

306065

January 27, 2023

BY E-FILING

Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20423-0001

ENTERED
Office of Proceedings
January 27, 2023
Part of
Public Record

Re: *Complaint and Petition of the National Railroad Passenger Corp. Under 49 U.S.C. § 24308(f)–For Substandard Performance of Amtrak’s Sunset Limited Trains 1 and 2 (Docket No. NOR 42175)*

Dear Ms. Brown:

Attached for filing in the above-referenced docket is the Response of Illinois Central Railroad Company to Amtrak’s Complaint and Proposed Procedures.

Sincerely,

/s/ David A. Hirsh

David A. Hirsh

Counsel for Illinois Central Railroad Company

Enclosure

cc: All Parties of Record

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 SUNSET
LIMITED TRAINS 1 AND 2

**RESPONSE OF ILLINOIS CENTRAL RAILROAD COMPANY TO
AMTRAK'S COMPLAINT AND PROPOSED PROCEDURES**

Kathryn J. Gainey
CN
Suite 500 North Building
601 Pennsylvania Avenue, N.W.
Washington, DC 20004
kathryn.gainey@cn.ca

David A. Hirsh
Shannon Y. Shin
DENTONS US LLP
1900 K Street, N.W.
Washington, DC 20006
(202) 496-7500
david.hirsh@dentons.com

Attorneys for Illinois Central Railroad Company

January 27, 2023

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 SUNSET
LIMITED TRAINS 1 AND 2

**RESPONSE OF ILLINOIS CENTRAL RAILROAD COMPANY TO AMTRAK’S
COMPLAINT AND PROPOSED PROCEDURES**

Illinois Central Railroad Company (“CN”) hereby responds to the Complaint and Petition for Board Investigation and Other Relief (“Complaint”) and to Amtrak’s Proposed Procedures and Framework for Board Investigative and Remedial Phases of Proceeding Under 49 U.S.C. § 24308(f) (“Amtrak’s Proposed Procedures”) filed by National Railroad Passenger Corporation (“Amtrak”) on December 8, 2022.¹

Amtrak has proposed a procedural framework that is inconsistent with and ignores the Board’s prior determination that a proceeding under 49 U.S.C. § 24308(f) (“Section 213”) “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

¹ The Complaint defines “CN” to include Canadian National Railway Company (“CNR”) and two of CNR’s indirect wholly owned subsidiaries, Illinois Central Railroad Company and Grand Trunk Western Railroad Company (Complaint ¶ 22). As explained below, however, the only one of those entities with even a tenuous connection to the Sunset Limited service is the Illinois Central Railroad Company. Accordingly, in this Response we use “CN” to refer exclusively to Illinois Central Railroad Company.

Amtrak did not invoke or follow the Board’s formal complaint procedures found in 49 C.F.R. § 1111.5, and it does not appear to have anticipated the filing of a formal answer to its “complaint.” Thus, CN is not filing a formal “answer” to the Complaint, but CN reserves all rights and would submit a formal answer if the Board so orders.

rules,” and that it is appropriate “to have the record built through party-directed discovery.”² As discussed in Part I, below, use of the Board’s “established procedures” will assure that a robust and complete record is created, and that the due process rights of the parties are safeguarded. By contrast, Amtrak’s proposed alternative calls for the Board to “develop” the record and make “determinations” without any clear delineation of the parties’ rights and due process protections. *See* Amtrak’s Proposed Procedures at 2.

In Part II, CN explains some of the reasons why it need not and should not be a focus of this proceeding. Amtrak has no agreement with CN for the Sunset Limited service and pays CN nothing for the service. Thus, under FRA’s definition of “host railroad,” CN is not a host for the Sunset Limited service. *See* 49 C.F.R. § 273.3 (defining a “host railroad”). CN has only the most tenuous connection to the Sunset Limited service – Amtrak’s two trains in that service operate via Union Pacific Railroad Company (“UP”) trackage rights over 2.2 miles of track owned by CN and leased to a shortline since 2019. Finally, the Complaint includes no specific allegations directed at CN, and CN is unaware of Amtrak ever raising any concerns with CN about the Sunset Limited service.

