
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

AMTRAK’S REPLY TO UNION PACIFIC’S MOTION TO STRIKE

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INTRODUCTION

In its Opening Statement, the National Railroad Passenger Corporation (“Amtrak”) responded to the Surface Transportation Board’s (“Board”) Order of August 19, 2024, which directed Amtrak to address what would constitute a “failure to provide preference to Amtrak” under 49 U.S.C. § 24308(f).¹ The Board also directed Amtrak to address “any other legal issues that it believes are relevant to whether preference violations by a host rail carrier have occurred on the *Sunset Limited* route during the Relevant Period.”² Amtrak did precisely that. As part of its response, Amtrak identified illustrative delays from the root cause analysis previously provided by Union Pacific (“UP”) and explained how those particular delays evinced UP’s failures to provide Amtrak with preference over freight transportation in using a rail line, junction, or crossing, as required by statute.³ UP responded to Amtrak’s identification of these preference violations by faulting Amtrak for failing to explain what UP dispatchers should have done differently.⁴ In Rebuttal, though it had no obligation to do so, Amtrak provided the Board with such explanations. UP now moves to strike the very evidence it claimed was needed by the Board to evaluate Amtrak’s identification of preference violations. The motion should be denied.

¹ *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, at 3 (S.T.B. served Aug. 19, 2024) (“August 2024 Order”).

² *Id.*

³ Amtrak Opening Statement at 76–88 (Oct. 7, 2024).

⁴ UP Reply at 77 (Dec. 23, 2024).

ARGUMENT

I. Amtrak's Evidence Regarding Dispatching Alternatives Is Quintessential Rebuttal And Provides The Board With A More Complete And Accurate Record.

In its Motion to Strike (“Motion”), UP contends that expert analysis concerning alternatives to unlawful dispatching maneuvers must be stricken because Amtrak did not provide that evidence in its Opening Statement.⁵ UP is incorrect.

Amtrak had no obligation to address the existence of alternative dispatching maneuvers in its Opening Statement. As Amtrak explained in its Opening Statement, host railroads violate preference when they prioritize the movement of freight trains over passenger trains when using rail lines, crossings, or junctions.⁶ A host railroad is excused from its preference obligation under federal law in only two circumstances: (1) when there is an emergency, or (2) when the host railroad has obtained a prior Board order under the procedure set forth in Section 24308(c).⁷ Nothing in the statute requires Amtrak to establish that UP dispatchers ignored available alternatives in deciding to prioritize freight over passenger transportation.⁸ In advocating for this extra-textual evidentiary burden, UP gets the law backwards and risks frustrating the preference right, including by making it prohibitively time-consuming and expensive to vindicate Amtrak's statutory right to preference over freight transportation.⁹ Because Amtrak had no obligation to offer evidence on alternatives in its Opening Statement, UP's cases are inapposite.¹⁰

⁵ Motion at 1 (March 13, 2025).

⁶ See 49 U.S.C. § 24308(c); Amtrak Opening Statement at 61–70.

⁷ See 49 U.S.C. § 24308(c); Amtrak Opening Statement at 70–74.

⁸ See Amtrak Rebuttal at 68 (Feb. 21, 2025).

⁹ *Id.* at 68–69. Perhaps because preparing the analysis that UP demands is so expensive and time consuming, UP offered very little of its own analysis in Reply, relying principally on the assertion that Amtrak failed to demonstrate alternatives existed. See UP Reply at 76–107.

¹⁰ See, e.g., *Pub. Serv. Co. of Colo. d/b/a Xcel Energy v. BNSF Ry.*, NOR 42057, 2003 WL 1788666, at *1 (STB served Apr. 4, 2003); *Duke Energy Corp. v. Norfolk S. Ry.*, 7 S.T.B. 89, 101 (2003); *Sunbelt Chlor Alkali Partnership v. Norfolk Southern Railway*, NOR 42130 (STB served June 20, 2014) (slip op.); *Total Petrochemicals & Refin. USA*,

If anything, the cases illustrate that the disputed evidence here is quintessential rebuttal because it responds directly to matters raised in UP's Reply.¹¹ Indeed, the Board has made clear that rebuttal evidence is proper when it "shows that reply evidence is itself unsupported, infeasible, or unrealistic."¹²

That is the case here. In its Reply, UP claimed that the 22 individual dispatching conflicts at issue "involve circumstances in which dispatchers had no prudent alternative to slowing or stopping the *Sunset Limited*."¹³ In Exhibit 11 of their Rebuttal Verified Statement, Amtrak experts offered evidence that responded directly to that claim and demonstrated that it was unsupported. Put differently, Amtrak appropriately corrected the investigative record and illustrated that UP's arguments fail even under its misguided standard. The Board has consistently denied motions to strike rebuttal evidence in such circumstances.¹⁴

