

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 RESPONSE TO
AMTRAK'S COMPLAINT AND PETITION AND PROPOSED PROCEDURES**

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On December 8, 2022, National Railroad Passenger Corporation (“Amtrak”) filed a “Complaint and Petition” invoking the Board’s authority pursuant to Section 213 of the Passenger Rail Investment and Improvement Act of 2008 (“PRIIA”) (codified at 49 U.S.C. § 24308(f)) to initiate an investigation into the customer on-time performance of Amtrak’s Sunset Limited Service, which includes Amtrak Trains 1 and 2, and award Amtrak damages and other relief. Amtrak also submitted its “Proposed Procedures and Framework” for the Board to follow in this proceeding. Amtrak alleges Union Pacific Railroad Company (“UP”) is largely responsible for the performance of the Sunset Limited Service and suggests an investigation should focus primarily on UP.

As discussed below, the Board should order Amtrak, UP, and the other railroads involved in hosting Sunset Limited trains to engage in mediation to resolve or narrow the issues in dispute. If mediation does not resolve this case, the Board should issue a procedural schedule based on the procedures it adopted in *National Railroad Passenger Corporation—Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Railway Company*, Docket No. NOR 42134 (STB served Jan. 3, 2012) (“*Canadian National*”). The Board should not adopt Amtrak’s proposed procedures.

I. Amtrak’s complaint and proposed procedures ignore the scheduling issue at the root of the Sunset Limited Service’s on-time performance problems.

Amtrak’s complaint and proposed procedures ignore the root cause of the Sunset Limited Service’s customer on-time performance issues: Amtrak’s schedules for Train 1 and Train 2 are not aligned with the new customer on-time performance metric (“COTP Metric”) or the customer on-time performance minimum standard (“COTP Minimum Standard”) the Federal Railroad Administration (“FRA”) adopted in its metrics and minimum standards rule (“Final Rule”).¹

A. Amtrak’s complaint reveals the scheduling disconnect.

Amtrak’s own complaint reveals the scheduling disconnect. According to Amtrak’s data, in the first quarter of 2022, Train 1’s median run time was 31 minutes under the scheduled run time.² The median run time over the route segment hosted by UP was 27 minutes under the scheduled run time.³ Yet, Train 1’s COTP was just 40%—far below the COTP Minimum Standard of 80%.⁴

¹ See *Metrics and Minimum Standards for Intercity Passenger Rail Service*, 85 Fed. Reg. 72,971 (Nov. 16, 2020). Also, Amtrak’s complaint focuses on a period in which UP has experienced significant operational challenges. UP expects the Sunset Limited Service’s on-time performance will improve as UP’s network conditions improve and the benefits of recent operating changes and related investments along the route, including investments in extended sidings, are reflected in performance data.

² See Compl. ¶ 100, Table 2 (0–5+5+10–9–27–5 = –31). UP is not endorsing Amtrak’s calculations but is relying on the data presented in the complaint for purposes of this response.

³ See *id.* Amtrak describes UP as the “contractual host” for two segments—a shorter segment between East Bridge Junction and Live Oak, Louisiana, and a longer segment between Iowa Junction, Louisiana, and El Monte, California. Compl. ¶ 27. UP does not own the track Amtrak uses between East Bridge Junction and Live Oak, and under UP’s operating agreement with Amtrak, UP’s on-time performance is measured based on operations on the Iowa Junction-El Monte segment only.

⁴ See Compl. ¶ 74.

Similarly, according to Amtrak’s data, in the first quarter of 2022, Train 2’s median run time was 22 minutes over the scheduled run time,⁵ a difference of less than 0.8%.⁶ The median run time over the route segment hosted by UP, which Amtrak says “drives COTP for the Sunset Limited 2,”⁷ was 17 minutes under the scheduled run time.⁸ Yet, Train 2’s COTP was also just 40%—once again, far below the COTP Minimum Standard of 80%.⁹

In short, Amtrak’s own complaint shows the Sunset Limited Service does not come close to meeting the COTP Minimum Standard, even when UP moves the trains faster than their scheduled run times. That is, Amtrak’s own data confirm the Sunset Limited Service schedules are not aligned with the COTP Metric and the COTP Minimum Standard.