ARGUMENT

I. AMTRAK PROPOSES AN INADEQUATE PROCEDURAL FRAMEWORK THAT IGNORES THE BOARD’S PRECEDENT.

Amtrak ignores Board precedent and proposes an inconsistent procedural framework that would fail to protect the due process rights of parties and ensure development of a complete

² *Nat’l R.R. Passenger Corp.—Section 213 Investigation of Substandard Performance on Rail Lines of Canadian Nat’l Ry.*, Docket No. NOR 42134, slip op. at 3 (STB served Jan. 3, 201[3]) (“2013 Decision”).

record. The Board should adhere to its well-reasoned *2013 Decision* and reject Amtrak's vague and inadequate framework.

The Board has held that a Section 213 proceeding initiated by Amtrak complaint "should be adjudicated using the established procedures governing complaints and the encompassing discovery and motions practice guidelines set forth in Parts 1112 and 1114 of our rules." *2013 Decision* at 3. As the Board explained in that proceeding, the adversarial complaint 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." *Id.* The Board further observed that "it is appropriate" in reviewing causes of delay to Amtrak's trains in a Section 213 proceeding, "to provide for the development of relevant information through the parties' own discovery," given that it is the parties who "are best positioned to know what information is relevant to the possible causes of delay." *Id.* The Board's reasoning was sound and its decision should govern here on the question of what procedures are appropriate after the Board initiates its independent Section 213 proceeding. Amtrak's argument fails to acknowledge the Board's decision, much less provide a reasoned basis for departing from this prior precedent.³

Amtrak's proposed alternative framework is also insufficient. Rather than have the record in the proceeding be developed by the parties, Amtrak would require the Board's staff to assume the litigants' role and undertake the tasks of developing a record, defining the factual and

³ The Customer OTP standard adopted by the Federal Railroad Administration ("FRA") in 2020, under Section 207 of Passenger Rail Investment and Improvement Act of 2008 ("PRIIA"), establishes a prerequisite to a Board proceeding under Section 213 of PRIIA, but neither that standard nor the FRA decision adopting it has any bearing on the Board's prior decision adopting appropriate procedures for the conduct of its independent Section 213 proceeding.

legal arguments and issues, and dealing with the complex procedural issues that could arise from Amtrak's proposal.⁴ Amtrak's framework calls for a bifurcated process, with an initial "phase" in which the Board would develop a record through document collection and questioning, discussions, and visits to facilities, most or all conducted on an *ex parte* basis, leading to "determination[s]" regarding (a) the causes of delays and substandard performance, and (b) "whether delays or substandard on-time performance are attributable to a host railroad's failure to provide preference to Amtrak." Amtrak's Proposed Procedures at 5 (citing 49 U.S.C. § 24308(f)(1), (2)). The Board would then undertake a second remedial "phase" to "identify reasonable measures and make recommendations to improve the service, quality, and on-time performance of the train," and if it had determined that delays or substandard OTP was attributable to a host's failure to provide preference to Amtrak, determine such damages and other remedial relief as it finds appropriate. *Id.* at 5-6 (quoting 49 U.S.C. § 24308(f)(2)). Whether this second phase would include renewed factual development on issues such as claimed "damages" and whether it would also depend on *ex parte* meetings is unclear, as are the procedural protections regarding *ex parte* communications, and whether and when in either phase there would be an opportunity for briefing or to directly engage other parties, or interim Board or staff decisions for comment.

Amtrak's proposal should be rejected. First, its approach would not ensure development of a reliable record. Under Amtrak's proposal, the Board's staff would be solely responsible for developing the record in both the evidentiary and the remedial phases. Doing so would deprive the parties of the ability to develop their own robust record, which would be ensured through an adversarial process like the one applied in the Board's *2013 Decision*. A Section 213 proceeding

⁴ See Amtrak's Proposed Procedures at 2-4, 5-6.

could implicate a multitude of complex factual and novel legal issues ranging from schedule issues, dispatching and other operational issues, capacity and infrastructure issues, delay analysis, and a range of issues specifically relating to preference. The Board previously has recognized that the parties themselves are in the best position to understand and develop such issues and their direct engagement is the best way to create a strong, well-supported record.⁵

