network fluidity in the event of a conflict between Amtrak and a freight train.⁵⁰³ That is not Amtrak’s burden, but if it were, UP’s destruction of dispatching playbacks in this proceeding makes that burden extremely and prohibitively time-consuming and expensive to meet for Amtrak.⁵⁰⁴ The Board should issue the recommendation. And it would be essential to do so if the Board were inclined (and it should not be) to accept UP’s erroneous burden-shifting framework.

(19) Rail carriers should document any decisions that result in delay to an Amtrak train, in a fashion that facilitates Board oversight, and preserve documentation for a minimum of two years.⁵⁰⁵

UP objects to this recommendation on the grounds that it “would require Union Pacific to expend substantial resources to document delays.”⁵⁰⁶ But as noted above, UP previously told the Board that whenever “a decision is made to delay an Amtrak train, dispatchers must inform their

⁵⁰¹ See *supra* note 213.

⁵⁰² UP Reply 137.

⁵⁰³ See *e.g., id.* at 77.

⁵⁰⁴ See *generally* Amtrak Mot. to Compel Prod. of Docs. from Union Pac. R.R. Co., (Dec. 20, 2023); *accord* Peabody Reply V.S. at 6–7.

⁵⁰⁵ See *supra* Part IV.A.

⁵⁰⁶ UP Reply 137.

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Corridor Manager, who in turn notifies Union Pacific’s Amtrak Corridor Desk.”⁵⁰⁷ Requiring that those communications be documented and preserved would allow the Board to continue its oversight and ensure that UP does not continue to systematically violate Amtrak’s preference rights.

* * *

Overall, Amtrak’s initial recommendations⁵⁰⁸ address the causes of delay to Amtrak’s *Sunset Limited* Trains and are designed to “identify reasonable measures” that will “improve the service, quality, and on-time performance” of the *Sunset Limited*.⁵⁰⁹ Amtrak looks forward to providing the Board with further information at Stage Two of this proceeding on how to assess an award of damages against UP, including an order prescribing such other relief to Amtrak as the Board determines to be reasonable and appropriate to address violations of Amtrak’s right to preference over freight transportation.

CONCLUSION

Amtrak respectfully requests that the Board enter its determination that *Sunset Limited* delays or failures to achieve minimum standards during the Complaint Period were due to causes that could reasonably be addressed by UP and adopt the recommendations set forth above to improve the service, quality, and on-time performance of the *Sunset Limited*. Moreover, Amtrak respectfully requests that the Board enter its determination that *Sunset Limited* delays or failures to achieve minimum standards were attributable to UP’s failure to provide preference to Amtrak

⁵⁰⁷ UP Sept. 2023 Resp. 32.

⁵⁰⁸ Several parties argue that any recommendations from the Board should be directed only at the party that the Board finds is responsible for the *Sunset Limited*’s substandard performance (*i.e.*, that any recommendations should be directed only at UP). Amtrak agrees that UP is the responsible party here, but also believes that the Board can and should issue recommendations that apply broadly to all parties in this proceeding, each of whom can help to “improve the service, quality, and performance” of the *Sunset Limited*. 49 U.S.C. § 24308(f)(1).

⁵⁰⁹ 49 U.S.C. § 24308(f)(1).

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over freight transportation as required under 49 U.S.C. § 24308(c). Accordingly, Amtrak further respectfully requests that the Board move expeditiously to Stage Two to determine damages and other appropriate relief, including measures to deter UP from taking future actions which may reasonably be expected to result in delays to Amtrak on the *Sunset Limited* route.

Dated: February 21, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

February 24, 2025

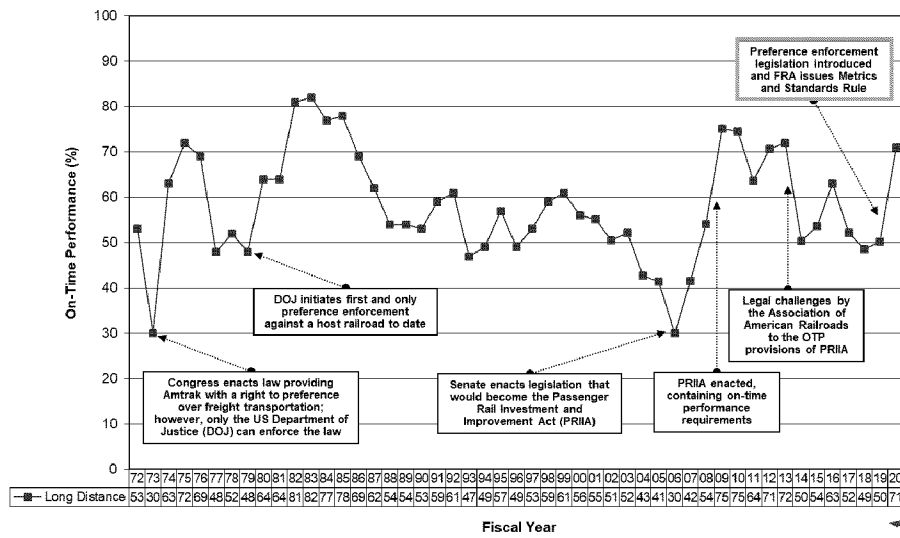
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Jessica Ring Amunson

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EXHIBIT A

Threat of Preference Enforcement Drives On-Time Performance

Amtrak Long Distance Service On-Time Performance since 1972



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BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42175

COMPLAINT AND PETITION OF THE NATIONAL RAILROAD PASSENGER CORP.
UNDER 49 U.S.C. § 24308(f)–FOR SUBSTANDARD PERFORMANCE OF
AMTRAK’S SUNSET LIMITED TRAINS 1 AND 2

**REPLY VERIFIED STATEMENT OF
AMTRAK DIRECTOR OF HOST RAILROADS
YOEL WEISS**

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1. My name is Yoel Weiss. I am the Director of Host Railroads at the National Railroad Passenger Corporation (“Amtrak”). In this role, I help oversee Amtrak’s relationship with host railroads across the lines on which Amtrak runs, nationwide. I joined Amtrak in 2018 as Lead Host Railroad Specialist. The responsibilities of my position include monitoring, reviewing, and analyzing customer on-time performance, delay data, and other data for several of Amtrak’s long-distance services, including the *Sunset Limited* service. In my role as Director of Host Railroads, I also collaborate with UP on efforts to improve the on-time performance of *Sunset Limited* Trains and have developed familiarity with the *Sunset Limited* schedules and operations.

Historic and More Recent Customer On-Time Performance for the Sunset Limited

2. Although the Federal Railroad Administration’s (“FRA”) Customer On-Time Performance (“COTP”) Metric did not take effect for the *Sunset Limited* until October 1, 2021, Amtrak had been measuring on-time performance using the same methodology for several prior years and can therefore provide some information concerning the historical performance of the *Sunset Limited* under the FRA’s COTP metric. That information is reported in Table 1 below.¹

Table 1: Historic Sunset Limited COTP

Year	Date	COTP
FY 2022	Oct. 1, 2021-Sept. 30 2022	21.1%
FY 2021	Oct. 1, 2020-Sept. 30 2021	27.1%
FY 2020	Oct. 1, 2019-Sept. 30 2020	29.5%
FY 2019	Oct. 1, 2018-Sept. 30 2019	19.8%
FY 2018	Oct. 1, 2017-Sept. 30 2018	45.1%
FY 2017	Oct. 1, 2016-Sept. 30 2017	55.1%

¹ Data supporting these calculations is reported in Amtrak’s Rebuttal Workpapers (“Amtrak Rebuttal Workpaper”) at Tabs “FY17 COTP,” “FY18 COTP,” “FY19 COTP,” “FY20 COTP,” “FY21 COTP,” & “FY22 COTP.”

3. During fiscal years preceding the COVID-19 pandemic, the *Sunset Limited* did not come close to achieving on-time performance commensurate with the FRA’s COTP Minimum Standard.

4. In the Reply Brief that UP filed in this proceeding, they report on performance for the period October 1, 2023 to September 30, 2024 (“Post-Complaint Period”). During that Post-Complaint Period, the *Sunset Limited* exceeded 60% COTP in seven months. Over the same period, 38.8% of all *Sunset Limited* runs satisfied the COTP Minimum Standard, and aggregate COTP was 60.1%.²

5. During the current fiscal year, customer on-time performance for the *Sunset Limited* has improved. Through the first four months of the fiscal year, customer on-time performance for the *Sunset Limited* is approximately 71%.³ The monthly COTP and number of runs that have achieved the COTP Minimum Standard are reported in Tables 2 and 3 below.

Table 2: Train 1 COTP for Fiscal Year 2025 To Date

Month	COTP	Runs Achieving 80%+ COTP
October	76.9%	8 (of 13)
November	72.9%	7 (of 13)
December	74.9%	9 (of 13)
January	78.1%	5 (of 11)

² Data supporting these calculations is reported in Amtrak’s Rebuttal Workpapers (“Amtrak Rebuttal Workpaper”) at Tab “FY24 COTP by Train.”

³ Data supporting these calculations is reported in Amtrak’s Rebuttal Workpapers (“Amtrak Rebuttal Workpaper”) at Tab “FY25 COTP by Train.”

Table 3: Train 1 COTP for Fiscal Year 2025 To Date

Month	COTP	Runs Achieving 80%+ COTP
October	57.4%	3 (of 13)
November	53.4%	4 (of 13)
December	80.0%	8 (of 13)
January	73.0%	7 (of 12)

Ridership on the Sunset Limited During the Complaint Period

6. The current schedule for the *Sunset Limited* is a 45-hour 40-minute eastbound and 46-hour 35-minute westbound schedule operated three times a week between New Orleans and Los Angeles, with 20 intermediate stops between those locations. The current schedules for Trains 1 and 2 contain more than six and five hours of recovery time, respectively. That represents approximately 15% and 14% (respectively) of all time in each Base Schedule, which exceeds the recovery time on almost every other long-distance route.⁴

7. For Train 1, during the Complaint Period, the three passenger stations with the highest ridership were Los Angeles, Houston, and Tucson, in descending order.⁵ In the current fiscal year through January 31, the three passenger stations with the highest ridership are again Los Angeles, Houston, and Tucson, in descending order.⁶

8. For Train 2, during the Complaint Period, the three passenger stations with the highest ridership on UP-hosted segments of the *Sunset Limited* route were San Antonio, Tucson,

⁴ This figure is calculated by comparing total recovery and miscellaneous time to the Base Schedule. The base schedule includes pure run time and all dwell time. Because *Sunset Limited* schedules contain excess dwell time intended to help host railroads recover *Sunset Limited* Trains to schedule, the reported figure understates the percentage of true recovery time in the *Sunset Limited* schedules.

⁵ Amtrak Rebuttal Workpaper at Tab “1-Complaint Pd - Riders by Stat.”

⁶ Amtrak Rebuttal Workpaper at Tab “1-FY25 YTD - Riders by Stat.”

and Houston, in descending order.⁷ In the current fiscal year through January 31, the three passenger stations with the highest ridership on UP-hosted segments of the *Sunset Limited* route have been Tucson, San Antonio, and Houston, also in descending order.⁸

9. I have reviewed analysis showing that, during the Complaint Period, fewer than 8% of *Sunset Limited* passengers rode from end-to-end.

All Stations On-Time Performance Following 2005 Modification of Schedule

10. In March 2005, Amtrak and UP agreed to add more than 200 minutes to each *Sunset Limited* schedule. During the two years predating that change, all stations on-time performance for the *Sunset Limited* was approximately 13%. During the two years following modification of the schedule, and even after adding well more than three additional hours to each schedule, all stations on-time performance for the *Sunset Limited* only increased to approximately 16%.⁹

⁷ Amtrak Rebuttal Workpaper at Tab “2-Complaint Pd - Riders by Stat.”

⁸ Amtrak Rebuttal Workpaper at Tab “2-FY25 YTD - Riders by Stat.”

⁹ An all-stations OTP metric measures train performance at all stations on a route, without weighing based on the number of passengers who disembark at each station.

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VERIFICATION

I, Yoel Weiss, declare under penalty of perjury that the foregoing information is true and correct to the best of my knowledge and belief. Further, I certify that I am qualified and authorized to file this statement on behalf of Amtrak.

Executed on February 21, 2025

Yoel Weiss

Yoel Weiss

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BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. NOR 42175
COMPLAINT AND PETITION OF THE NATIONAL RAILROAD PASSENGER CORP.
UNDER 49 U.S.C. § 24308(f)—FOR SUBSTANDARD PERFORMANCE OF AMTRAK’S
SUNSET LIMITED TRAINS 1 AND 2

REBUTTAL VERIFIED STATEMENT

of

Robert D. Mulholland
Executive Vice President

and

Timothy D. Crowley
President

L. E. PEABODY & ASSOCIATES, INC.
ECONOMIC CONSULTANTS

On Behalf of

THE NATIONAL RAILROAD PASSENGER CORPORATION (“AMTRAK”)

Dated: February 21, 2025

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LIST OF EXHIBITS

Exhibit No.	Exhibit Description
(1)	(2)
11	UP Dispatchers Frequently Failed to Identify or Ignored Alternative Dispatching Moves in Historical Operating Scenarios

I. INTRODUCTION

We are Robert D. Mulholland and Timothy D. Crowley, Executive Vice President and President, respectively, of L. E. Peabody & Associates, Inc. We submitted a Verified Statement in support of The National Railroad Passenger Corporation’s (“Amtrak”) October 7, 2024 filing in this proceeding, in which we evaluated the extent to which host railroad operating and dispatching practices contributed to Amtrak delays for UP-hosted portions¹ of the *Sunset Limited* service between October 1, 2021 and September 30, 2022 (“Study Period”). Our credentials were included as Exhibit Nos. 1 and 2 to our October 7, 2024 Opening Verified Statement (“OVS”).

Counsel for Amtrak asked us to evaluate and address the Union Pacific Railroad Company (“UP”) Reply statement and supporting evidence filed on December 23, 2024.² Specifically, we were asked to: 1) review and address UP’s assertions regarding specific delays; and 2) review and address UP’s assertions regarding various service issues observed during the Study Period, as well their causes and impact on *Sunset Limited* operations.

The results of our analysis are included in this Rebuttal Verified Statement (“RVS”) under the following topical headings:

- II. Summary of Findings
- III. Arguments Presented in the UP Reply Brief do not Alter or Affect our Conclusion that the Operating Environment UP Created During the Study Period Ensured *Sunset Limited* Trains Would Encounter FTI
- IV. UP’s Reply Relies on Contradictory Statements and Evidence, along with Misplaced Analogies
- V. UP’s Quantitative Analyses are Flawed, Incomplete and Unsupported
- VI. UP Dispatchers Frequently Failed to Identify or Ignored Alternative Dispatching Moves in Historical Operating Scenarios

¹ In this Rebuttal Verified Statement, as in our OVS, “UP-Hosted Segments” refers to the route between Iowa Jct., LA and Yuma Jct., CA.

² Supporting evidence included portions of the Verified Statements of Grant A. Janke (“Janke VS”), Erin Batt (“Batt VS”), and Katherine N. Novak (“Novak VS”).

II. SUMMARY OF FINDINGS

With respect to the Study Period, UP acknowledges that it provided poor service to Amtrak and that on-time performance (“OTP”) for the *Sunset Limited* suffered.³ UP blames its poor service on network-wide performance issues. However, UP claims that it has resolved all of the issues that affected its poor operational performance during the Study Period,⁴ and should therefore be absolved for its past failures.⁵ Turning to an illustrative set of Freight Train Interference (“FTI”) delays that occurred during the Study Period, UP attempts to justify its dispatchers’ decisions largely by citing operating conditions that UP created – such as conditions caused by the operation of trains that were too long to fit in available sidings, and the prevalence of trains under the operation of crews that were nearing hours of service (“HOS”) expiration. UP claims that Amtrak failed to present evidence of alternatives that could be implemented with compromising overall network fluidity. Rather than address whether UP gave Amtrak *Sunset Limited* trains “preference” as required by federal statute, UP reframes the issue to examine whether its dispatchers “advantaged” freight trains (plural) at the expense of the *Sunset Limited*.⁶

We conclude that the limited information UP provided does not support its claim that its past service issues on the *Sunset Limited* Route have been fully resolved. Furthermore, we find UP’s explanations for its dispatchers’ inability to have taken other actions concerning individual dispatching decisions unconvincing. Nothing in the UP Reply alters our initial conclusion about causes of delay during the Study Period.

³ See: December 23, 2024 Union Pacific Railroad Company’s Reply Statement and Evidence (“UP Reply”) at p. 20 (“Union Pacific does not dispute that the *Sunset Limited*’s on-time performance suffered during the Complaint Period”).

⁴ Ibid.

⁵ See: UP Reply at p. 26.

⁶ For example, UP suggests that if a { [REDACTED] } (See: e.g., UP Reply at p. 86). Following this logic, a freight train is only advantaged over the *Sunset Limited* if the freight train is never sided or otherwise overtaken.