In short, the Board's rules did not require Amtrak to anticipate and prebut UP's claims about alternative dispatching maneuvers when preparing its Opening Statement. Nor did Board's

Inc. v. CSX Transp., NOR 42121, slip op. at 12 (STB served May 31, 2013); *M&G Polymers USA, LLC v. CSX Transp.*, NOR 42123, slip op. at 9 n. 24 (STB served Sept. 27, 2012). The cases that UP relies on in its Motion are also inapposite for another reason: They address the presentation of evidence in adversarial rate cases, long governed by the stand-alone cost test. *See Gen. Procs. for Presenting Evid. in Stand-Alone Cost Rate Cases*, 5 S.T.B. 441, 446 (2001). Those proceedings bear no resemblance to and do not govern appropriate process in Board investigations.

¹¹ *See Gen. Procs. for Presenting Evidence in Stand-Alone Cost Rate Cases*, 5 S.T.B. at 446; *Duke Energy*, 7 S.T.B. at 101.

¹² *Duke Energy*, 7 S.T.B. at 101.

¹³ UP Reply at 77.

¹⁴ *See, e.g., Canadian Pac. Ry. Limited; Canadian Pac. Ry. Company; Soo Line R.R. Company; Cent. Maine & Quebec Ry. Us Inc.; Dakota, Minnesota & E. R.R. Corporation; & Delaware & Hudson Ry. Co., Inc.-Control-Kansas City Southern; the Kansas City S. Ry. Company; Gateway E. Ry. Company; & the Texas Mexican Ry. Co.*, No. FD 36500, 2022 WL 11600182, at *2 (STB served Oct. 19, 2022) (denying motion to strike rebuttal evidence that was "a direct response to [reply] evidence and is therefore within the scope of proper rebuttal evidence"); *W. Fuels Ass'n, Inc., & Basin Elec. Power Coop.*, STB No. 42088, 2007 WL 2590251, at *8 (STB served Sept. 10, 2007) (denying motion to strike "permissible rebuttal to the feasibility and accuracy of BNSF's reply evidence"); *L. B. Foster Co.-Petition for Declaratory Ord.-Certain Rates & Pracs. of c&h Nationwide, Inc. d/b/a c&h Transportation Co. Lyco Mfg. Co., Inc.-Petition for Declaratory Ord.-Certain Rates & Pracs. of c&h Nationwide, Inc., d/b/a c&h Transportation Co.*, No. 40306, 1990 WL 287762, at *3 n.3 (I.C.C. Aug. 27, 1990) (denying motion to strike the testimony in rebuttal statement that concerned "matters raised by respondent in its reply statement [] and therefore appropriate for consideration").

rules prohibit Amtrak from responding when UP claimed such information was needed for the Board to evaluate whether UP had provided Amtrak with preference as required by statute. Amtrak had no burden to demonstrate that alternative dispatching maneuvers exist for any individual dispatching decision, but Amtrak did so at UP's invitation to ensure the Board had a full record before it. The Motion to Strike should be denied.

II. UP's Additional Arguments Are Mistaken.

The Board should also reject other arguments in the Motion. None provide grounds to strike the disputed evidence and none provide any basis for permitting UP to submit a sur-rebuttal.

First, UP claims the disputed evidence is “deeply flawed.”¹⁵ That claim is mistaken. UP only addresses two of the twenty-two individual dispatching conflicts at issue. The two dispatching conflicts that UP addresses are not representative. Neither address meets, early route delays, alternatives to freight expiration, or alternatives to dispatching the *Sunset Limited* over slower trackage.¹⁶ Because UP did not even ask its personnel to evaluate the other twenty individual dispatching decisions addressed in Exhibit 11, it has no basis for its claim of flawed evidence.

As important, the analysis that UP offers is misleading. Take UP's analysis of the first delay. Amtrak's experts Mulholland and Crowley indicated that UP's dispatcher { [REDACTED]

[REDACTED]

[REDACTED] }.¹⁷ UP never actually disputes that assertion. Instead, UP elides the

¹⁵ Motion at 4.

¹⁶ The October 13, 2022 delay is not representative for a separate reason: Its inclusion was predicated on erroneous data provided by UP. In its Opening Statement, Amtrak alleged that { [REDACTED]

[REDACTED] }. Amtrak Opening Statement at 81–82. In its Reply, UP clarified that { [REDACTED] }.

UP Reply at 87. Analysis of that individual dispatching conflict was nevertheless included in Amtrak's Rebuttal, for completeness. In responding to it, UP does not dispute that the identified alternative existed.

