

BEFORE THE
SURFACE TRANSPORTATION BOARD

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Docket No. NOR 42175

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

UNION PACIFIC RAILROAD COMPANY'S MOTION TO STRIKE

CRAIG V. RICHARDSON
JAMES B. BOLES
JOSEPHINE JORDAN
DOMINIQUE JOHNSON
Union Pacific Railroad Company
1400 Douglas Street
Omaha, NE 68179

MICHAEL L. ROSENTHAL
WENTAO YANG
Covington & Burling LLP
One CityCenter
850 Tenth Street, N.W.
Washington, DC 20001
(202) 662-6000

Attorneys for Union Pacific Railroad Company

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Union Pacific Railroad Company (Union Pacific) hereby moves to strike impermissible rebuttal evidence from the rebuttal brief and evidence filed by the National Railroad Passenger Corporation (Amtrak). Amtrak's filing includes a rebuttal verified statement from consultants Robert D. Mulholland and Timothy D. Crowley. In Exhibit 11 to their statement, Mulholland and Crowley purport to show Union Pacific dispatchers failed to exercise available options that would have mitigated delays to *Sunset Limited* trains arising from conflicts with freight trains. Under the Board's rules, Amtrak was required to submit any such evidence on opening, so Union Pacific could address it on reply. Mulholland and Crowley have no apparent knowledge, skill, experience, training, or education that qualifies them to offer opinions on dispatching. Union Pacific's review of just the first two delays they discuss shows they do not understand the choices dispatchers made or basic operating rules. The Board should enforce its rules by striking Exhibit 11 and all references to the exhibit in Amtrak's rebuttal.

ARGUMENT

- I. Amtrak violated Board rules requiring Amtrak to present its best evidence on opening, so Union Pacific would have a fair opportunity to reply.**

The Board has long recognized "[t]he interests of fairness and orderly handling of a case dictate that parties submit their best evidence on opening, so that each party has a

fair opportunity to reply to the other's evidence.”¹ A complaint therefore must submit a “fully supported case on opening” and “may not hold back to see the [defendant's] reply evidence before finalizing or supporting its own case.”² In other words, rebuttal “may not be used as an opportunity to introduce new evidence that could and should have been submitted on opening to support the opening submissions.”³

Amtrak failed to follow the Board's rules. On opening, Amtrak claimed hundreds of delays to the *Sunset Limited* resulted from Union Pacific's alleged failure to provide preference. On reply, Union Pacific showed Amtrak's complaints mostly involved Union Pacific's network design and operating strategy and that when Amtrak complained about dispatcher decisions, it relied on “absolute preference”—that is, Amtrak never tried to show dispatchers failed to give its interests greater weight than they gave freight interests. Union Pacific observed Amtrak never specified what it believed dispatchers should have done differently and never showed the alternatives would not have compromised network fluidity. Union Pacific also noted many of the delays did not give freight trains any advantage. Union Pacific reinforced Amtrak's evidentiary failings by discussing the circumstances surrounding 22 delays Amtrak said illustrated its preference complaints. In each case, Union Pacific discussed the circumstances surrounding the delay and noted Amtrak had not shown a preference violation because, among other things, it had not specified how dispatcher should have handled the situation differently.⁴

¹ *Pub. Serv. Co. of Colo. d/b/a Xcel Energy v. BNSF Ry.*, NOR 42057, slip op. at 2 (STB served Apr. 4, 2003).

² *Duke Energy Corp. v. Norfolk S. Ry.*, 7 S.T.B. 89, 101 (2003).

³ *Gen. Procs. for Presenting Evid. in Stand-Alone Cost Rate Cases*, 5 S.T.B. 441, 446 (2001).

⁴ See Union Pacific Reply at 86–106.