B. Amtrak’s complaint ignores the scheduling disconnect.

Amtrak’s complaint fails to address the disconnect between the Sunset Limited Service schedules and the COTP Metric and COTP Minimum Standard. When the FRA adopted the Final Rule, it recognized Amtrak and host railroads would need to align the existing schedules with the new COTP Metric. It explained: “Amtrak’s published train schedules have not been designed with a customer OTP metric in mind.”¹⁰ The Board

⁵ See *id.* ¶ 108, Table 3 (0+5–17+38+21+3–28 = 22).

⁶ See *id.* (22 ÷ (18+2556+208+25+5+48) = 0.0077).

⁷ See Compl. ¶ 106.

⁸ See *id.* ¶ 108, Table 3. See also note 3, *supra*, regarding the segment of the route between East Bridge Junction and Live Oak.

⁹ See Compl. ¶ 75.

¹⁰ 85 Fed. Reg. at 72,979.

agreed. It urged the FRA to require “realistic, properly aligned schedules” before new metrics and standards took effect.¹¹ The Board warned that “[r]ealistic schedules that are compatible with Customer OTP will be crucial to avoiding unnecessary litigation before the Board.”¹² However, Amtrak has not agreed to changes needed to bring the Sunset Limited train schedules into alignment with the FRA’s metrics and standards. It has also refused to accept other changes UP has proposed to make the schedules reliable and achievable. Amtrak is asking the Board to commence litigation based on schedules that are not realistic and not compatible with the FRA’s metrics and standards. Amtrak’s complaint mentions the schedule alignment issue only to criticize UP for “continu[ing] to dispute that the published train schedules for the Sunset Limited Trains are aligned with the COTP Metric and Minimum Standard.”¹³ But of course UP continues to dispute the schedule alignment issue—Amtrak’s own data confirm the disconnect.

C. Amtrak’s procedural proposal would restrict the Board’s role in developing recommendations to improve on-time performance, create inefficiency, and it violates due process.

1. Amtrak’s procedural proposal would restrict the Board’s role.

Amtrak’s procedural proposal also ignores the schedule alignment issue. Amtrak wants the Board to presuppose the Sunset Limited Service is failing to achieve minimum on-time performance standards because of “delays” and only investigate the causes of the “delays.” Given that Amtrak and UP dispute whether the train schedules are aligned with the minimum standard, however, the Board should start with the issue it identified

¹¹ Comments of the Surface Transportation Board at 3, Docket No. FRA-2019-0069, *Metrics and Minimum Standards for Intercity Passenger Rail Service* (June 2, 2020).

¹² *Id.*

¹³ Compl. ¶ 71.

in the FRA rulemaking: Are the schedules “realistic” and “compatible with Customer OTP?”¹⁴ Trains inevitably experience some amount of delay en route, as even Amtrak acknowledges.¹⁵ In any investigation, the Board’s primary task is not to catalogue the causes of delays, but to determine why trains are failing to achieve minimum standards. Unless train schedules are aligned with the minimum standard, any investigation focused on the causes of delays will itself be disconnected from the task Congress assigned the Board in Section 24308(f). The Board should not adopt a procedural proposal that would improperly restrict the scope of its investigation and its development of recommendations to improve on-time performance.

2. Amtrak’s proposed procedures would be inefficient and contrary to precedent.

Adopting Amtrak’s proposed procedures would also be extremely inefficient. Amtrak is proposing a set of novel, untested rules that place on the Board the burden of developing an administrative record addressing a wide range of complex, data-intensive scheduling and operating issues.¹⁶ The Board rejected a similar proposal for a Board-driven investigation in *Canadian National*. It concluded the case “should be adjudicated using the established procedures governing complaints and the encompassing discovery and motion practice guidelines set forth in Parts 1112 and 1114 of our rules.”¹⁷ As it

¹⁴ Comments of the Surface Transportation Board at 3.