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As an initial matter, we understand that this proceeding is meant to focus on the causes of delay to *Sunset Limited* trains during the Study Period, and whether those causes of delay can reasonably be addressed by UP. We are not surprised to see UP acknowledge that its own poor service caused deficient OTP for *Sunset Limited* trains during the Study Period. That acknowledgement is consistent with the analysis in our OVS, which confirmed that UP's dispatching practices are driven by factors that are in UP's control—namely, that {{[REDACTED]}}

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]}

Notwithstanding the admission that its own unacceptable service levels caused deficient OTP for the *Sunset Limited* during the Study Period, UP attacks the veracity of our analysis concerning operations during that period. Those attacks are misguided. For example, UP complains that we relied on two outdated train symbol decoders included in materials it provided to the Surface Transportation Board (“STB” or “Board”) and to Amtrak through discovery, implying that doing so renders our analysis unreliable. However—even setting aside that the alleged “error” was caused by inaccurate materials that UP provided—this issue and others raised by UP have no impact whatsoever on our analysis. The issue also has no impact on our overall conclusion that the operating environment created by UP for the *Sunset Limited* Route ensures that *Sunset Limited* trains will encounter FTI as a result of: {{[REDACTED]}}

[REDACTED]

[REDACTED]

[REDACTED]}}

Next, we reviewed the explanations and evidence that UP offered to support its claims that service issues have been fully resolved, and that improved Amtrak service means that no UP operational adjustments are needed. We find UP's explanations and evidence are based on contradictions and unsupported assertions regarding UP operations and dispatching. For example, with respect to UP's discussion of passing sidings: On the one hand, UP claims that the length of passing sidings on double-tracked segments is irrelevant, implying that the second mainline can be used for train meets and overtakes. On the other hand, UP insists that second-main track is principally used for directional running, not for passing and overtakes. These statements cannot be reconciled,⁷ and suggest that UP may be focused on preserving its ability to operate long trains without addressing the consequences for *Sunset Limited* trains, which are still not achieving the minimum standard for OTP.⁸

UP's treatment of crew management issues also illustrates the contradictory nature of its explanations and evidence, and demonstrates that service issues have not been fully resolved. For example, UP claims that its train schedules are designed so that freight crews reach crew change points "comfortably before they reach their hours-of-service limits."⁹ However, UP's recrew rate and delay data demonstrate that the opposite is true. During the Study Period, and continuing even more recently, UP's crew staffing and crew management practices resulted in a substantial number of crew expirations on the *Sunset Limited* Route. UP's own summary of its more recent operating

⁷ These are not the only contradictory statements that UP made on train and siding length. As another example, UP makes statements that attempt to downplay the importance of siding length. (See: UP Reply at pp. 31-32). Those statements are inconsistent with UP's efforts to focus on investments it made to extend or add new long sidings (See: UP Reply at pp. 12-15). The latter efforts are proof that UP knows its insistence on running trains that do not fit in available sidings has an adverse impact on operating conditions and dispatch flexibility.

⁸ (See: UP Reply at p. 3); *See also* (Final Rule, 85 Fed. Reg. at 72975 (FRA expected at least some intercity passenger rail services to "reliably achieve a higher standard of performance.")); and at 72977 ("FRA expects many services to operate more reliably" than the Minimum Customer OTP Standard requires).

⁹ See: Batt VS at p. 21.

data (which it did not provide to Amtrak or the Board for review and verification) shows that recrew rates have {{ [REDACTED] }} in UP's twelve-month "Comparison Period" from October 1, 2023 through September 30, 2024.¹⁰ Similarly, daily miles per car {{ [REDACTED] }} during UP's Comparison Period.¹¹ Therefore, UP's claim that it has resolved *all* operating problems that caused Amtrak *Sunset Limited* trains' OTP during the Study Period is contradicted by its own operating data.

Finally, we reviewed UP's defense of several individual historical operating scenarios, in which *Sunset Limited* trains incurred delay due to conflicts with freight trains. In each instance, UP appears to conclude that its dispatchers followed standard operating procedures. Additionally, in most instances, UP appears to conclude or imply that its dispatchers could not have done anything differently to reduce the delay incurred by the subject *Sunset Limited* trains. As discussed in Exhibit No. 11 to this RVS,¹² many of UP's assertions regarding its historical operations are demonstrably inaccurate and contradicted by UP's provided data.

¹⁰ See: Janke VS at p. 14.

¹¹ Ibid.

¹² Exhibit Nos. 1 through 10 were included in our OVS filed in this proceeding on October 7, 2024.

III. ARGUMENTS PRESENTED IN THE UP REPLY BRIEF DO NOT ALTER OR AFFECT OUR CONCLUSION THAT THE OPERATING ENVIRONMENT UP CREATED DURING THE STUDY PERIOD ENSURED *SUNSET LIMITED* TRAINS WOULD ENCOUNTER FTI

In our OVS, we presented analysis indicating that the operating environment created by UP on the *Sunset Limited* Route ensures that *Sunset Limited* trains will encounter FTI as a result of three (3) factors: {{[REDACTED]}}

In its Reply, UP did not meaningfully dispute the analysis underlying our conclusions. Instead, UP attempted to dismiss the analysis as “a series of meaningless, flawed statistics.”¹³ The statistics we developed are neither meaningless nor flawed. We address UP’s misleading and inaccurate claims below.

A. THE OPERATING STATISTICS WE DEVELOPED FROM UP TRAFFIC AND INFRASTRUCTURE DATA PROVIDE IMPORTANT CONTEXT FOR THE BOARD’S INVESTIGATION

UP dismisses our summary of operating statistics developed from UP's own data on the grounds that we "recite raw numbers and percentages" rather than "provide analysis."¹⁴ *First*, UP's statement is not an accurate description of the work we performed. The output tables referenced by UP include no raw numbers. Rather, we compiled the CADX, Train Sheets, Train Delay and related UP data tables into a relational database, analyzed the scheduled and actual event data for each individual train that operated over the *Sunset Limited* Route during the Study Period, and then (i) compared the reported train length to the length of available sidings at every station along the

¹³ See: UP Reply at pp. 30-31.

¹⁴ See: UP Reply at p. 32.

route, (ii) identified individual freight trains that were involved in train conflicts that caused Amtrak delays attributed to FTI, and (iii) aggregated and summarized FTI delay by specific subdivision and station along the entire *Sunset Limited* Route.

As documented in Exhibit No. 4 to our OVS, we filed workpapers containing over 60 gigabytes of data in support of our OVS, including over 10,000 lines of code that we developed to process, link, and analyze the disparate data sets UP provided to Amtrak (and in some cases to the Board) in response to discovery requests in this proceeding. Our workpapers allow both the Board and the involved parties to validate the numbers we developed and presented, and to evaluate our work in full. In contrast, UP's workpapers are incomplete and preclude both Amtrak and the Board from validating UP's claims.

Second, the operating statistics we developed analyze key issues in this investigation. As the Board has repeatedly emphasized, the purpose of its investigation is “to determine whether and to what extent delays or failures to achieve minimum standards are due to causes that could reasonably be addressed by the passenger rail operator or the host railroad.”¹⁵ The operating statistics that we prepared enable the Board to make that determination.¹⁶ Specifically, we demonstrated that: {{ [REDACTED]

[REDACTED]

[REDACTED]

¹⁵ See: July 9, 2023 Decision (served July 11, 2023) at p. 1; *accord* See: February 13, 2024 Decision at pp. 1-2.

¹⁶ UP's attempt to disregard portions of our analysis as drawn exclusively from “raw numbers and percentages” is also disingenuous. Throughout its reply, UP relies on an analogous analysis, for example to argue that its service has improved, UP Reply at p. 25, or that its infrastructure has been enhanced, Janke VS at p. 8. The primary issue with the analysis UP presents (assuming it is accurate, which we often cannot test because UP failed to provide underlying data) is that it does not provide the Board with information about what caused delay during the Study Period. The operating statistics that we developed do exactly that, for reasons discussed in our OVS and this RVS.

¹⁷ See: OVS Exhibit Nos. 5 and 7, and Table Nos. 9, 11, 14, and 15.

[REDACTED]

[REDACTED] } }.¹⁹ In short, UP created an operating environment that made significant FTI inevitable for the *Sunset Limited*. And UP may have compounded those operating challenges by { [REDACTED]

[REDACTED]

[REDACTED] } }.²⁰

B. ALLEGED FLAWS ARE ATTRIBUTABLE TO ERRONEOUS OR CONFLICTING MATERIALS PROVIDED BY UP, AND HAVE NO IMPACT ON OUR CONCLUSIONS

UP identified two alleged flaws in our OVS in an apparent attempt to discredit the entirety of our work. Neither alleged flaw has any substantive impact on our analysis or conclusions and both alleged flaws can be traced directly to the erroneous and/or contradictory materials provided by UP in this proceeding.

First, UP complained that we classified trains that operate under a train symbol beginning with “Q” as ‘Priority Manifest’ trains, but that we should have classified them as “non-Union Pacific trains—primarily BNSF trains.”²¹ However, as UP acknowledges, “At one time, Union Pacific operated priority manifest trains and designed those trains with symbols beginning with ‘Q’.”²² In fact, we relied on two separate documents provided by UP that identify Q trains as priority manifest trains. Both were dated in 2022. The first document is titled “Thru Freight

¹⁸ See: OVS Exhibit No. 6 and Table Nos. 12, 13, and 19.

¹⁹ See: OVS Exhibit Nos. 8, 9, and 10, Table Nos. 2 and 18, and Figure No. 4.

²⁰ See: OVS Table No. 17.

²¹ See: UP Reply at p. 31, footnote 100.

²² Ibid.

Naming Scheme,” which includes a note that reads, “Revised 3/4/2022.” This document defines Train Category Q as follows: “Q-PRIORITY: MANIFEST.”²³ The second document is titled {{[REDACTED]}} which also defines Q trains as priority manifest trains. This document includes the timestamp {{[REDACTED]}}²⁴ Both documents indicate that UP categorized priority manifest trains under the letter “Q” well into 2022.

Regardless, this change in train category name has no impact on our analysis or conclusions. Nor does it have any bearing on the actions of UP dispatchers during the Study Period. Making the change UP states is required would change only the label we applied to the “Q” train category, which would not impact the results of our analysis, or any conclusions drawn from it. In short, regardless of the “Q” label, the fact remains that trains so labeled {{[REDACTED]}}
[REDACTED]
[REDACTED]}}.

Second, UP stated that, “Amtrak’s consultants also mistakenly identify Acolita as a siding on a single-main segment.”²⁵ Acolita is located on UP’s Yuma Subdivision, which runs from Riverside, CA to Yuma, AZ, just east of the California-Arizona border. UP’s timetables identify an {{[REDACTED]}}
[REDACTED]}.²⁶ In other words, we identified Acolita as an {{[REDACTED]}}
[REDACTED]}, whereas it is actually an {{[REDACTED]}}
[REDACTED]}. This technical distinction, at a single

²³ See: UP-SL-0003416_P at UP-SL-0003418_P and UP-SL-0003420_P.

²⁴ See: UP-SL-0012409_HC.

²⁵ See: UP Reply at p. 32, footnote 106.

²⁶ See: UP-SL-0008694_C.

station and across the 1,900-mile *Sunset Limited* Route,²⁷ does not affect our conclusions. Whether this precise location is treated as double-track or a single-track with passing sidings, the fact remains that {{ [REDACTED]

[REDACTED] }}²⁸

In short, both of UP's criticisms boil down to semantics, and neither has any material impact on the results of our analyses, nor do they change our conclusions.

²⁷ One of 286 stations, see: OVS Exhibit No. 6.

²⁸ See: Exhibit No. 6, Lines 21-49, Column (13).

**IV. UP'S REPLY RELIES ON CONTRADICTORY STATEMENTS
AND EVIDENCE, ALONG WITH MISPLACED ANALOGIES**

UP's Reply does not cast doubt on the conclusions we drew in our OVS about the impact of UP's operating practices in causing delays to the *Sunset Limited*. Below we address UP's misleading and contradictory responses to our analyses.

A. TRAIN AND SIDING LENGTH

In our OVS, we included the results of several analyses in which we compared the length of UP freight trains operating over the Sunset Limited Route to the sidings along the route. Exhibit No. 6 to our OVS contains a summary of train operations for all 286 operating stations along the *Sunset Limited* Route.²⁹ Among other statistics, it includes:

- Number of mainline tracks (Column (5)),
- Number of sidings (Column (6)),
- Siding length (Column (7)),
- Average freight trains per day (Column (8)),
- Average freight train length (Columns (11)-(12)),
- Percent of trains that exceed siding length (Column (13)),
- Amtrak Reported FTI Delays (Column (19)), and,
- Amtrak Reported FTI Delay Minutes (Column (20))

{{ [REDACTED] }}

[REDACTED] }}. As shown in Exhibit No. 6, {{ [REDACTED] [REDACTED] [REDACTED] }}

[REDACTED] }} Exhibit No. 6 is also color coded to highlight the stations where

Sunset Limited trains incur the most FTI. As shown, {{ [REDACTED] }}

[REDACTED] }} For example:

- {{ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] }}.³¹

²⁹ See: Exhibit No. 6, Columns (1) through (4).

³⁰ Excluding Acolita.

³¹ See: Exhibit No. 6, Line 7.

- {{{[REDACTED]}}}³²

In response to this analysis, UP offered a series of statements intended to minimize the importance of siding length along the *Sunset Limited* Route. However, UP contradicts many of those statements in its own Reply, and its statements are generally misguided, as discussed below. Our analysis of siding length and FTI continues to provide the Board with important information about the causes of delay to *Sunset Limited* trains.

First, UP attempts to dismiss the relevance of siding length on double-track segments, implying that second-main track is available to accommodate train meets and overtakes in double-track territory.³³ However, UP later asserts that Amtrak is wrong to assume double-track should be used for overtakes. To support its position that double-track is not for overtakes, UP offers a misplaced analogy. Specifically,

An overtake on a double-main segment is somewhat like one vehicle passing another on a two-way road. One vehicle can cross the dashed center line to overtake a slower vehicle if there is no traffic moving in the opposite direction and if there is sufficient space to make the pass safely.³⁴

The obvious difference between railroad and highway operations is that drivers on one side of a highway have no control over the flow of traffic in the opposite lane, whereas in railroading, traffic flow in both directions is actively managed by dispatchers. For example, as UP later acknowledges:

³² See Exhibit No. 6, Lines 84 and 85.

³³ See: UP Reply at pp. 31-32 (“Amtrak treats double-main segments with no sidings like single-main segments with no sidings”). As noted in the opening paragraph of this section, we explicitly documented the presence of double-main track in our statistics regarding train length and sidings. Only {{{[REDACTED]}}} of 140 passing sidings on the *Sunset Limited* Route are in double-track territory.

³⁴ See: Batt VS at p. 23, footnote omitted.

In the railroad world, because the dispatcher directs the movements of all trains in a territory, the dispatcher can also arrange for an overtake by instructing the slower train to pull onto the other track while the faster train remains on the same track.³⁵

But UP stretches its misplaced argument even further:

Imagine a busy two-lane highway where each lane allows traffic to flow in opposite directions. Amtrak is essentially proposing that vehicles traveling in the eastbound direction stop anytime a westbound vehicle is trailing a slower vehicle.³⁶

UP's extended analogy mischaracterizes Amtrak's position, as we understand it. Amtrak is not 'proposing that vehicles traveling in the eastbound direction stop anytime a westbound vehicle is trailing a slower vehicle.' Amtrak is proposing that UP's dispatchers prioritize Amtrak *Sunset Limited* trains when they are following slower freight trains, whether in single-track or double-track territory.

Second, UP cites a National Academies of Sciences ("NAS") study out of context to support its position that long trains provide "significant and unambiguously positive benefits."³⁷ Specifically, UP ignores the most important qualifier in the cited NAS study: "When additional sidings on a corridor are extended to handle long trains, overall train delay actually decreases relative to the baseline operations with short trains."³⁸ The operating scenario that NAS describes was not present on the *Sunset Limited* Route during the Study period. As demonstrated in our OVS,

{{ [REDACTED] }}

[REDACTED] }}

³⁵ See: Batt VS at p. 23, footnote 11.

³⁶ See: UP Reply at p. 41.

³⁷ See: UP Reply at p. 30.

³⁸ Ibid, emphasis added.

Third, UP argues that because average train length is longer now than it was during the Study Period, and FTI delay has since decreased, FTI was not attributable to long trains.³⁹ This claim is wrong for three reasons: (i) It fails to acknowledge the operating realities caused by delays discussed in section V.B. below, (ii) it incorrectly evaluates the length of UP trains in isolation, rather than in comparison to the length of sidings available to accommodate them on the operating segments over which they encountered *Sunset Limited* trains, and (iii) it assumes that dispatching patterns have remained constant between the Study Period and Comparison period.⁴⁰

Fourth, despite UP's insistence that regularly operating significant volumes of trains that exceed the lengths of available sidings has no bearing on its ability to give the required dispatch priority to Amtrak trains on the *Sunset Limited* Route, UP attempts to excuse its inability to give Amtrak priority in several of the specific incidents UP analyzed and summarized in its Reply Statement, specifically because its trains "could not fit into all sidings along their route."⁴¹

For example:

- Regarding the FTI attributable to the April 2022 train AMT1-03 following intermodal train IDISI-04,⁴² UP states that its inability to allow AMT-1 to overtake IDISI-04 was acceptable because, { [REDACTED] }⁴³
- Regarding the FTI attributable to the October 2022 train AMT1-11 following manifest train MEWTU-12,⁴⁴ UP states that, { [REDACTED] }⁴⁵

³⁹ See: UP Reply at pp. 33-34.