On rebuttal, Amtrak for the first time tried to establish one of the necessary elements of a preference violation: dispatchers should have done something differently. In Exhibit 11, Mulholland and Crowley claim dispatchers failed to identify or implement alternatives to mitigate the 22 delays Amtrak identified in its opening and Union Pacific discussed in its reply. However, they could have and should have presented such evidence on opening. Union Pacific had produced all the underlying information Mulholland and Crowley used in its responses to Amtrak's discovery requests and pursuant to the Board's orders that Union Pacific provide root cause analyses of specified delays to *Sunset Limited* trains.⁵ Had Mulholland and Crowley presented their claims on opening, Union Pacific could have addressed them on reply. Instead, Amtrak impermissibly held back until Union Pacific filed its reply before supporting its own case.

When a complainant submits impermissible rebuttal evidence, the appropriate remedy is to strike that evidence from the record. For example, in *Sunbelt Chlor Alkali Partnership v. Norfolk Southern Railway*,⁶ the Board struck rebuttal testimony from an expert witness supporting Sunbelt's assertion on opening about the appropriate size of roadmaster districts. The Board rejected Sunbelt's argument that the rebuttal permissibly supported Sunbelt's opening claim by challenging Norfolk Southern's reply evidence regarding roadmaster districts. The Board said Sunbelt's opening contained no support for its claim and it was "not permissible for Sunbelt to wait for its rebuttal to provide

⁵ Mulholland and Crowley apparently never fully reviewed the material Union Pacific previously produced. For example, they erroneously claim that "UP did not produce workpapers supporting its root cause analysis." Amtrak Rebuttal Brief and Evidence, Reply Verified Statement of Robert D. Mulholland and Timothy Crowley ("Peabody RVS") Ex. 11 at 8.

⁶ NOR 42130 (STB served June 20, 2014).

supporting evidence for the first time.”⁷ As in *Sunbelt*, Amtrak for the first time on rebuttal tried to support naked assertions in its opening evidence. Union Pacific’s effort to address those assertions and identify Amtrak’s failure of proof on reply did not give Amtrak license to submit expert evidence supporting its claims for the first time on rebuttal. As in *Sunbelt*, the appropriate remedy is to strike the offending evidence from the record.⁸

II. Amtrak’s rebuttal evidence in Exhibit 11 is deeply flawed.

Striking Exhibit 11 and all references to that exhibit in Amtrak’s rebuttal is necessary to ensure the Board’s decision rests on an accurate record. Neither Mr. Mulholland nor Mr. Crowley has the knowledge, skill, experience, training, or education that qualifies them to offer opinions on dispatching. In the combined eight pages of credentials they submitted, dispatching is not mentioned. Had Amtrak submitted Mulholland and Crowley’s evidence on opening, Union Pacific could have fully addressed their lack of credentials and uninformed claims.⁹

To illustrate the flaws in Mulholland and Crowley’s evidence, Union Pacific asked one of its dispatching professionals, Mary Greise, to review the Mulholland and Crowley critique of the first two delays addressed in Exhibit 11. Ms. Greise has over 14 years of

⁷ *Id.*, slip op. at 9; *see also id.*, slip op. at 8 (striking crew deadheading evidence because *Sunbelt* “present[ed] its evidence on this issue for the first time on rebuttal”).

⁸ *See also Total Petrochemicals & Refin. USA, Inc. v. CSX Transp.*, NOR 42121, slip op. at 12 (STB served May 31, 2013) (striking rebuttal arguments regarding the feasibility of alternatives proposed on reply because complainant failed to address on opening the issue and potential alternatives it was aware of); *M&G Polymers USA, LLC v. CSX Transp.*, NOR 42123, slip op. at 9 n. 24 (STB served Sept. 27, 2012) (striking rebuttal expert testimony purporting to “validate[] and confirm[]” argument presented on opening).