Second, Amtrak’s vague framework fails to grapple with or provide for adequate due process protections during a Section 213 proceeding, particularly given that the Board must determine whether a host rail carrier has violated its obligation to provide Amtrak with preference, as required by 49 U.S.C. § 24308(c), and, if so, whether that host should be subject to damages and other potentially intrusive “relief.” As a matter of law and fundamental fairness, due process safeguards must be in place to protect host railroads threatened with potential liability.⁶

The formal rules and due process protections adopted by the Board for “Board-Initiated Investigations” of alleged violations of the rail provisions of the Interstate Commerce Act (as

⁵ Amtrak’s argument incorrectly implies that FRA’s Metrics and Standards settled the question of what information is required for this proceeding. Amtrak’s Proposed Procedures at 4 (“The information required to conduct an investigation has been defined through the FRA’s Final Rule, which established the metrics intended to help the Board to identify the causes of delay, and provided the freight railroads with a full opportunity to litigate the appropriate evidence for a Section 213 proceeding.”). To the contrary, FRA’s Metrics and Standards implemented Congress’s mandate to “develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations,” PRIIA, Pub. L. No. 110-432, Div. B, § 207(a), 122 Stat. 4848, 4916, and established the Customer OTP standard that now serves as the prerequisite for launching proceedings under 49 U.S.C. § 24308(f). FRA’s rulemaking did not purport to intrude on the Board’s independent conduct of its proceeding under Section 213.

⁶ Agencies must provide due process to parties facing the potential deprivation of liberty or property. *See Karst Robbins Coal Co. v. Director, Office of Workers Compensation Programs*, 969 F.3d 316, 329 (7th Cir. 2020) (citing *Richardson v. Perales*, 402 U.S. 389, 401 (1971)); *McClelland v. Andrus*, 606 F.2d 1278, 1286 (D.C. Cir. 1979).

codified in 49 U.S.C. §§ 10101-11908) are instructive. *See* 49 C.F.R. Part 1122. Those rules deal explicitly with the topics of separating staff fact-finding from later decisions and with confidentiality and disclosure issues. More importantly, they incorporate strong due process protections. For example, they provide, after preliminary staff fact-finding and recommendations, for the issuance of a show cause order and formal Board proceedings as a predicate to any Board decision finding a violation of law or imposing a penalty or remedy.

The necessary safeguards for this proceeding include the right to be presented with adverse evidence, to confront and cross-examine adverse witnesses (which may be provided through depositions), the requirement that evidence be given under oath or the equivalent, and the right to obtain relevant information and documents through discovery from other participants in the proceeding. All of these safeguards are provided by the Board's "established procedures" under 49 C.F.R. Parts 1111, 1112, and 1114, and not by Amtrak's vague framework.

As the Board determined in the *2013 Decision*, the best means of assuring the complete development of a record in a Section 213 proceeding, and the best way to protect the due process rights of the parties to such a proceeding, is by adhering to its "well developed" adverse complaint procedures. Amtrak has failed to demonstrate that there is any basis for or advantage to the Board departing from its prior determination in favor of Amtrak's insufficient proposed procedural framework. If the Board determined not to use its "well developed" adversarial procedures and instead adopt new investigatory procedures in a Section 213 case, it would need to conduct a rulemaking to consider and adopt rules and procedures to safeguard the due process rights of parties.