⁴⁰ Elsewhere in its Reply, UP explicitly recognizes the importance of extending siding lengths. See, e.g., UP reply at pp. 12-15, documenting a \$385 million investment in: 1) adding double-main track; 2) adding new long sidings; and 3) extending the length of short sidings along the *Sunset Limited* Route.

⁴¹ See: UP Reply at p. 82.

⁴² See: Exhibit No. 11, Section 1.

⁴³ See: UP Reply at p. 86.

⁴⁴ See: Exhibit No. 11, Section 2.

⁴⁵ See: UP Reply at p. 87.

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To recap UP's contradictory logic: 1) The length of trains relative to sidings is irrelevant on double-track segments, but second-main track is for directional running, not passing; 2) Empirical studies show that long trains create delay unless a sufficient number of sidings are extended to accommodate them, but the length of sidings should be ignored when evaluating UP's operation of long trains; and 3) UP's operation of long trains does not impact UP's ability to give dispatch priority to Amtrak trains, but delaying Amtrak trains to move freight trains which do not fit into sidings should be acceptable because it is out of the dispatcher's immediate control.

As these contradictions illustrate, UP's positions in briefing do not change the conclusion demonstrated in our OVS that UP's operation of long-trains over the *Sunset Limited* Route caused delay to *Sunset Limited* trains.

UP Delay Comments that were produced in discovery reinforce our conclusion. We reviewed those comments for Amtrak *Sunset Limited* trains and found several instances in which UP dispatcher comments identify the length of UP freight trains as the primary driver of their actions. The following are just a few examples of such UP Delay comments:

- May 24, 2022 AMT-1 was delayed for 25 minutes at Kirby, TX for {{[REDACTED]}}⁴⁶
- July 22, 2022 AMT-2 was delayed for 46 minutes at Del Rio, TX due to {{[REDACTED]}}⁴⁷
- November 14, 2021 AMT-1, which was delayed for 64 minutes at Lake Charles, LA due to “{{[REDACTED]}}”⁴⁸
- March 13, 2022 AMT-1 was delayed for 22 minutes at Del Rio, TX due to {{[REDACTED]}}⁴⁹

⁴⁶ See: Rebuttal workpaper “ETE Delay Comment List – SQL Output.xlsx” at tab “SL Trains”.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

- May 24, 2022 AMT-1, which was delayed for 37 minutes at Kingsbury, TX due to {{[REDACTED]}}⁵⁰
- February 11, 2022 AMT-2 was delayed for 20 minutes at Dunlay, TX due to {{[REDACTED]}}⁵¹
- September 28, 2022 AMT-2, which was delayed for 34 minutes at Flatonia, TX due to {{[REDACTED]}}⁵²
- November 5, 2021 ISILB3, which was delayed for 79 minutes at Fortuna, AZ due to {{[REDACTED]}}⁵³
- March 12, 2022 ZAILC-3, which was delayed for 33 minutes at Fortuna, AZ due to {{[REDACTED]}}⁵⁴
- January 26, 2022 AMT2, which was delayed for 103 minutes at El Paso, TX Fortuna, AZ due to {{[REDACTED]}}⁵⁵
- July 19, 2022 AMT1, which was delayed for 171 minutes at El Paso, TX due to {{[REDACTED]}}⁵⁶

**B. SERVICE LEVELS, CREW
MANAGEMENT AND DISPATCH PRIORITY**

UP acknowledges that *Sunset Limited* trains failed to achieve the Customer OTP Minimum Standard because UP's service was poor.⁵⁷ In particular, UP claims that, "congestion was impacting Union Pacific's 'crew and power availability,' which was 'feed[ing] into a cycle' and

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

⁵³ See: Rebuttal workpaper "ETE Delay Comment List – SQL Output.xlsx" at tab "All FT_SL FTI".

⁵⁴ Ibid.

⁵⁵ See: Rebuttal workpaper "ETE Delay Comment List – SQL Output.xlsx" at tab "SL Trains".

⁵⁶ Ibid.

⁵⁷ See: UP Reply at p. 20. UP also blames misalignment between *Sunset Limited* schedules and Customer OTP.

'degrading network fluidity.'⁵⁸ Although UP claims its service was universally poor, its data tells a different story. As shown in Exhibit No. 8 in our OVS, {{ [REDACTED] [REDACTED] }} UP delay data shows that during the Study Period, {{ [REDACTED] [REDACTED] }}, as shown in Table No. 1 below

{ { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

As shown in Table No. 1 above, { {

_____ }

⁵⁸ See: UP Reply at p. 21, citing testimony of Eric Gehringer, Union Pacific's Executive Vice President Operations.

⁵⁹ Delays for which the UP Delay Reason Code is identified as “Train Meet”

UP delay data also reveals that during the Study Period, { {

[REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]}⁶¹

Fast forwarding to today, UP proclaims that it “has resolved the service issues that contributed to the *Sunset Limited*’s failure to achieve Congress’s standard for on-time performance during the Complaint Period.”⁶² Certain statistics UP offers in support of this claim are unconvincing. Most notably, UP claims that its Recrew Rate {{REDACTED}} systemwide, but acknowledges that the Recrew Rate {{REDACTED}} on the *Sunset Limited* Route.⁶³ This statistic fails to demonstrate a {{REDACTED}} UP’s ability to keep crews from expiring on the *Sunset Limited* Route, much less resolution of the problem. If anything, these statistics imply that {{REDACTED}}.

UP's recrew rates also fail to support its claim that, "Union Pacific's train schedules are designed so crews reach crew change points comfortably before they reach their hours-of-service limits."⁶⁴ UP's failure to {{REDACTED}}, and to ensure crews can reach change points comfortably before they reach HOS limits, is surprising because UP clearly understands the magnitude of the issue: "Crews expiring before reaching a crew change point can

⁶⁰ TrainID AMT1 or AMT2.

⁶¹ See: Rebuttal workpaper "ETE Delay Comment List-SQL Output.xlsx" at tab "Z Trains_SL Route" and tab "SL Trains".

62 See: UP Reply at p. 20.

⁶³ See: UP Reply at pp. 24-25 and Janke VS at pp. 14-15.

64 See: Batt VS at p. 21.

cause significant disruption to our network and is thus considered an extremely serious operating incident.”⁶⁵ UP explains at length the focus it places on ensuring that crews do not expire between planned crew change stations. In fact, the primary real-time metric tracked by UP’s Train Management Team and its CADX dispatching program is crew HOS.⁶⁶ However, despite UP’s sophisticated real-time train and crew tracking systems, its automated dispatcher alert programs, and its policy requiring dispatchers to prevent crews from expiring before reaching crew change points, UP frequently allows freight crews to either expire or come close to expiring before reaching established crew change points during the Study Period.⁶⁷

UP’s position appears to be that any time there are freight trains being operated by crews that are bumping against HOS limits, UP is entitled to elevate the priority of those trains above all others (ostensibly to prevent network disruption). Indeed, UP acknowledges that its dispatchers are instructed to give priority treatment to trains with crews running short of service.⁶⁸ Endorsing that position would create incentives that are misaligned with on-time performance for passenger trains and would license UP to prioritize freight trains over Amtrak for commercial expediency. UP can engineer circumstances that require prioritizing freight trains over passenger trains by implementing more ambitious UP’s train schedules and more challenging crew change schedules.

UP Delay Comments illustrate this risk, because UP dispatchers {{[REDACTED]}}
[REDACTED]
[REDACTED]}}:

- September 11, 2022 train AMT1 was delayed for 67 minutes at Kingsbury, TX that UP’s dispatcher attributed to {{[REDACTED]}}⁶⁹

⁶⁵ Ibid.

⁶⁶ See: UP Reply at p. 37.

⁶⁷ See: Amtrak Opening Statement Section IV.B.4.

⁶⁸ See: UP Reply at p. 99.

⁶⁹ See: Rebuttal workpaper “ETE Delay Comment List – SQL Output.xlsx” at tab “SL Trains”.

- July 15, 2022 train AMT1 was delayed for 31 minutes at West Palm Springs, CA that UP's dispatcher attributed to {{[REDACTED]}}⁷⁰
- December 10, 2021 AMT-1 was delayed for 68 minutes at Del Rio, TX due to {{[REDACTED]}}⁷¹
- January 7, 2022 AMT-1 was delayed 33 minutes at Echo, TX due to {{[REDACTED]}}⁷²
- February 25, 2022 AMT-1 realized a 42 minute delay at West Palm Springs, CA due to {{[REDACTED]}}⁷³
- August 7, 2022 AMT-2 was delayed for 27 minutes at El Monte, CA due to {{[REDACTED]}}⁷⁴

The importance of preventing crews from bumping up against HOS limits in the first instance is also illustrated by evidence indicating that UP's practice of prioritizing freight crews short on hours did not always prevent freight trains from expiring on the main line and imposing severe delays on *Sunset Limited* trains during the Study Period. For example:

- April 24, 2022 train AMT1 was delayed for 436 minutes (over 7 hours) at Yuma Jct., CA that UP's dispatcher attributed to {{[REDACTED]}}⁷⁵
- January 21, 2022 AMT-1 was delayed for 92 minutes at Ryan, TX due to {{[REDACTED]}}⁷⁶

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

- March 2, 2022 AMT-2 was delayed 35 minutes at Eagle Lake, TX due to {{[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]}},⁷⁷

C. DISCRETIONARY ELEVATED PRIORITY

In addition to its inability to maintain schedules between crew change points, UP acknowledges that its trains regularly operate behind schedule overall. UP points to this fact to claim that {REDACTED} {REDACTED}. But UP fails to address whether {REDACTED} {REDACTED}.

UP delay comments appear to contain examples of freight train priority being elevated for this or other commercial reasons:

- November 16, 2021 train AMT1 was delayed for 71 minutes at Deming Jct., NM that UP's dispatcher attributed to {{[REDACTED] [REDACTED] [REDACTED]}
[REDACTED]
[REDACTED]}}⁷⁸
- March 22, 2022 train AMT1 was delayed for 86 minutes at Tucson, AZ that UP's dispatcher attributed to {{[REDACTED]
[REDACTED]}}⁷⁹

⁷⁷ Ibid.

78 Ibid.

79 Ibid.

V. UP'S QUANTITATIVE ANALYSES ARE FLAWED, INCOMPLETE AND UNSUPPORTED

UP included summaries of some quantitative analyses it conducted as support for its positions. Although UP's workpapers were often devoid of functioning formulas and supporting data, we reviewed certain UP's analyses and related claims, which are addressed below.

A. UP'S COMPARISON BETWEEN FTI AND CUSTOMER OTP IS FLAWED AND INCOMPLETE

UP contends that *Sunset Limited* train schedules should be extended because Amtrak's inability to regularly achieve Customer OTP cannot be attributed to FTI.⁸⁰ To support these contentions, UP included an analysis of 296 complete *Sunset Limited* runs during the Study Period, comparing each run's Customer OTP and its aggregate FTI delay minutes as reported by Amtrak.⁸¹ But UP's analysis flawed.

To more precisely investigate the causal link between Amtrak Customer OTP and FTI delay minutes on *Sunset Limited* trains, we utilized a simple linear regression model (SLR) to better determine the nature of the link.⁸² Linear regression is a commonly used statistical method to test the relationship between two or more variables and is commonly used by the STB in its

⁸⁰ See: UP Reply at pp. 52-53 and Novak VS at pp. 11-12.

⁸¹ Ibid.

⁸² An SLR is a linear regression model with a single explanatory variable. That is, the model concerns two-dimensional sample points (as shown in UP's graphical representation of the data) with one independent variable (FTI delay minutes), and one dependent variable (Customer OTP), and finds the linear relationship that predicts the dependent variable values as a function of the independent variable values. UP's graphical analysis shows that the data also has what appears to be a curvilinear relationship and not a straightforward linear relationship. To account for the curvilinear relationship between the values, we used a log transformation process to calculate the natural log (ln) of both the Customer OTP and FTI delay minutes. The log transformation process reduces the skewness of the data and allows for a more statistically robust linear fit. See: <https://library.virginia.edu/data/articles/interpreting-log-transformations-in-a-linear-model>. Because the Customer OTP has values of zero in many cases, we made one additional adjustment to the data prior to the regression. The log of zero is undefined so convention indicates when performing a log transformation with data containing values of zero to add a one to each value before log-transforming the data. This eliminates the issue of an undefined value in the data sample and retains the zero value in the regression because the log value of one is equal to zero. See <https://ubco-biology.github.io/BIOL202/transform.html>.

proceedings.⁸³ If there is a causal relationship between two variables, a regression analysis can predict one variable using the other variable. Based on our review of the investigative record, we predicted the regression coefficient for Customer OTP would be negative, indicating an inverse relationship between Customer OTP and FTI.

The SLR analysis we conducted confirmed our prediction. Namely, the analysis showed a causal relationship between Customer OTP and FTI delay minutes does exist.⁸⁴ The coefficient for the FTI delay minutes is negative as we predicted, which indicates that as FTI delay minutes increase, Customer OTP decreases.⁸⁵ While there are other factors that impact OTP, the results of the SLR analysis contradict UP's assertion that there is no causal link between the two factors, and instead indicate that increasing FTI leads to decreases in Customer OTP.

B. UP'S TRAIN LENGTH AND FTI CORRELATION ANALYSIS IS FLAWED

UP claims that our efforts to link FTI delays to UP trains accounted for just {{[REDACTED]}} of FTI delays, and that UP was able to link {{[REDACTED]}} of FTI delays to UP trains.⁸⁶ UP provided no detailed workpapers to demonstrate that its linking process was valid. Nonetheless, UP ran a regression using data for the trains involved in FTI delays that it purportedly linked, and

⁸³ See, for example, Docket No. EP 290 (Sub-No. 4), *Railroad Cost Recovery Procedures – Productivity Adjustment*, served January 29, 2018 at p. 2, STB Ex Parte No. 558 (Sub-No. 10), *Railroad Cost of Capital – 2006*, served April 15, 2008 at p. 6, and STB Finance Docket No. 34890, *Pyco Industries, Inc. – Feeder Line Application – Lines of South Plains Switching Company, Ltd. Co.*, Served August 31, 2007 at p. 22.

⁸⁴ See: Rebuttal workpaper “FTI-OTP Regression Analysis.xlsx”. The statistics from the regression model indicate that 35 percent of the variability observed in Customer OTP can be explained by the variability in the FTI delay minutes. From a statistical perspective, the coefficient of determination, or R^2 , was 0.349 with a standard error of 0.168.

⁸⁵ See: Rebuttal workpaper “FTI-OTP Regression Analysis.xlsx”. The FTI delay minutes coefficient was -0.253 and was statistically significant at the 99.9 percent level ($p < 0.001$). Additionally, the SLR had a calculated F-Statistic of 157.8 ($p < 0.001$) and tabulated F-statistic of 6.635 at a 0.01 significance level. A standard rule of thumb when evaluating F-statistics is that when the calculated F-statistic exceeds the tabulated F-statistic by a magnitude of four (4), one can assume the regression results have practical significance.

⁸⁶ See: UP reply at pp. 32-34.

which occurred during the Study Period. The results purportedly show that there is little statistical correlation between the length of an FTI delay and the length of the train that was identified by the conductor in the field as the immediate cause of Amtrak's delay. UP concluded that, "Amtrak does not show any meaningful relationship between train size and delays to the Sunset Limited."⁸⁷

UP's conclusion is a non sequitur. UP's operation of long trains often gave rise to delay-causing conflicts between the *Sunset Limited* and shorter freight trains during the Study Period.⁸⁸

For example:

- Regarding the FTI attributable to train AMT2-13 twice following sub-8,000 foot auto train AMLNGR-12 near Yuma, UP states that, { [REDACTED] }
[REDACTED]
[REDACTED] }

In the above example, which is discussed in greater detail in Exhibit No. 11,⁸⁹ AMT2-13 caught up to AMLNGR-12 twice near Yuma, { { [REDACTED] } }
[REDACTED] } }

Although the short auto train was the immediate cause of Sunset Limited FTI, the auto train was delayed { { [REDACTED] } }.

This happened frequently during the Study Period. In another example discussed in detail in Exhibit No. 11:⁹⁰

- In May 2022, AMT2-06 was delayed between its Pomona and Ontario station stops because, as UP states, "{ [REDACTED] }

⁸⁷ See: UP reply at p. 33.