¹⁵ For example, Amtrak’s “Host Railroad Report Card” assigns a grade of “A” to hosts with up to 899 minutes of Host Railroad Delay Minutes per 10,000 train-miles. Hosts earn a “B” when Amtrak trains experience 900 to 1,199 Host Railroad Delay Minutes per 10,000 train-miles. Amtrak’s Host Railroad Report Cards are available at <http://amtrak.com/reports-documents>.

¹⁶ See Amtrak Proposed Procedures at 7–8, 11–15.

¹⁷ *Canadian National* at 3.

explained, following established procedures would be much more efficient: “These procedures have been thoroughly developed and interpreted through numerous litigations before the agency, and therefore provide a complete and ascertainable structure for the parties in moving forward in this type of litigation.”¹⁸ The Board also recognized the benefit of party-directed discovery: Amtrak and host railroads “are best positioned to know what information is relevant,” and, therefore, “it is appropriate to provide for the development of relevant information through the parties’ own discovery.”¹⁹ The Board should follow its time-tested procedures in this case, too.

Amtrak’s proposal to bifurcate this proceeding would also be inefficient, as well as contrary to the statutory structure and the approach the Board adopted in *Canadian National*. Amtrak says the Board should divide this proceeding into separate phases: (i) investigating the causes of the Sunset Limited Service’s failure to achieve minimum standards, and (ii) making recommendations to improve the on-time performance.²⁰ Amtrak says each phase should include separate discovery processes and result in a separate finding and orders.²¹ Amtrak’s proposal is not practical. The investigatory and remedial tasks Congress assigned to the Board are inextricably connected, as reflected in Congress’s express directions: “In making its determination [of the causes of failures to achieve minimum standards], the Board shall . . . make recommendations to improve . . . on-time performance of the train.”²² The connection is even closer in cases involving

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *See Amtrak Proposed Procedures* at 5–6.

²¹ *See id.* at 6.

²² 49 U.S.C. § 24308(f)(1).

contested schedules, where discovery into matters Amtrak seems to regard as part of its proposed “remedial” phase—such as Amtrak documents relating to scheduling and the impacts of performance and scheduling on ridership²³—will likely play a critical role in investigating whether existing schedules are a substantial cause of the failure to achieve minimum standards. Attempting to enforce an artificial bifurcation of issues would lead to disputes and attendant delays. Also, requiring parties to engage in multiple rounds of discovery and requiring the Board to issue separate decisions for each phase of the proceeding would be inefficient and would unnecessarily draw out this case.

3. Amtrak’s proposed procedures would deprive UP of due process.

Amtrak’s proposed procedures are also inconsistent with due process. As framed by Amtrak, the Board’s role here would include investigating Amtrak’s allegations of preference violations and potentially awarding damages against UP and other host railroads.²⁴ The Due Process Clause of the Fifth Amendment and basic considerations of fairness require affording parties notice of the specific allegations against them, and an opportunity to defend themselves by gathering and presenting evidence in their defense, before they are found subject to damages.²⁵ Under Amtrak’s proposal, the

²³ See Amtrak Procedural Proposal at 6.

²⁴ See 49 U.S.C. § 24308(f)(2) & (3).

²⁵ UP does not concede the Board could award damages or any other relief under the statutory preference provision. The provision is unconstitutionally vague because “men of common intelligence must necessarily guess at its meaning.” *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926); see also *Hastings v. Judicial Conferences of the United States*, 829 F.2d 91, 105 (D.C. Cir. 1987) (explaining a vague law “denies due process by imposing standards of conduct so indeterminate that it is impossible to ascertain just what will result in sanctions”); *Policy Statement on Implementing Intercity Passenger Train On-Time Performance and Preference Provisions of 49 U.S.C. § 24308(c) and (f)*, Docket No. EP 728, slip op. at 3 (STB served July 28, 2016)

Board could conclude that UP committed a preference violation without providing timely notice of the acts alleged to constitute the violation—that is, notice at a time when UP could meaningfully defend itself by offering evidence to rebut a specific charge.²⁶ If Amtrak has its way, UP would receive notice only after the Board finds a violation, and a hearing would address only damages. Such a procedure would be unlawful.²⁷

The Board’s existing rules for Board-initiated investigations help illuminate the due process problem inherent in Amtrak’s proposal. Under the Board’s existing rules, after the Board reviews the recommendations and summary of findings prepared by the assigned Investigating Officers, it can decide to dismiss the investigation or “initiate a Formal Board Proceeding *to determine whether any provision of 49 U.S.C. Subtitle IV, Part A, has been violated.*”²⁸ In other words, a Board-initiated investigation could not conclude with a finding of a violation of the law; rather, it might conclude with a decision to institute a formal proceeding to determine whether a violation actually occurred. In addition, if the Board decides to institute a formal proceeding, it must

(withdrawing proposed policy statement because host carriers and Amtrak “hold very different views on . . . the interpretation of ‘preference’”).