II. CN HAS A TENUOUS CONNECTION TO THE SUNSET LIMITED SERVICE AND SHOULD NOT BE A FOCUS OF THIS PROCEEDING.

Whatever procedure applies in this proceeding, CN should not be a focus. It has only a minimal, insignificant connection to Amtrak's long-distance Sunset Limited service operating between Los Angeles, CA, and New Orleans, LA. The 1997-mile service operates over 2.2 miles of track owned by CN between Southport Junction, LA, and East Bridge Junction, LA ("EBJ-Southport Segment"), just one-tenth of one percent of the total mileage. CN's track segment is a fraction of the mileages of other railroads referenced in the Complaint.⁷ It is less than the 4.2 miles hosted and owned by Amtrak itself.⁸ It is also less than the approximately five miles of track owned by the New Orleans Public Belt Railroad Corporation ("NOPB") – the Huey P. Long Bridge and its approaches – which is traversed by the Sunset Limited trains and is directly adjacent to the track owned by CN. But Amtrak does not identify NOPB as a host railroad and did not even serve the Complaint on NOPB. Instead, Amtrak simply references NOPB in a map in its Complaint with the explanation that "The Huey P. Long Bridge (XEB-XWB) is owned by NOPB, but is hosted and dispatched by UP."⁹ Further, although the Sunset Limited trains serve 22 stations,¹⁰ there is no station on the EBJ-Southport Segment.¹¹

⁷ The other mileages cited by Amtrak are UP (1,784); BNSF (190.4); Southern California Regional Rail Authority (Metrolink) (12.6); and Amtrak (4.2). *Id.* ¶ 27. *See also id.* at 66, Appendix A (schedule skeletons).

⁸ Complaint ¶ 27.

⁹ Complaint at 12. CN includes the map from Amtrak's Complaint herein as Attachment A.

¹⁰ Complaint at 66, Appendix A (schedule skeletons).

¹¹ *Id.*

Whatever relevance might be attached to CN's ownership of this small segment is further diminished by the fact that CN has leased the EBJ-Southport Segment since 2019 to the NOPB, which assumed and continues to have responsibility for maintaining the line.¹²

Despite CN's tenuous connection to the Sunset Limited service, Amtrak identified CN in its Complaint as a supposed "host" of that service. *See* Complaint ¶ 26. But as CN has repeatedly pointed out to Amtrak, that is mistaken.¹³ "Host railroad" is defined in the Metrics and Minimum Standards for Intercity Passenger Train Operations developed jointly by Amtrak and FRA¹⁴ as "a railroad that is directly accountable to Amtrak by agreement for Amtrak operations over a railroad line segment." 49 C.F.R. § 273.3. Amtrak and CN have no agreement regarding the Sunset Limited service and, in fact, Amtrak pays nothing to CN for the service. Before Amtrak began operations in 1971, UP's predecessor Southern Pacific Transportation Company ("SP") operated the Sunset Limited as its own passenger train over the EBJ-Southport Segment, which was then owned by CN's predecessor, using trackage rights granted by that predecessor. Those trackage rights remain in force today between CN and UP. When Amtrak assumed the direct operation of the Sunset Limited in 1971, it continued operating over the EBJ-

¹² *See New Orleans Pub. Belt R.R.—Lease & Operation Exemption—Line of Ill. Cent. R.R.*, Docket No. FD 36362 (STB served Dec. 13, 2019). The leased lines include approximately 1.16 miles of track not used by Amtrak, in addition to the 2.2 miles of the EBJ-Southport Segment. CN retained the right to dispatch the line, including Southport Junction. UP dispatches the interlocking at East Bridge Junction.

¹³ *See, e.g.*, Letter from Michael A. Matteucci to Michael W. Lestingi and Dennis Newman (Jan. 26, 2023) (writing to "correct the record" and "formally request" that FRA and Amtrak "stop incorrectly referring to and treating [CN] as a 'host railroad' for Amtrak's Sunset Limited service") (attached hereto as Attachment B); *see also* Letter from Robert M. Reilly to Scot Naparstek at 1 (Mar. 23, 2022) ("CN is not a host for the Sunset Ltd., which is operated by UP via trackage rights over only a tiny segment of CN") (attached as Exhibit A to Attachment B hereto).

¹⁴ Metrics and Minimum Standards for Intercity Passenger Train Operations, 49 C.F.R. pt. 273 ("Metrics and Standards").

Southport Segment as SP had done, via SP's trackage rights, and to this day Amtrak continues to operate via those rights (now UP's trackage rights).¹⁵ CN therefore is not Amtrak's host for the Sunset Limited service, as it is not "directly accountable to Amtrak by agreement" for the operation of that service.