⁸⁸ In addition, as discussed above in Section IV.B, UP acknowledges that it was managing crew shortages during the Study Period, and UP is continuing to experience recrew issues today. UP delay comments indicate that it frequently { { [REDACTED] } } illustrating that UP's commitment to running long trains can drive delay in indirect ways. For example, { { [REDACTED] } }
[REDACTED]
[REDACTED] } } See:

Rebuttal workpaper "ETE Delay Comment List – SQL Output.xlsx" at tab "FTI Trains".

⁸⁹ See: Exhibit No. 11, Section 3.

⁹⁰ See: Exhibit No. 11, Section 14.

[REDACTED]
[REDACTED]
[REDACTED] }”

In this case, {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }}

**C. UP’S COMPARISON BETWEEN
AMTRAK AND Z TRAIN
PERFORMANCE IS IRRELEVANT**

In our OVS, we used schedule and operating data provided by UP to develop a metric to determine the extent to which UP maintains and adheres to train schedules. Specifically, we

{{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }} UP seeks to dismiss our summary of UP operating data, based

on three misleading claims⁹² and unwarranted adjustments to our analytical framework.

⁹¹ See: OVS at Table 17, p. 50.

⁹² As discussed above in Section II.B., UP also complains that we misclassified one category of freight trains with better schedule adherence than *Sunset Limited* trains (“Q” trains) as “priority manifest.” UP claims that “Q” trains are BNSF trains operating under trackage or haulage rights agreements. First, as discussed above in Section III.B, the documentation UP provided in support of its operating data defines “Q” trains as “priority manifest” trains. Second, making the change UP states is required does not change the results of our analysis, only the label we applied to the “Q” train category.

First, UP claims that it “was not able to replicate Amtrak’s calculations.”⁹³ UP’s claimed inability to replicate our calculations is inexplicable. Unlike UP, we provided the SQL code and all supporting databases that we used to make the calculations that are reflected in our analysis. Rather than address the data and formulas we relied upon to make the calculations, UP feigns ignorance as an apparent pretext to substitute its preferred methodology. UP’s preferred methodology is flawed for several reasons. As discussed in more detail below, UP’s comparison uses an arbitrarily shortened study segment, and it relies on a comparison between transit times and inconsistent theoretical benchmarks, rather than between actual event times and schedules. As a result, UP’s analysis is both unrepresentative and divorced from operating reality.

Second, UP complains that we analyzed schedule adherence over the entire *Sunset Limited* Route, but that some portions of the route do not host Z train traffic.⁹⁴ As a threshold matter, there is nothing inconsistent about the observations included in our analysis. We included all events for which UP provided data. Moreover, UP mischaracterized its Z train operations over the route. Specifically, UP claims that “During the Complaint Period, no Z trains operated east of El Paso/Sierra Blanca.”⁹⁵ This is demonstrably false. UP CADX data { [REDACTED]

After objecting to our decision to analyze all events for which UP provided data, UP proceeds with an arbitrarily limited analysis. For context, UP operates {{REDACTED}}

⁹³ See: UP Reply at p. 81.

⁹⁴ See: UP Reply at p. 79.

⁹⁵ See: Janke VS at p. 18, footnote 29.

⁹⁶ See: Rebuttal Workpaper “Rebuttal - Z Trains East of El Paso.xlsx”

_____. The
Los Angeles to El Paso Segment is {_____
_____, as shown at lines 1 through 127 in Exhibit No. 6 to our
OVS. Sierra Blanca is another {_____}⁹⁷

Rather than analyzing the entire Los Angeles to El Paso or Los Angeles to Sierra Blanca segment, UP artificially limited its own analysis to only the {_____} between Palm Springs, CA and Deming, NM.⁹⁸ This accounts for just {_____} Los Angeles to Sierra Blanca segment.

According to UP, these two segment endpoints were selected because they “were common reporting locations for the *Sunset Limited* trains and Z trains.”⁹⁹ While UP’s statement is technically accurate, these were not the *only* common reporting locations for *Sunset Limited* and Z trains. UP claims its study ended at Deming because, “Deming is the first station on the *Sunset Limited* schedules west of El Paso.”¹⁰⁰ But UP neglects to recognize that El Paso itself is on the *Sunset Limited* schedules, and is a common reporting point for both Amtrak and Z trains, so there was no justification for excluding the El Paso to Deming segment from UP’s analysis.

Moreover, in UP’s discussion on scheduling, it describes the operations of its “regularly scheduled eastbound Z train between City of Industry in California and Global 4 in Chicago” and the companion “regularly scheduled westbound Z train between Global 4 and City of Industry.”¹⁰¹ These trains, like many others, report at both Industry and El Paso, in addition to Palm Springs

⁹⁷ See: UP-SL-0007914 at UP-SL-0007917_C - UP-SL-0007935_C.

⁹⁸ See: UP Reply at p. 79.

⁹⁹ See: UP Reply at p. 79, footnote 261.

¹⁰⁰ See: Janke VS at p. 18, footnote 29.

¹⁰¹ See: Janke VS at p. 20.

and Deming. In fact, Z trains operating out of City of Industry are frequent subjects of the Board's requested root cause analyses.¹⁰²

Review of our Exhibit No. 6 reveals the likely reason for UP's selected study segment – to exclude from its median transit time calculations the segments on either side where *Sunset Limited* trains incur significant FTI delay. Table No. 2 below shows the Amtrak FTI delay UP intentionally excluded from its analysis.

[illegible]

¹⁰² See: e.g., Exhibit No. 11, Section 5.

As shown in Table No. 2, Line 5, Column (5) above, {{[REDACTED]}} of the FTI delay incurred by *Sunset Limited* trains {{[REDACTED]}} was excluded from UP's transit time calculations.

Moreover, while *Sunset Limited* trains incurred {{[REDACTED]}} delay minutes per mile over UP's selected Palm Springs to Deming segment,¹⁰³ *Sunset Limited* trains incurred significantly more on the excluded segments. Between Yuma Junction, CA and Palm Springs, *Sunset Limited* trains incurred {{[REDACTED]}} delay minutes per mile, while between Deming and Sierra Blanca, TX, *Sunset Limited* trains incurred {{[REDACTED]}} delay minutes per mile.¹⁰⁴ By focusing on a segment with relatively fewer FTI delays, UP masks the full extent of delays that affect Amtrak's performance.

Third, rather than compare event timestamps to schedule times, as we did, UP compares median transit times between its selected endpoint stations to an arbitrary transit time standard. Furthermore, despite its claims, UP's comparison of *Sunset Limited* and Z train performance during the Study period is not "apples-to-apples," because the arbitrary standards against which the median transit times for each group are measured are different. Specifically, UP compared median *Sunset Limited* transit times to "their fastest theoretical transit times (that is, their pure running time plus dwell time between those points under their schedules)."¹⁰⁵ However, UP compared median Z train transit times "to the fastest single run of any Z train between those points during the Complaint period."¹⁰⁶ UP does not explain why it "used the fastest transit time for any one Z train during the period as a proxy for the fastest theoretical transit time."¹⁰⁷ UP had the information required to make the required calculation for both train groups, which would have at

¹⁰³ See: Rebuttal Workpaper "Rebuttal Exhibit No. 6_Segment Comp.xlsx"

¹⁰⁴ Ibid.

¹⁰⁵ See: Janke VS at p. 18.

¹⁰⁶ See: Janke VS at p. 19.

¹⁰⁷ See: Janke VS at p. 19, footnote 30.

least resulted in a framework that could have allowed an apples-to-apples comparison, but it did not do so. Therefore, UP's entire presentation is based on comparing incomparable statistics.

Additionally, UP claims that our analysis fails to account for the fact that its freight schedules are based on real world conditions, while Amtrak's are based "primarily" on theoretical running time. However, we reviewed the methods used to create Amtrak passenger schedules.¹⁰⁸ Those schedules are based on four components. In addition to Pure Running Time, Amtrak schedules include Dwell Time, Recovery Time, and Miscellaneous Time. Dwell Time includes the amount of time required to accomplish station operations (and, sometimes, excess dwell). Recovery Time is the amount of time above and beyond Pure Running Time *and* Dwell Time, which is built into a train schedule to ensure the train can continue to run on-time even if it encounters delays on route. Miscellaneous Time generally has the same effect on train operations and OTP as Recovery Time but is included separately.

Moreover, UP's fastest theoretical transit time standard has no bearing on UP dispatching decisions. In contrast, as UP acknowledges, the real-time status of a train relative to its schedule, and in particular its scheduled crew change times, is a primary focus of UP dispatchers, and has a direct impact on dispatching priority with respect to individual train conflicts.¹⁰⁹

UP delay data for *Sunset Limited* trains and Z trains operating on the portion of the *Sunset Limited* Route over which high volumes of Z trains operate (between Los Angeles and El Paso) demonstrates that UP dispatchers do a better job minimizing the length of individual delays for Z-trains than for Amtrak trains, as shown in Table No. 3 below.

¹⁰⁸ See: Amtrak September 25, 2023 Response to Investigative Question No. 24.

¹⁰⁹ See: UP Reply at p. 37.

3

As shown in Table No. 3 above, {{[REDACTED]}}

[REDACTED]

}}

In an apparent attempt to explain why, as we documented in our OVS,¹¹⁰ UP's {{[REDACTED]}}
[REDACTED]}}, UP argues that freight trains can more easily make up time compared to *Sunset Limited* trains because Amtrak trains cannot leave an intermediate passenger station before their scheduled departure time to make up for lost time, whereas Z trains can “depart ahead of schedule if conditions permit.”¹¹¹ Review of UP operating data reveals this UP analysis to be a red herring, as demonstrated in Table No. 4 below.

¹¹⁰ See: OVS at p. 47.

¹¹¹ See: UP Reply at p. 82, footnote 270.

{ { [REDACTED]

[REDACTED]

} }

As shown in Table No. 4 above, *Sunset Limited* trains routinely arrive so late at intermediate stations, that they have already missed their scheduled departure time and must depart as quickly as possible. UP data shows that { [REDACTED]

}} for stations that report actual event times and scheduled event times.¹¹²

Using the data supporting our Exhibit No. 6, we calculated average deviation from schedule for UP's Z trains and Amtrak's *Sunset Limited* trains over the Palm Springs, CA to Deming, NM segment UP selected for its transit time analysis. The results confirm that, even using UP's inappropriate line segment definition, UP's conclusions are wrong. Table No. 5 below shows the actual deviation from schedule for both *Sunset Limited* trains and UP's Z trains at Amtrak passenger stations between Palm Springs and Deming at which scheduled arrival and departure times are regularly reported¹¹³ for both train types.

As shown in Table No. 5 above, UP's { {

_____}}. However, at three of the four stations on

¹¹² See: Rebuttal workpaper “Rebuttal - Amtrak Trains Later Than Scheduled Departure.xlsx”

¹¹³ See: Rebuttal worksheet, Rebuttal Affidavit, *Trains Later Than Scheduled Departures*, Table No. 5 includes all Stations on UP's selected Palm Springs to Deming comparison segment with at least 10 observations of both scheduled arrival/departure times and a actual arrival/departure times for both *Sunset Limited* and UP's Z trains.

the Palm Springs to Deming segment for which UP provided schedule data, *Sunset Limited* trains made up more time (or lost less time) than Z trains despite scheduled station dwell. For example, as shown in Line 3, {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }} This shows the opposite of UP's claim that Amtrak trains are unable to make up time due to scheduled station dwell.

UP's analysis is built on faulty assumptions, selective data, and misleading methodologies that obscure the systemic issues affecting Amtrak's on-time performance. For the above reasons, the methodology we developed to compare the performance of *Sunset Limited* and Z trains was reliable and the results of that analysis remain informative.

VI. UP DISPATCHERS FREQUENTLY FAILED TO IDENTIFY OR IGNORED ALTERNATIVE DISPATCHING MOVES IN HISTORICAL OPERATING SCENARIOS

In its Reply, UP attempts to justify certain “individual dispatching decisions” that resulted in *Sunset Limited* trains accruing delay attributed to FTI.¹¹⁴ We reviewed each of UP’s narrative descriptions and find the proffered justifications mostly unpersuasive. *First*, UP places undue focus on the options immediately available to its individual dispatchers, which are necessarily constrained by UP policies and procedures, and can also be constrained by prior dispatching decisions and poor adherence to train schedules.¹¹⁵ *Second*, we conclude that UP’s justifications are frequently drawn from incomplete analysis, which ignores relevant data, such as the presence of unoccupied sidings. *Third*, we conclude that UP’s justifications frequently fail to identify or disclose alternative train sequencing and routing decisions that could have been implemented by its dispatchers. In Exhibit 11, we analyze the operating environment for the individual FTI delays that UP addresses in its Reply Brief, for the sole purpose of demonstrating that UP’s dispatchers often had other options that would have mitigated the delay to Amtrak at the point of conflict between *Sunset Limited* Trains and freight trains.¹¹⁶

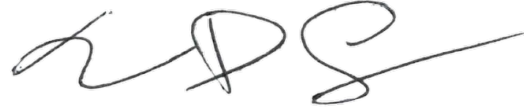
¹¹⁴ See: UP Reply at p. 86-106.

¹¹⁵ See above at Part IV. (addressing UP policies and procedures that may preclude dispatchers from planning an efficient meet or overtake between Amtrak and freight trains operating over shared rail lines). We note that UP frequently references whether trains involved in a conflict were operating on schedule. We have not been asked to evaluate whether better adherence to freight schedules could have mitigated delay, and focus exclusively on whether UP dispatchers ignored alternatives that would have eliminated or mitigated delay to *Sunset Limited* trains under circumstances.

¹¹⁶ To be clear, we do not express a view as to whether each of those alternatives is fully consistent with Amtrak’s right to preference over freight transportation. Additionally, UP frequently asserts that Amtrak has failed to provide information about how alternative dispatching decisions would have impacted network fluidity. We have not been asked to opine on that question.

VERIFICATIONS

I, Timothy D. Crowley, verify under penalty of perjury that I have read this Rebuttal Verified Statement on behalf of the National Railroad Passenger Corporation, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

A handwritten signature in black ink, appearing to read 'TDC', is written above a horizontal line.

Timothy D. Crowley

Executed on 2/21/25

* * *

I, Robert D. Mulholland, verify under penalty of perjury that I have read this Rebuttal Verified Statement on behalf of the National Railroad Passenger Corporation, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

A handwritten signature in blue ink, appearing to read 'R. D. Mulholland', is written above a horizontal line.

Robert D. Mulholland

Executed on 2/21/25

EXHIBIT 11

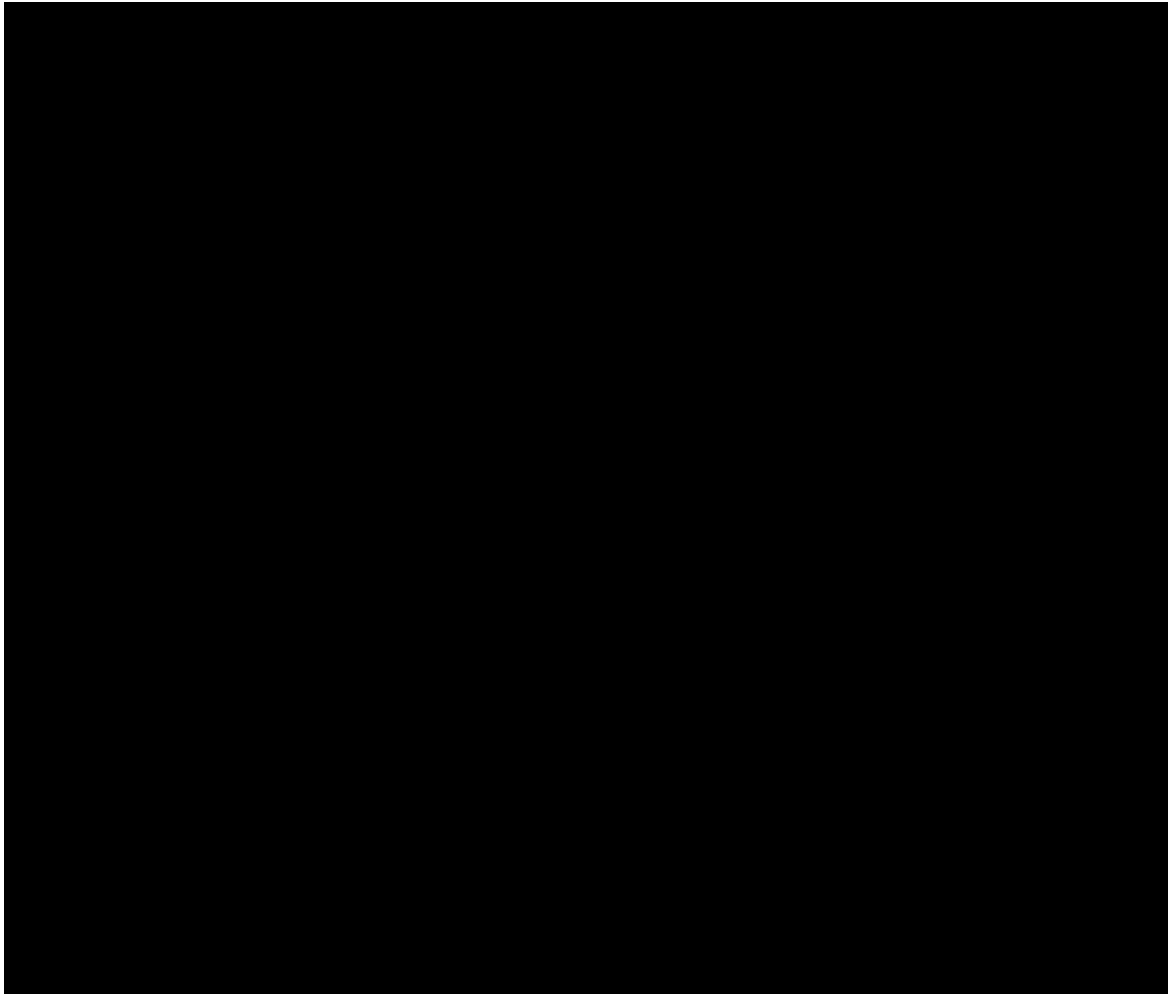
² See: UP Reply at p. 86 (responding to Amtrak Opening at p. 81, discussing UP AMT1 Root Cause Analysis File “HC Host-Responsible Delays AMT1 11-09-21 to 09-02-22 - Highly Confidential.pdf” filed on 6/4/2024 (“UP Train 1 RCA”) at p. 156), footnotes omitted.