¹⁷ UP Mot. at 6; see also Exhibit 11 at 1–3.

existence of that alternative by asserting that its dispatcher { [REDACTED] }¹⁸ UP never explains why its decision—which prioritized the forward movement of freight trains over mitigating delay to the *Sunset Limited*—was { [REDACTED] }.¹⁹ In short, UP never contests that an alternative dispatching maneuver was available.

Second, UP asserts that Amtrak experts are not qualified to opine on dispatching decisions.²⁰ As an initial matter, this claim must be rejected because UP does not develop the claim or support it with pertinent authority.²¹ In any event, UP is wrong. Mr. Mulholland has a master’s degree in Transportation Policy, Operations, and Logistics.²² His statement of qualifications (“SOQ”) illustrates that Mr. Mulholland has—over his thirty years in the field—developed considerable experience with freight operations, including train dispatching. For example, Mr. Mulholland has evaluated traffic and operating factors in connection with proposed rail mergers, offered testimony on train operations in several maximum reasonable rate proceedings, conducted studies evaluating the operational impacts of changes in infrastructure and traffic mix over

¹⁸ Motion at 6. UP’s analysis also presumes, without any evidence or justification, that the dispatcher reasonably { [REDACTED] }. *Id.* at 6–7.

¹⁹ UP contends that all of the dispatching decisions made in connection with this delay were consistent with preference. To be clear, Amtrak disputes that assertion.

²⁰ Motion at 4 & n.9. UP also complains that it “could have fully addressed” this credentialing issue had the disputed evidence been submitted with Amtrak’s Opening Statement. *Id.* At 4. However, UP had the statement of credentials for Messrs. Crowley and Mulholland with Amtrak’s Opening Statement. The most UP can muster in its Motion to attack Amtrak’s experts is one sentence that ignores the considerable experience both experts have with freight operations, including dispatching.

²¹ See *United States v. McGill*, 815 F.3d 846, 909 (D.C. Cir. 2016) (noting that “woefully underdeveloped arguments are forfeited”); *United States v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1195 (D.C. Cir. 2005) (a party “does not properly raise an issue by addressing it in a ‘cursory fashion,’ with only ‘bare-bones arguments’” (citation omitted)); *City of Waukesha v. EPA*, 320 F.3d 228, 250 n.22 (D.C. Cir. 2003) (argument raised “only summarily, without explanation or reasoning” is forfeited); *Seo v. Oh*, 573 F. Supp. 3d 277, 287 (D.D.C. 2021) (“[P]erfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are deemed waived.” (citation omitted)).

²² See Peabody V.S., Exhibit 1 at 1 (Oct. 7, 2024).

shared-use rail facilities, and provided testimony on the assumption of dispatching responsibility.²³

Mr. Crowley's SOQ also demonstrates that he possesses the requisite knowledge and experience to provide dependable opinion evidence.²⁴ Over twenty-four years in the field, Mr. Crowley has developed substantial knowledge of railroad operations, including dispatching. As examples, Mr. Crowley has participated in and sponsored evidence in numerous maximum rate case proceedings that required addressing development of the rail network and operating plan, and has been retained on several occasions to assist clients in monitoring and tracking train movements.²⁵

Third, UP asserts without explanation or reference to authority that it is entitled to sur-rebuttal under the Due Process Clause. UP's attempt to secure sur-rebuttal through a single sentence in its conclusion is procedurally defective and should be rejected.²⁶ It also lacks substantive merit. UP had every opportunity to assess whether alternatives existed in its Reply.²⁷ Instead, UP argued that mustering that evidence was Amtrak's obligation, and UP offered little evidence of its own.

Finally, in moving to strike, and seeking leave to file sur-rebuttal, UP has attempted to secure for itself significant time to evaluate and prepare any response to the disputed evidence. Indeed, UP has already had nearly as much time to review the disputed evidence as Amtrak had to address all party and non-party briefs.²⁸ That provides another reason to reject the Motion in full.

²³ *Id.* at 2–3.

²⁴ *See id.* Exhibit 2 at 1–4.

²⁵ *See id.*

²⁶ *See supra* note 21.

²⁷ As UP acknowledges, the disputed evidence concerns a set of individual dispatching conflicts that UP was already addressing in its Reply, and relies primarily on UP data to do so. *See* Motion at 3.

²⁸ Should UP receive sur-rebuttal, Amtrak reserves the right to seek further relief.

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CONCLUSION

For the foregoing reasons, Amtrak respectfully requests that the Motion to Strike be denied in full.

Dated: April 1, 2025

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CERTIFICATE OF SERVICE

I, Alex Trepp, 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.

April 1, 2025

/s/ Alex Trepp
Alex Trepp