The lack of a host relationship between Amtrak and CN for the Sunset Limited service is also reflected in the fact that Amtrak has not sought to consult with CN regarding the service and Amtrak has not viewed CN as a source of problems or issues for that service. Mr. Matteucci and Mr. Kuxmann, the two individuals with the most direct responsibility for Amtrak matters at CN, including regularly working directly with Amtrak personnel, have no recollection of Amtrak ever raising a concern with CN or seeking discussions with CN concerning the Sunset Limited.¹⁶ Similarly, the Complaint includes no allegations against CN regarding poor service or excessive delays to the Sunset Limited trains and proposes no remedial action regarding CN.

As is evident from the above, CN is not responsible for the Sunset Limited's alleged failure to meet minimum Customer OTP standards, and the solution to any problems with that service does not lie with CN.¹⁷

¹⁵ UP pays CN a small flat annual fee for Amtrak's operation of the Sunset Limited train via UP's trackage rights over the EBJ-Southport Segment.

¹⁶ Mr. Matteucci is CN's Senior Director – Interline Services, with responsibility for Amtrak contracts. Mr. Kuxmann is CN's "NRPC (Amtrak) Officer," designated under the Amtrak-CN Operating Agreement, a position he has held for over ten years. The factual representations in Part II of this Response, including the one above, are verified at the end of this response by both Mr. Matteucci and Mr. Kuxmann.

¹⁷ The Board's primary charge under PRIIA is to conduct a proceeding to examine the reasons Amtrak's service is failing to achieve minimum Customer OTP standards and to make recommendations to address those issues. *See* 49 U.S.C. § 23408(f)(1). *See also* Complaint ¶ 145 (requesting that the Board initiate a proceeding to "determine whether and to what extent delays or failures to achieve minimum standards are due to causes that could reasonably be addressed by UP").

For all of these reasons, CN respectfully suggests that targeting CN or requiring that CN participate as an active party to this proceeding is unnecessary and would be a poor use of resources. It would be patently unfair and unreasonable to require CN to commit the resources and bear the cost and expense to participate actively as a party in a Board proceeding concerning the Sunset Limited service, when Amtrak brought no concerns to CN prior to its Complaint and has raised no allegations against CN in its Complaint. Any alleged issues regarding the Sunset Limited service can and should be adjudicated with little or no participation by CN, which has only the most tenuous connection with the service and is not a host for the service.¹⁸

CONCLUSION

Amtrak's proposed procedural framework ignores and is inconsistent with Board precedent. The Board should not depart from its prior decision that a Section 213 proceeding should be "adjudicated using the established procedures governing complaints and the encompassing discovery and motion practice guidelines set forth in Parts 1112 and 1114."¹⁹ Those procedures will assure that a robust and complete record is created, and that the due process rights of parties are safeguarded.

In addition, there is no need to focus on CN, which is not a host of the Sunset Limited service and has only a tenuous connection to the Sunset Limited.

¹⁸ An adversarial proceeding would provide well established procedures under which a party could propose discovery and another party could object based on scope and relevance.

¹⁹*2013 Decision* at 3.

Respectfully submitted,

/s/ David A. Hirsh

David A. Hirsh
Shannon Y. Shin
DENTONS US LLP
1900 K Street, N.W.
Washington, DC 20006
(202) 496-7500
david.hirsh@dentons.com