**UP Dispatchers Frequently Failed to Identify or Ignored
Alternative Dispatching Moves in Historical Operating Scenarios**

Based on our review of this delay, we conclude that UP's dispatcher failed to identify or implement several available alternatives that would not have required AMT1-03 to follow IDISI-04 west between Finlay, TX, and Campbell Street, TX. Figure No. 1 below displays annotated timetable information for the segment between Finlay, TX, and Campbell Street, TX.

{{ [REDACTED]

[REDACTED]



[REDACTED]

UP asserts that { [REDACTED]

[REDACTED]}. This is wrong. First, UP's dispatcher {{ [REDACTED]

[REDACTED]

**UP Dispatchers Frequently Failed to Identify or Ignored
Alternative Dispatching Moves in Historical Operating Scenarios**

[REDACTED] }, clearing the
mainline for Amtrak.

Second, the {{ [REDACTED]

[REDACTED] }}. As shown in Figure No. 1 above,

{{ [REDACTED] }}. In fact, UP's CADX data shows that {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }}

Third, {{ [REDACTED]

[REDACTED]

[REDACTED] }}. {{ [REDACTED]

[REDACTED] }}

Figure 2 below shows the stringline graph for this area between Clint, TX and Finlay, TX
in the red box.

**UP Dispatchers Frequently Failed to Identify or Ignored
Alternative Dispatching Moves in Historical Operating Scenarios**

{{ [REDACTED] }}

[REDACTED]

[REDACTED]

[REDACTED] }}

**2. AMT1-11, 10/13/22,
142-minute delay, Glidden Subdivision**

In its Opening Statement, Amtrak alleged that UP failed to make appropriate use of sidings that would have permitted the *Sunset Limited* to overtake {{ [REDACTED] }}
[REDACTED]
[REDACTED] }}. In pertinent part, UP attempts to explain its failure to make use of sidings as follows:

Amtrak claims Union Pacific committed a preference violation when AMT1-11 did not overtake MEWTU-12 before Flatonia, particularly at Weimar. Union Pacific's root cause analysis shows { [REDACTED] }
[REDACTED]
[REDACTED] }

Amtrak does not specify how Union Pacific's dispatcher should have handled the situation differently. { [REDACTED] }

**UP Dispatchers Frequently Failed to Identify or Ignored
Alternative Dispatching Moves in Historical Operating Scenarios**

[REDACTED]
[REDACTED]}

To make sense of this explanation, UP necessarily offers the following correction to its prior root cause analysis:

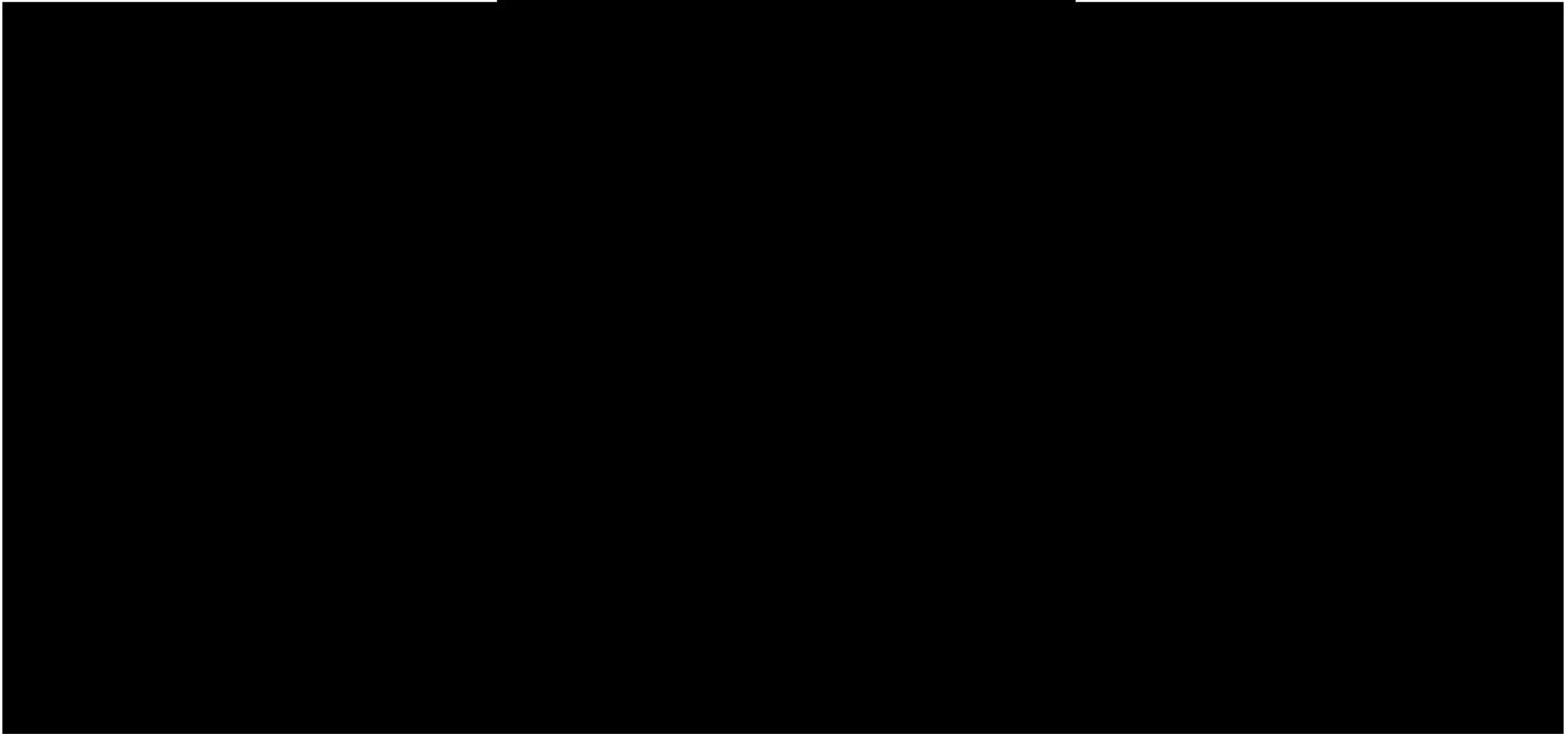
Union Pacific's root cause analysis included a stringline graph in which
{[REDACTED]
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
[REDACTED]}³

Based on our review of this delay, we conclude that UP's dispatcher failed to identify or implement an option that would have permitted AMT1-11 to overtake MEWTU-12 earlier. Figure No. 3 below displays the timetable information for the segment between Eagle Lake, TX { [REDACTED] } and Flatonia, TX { [REDACTED] }.

³ See: UP Reply at p. 87 (responding to Amtrak Opening at pp. 81-82, discussing UP AMT1 Root Cause Analysis File "HC Host-Responsible Delays AMT1 09-20-22 to 10-11-22 - Highly Confidential.pdf" filed on 6/14/2024 ("UP Train 1 Supp. RCA") at p. 96), some footnotes omitted.

**UP Dispatchers Frequently Failed to Identify or Ignored
Alternative Dispatching Moves in Historical Operating Scenarios**

{{ [REDACTED] }}



[REDACTED]}

UP alleges that AMT1-11 { [REDACTED] },
because the { [REDACTED] } Actually, the
{ [REDACTED] }
[REDACTED]} (highlighted in yellow in Figure No. 4
below).

**UP Dispatchers Frequently Failed to Identify or Ignored
Alternative Dispatching Moves in Historical Operating Scenarios**

[REDACTED]

[REDACTED]}

Although UP is correct in that its train sheets data show that the {{ [REDACTED]

[REDACTED]} UP fails to acknowledge that it

{{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]}. {{ [REDACTED]

[REDACTED]

**UP Dispatchers Frequently Failed to Identify or Ignored
Alternative Dispatching Moves in Historical Operating Scenarios**

[REDACTED]

[REDACTED]}}.4

Additionally, while UP's Reply explanation states (correctly) that MEWTU-12 was {{[REDACTED]}} feet long, and {{[REDACTED]}}}, this statement conflicts with the data UP included in its initial review of this incident in its root cause analysis. Specifically, the string chart UP produced with its original root cause analysis included data {{[REDACTED]}} [REDACTED]}}, as shown in Figure No. 5 below.

{{[REDACTED]}}

[REDACTED]

[REDACTED]}}

Because UP did not produce workpapers supporting its root cause analysis, we cannot determine whether: 1) UP relied on some other data set that contains train length data that conflicts with the UP Train Sheets data that was provided to Amtrak; 2) UP's root cause analysis was developed using erroneous code that pulled the wrong data for this train; or 3) some combination of the two. Additionally, we have no ability to determine the frequency with which train length data included in the Train Sheets data provided to Amtrak conflicts with train length data included in whatever data set(s) UP used to support its root cause analysis.

⁴ See: Rebuttal Workpaper "Saw-By Delay Comments.xlsx"

**3. AMT2-13, 3/13/22,
15-minute delay, Yuma Subdivision**

Amtrak claims Union Pacific committed a preference violation when AMT2-13 twice caught up to AMLNGR-12 near Yuma. Union Pacific's root cause analysis shows { [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] }

Amtrak does not specify how Union Pacific's dispatcher should have handled the situation differently. Union Pacific dispatching records show { [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] }⁵

Based on our review of this delay, we conclude that UP's dispatcher failed to identify or implement an alternative that would have permitted AMT2-13 to overtake AMLNGR-12 earlier. Figure No. 6 below displays the timetable information for the segment between Yuma, AZ { [REDACTED] } and West Wellton, AZ { [REDACTED] }.

⁵ See: UP Reply at p. 88 (responding to Amtrak Opening at p. 82, discussing UP AMT2 Root Cause Analysis File “HC Host-Responsible Delays AMT2 -Highly Confidential.pdf” filed on 7/24/2024 (“UP Train 2 RCA”) at p. 10), footnotes omitted.

**UP Dispatchers Frequently Failed to Identify or Ignored
Alternative Dispatching Moves in Historical Operating Scenarios**

{{ [REDACTED] }}

[REDACTED]

[REDACTED] }}

UP alleges that { [REDACTED] }

[REDACTED]

[REDACTED] } However, {{ [REDACTED] }

[REDACTED] }}. As shown in

Figure No. 6 above, {{ [REDACTED] }

[REDACTED]

[REDACTED]

**UP Dispatchers Frequently Failed to Identify or Ignored
Alternative Dispatching Moves in Historical Operating Scenarios**

[REDACTED]

[REDACTED]}.⁶

**4. AMT2-09, 9/9/22,
60-minute delay, Yuma Subdivision**

In its Opening Statement, Amtrak alleged that UP failed to {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }}. In pertinent part, UP attempts to

explain its failure to make use of double track territory as follows:

Amtrak claims Union Pacific committed a preference violation when AMT2-09 followed ILBG3-08 between Beaumont and Thermal over a segment of double-track main line. Union Pacific's root cause analysis shows { [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] }

Amtrak does not specify how Union Pacific's dispatcher should have handled the situation differently. Dispatchers are instructed not to allow a faster train to overtake a slower train using double-main track unless there is no oncoming opposing traffic. Stopping opposing traffic for an overtake would severely compromise the capacity benefits provided by adding double-main track and potentially lead to a cascading traffic back-up, compromising the overall fluidity of the network for both freight and passenger transportation.²⁸⁸ { [REDACTED]

[REDACTED]
[REDACTED] }⁷

⁶ Additionally, UP alleges in its analysis that { [REDACTED]
[REDACTED] } However, data provided by UP { [REDACTED]
[REDACTED] }}. As shown in UP's supporting workpapers (see: UP workpapers MDR ILBG4-13 YUMA 0049 03-14-22_HC.pdf and MDR ILBG4-13 YUMA 0345 03-14-22_HC.pdf), {{ [REDACTED]
[REDACTED]
[REDACTED] }}. These locations are on the Yuma subdivision, but not near Yuma as UP stated.

⁷ See: UP Reply at p. 89 (responding to Amtrak Opening at p. 82, discussing UP Train 2 RCA at p. 371), footnotes omitted.

UP's description is misleading. In its Reply Brief, UP states that "[d]ispatchers are instructed not to allow a faster train to overtake a slower train using double-main track unless there is no oncoming opposing traffic." As shown in Figure No. 7 below, the stringline graph UP included with its root cause analysis shows that {{[REDACTED] [REDACTED]}} (highlighted in yellow and purple dashed lines in Figure No. 7 below).

████████████████████

[illegible]

_____ } }

{ {

[REDACTED] }} (highlighted in red in Figure No. 7 above) { {**[REDACTED]**

}}.⁸ There are $\{ \{$

⁸ UP delay data reads $\{\{\text{[redacted]}\}\}$.

Accordingly, and based on our review of this delay, we conclude that UP's dispatcher failed to identify or implement an alternative that would have permitted an earlier overtake.

[REDACTED]

⁹ Also as shown on the timetables, { [REDACTED]
[REDACTED] }

**UP Dispatchers Frequently Failed to Identify or Ignored
Alternative Dispatching Moves in Historical Operating Scenarios**

**5. AMT1-12, 7/15/22,
42-minute delay, Alhambra Subdivision**

In its Opening Statement, Amtrak alleged that UP exposed the *Sunset Limited* to

{{ [REDACTED] }}. In pertinent part, UP attempts to explain the imposition of this

delay as follows:

Amtrak claims Union Pacific committed a preference violation when AMT1-12 was held at Hamilton because ZCIG4-15 was occupying a main line near City of Industry. Union Pacific's root cause analysis shows the two trains would not have interacted if AMT1-12 had been on time. Union Pacific records show

{ [REDACTED] }

Amtrak does not specify how Union Pacific's dispatcher should have handled the situation differently. { [REDACTED] }¹⁰

Based on our review of this delay, we conclude that UP's dispatcher failed to identify or implement an alternative that would have mitigated or eliminated the delay to the *Sunset Limited*.

As UP stated, { [REDACTED] }. As shown in the stringline graph below, which is Figure No. 9 { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁰ See: UP Reply at p. 90 (responding to Amtrak Opening at p. 82, discussing UP Train 1 RCA at p. 399), footnotes omitted.

**UP Dispatchers Frequently Failed to Identify or Ignored
Alternative Dispatching Moves in Historical Operating Scenarios**

{} UP could have {{
}}.

{{
}}

[REDACTED]

{}
}}

**6. AMT1-12, 7/15/22,
62-minute delay, Alhambra Subdivision**

In its Opening Statement, Amtrak alleged that UP exposed the *Sunset Limited* to

{{
}}

{} In pertinent part, UP attempts to explain the imposition of this delay as follows:

Amtrak claims Union Pacific committed a preference violation when AMT1-12 was held at New Siding because ILCG1-14 was occupying yard tracks at Aurant. Union Pacific's root cause analysis shows the two trains would not have interacted had AMT1-12 been on time. Union Pacific records show {
}

**UP Dispatchers Frequently Failed to Identify or Ignored
Alternative Dispatching Moves in Historical Operating Scenarios**

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Amtrak does not specify how Union Pacific's dispatcher should have handled the situation differently. [REDACTED]
[REDACTED] }¹¹

Based on our review of this delay, we conclude that UP's dispatcher failed to identify or implement an alternative that would have mitigated or eliminated the delay to the *Sunset Limited*.

In UP's explanation for its dispatchers' actions, UP claims that, [REDACTED]

[REDACTED]

[REDACTED] } In fact, as shown in the Figure No. 10 below, { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }}

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } UP

simply prioritized [REDACTED] over Amtrak when one of its mainlines was blocked.

¹¹ See: UP Reply at p. 91 (responding to Amtrak Opening at p. 82, discussing UP Train 1 RCA at p. 400), footnotes omitted.