⁹ Their lack of qualifications is an additional reason to strike their testimony. *See Fed. R. Evid.*, Rule 702 (“A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise [if other conditions are also met].”).

experience in train dispatching. She began working at Union Pacific in 2011 as an Apprentice Train Dispatcher and served as a Train Dispatcher until 2017, when she became a Manager II Central Train Dispatch. Ms. Greise was promoted to her current position as a Manager I Central Train Dispatch in 2021.¹⁰

The first delay involved AMT1-03 on April 6, 2022. Amtrak complained AMT1-03 was delayed because it followed IDISI-04. Ms. Greise created the diagram below to help illustrate the issues. The top half of the diagram shows westbound AMT1-03 and IDISI-04 and the times they passed certain control points. The bottom half shows similar information for eastbound AMLEG-04 and RGCDOC-5.¹¹

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¹⁰ See the accompanying verification from Mary Greise.

¹¹ In this filing, Highly Confidential information is enclosed in double braces, and Confidential information is enclosed in single braces. Highly Confidential and Confidential information is redacted from the public version of this document.

As Ms. Greise explains, {

¹² See Peabody RVS Ex. 11 at 2–3.

¹³ Union Pacific’s dispatch tapes { See “Amtrak Tornillo-HC.WAV” in the accompanying file “UP_Exh_031325_HC.zip.”

¹⁴ See Peabody RVS Ex. 11 at 3 (referencing “CADX data”).

¹⁵ See “SA792_Excerpt_from_UP-SL-0017542_HC.xlsx” in the accompanying file “UP_Exh_031325_HC.zip.”

}

In sum, Mulholland and Crowley criticize the dispatching approach without an understanding of the original plan for AMT1-03's interactions with AMLEG-04, RGCDOC-05, and IDISI-04, and they fail to recognize why IDISI-04 left Tornillo ahead of AMT1-03. {

}

The second delay involved AMT1-11 on October 13, 2022. Amtrak complained AMT1-11 was delayed because it followed MEWTU-12, which was 14,302 feet in length. As Union Pacific explained in its root cause analysis, {

}¹⁶

¹⁶ Mulholland and Crowley use an older version of Union Pacific's Glidden Subdivision timetable in their Figure 3 that does not show the current length of the siding at Flatonina. See Peabody RVS Ex. 11 at 6, Figure 3.

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¹⁸ Peabody RVS Ex. 11 at 7.

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CONCLUSION

The Board should not accept the Mulholland and Crowley opinions about Union Pacific's dispatching decisions. If the Board is at all inclined to consider those opinions, then due process requires giving Union Pacific an opportunity to respond.¹⁹ Rather than extend this proceeding to allow a sur-rebuttal, the Board should apply its rule against impermissible rebuttal and strike Exhibit 11 and all references to that exhibit in Amtrak's rebuttal.

¹⁹ See, e.g., *Ralpho v. Bell*, 569 F.2d 607, 628 (D.C. Cir. 1977) ("An opportunity to meet and rebut evidence utilized by an administrative agency has long been regarded as a primary requisite of due process.").

CRAIG V. RICHARDSON
JAMES B. BOLES
JOSEPHINE JORDAN
DOMINIQUE JOHNSON
Union Pacific Railroad Company
1400 Douglas Street
Omaha, NE 68179

Respectfully submitted,

/s/ Michael L. Rosenthal
MICHAEL L. ROSENTHAL
WENTAO YANG
Covington & Burling LLP
One CityCenter
850 Tenth Street, N.W.
Washington, DC 20001
(202) 662-6000

Attorneys for Union Pacific Railroad Company

March 13, 2025

VERIFICATION

I, Mary R. Greise, declare under the penalty of perjury that I have read the foregoing Motion to Strike and that the facts stated in it are true and correct to the best of my knowledge and belief. Further, I certify that I am qualified and authorized to file this Verification.

Executed on March 13, 2025.

/s/ Mary R. Greise

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of March, 2025, I caused a copy of the foregoing document to be served by email on Administrative Law Judge McCarthy and all parties of record in Docket No. NOR 42175.

/s/ Michael L. Rosenthal