²⁶ Amtrak’s complaint does not contain specific allegations of preference violations, so it is not sufficient standing alone to provide the notice required by due process. Amtrak merely alleges that data regarding freight train interference, host-responsible delay, and poor COTP are “indicators” of preference violations. *See, e.g.*, Compl. ¶¶ 96, 120. Amtrak also complains about how certain aspects of UP’s operations affect Amtrak trains—for example, siding length, expiring crews, and coordination with other host railroads. *See, e.g., id.* ¶¶ 131–139. Although these operational issues might be the subject of Board recommendations for improving on-time service, they are not examples of preference violations.

²⁷ *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (“The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”).

²⁸ 49 C.F.R. § 1122.5(d) (emphasis added).

provide the defendant specific notice of the alleged violation—that is, it must issue an Order to Show Cause that “state[s] the basis for, and the issues to be considered during, the Formal Board Proceeding.”²⁹ Amtrak’s proposal fails to provide these critical procedural protections.

II. The Board should order the parties to participate in Board-sponsored mediation, and if and to the extent necessary after mediation, adopt the procedures it used *Canadian National*.

In administering this case, the Board should follow the procedures it adopted in *Canadian National*.³⁰ Specifically, the parties should develop a record through party-directed discovery. As the complainant, Amtrak should file opening evidence. Host railroads would then file a reply. Amtrak would then have an opportunity to file rebuttal. Parties would simultaneously file closing briefs.

However, before instituting the procedural schedule and embarking on what is sure to be a time-consuming, resource-intensive matter, the Board should order Amtrak, UP, and all the other railroads named in the complaint to participate in Board-sponsored mediation.³¹ Board-sponsored mediation would allow parties to address a broader range of issues than the dispute resolution procedures established under the FRA’s Final Rules. As discussed above, Amtrak’s complaint shows the Sunset Limited train schedules are not aligned with the COTP Metric and the COTP Minimum Standard. If Amtrak has already agreed to Sunset Limited Service schedules with the other railroads involved in the service, as Amtrak alleges,³² participation of all railroads in Board-sponsored

²⁹ *Id.* § 1122.5(e).

³⁰ *See Canadian National*, slip. op at 6 (Procedural Schedule).

³¹ *See* 49 C.F.R. § 1109.2(b).

³² *See* Compl. ¶ 71.

mediation might be required to address necessary changes. In addition, resolution of scheduling issues might not be sufficient to address all of Amtrak's complaints. Board-sponsored mediation involving all railroads involved in the service would be an effective forum in which to address other issues raised by Amtrak, such as UP's "coordinat[ion] with other host railroads about the location and handoff of Amtrak passenger trains on the Sunset Limited route."³³ Board-sponsored mediation would also provide a forum that might help Amtrak and UP reach agreements on other issues Amtrak raised in its complaint, including the use of alternative routes to avoid congestion³⁴ and additional investments to expand capacity on the route used by the Sunset Limited trains.³⁵

UP agrees with the Board that resolution of disputes through the use of mediation is preferable to formal Board proceedings, wherever possible,³⁶ and it commits to being an active, constructive participant if the Board orders mediation in this proceeding.

³³ *Id.* ¶ 139.

³⁴ *See id.* ¶¶ 137–138.

³⁵ *See id.* ¶¶ 131–134.

³⁶ *See* 49 C.F.R. § 1109.1.

Respectfully submitted,

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January 27, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of January, 2023, I caused a copy of the foregoing document to be served by email on counsel for Amtrak, BNSF, CN and SCRRA.

/s/ Michael L. Rosenthal