**UP Dispatchers Frequently Failed to Identify or Ignored
Alternative Dispatching Moves in Historical Operating Scenarios**

{{ [REDACTED] }}

[REDACTED]

[REDACTED]

[REDACTED]}}

At a minimum, UP could have {{ [REDACTED] }}

[REDACTED]}}, as shown in the timetable excerpt below, { [REDACTED]

[REDACTED]}.

**UP Dispatchers Frequently Failed to Identify or Ignored
Alternative Dispatching Moves in Historical Operating Scenarios**

{{ [REDACTED] }}

[REDACTED]

[REDACTED] }}

**7. AMT2-07, 8/7/22,
22-minute delay, Alhambra Subdivision**

In its Opening Statement, Amtrak alleged that UP failed to prioritize the *Sunset Limited* during a freight meet, as the {{ [REDACTED] [REDACTED] }}

[REDACTED]

[REDACTED] [REDACTED]}¹². In pertinent part, UP attempts to explain its failure to plan a more efficient meet as follows:

_____ }
_____ }

Based on our review of this delay, we conclude that UP's dispatcher failed to identify or implement alternatives that would have permitted UP to eliminate or mitigate this delay to the *Sunset Limited*. Figure No. 12 below displays the timetable information for the segment between Guasti, CA, and Aurant, CA.

¹³ See: UP Reply at pp. 91-92 (responding to Amtrak Opening at p. 82, discussing UP Train 2 RCA at p. 278), footnotes omitted.

**UP Dispatchers Frequently Failed to Identify or Ignored
Alternative Dispatching Moves in Historical Operating Scenarios**

{{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }}

**UP Dispatchers Frequently Failed to Identify or Ignored
Alternative Dispatching Moves in Historical Operating Scenarios**

ISELC-05 was involved in a {{ [REDACTED] }}

[REDACTED] [REDACTED]

[REDACTED] }} As

UP indicated in Reply, {{ [REDACTED] }}

minutes before Amtrak's arrival on the single-track section at Alhambra. As asserted by Amtrak

in its Opening Statement, {{ [REDACTED] }}

[REDACTED] }}

**8. AMT1-12, 7/13/22,
102-minute delay, Glidden Subdivision**

In its Opening Statement, Amtrak alleged that UP failed to prioritize the *Sunset Limited* during meets with {{ [REDACTED] }}

[REDACTED] }}. In pertinent part, UP attempts to explain its decision to side the *Sunset*

Limited as follows:

Amtrak claims Union Pacific committed a preference violation when AMT1-12 was placed in a siding at Glidden for meets with three eastbound trains, MLDLI-12, MKBHO-13, and RMEMY-13, which were approaching during AMT1-12's scheduled arrival into the area. Union Pacific's root cause analysis shows scheduling was not a factor. {{ [REDACTED] }}

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] }

Amtrak does not specify how Union Pacific's dispatcher should have handled the situation differently. {{ [REDACTED] }}

[REDACTED]
[REDACTED]
[REDACTED] } Further, Union Pacific's root cause analysis shows Union Pacific's dispatcher {{ [REDACTED] }}

¹⁴ See: UP Train 2 RCA workpaper "ISELC 05 08-05-2022.pdf"

**UP Dispatchers Frequently Failed to Identify or Ignored
Alternative Dispatching Moves in Historical Operating Scenarios**

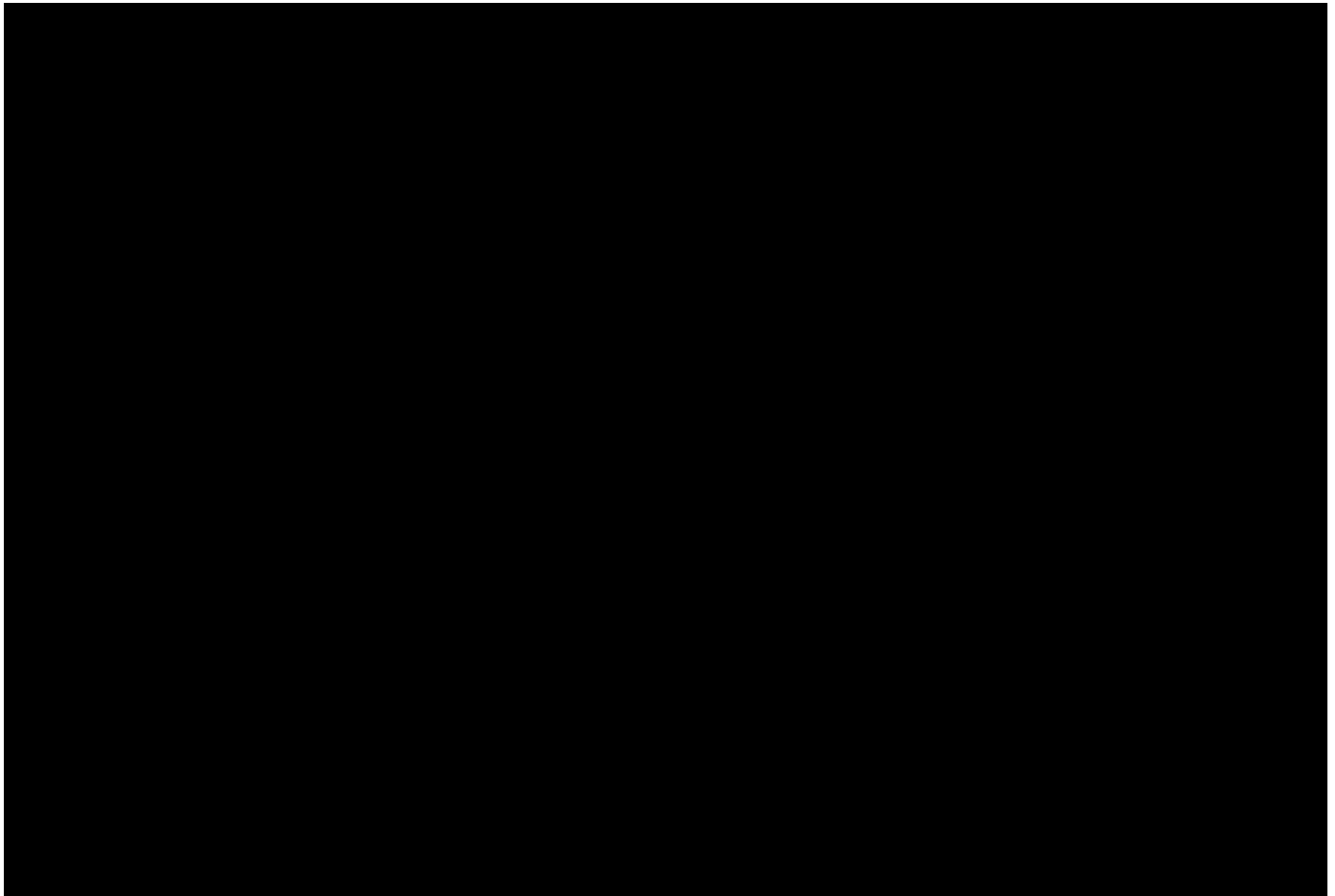
[REDACTED]

[REDACTED] }¹⁵

Based on our review of this delay, we conclude that UP's dispatcher failed to identify or implement an alternative that would have permitted UP to avoid siding Amtrak for 102 minutes, as a fleet of opposing freight trains operated over the main line. Figure No. 13 below displays the timetable information for the segment between Rosenberg, TX, and Flatonia, TX.

{{ [REDACTED]

[REDACTED]



[REDACTED] }}

¹⁵ See: UP Reply at p. 92 (responding to Amtrak Opening at p. 83, discussing UP Train 1 RCA at p. 380), footnotes omitted.

_____ }

**UP Dispatchers Frequently Failed to Identify or Ignored
Alternative Dispatching Moves in Historical Operating Scenarios**

{{ [REDACTED] }}

[REDACTED]

[REDACTED]

[REDACTED] }}

**9. AMT2-10, 4/11/22,
45-minute delay, Alhambra**

In its Opening Statement, Amtrak alleged that UP failed to prioritize the *Sunset Limited* during a freight meet, requiring it to {{ [REDACTED] }}
[REDACTED] }}. In pertinent part, UP attempts to explain its failure to plan a more efficient meet as follows:

Amtrak claims Union Pacific committed a preference violation when AMT2-10 was held at South Fontana, before the beginning of a double-main segment, until it met MEWWC-06 and OTNLB-09 near West Colton Yard, during AMT2-10's scheduled arrival in the area. Union Pacific's root cause analysis shows scheduling was not a factor. { [REDACTED]

[REDACTED]

**UP Dispatchers Frequently Failed to Identify or Ignored
Alternative Dispatching Moves in Historical Operating Scenarios**

[REDACTED]
[REDACTED]
[REDACTED] }

Amtrak does not specify how Union Pacific's dispatcher should have handled the situation differently and in a way that would not have compromised the overall fluidity of the network for both freight and passenger transportation.

{ [REDACTED] }¹⁶

Based on our review of this delay, we conclude that UP's dispatcher likely failed to identify or implement an alternative that would have permitted UP to eliminate or mitigate this delay to the *Sunset Limited*. { [REDACTED]

[REDACTED] } which is not part of the Sunset Limited Route, and for which UP did not provide track or train movement information. Therefore, the data provided by UP does not allow Amtrak to determine { [REDACTED]

[REDACTED]
[REDACTED] }.

Figure No. 15 below displays the track chart information for the segment between Ranco, CA, and Sierra, CA, including West Colton Yard, and the connection to the Mojave Subdivision at Pepper.

¹⁶ See: UP Reply at p. 93 (responding to Amtrak Opening at p. 82, discussing UP Train 2 RCA at p. 60), footnotes omitted.

**UP Dispatchers Frequently Failed to Identify or Ignored
Alternative Dispatching Moves in Historical Operating Scenarios**

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }

UP concedes that {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }}

**UP Dispatchers Frequently Failed to Identify or Ignored
Alternative Dispatching Moves in Historical Operating Scenarios**

We can also determine that {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]}}

UP could have {{ [REDACTED]

[REDACTED]

[REDACTED]}.

**10. AMT2-06, 11/7/22,
90-minute delay, Yuma Subdivision**

In its Opening Statement, Amtrak alleged that UP failed to prioritize the *Sunset Limited* during this meet with {{ [REDACTED]

[REDACTED]}}.¹⁷ In pertinent part, UP attempts to explain its

decision to side the *Sunset Limited* as follows:

Amtrak claims Union Pacific committed a preference violation when AMT2-06 was held near Hinda to meet a premium intermodal train and a manifest train short on hours of service. Union Pacific's root cause analysis shows the delay resulted from two factors: {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } and AMT2-06 was operating approximately 27 minutes behind schedule.

Amtrak does not specify how Union Pacific's dispatcher should have handled the situation differently and in a way that would not have compromised the overall fluidity of the network for both freight and passenger transportation.

{{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } Further, Union Pacific's root cause analysis shows Union Pacific's dispatcher had also {{ [REDACTED]

¹⁷ See: Amtrak Opening at p. 83, discussing UP Select Delays RCA at p. 42.

**UP Dispatchers Frequently Failed to Identify or Ignored
Alternative Dispatching Moves in Historical Operating Scenarios**

[REDACTED]
[REDACTED]
[REDACTED]}¹⁸

Based on our review of this delay, we conclude that UP's dispatcher failed to identify or implement alternatives that would have permitted UP to eliminate or mitigate this delay to the *Sunset Limited*. Figure No. 16 below shows the relevant UP timetable.

¹⁸ See: UP Reply at p. 94 (responding to Amtrak Opening at p. 83, discussing UP Select Delays of 90 Minutes or More Root Cause Analysis File "HC UP Select Delays of 90 Minutes or More - Highly Confidential.pdf" filed on 4/15/2024 ("UP Select Delays RCA") at p. 42), footnotes omitted.

**UP Dispatchers Frequently Failed to Identify or Ignored
Alternative Dispatching Moves in Historical Operating Scenarios**

{ [REDACTED]

[REDACTED]

[REDACTED]

{ [REDACTED]

[REDACTED]

[REDACTED]

**UP Dispatchers Frequently Failed to Identify or Ignored
Alternative Dispatching Moves in Historical Operating Scenarios**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } }.

**11. AMT2-03, 8/3/22,
61-minute delay, Alhambra Subdivision**

In its Opening Statement, Amtrak alleged that UP imposed freight train interference on the *Sunset Limited* shortly after its on-time departure from Los Angeles, { [REDACTED] }

[REDACTED]

[REDACTED] } }. In pertinent part, UP attempts to explain its failure to plan a more efficient meet as follows:

Amtrak claims Union Pacific committed a preference violation when AMT2-03 was held near El Monte to meet IG1LC-30. Union Pacific's root cause analysis shows the Alhambra Subdivision was extremely congested when AMT2-03 arrived at El Monte. { [REDACTED] }

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }

¹⁹ The stringline graph UP provided in UP Select Delays RCA at p. 42 did not include all of the pertinent locations needed to demonstrate the issues outlined with this delay. Specifically, points west of Riverside Lead, CA, including Rancho, CA, were excluded.

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Alternative Dispatching Moves in Historical Operating Scenarios**

Amtrak does not specify how Union Pacific's dispatcher should have handled the situation differently and in a way that would not have compromised the overall fluidity of the network for both freight and passenger transportation.²⁰

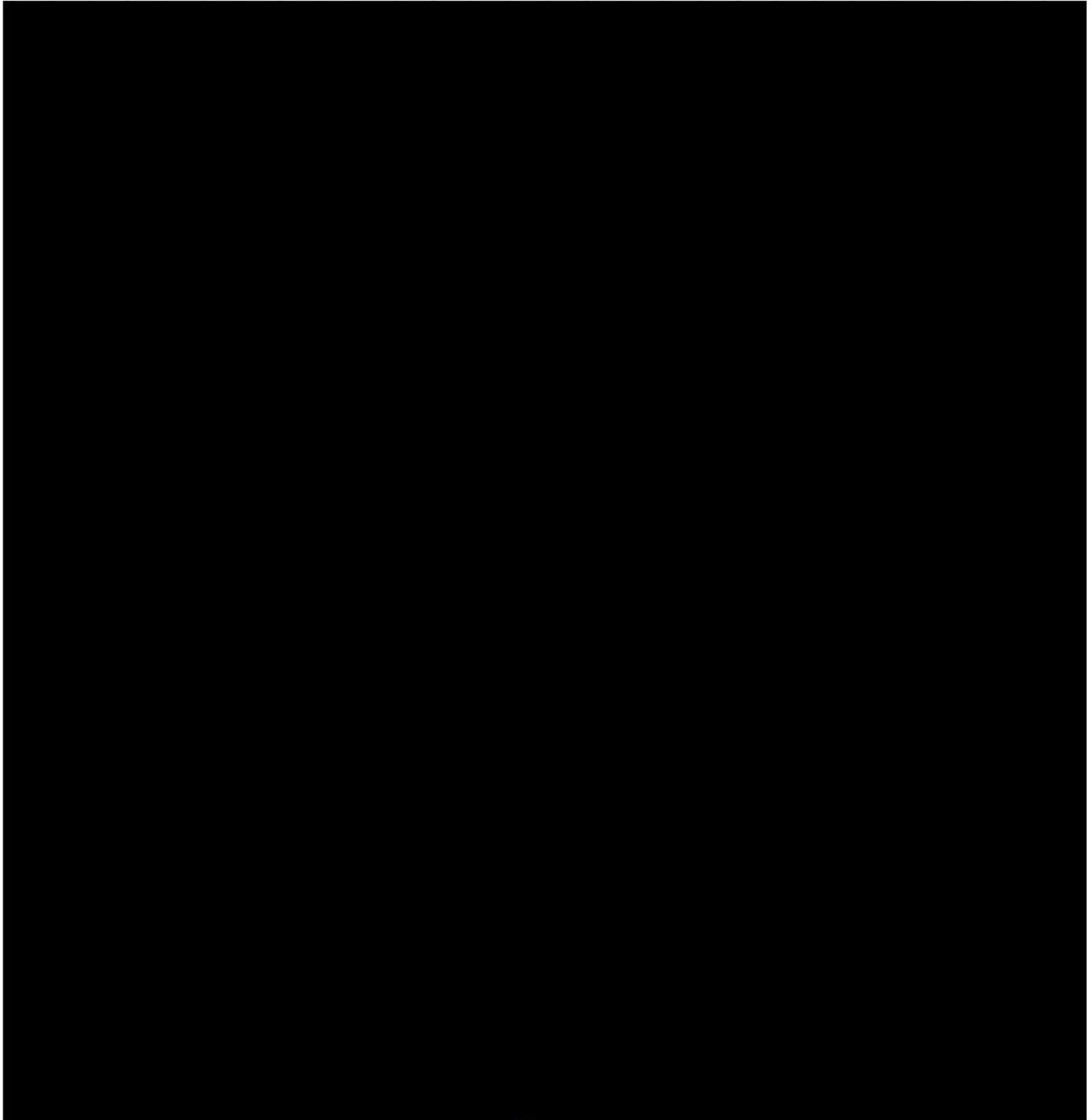
Based on our review of this delay, we conclude that UP's dispatcher failed to identify or implement alternatives that would have permitted UP to eliminate or mitigate this delay to the *Sunset Limited*. It is telling that despite UP's claim that the Alhambra Subdivision was 'extremely congested,' { [REDACTED] } Moreover, UP's claim that { [REDACTED] } ignores { { [REDACTED] } } on the route. Figure No. 17 below shows the relevant UP timetable.

²⁰ See: UP Reply at p. 96 (responding to Amtrak Opening at p. 84, discussing UP Train 2 RCA at p. 256), footnotes omitted.

**UP Dispatchers Frequently Failed to Identify or Ignored
Alternative Dispatching Moves in Historical Operating Scenarios**

{{ [REDACTED] }}

[REDACTED]



[REDACTED]}}

As shown above, there is a {{ [REDACTED] }}

[REDACTED]}} that could have accommodated a meet between AMT2-3 and the

**UP Dispatchers Frequently Failed to Identify or Ignored
Alternative Dispatching Moves in Historical Operating Scenarios**

{{ [REDACTED] }} long IG1LC-30, even if there were other trains in the area. UP states that {{ [REDACTED] }}
[REDACTED] }}. {{ [REDACTED] }}
[REDACTED] }} UP
could have {{ [REDACTED] }}
[REDACTED] }}. Instead, UP did the opposite – it held
AMT2-03 and allowed IG1LC-30 to advance.

UP's CADX data also shows that {{ [REDACTED] }}
[REDACTED]
[REDACTED]
[REDACTED] }}²¹

**12. AMT2-19, 6/19/22,
39-minute delay, Yuma Subdivision**

In its Opening Statement, Amtrak alleged that UP exposed the *Sunset Limited* to {{ [REDACTED] }}
[REDACTED] }}.²² In pertinent part,
UP attempts to explain its decision to delay the *Sunset Limited* as follows:

Amtrak claims Union Pacific committed a preference violation when AMT2-19 followed ICIG1-19 near Beaumont. Union Pacific's root cause analysis shows {{ [REDACTED] }}

Amtrak does not specify how Union Pacific's dispatcher should have handled the situation differently. As discussed above, dispatchers are instructed not to allow a faster train to overtake a slower train using double-track main line unless

²¹ UP's description of the operations is also inconsistent with the stringline graph UP submitted in its original assessment of this delay. {{ [REDACTED] }}

²² See: Amtrak Opening at p. 84, fn 219, discussing UP Train 2 RCA at p. 207).

**UP Dispatchers Frequently Failed to Identify or Ignored
Alternative Dispatching Moves in Historical Operating Scenarios**

there is no oncoming opposing traffic. In addition, { [REDACTED]

[REDACTED]
[REDACTED] }²³

Based on our review of this delay, we conclude that UP's dispatcher failed to identify or implement an alternative that would have permitted UP to eliminate this delay to the *Sunset*

Limited. {{ [REDACTED]

[REDACTED] }} For

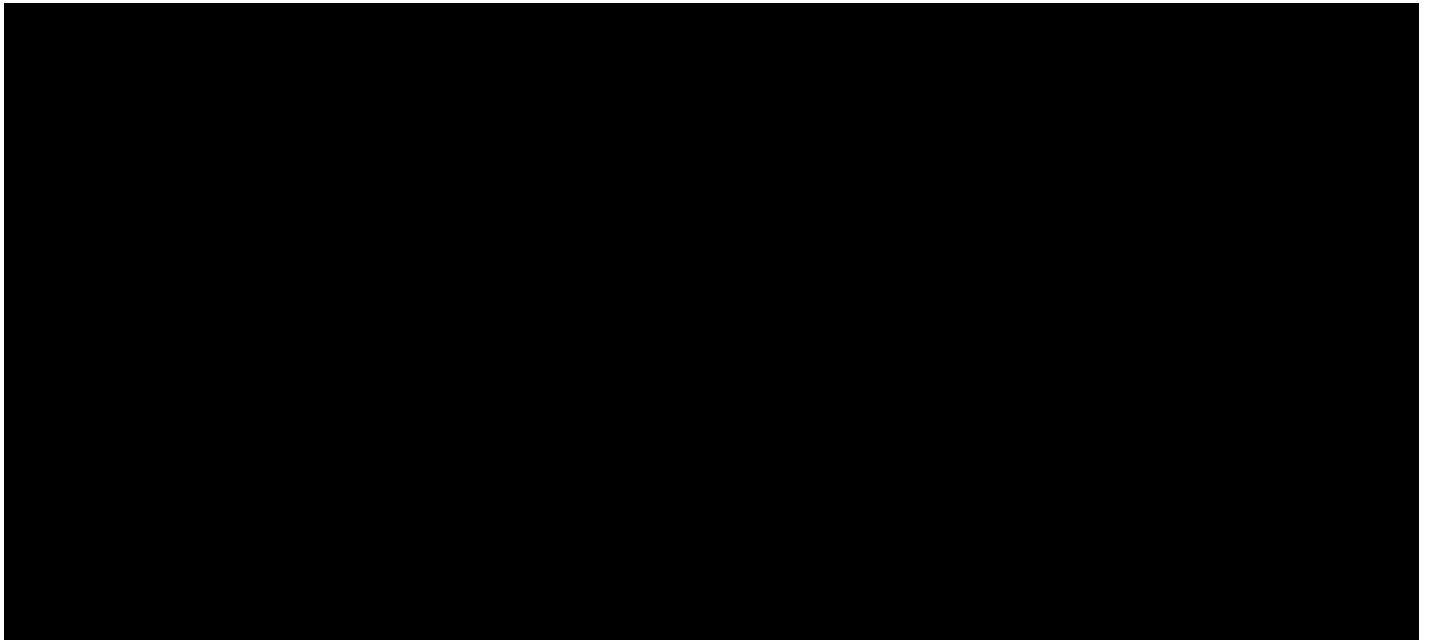
that reason, UP's claim that { [REDACTED]

[REDACTED] } is incorrect. We include the UP stringline graph at Figure No. 18 and UP track chart at Figure

No. 19 below, for ease of reference.

{{ [REDACTED]

[REDACTED]



[REDACTED] }}

²³ See: UP Reply at p. 97 (responding to Amtrak Opening at p. 84, discussing UP Train 2 RCA at p. 5), footnotes omitted.

**UP Dispatchers Frequently Failed to Identify or Ignored
Alternative Dispatching Moves in Historical Operating Scenarios**

[REDACTED]

[REDACTED]}

**UP Dispatchers Frequently Failed to Identify or Ignored
Alternative Dispatching Moves in Historical Operating Scenarios**

**13. AMT2-13, 3/13/22,
20-minute delay, Yuma Subdivision**

In its Opening Statement, Amtrak alleged that UP exposed the *Sunset Limited* to {{ [REDACTED] [REDACTED] }}. In pertinent part,

UP attempts to explain the imposition of this delay as follows:

Amtrak claims Union Pacific committed a preference violation when AMT2-13 followed ILBG4-13 between Wister Crossovers and Mesquite. Union Pacific's root cause analysis shows { [REDACTED]

[REDACTED] } Union Pacific records show { [REDACTED] [REDACTED] }

Amtrak does not specify how Union Pacific's dispatcher should have handled the situation differently. Union Pacific's root cause analysis shows the dispatcher had arranged for { [REDACTED]

[REDACTED] } As discussed above, dispatchers are instructed not to allow a faster train to overtake a slower train using double-track main line unless there is no oncoming opposing traffic. In addition, { [REDACTED] [REDACTED] }²⁴

Based on our review of this delay, we conclude that UP's dispatcher failed to identify or implement an alternative that would have permitted UP to eliminate this delay to the *Sunset Limited*. Indeed, UP's description of the pertinent operations is misleading because {{ [REDACTED] [REDACTED] [REDACTED] }}

As shown in Figure 20 below, the stringline graph UP included with its root cause analysis shows {{ [REDACTED]

²⁴ See: UP Reply at p. 97 (responding to Amtrak Opening at p. 84, discussing UP Train 2 RCA at p. 5), footnotes omitted.

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[REDACTED] }, which are

shown in the timetable excerpt below in Figure No. 21. Therefore, {{ [REDACTED]

[REDACTED]

}, which UP acknowledges { [REDACTED]

[REDACTED]

{{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }}

[REDACTED]

In its Opening Statement, Amtrak alleged that UP exposed the *Sunset Limited* to {{[REDACTED]}}. In pertinent part,

Amtrak claims Union Pacific committed a preference violation when AMT2-06 was delayed between its Pomona and Ontario station stops. Union Pacific's root cause analysis shows the delay occurred because {REDACTED}

**UP Dispatchers Frequently Failed to Identify or Ignored
Alternative Dispatching Moves in Historical Operating Scenarios**

[REDACTED]
[REDACTED] } One passenger
detained at Pomona; three detained at Ontario.

Amtrak does not specify how Union Pacific's dispatcher should have
handled the situation differently.²⁵

Based on our review of this delay, we conclude that UP's dispatcher failed to identify or
implement alternatives that would have permitted UP to eliminate or mitigate this delay to the
Sunset Limited. UP fails to acknowledge that {{ [REDACTED]

[REDACTED] }}.²⁶ UP could have
{{ [REDACTED] }}.

Additionally, as UP acknowledged in its original root cause analysis of this incident,

{ [REDACTED]
[REDACTED]
[REDACTED] }²⁷ However, {{ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] }}

{{ [REDACTED] }}, { [REDACTED]

[REDACTED] } UP's Train 2 RCA also states {{ [REDACTED]
[REDACTED]

²⁵ See: UP Reply at p. 98 (responding to Amtrak Opening at p. 84, discussing UP Train 2 RCA at p. 112),
footnotes omitted.

²⁶ {{ [REDACTED] }} is shown in Figure No. 22 below, which contains the
stringline graph included in UP's root cause analysis, and in which {{ [REDACTED] }} is highlighted in orange.

²⁷ See: UP Train 2 RCA at p. 112.

**UP Dispatchers Frequently Failed to Identify or Ignored
Alternative Dispatching Moves in Historical Operating Scenarios**

[REDACTED]

[REDACTED] }}²⁸

{{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }}.

²⁸ See: UP Train 2 RCA at p. 112.

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{ [REDACTED]

[REDACTED]

[REDACTED] }

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**15. AMT2-23, 9/24/22,
124-minute delay, Yuma Subdivision**

In its Opening Statement, Amtrak alleged that UP delayed Amtrak passengers “for over two hours because the crew of the UP train had reached its hours-of-service limit” and the train {REDACTED} ²⁹ In pertinent part, UP attempts to explain its failure to avoid blocking the mainline due to expiring hours-of-service as follows:

Amtrak claims Union Pacific committed a preference violation when the crew of MWCEP-23 reached their hours-of-service limit and stopped on the single-main track just west of the crew change point at Yuma. Union Pacific’s root cause analysis shows {REDACTED}

{REDACTED} Union Pacific dispatching records show {REDACTED}
{REDACTED}
{REDACTED}
{REDACTED}
{REDACTED}
{REDACTED}
{REDACTED}
{REDACTED}
{REDACTED}

{REDACTED} Amtrak does not specify how Union Pacific’s dispatcher should have handled the situation differently. Union Pacific’s dispatcher was trying to get MWCEP-23 to Yuma, or as close as possible to the crew change point. Amtrak fails to evaluate the consequence of stopping MWCEP-23 further from Yuma, which also would have caused congestion, including because recrewed the train would have taken even longer. AMT2-23 would have been delayed by that congestion.³⁰

Based on our review of this delay, we conclude that UP’s dispatcher failed to identify or implement an obvious alternative to obstructing this single-tracked line. The crew operating the MWCEP-23, which was {{REDACTED}} long, expired on {{REDACTED}} between Clyde, CA and Cactus, CA. UP could have {{REDACTED}}

²⁹ See: Amtrak Opening at p. 85, discussing UP Select Delays RCA at p. 37, footnotes omitted.

³⁰ See: UP Reply at p. 100 (responding to Amtrak Opening at p. 85, discussing UP Select Delays RCA at p. 37), footnotes omitted.

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[REDACTED] }}. UP acknowledges that {{ [REDACTED]

[REDACTED] [REDACTED]

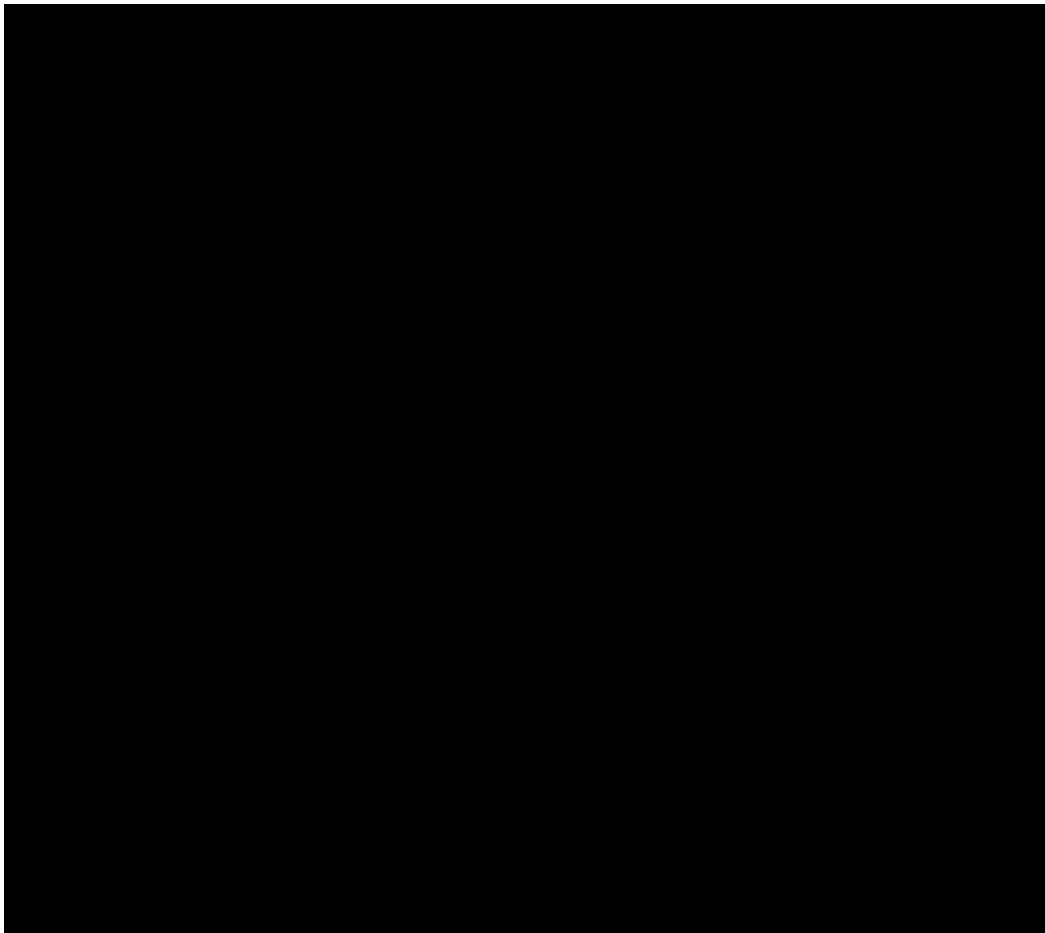
[REDACTED] }}³¹ The layout of pertinent segments is shown below in Figure No. 24.

We note that this delay occurred 24 hours after { [REDACTED]

[REDACTED] } as detailed in Section 16 below.

{ [REDACTED]

[REDACTED]



[REDACTED] }

³¹ See: UP Select Delays RCA at p. 37, footnotes omitted. UP speculates that holding MWCEP on the double-track segment would also have caused congestion because the recrew would have taken longer. See: UP Reply at p. 100. We have not been asked to evaluate how implementing the alternative identified above would have impacted UP's network.

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**16. AMT1-20, 9/23/22,
63-minute delay, Yuma Subdivision**

In its Opening Statement, Amtrak alleged that { [REDACTED] }

[REDACTED]

[REDACTED] } on the mainline in single-track territory. In pertinent part, UP attempts to explain the imposition of this delay as follows:

Amtrak claims Union Pacific committed a preference violation when the crew of ILBNS-21 reached their hours-of-service limit and stopped on the single-main track just west of the crew change point at Yuma. Union Pacific dispatching records show { [REDACTED] } Union Pacific's root cause analysis shows { [REDACTED] } [REDACTED] [REDACTED] [REDACTED] }

Amtrak does not specify how Union Pacific's dispatcher should have handled the situation differently. Amtrak appears to fault the dispatcher for not stopping ILBNS-21 further from Yuma, but Amtrak fails to consider whether such a decision would have compromised the overall fluidity of the network for both freight and passenger transportation.³²

Based on our review of this delay, we conclude that UP's dispatcher failed to identify or implement an obvious alternative to obstructing this single-tracked line. The crew operating ILBNS-21, which was { [REDACTED] } long, { [REDACTED] } [REDACTED] }. UP could have { [REDACTED] } [REDACTED] }³³ The layout of pertinent segments is shown below in Figure No. 25.

³² See: UP Reply at p. 101 (responding to Amtrak Opening at p. 85, discussing UP Train 1 RCA at p. 25), footnotes omitted.

³³ UP asserts that Amtrak in suggesting this alternative failed to consider whether such a decision would have compromised the overall fluidity of the network for both freight and passenger transportation. See: UP Reply at p. 101. We have not been asked to evaluate whether the identified alternative would have had any impact on the overall fluidity of the network.

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{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }

**17. AMT1-05, 4/6/22,
105-minute delay, Lafayette Subdivision**

In its Opening Statement, Amtrak alleged that UP failed to prioritize the *Sunset Limited* during a meet with {{ [REDACTED] [REDACTED] }}. In pertinent part, UP attempts to explain its decision to side the *Sunset Limited* as follows:

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Amtrak claims Union Pacific committed a preference violation when AMT1-05 was held at Brimstone for a meet with MBTLK-06 to allow MBTLK-06 to reach its destination before the crew's hours of service expired, after MBTLK-06 was delayed in departing from Beaumont. Union Pacific's root cause analysis shows { [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] }

Amtrak does not specify how Union Pacific's dispatcher should have handled the situation differently. Amtrak does not consider the consequences of stopping MBTLK-06 on one of the few available sidings on the Lafayette Subdivision, which would have left the siding unavailable for other meets until the train could be recrewed, and whether such a decision would have compromised the overall fluidity of the network for both freight and passenger transportation.³⁴

Based on our review of this delay, we conclude that UP's dispatcher failed to identify or implement alternatives that would have permitted UP to eliminate or mitigate this delay to the *Sunset Limited*. More specifically, UP could have stopped {{ [REDACTED]

[REDACTED]

[REDACTED] }}. Additionally, UP's response fails to acknowledge that {{ [REDACTED]

[REDACTED] }}.³⁵

The track configuration for this segment is shown in Figure No. 26 below, and the stringline reflecting that {{ [REDACTED] }} is shown in Figure No. 27 below, with MBTLK-06 highlighted in green.

³⁴ See: UP Reply at pp. 101-102 (responding to Amtrak Opening at p. 86, discussing UP Select Delays RCA at p. 12), footnotes omitted.

³⁵ UP asserts that Amtrak in suggesting this alternative failed to consider whether such a decision would have compromised the overall fluidity of the network for both freight and passenger transportation. See: UP Reply at p. 102. We have not been asked to evaluate whether the identified alternative would have had any impact on the overall fluidity of the network.

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{{ [REDACTED]

[REDACTED]

[REDACTED] }}

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{{ [REDACTED] }}

[REDACTED]

[REDACTED]

[REDACTED]}}

**18. AMT1-08, 3/11/22,
18-minute delay, Lordsburg Subdivision**

In its Opening Statement, Amtrak alleged that UP “chose to prioritize the movement of freight transportation by dispatching freight trains over faster trackage and relegating faster-moving Amtrak passenger trains to slower trackage.”³⁶ In pertinent part, UP attempts to explain its failure to allow Amtrak to utilize the faster track as follows:

Amtrak claims Union Pacific committed a preference violation when AMT1-08 was routed westbound over the slower track between the Vail Crossovers and Mescal. Union Pacific’s root cause analysis shows { [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] }

Amtrak does not specify how Union Pacific’s dispatcher should have handled the situation differently, but it implies the dispatcher should have { [REDACTED]

³⁶ See: Amtrak Opening at pp. 86-87, discussing UP Train 2 RCA at p. 313, footnotes omitted.

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{
Amtrak does not consider the total delay involved and other consequences of
{
} would not have compromised the overall fluidity of the
network for both freight and passenger transportation. Amtrak merely asserts an
absolute right to the faster track that is not provided by § 24308(c).³⁷

Based on our review of this delay, we conclude that UP's dispatcher failed to identify or
implement alternatives that would have permitted UP to eliminate or mitigate this delay to the
Sunset Limited by moving the AMT1-08 over faster track. Figure No. 28 below displays the
timetable information for the segment between East Kolb, AZ { } and Chamiso,
AZ { }.



UP acknowledges {

{

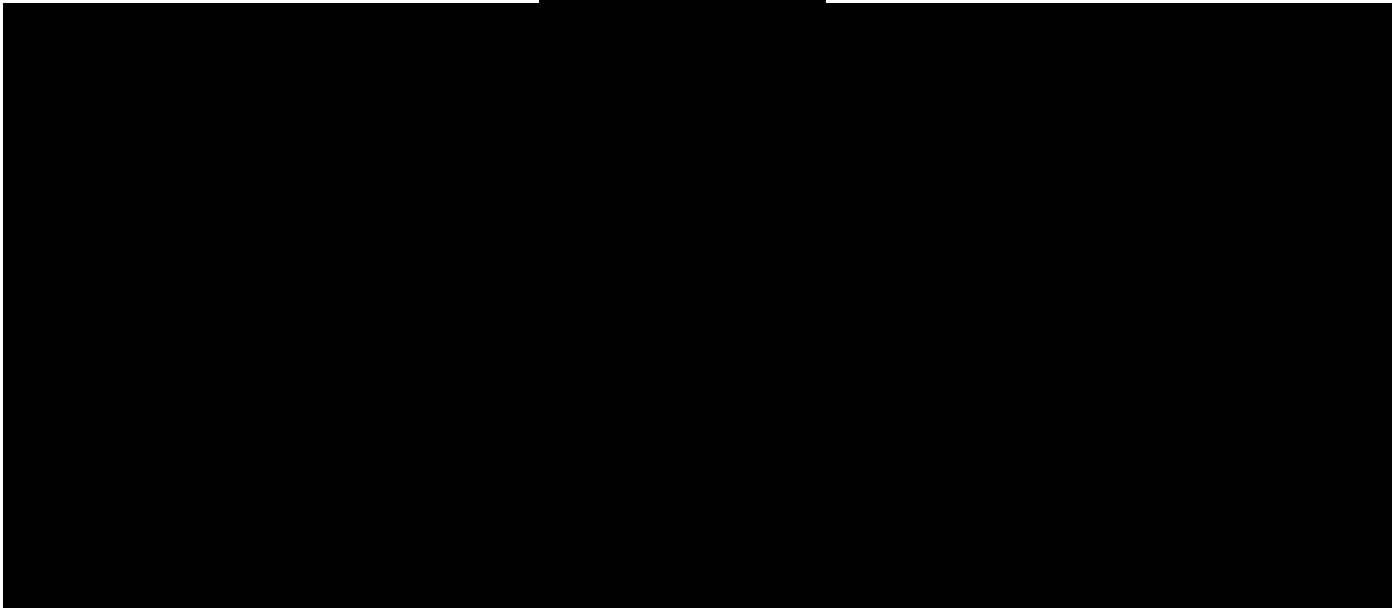
{

³⁷ See: UP Reply at p. 103 (responding to Amtrak Opening at pp. 86-87, discussing UP Train 1 RCA at p. 77), footnotes omitted.

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[REDACTED] } These {{ [REDACTED] }} are
shown in pink in Figure 29 below, the stringline graph UP included with its root cause analysis.

{{ [REDACTED] }}



[REDACTED] }}

{{ [REDACTED] }}

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]}}

**19. AMT2-10, 8/11/22,
33-minute delay, Lordsburg Subdivision**

In its Opening Statement, Amtrak alleged that UP “chose to prioritize the movement of freight transportation by dispatching freight trains over faster trackage and relegating faster-moving Amtrak passenger trains to slower trackage.”³⁸ In pertinent part, UP attempts to explain its failure to allow Amtrak to utilize the faster track as follows:

Amtrak claims Union Pacific committed a preference violation when AMT2-10 was routed eastbound over the slower track between the Vail Crossovers and Mescal. Union Pacific’s root cause analysis shows { [REDACTED]

[REDACTED] }

Amtrak does not specify how Union Pacific’s dispatcher should have handled the situation differently. The dispatcher could not { [REDACTED]

[REDACTED] }³⁹

Based on our review of this delay, we conclude that UP’s dispatcher failed to identify or implement alternatives that would have permitted UP to eliminate or mitigate this delay to the *Sunset Limited* by running AMT2-10 over faster track. Figure No. 30 below displays the timetable information for the segment between East Kolb, AZ { [REDACTED] } and Chamiso, AZ { [REDACTED] }.

³⁸ See: Amtrak Opening at pp. 86-87, discussing UP Train 2 RCA at p. 313, footnotes omitted.

³⁹ See: UP Reply at p. 104 (responding to Amtrak Opening at p. 87, discussing UP Train 2 RCA at p. 313), footnotes omitted.

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{ [REDACTED] }

[REDACTED]

[REDACTED] }

Based on our review of this delay, we conclude that UP's dispatcher had an alternative option available that would not have resulted in AMT2-10 having to move on the slower track. UP alleges that { [REDACTED] } [REDACTED] } However, {{ [REDACTED] } } The distance between Vail Crossovers and Mescal is { [REDACTED] }. UP's dispatcher could have determined that {{ [REDACTED] } } [REDACTED] }}

**20. AMT1-08, 2/11/22,
16-minute delay, Lordsburg Subdivision**

In its Opening Statement, Amtrak alleged that UP "chose to prioritize the movement of freight transportation by dispatching freight trains over faster trackage and relegating faster-

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moving Amtrak passenger trains to slower trackage.”⁴⁰ In pertinent part, UP attempts to explain its failure to allow Amtrak to utilize the faster track as follows:

Amtrak claims Union Pacific committed a preference violation when AMT1-08 was routed westbound over the slower track between the Vail Crossovers and Mescal. Union Pacific’s root cause analysis shows { [REDACTED]

[REDACTED]
[REDACTED] }

Amtrak does not specify how Union Pacific’s dispatcher should have handled the situation differently. The dispatcher could not { [REDACTED]

[REDACTED]
[REDACTED] }⁴¹

Based on our review of this delay, we conclude that UP’s dispatcher failed to identify or implement alternatives that would have permitted UP to eliminate or mitigate this delay to the *Sunset Limited* and run the AMT1-08 on faster track. Figure No. 31 below displays the timetable information for the segment between East Kolb, AZ { [REDACTED] } and Chamiso, AZ { [REDACTED] }.

⁴⁰ See: Amtrak Opening at pp. 86-87, discussing UP Train 2 RCA at p. 313, footnotes omitted.

⁴¹ See: UP Reply at p. 104 (responding to Amtrak Opening at p. 87, discussing UP Train 2 RCA at p. 312), footnotes omitted.

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{ [REDACTED] }

[REDACTED]

[REDACTED] }

UP alleges that { [REDACTED]

[REDACTED] } However, {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }}

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**21. AMT2-19, 1/20/22,
96-minute delay, Sanderson Subdivision**

In its Opening Statement, Amtrak alleged that UP failed to clear a maintenance team sufficiently in advance of the *Sunset Limited*'s arrival. In pertinent part, UP attempts to explain the imposition of this delay as follows:

Amtrak claims Union Pacific committed a preference violation when AMT2-19 was stopped near Strobel because of an overstay of a maintenance-of-way crew. Union Pacific's root cause analysis shows { [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] }

Amtrak does not specify how Union Pacific's dispatcher should have handled the situation differently or show that disrupting the maintenance-of-way work would not have compromised the overall fluidity of the network for both freight and passenger transportation.⁴²

Based on our review of this delay, it does not appear that UP { [REDACTED]

[REDACTED]

[REDACTED] } UP offered a more granular description of events in its original root cause analysis. There, UP indicated: { [REDACTED]

[REDACTED]

[REDACTED] }⁴³

In fact, {{ [REDACTED]

[REDACTED]

[REDACTED] }}, as shown in Figure No. 32 below.

⁴² See: UP Reply at p. 105 (responding to Amtrak Opening at p. 87, discussing UP Select Delays RCA at p. 28), footnotes omitted.

⁴³ UP Select Delays RCA at p. 28, emphasis added.

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{{ [REDACTED] }}

[REDACTED]

[REDACTED] }}

Therefore, UP's dispatcher either {{ [REDACTED] [REDACTED]

[REDACTED]

[REDACTED] }}. Instead, UP's dispatcher could have {{ [REDACTED]

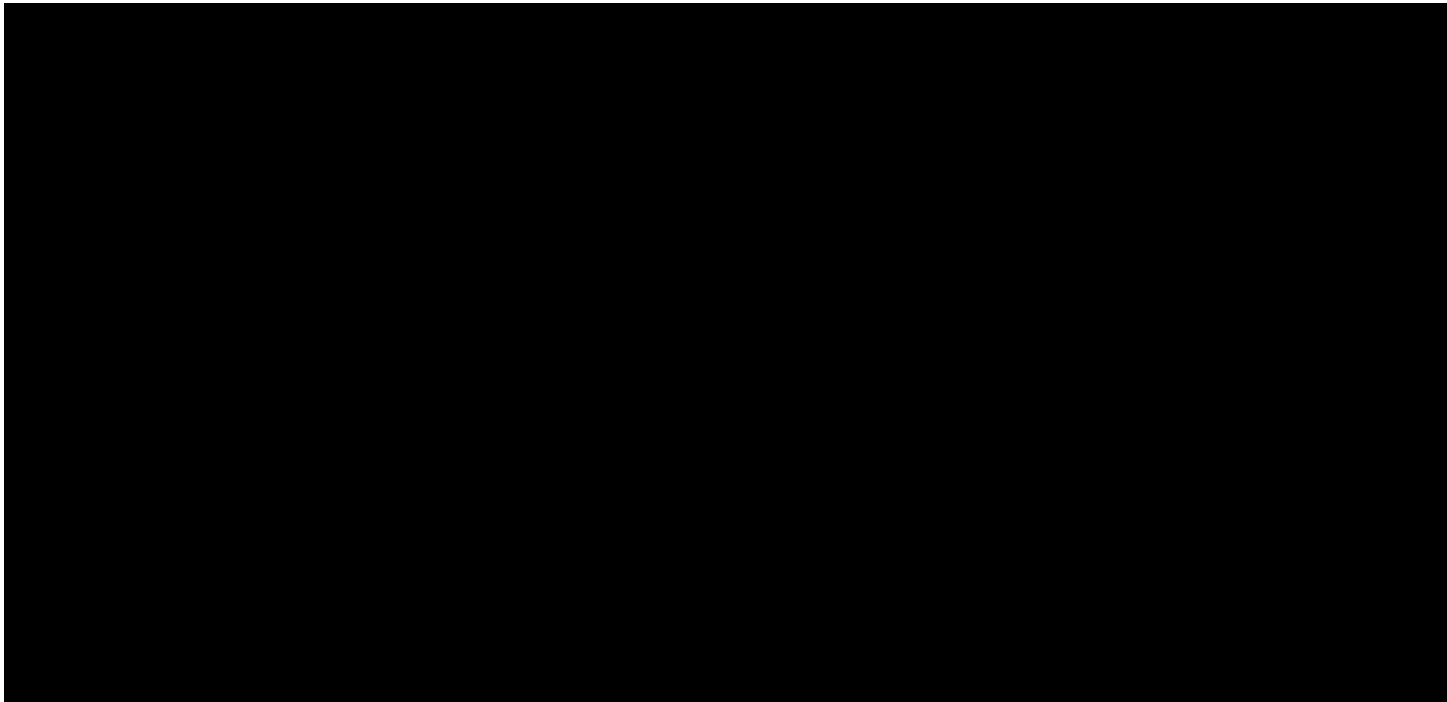
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[REDACTED]

[REDACTED] Figure No. 33 below shows the stringline graph for this area between Strobel, TX, and
Tesus, TX in the red box.

{{ [REDACTED]

[REDACTED]



[REDACTED]}}

As shown above, {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]}}

**22. AMT2-20, 9/22/22,
99-minute delay, Lordsburg Subdivision**

In its Opening Statement, Amtrak alleged that UP delayed the *Sunset Limited* because it

{ [REDACTED]

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[REDACTED]. In pertinent part, UP attempts to explain the imposition of this delay as follows:

Amtrak claims Union Pacific committed a preference violation when AMT1-20 was blocked from entering the El Paso station by MEPWCX-21. Union Pacific's root cause analysis shows { [REDACTED]

[REDACTED]
[REDACTED] }

Amtrak does not specify how Union Pacific's dispatcher should have handled the situation differently. { [REDACTED]

[REDACTED] }⁴⁴

To perform the air test, { { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }} as shown in the orange box in Figure No. 34 below.

⁴⁴ See: UP Reply at p. 106 (responding to Amtrak Opening at p. 87, discussing UP Train 1 RCA at p. 16), footnotes omitted.

[REDACTED]

}}. 45

⁴⁵ See: UP Train 1 RCA workpaper “MDR 1 MEPWCX-21 2022-09-21.pdf.”

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could have {{ [REDACTED]
[REDACTED] }}

⁴⁶ Although the incident report states that {{ [REDACTED]
[REDACTED] }}