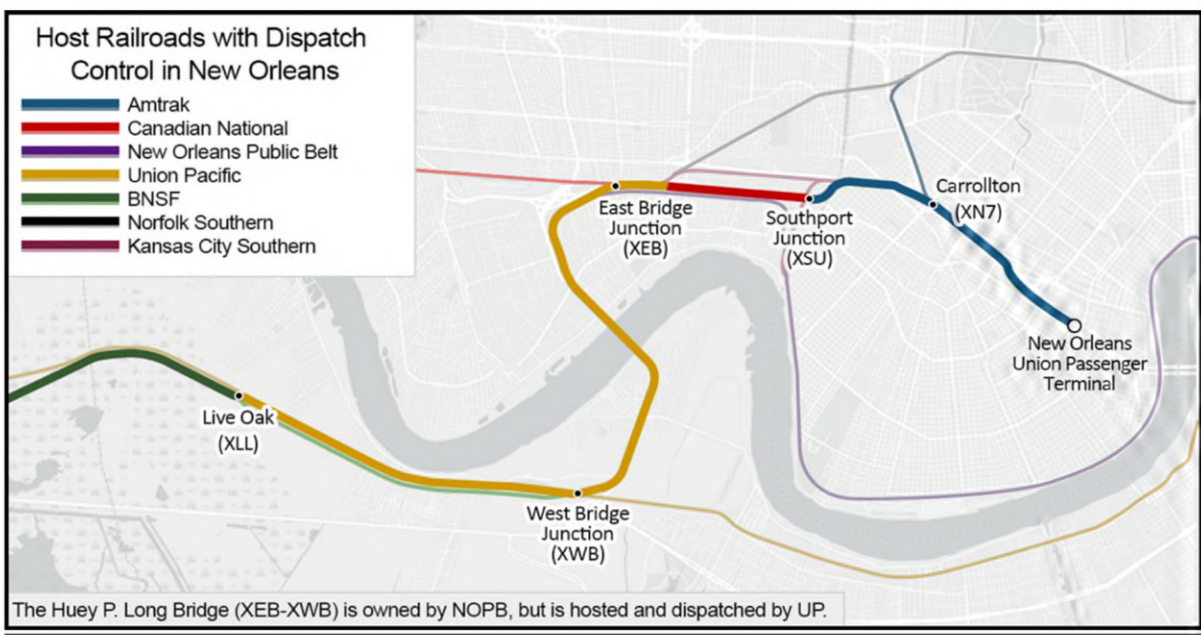
Kathryn J. Gainey
CN
Suite 500 North Building
601 Pennsylvania Avenue, N.W.
Washington, DC 20004
kathryn.gainey@cn.ca

Attorneys for Illinois Central Railroad Company

January 27, 2023

ATTACHMENT A

Sunset Limited Route (Live Oak to New Orleans Passenger Terminal)



Source: Amtrak Complaint at 12.

ATTACHMENT B



Michael A. Matteucci
Senior Director – Interline Services

17641 So. Ashland Avenue
Homewood, IL 60430-1345
T 708.332.3598

January 26, 2023

By Email

Mr. Michael W. Lestingi
Executive Director
Federal Railroad Administration
U.S. Department of Transportation
1200 New Jersey Avenue, S.E.
Washington, DC 20590
michael.lestingi@dot.gov

Mr. Dennis Newman
EVP, Strategy, Planning & Accessibility
National Railroad Passenger Corporation
30th Street Station
Philadelphia, PA 19104
dennis.newman@amtrak.com

Dear Messrs. Lestingi and Newman:

I write in order to correct the record and formally request that Federal Railroad Administration (“FRA”) and the National Railroad Passenger Corporation (“Amtrak”) stop incorrectly referring to and treating Illinois Central Railroad Company and/or Grand Trunk Western Railroad Company (collectively “CN”) as a “host railroad” for Amtrak’s Sunset Limited service (Amtrak Train Nos. 1 and 2).¹ CN has previously informed Amtrak in writing that it is incorrect to characterize CN as a host railroad for the Sunset Limited service,² but Amtrak and FRA have continued doing so.

¹ We understand that FRA reports (including the reports for “Delay Metrics,” “Delays per 10K TM Metric,” and “Run Time Metric”) generally use “CN – IC (Former GTW and IC)” to refer jointly to Grand Trunk Western Railroad Company (“GTW”) and Illinois Central Railroad Company (“IC”), which are indirect wholly owned subsidiaries of Canadian National Railway Company. Amtrak in its monthly “Host Railroad Report” and delay and other underlying data variously refers to “Canadian National” or uses the abbreviations “CN” or “CC” to refer to GTW, IC, or both.

² See, e.g., Letter from Robert M. Reilly (Executive Vice-President & Chief Operating Officer, CN) to Scot Naparstek (Executive Vice President, Service Delivery & Operations, Amtrak) at 1 (Mar. 23, 2022) (CN “is not a host for the Sunset Ltd., which is operated by UP via trackage rights over only a tiny segment of CN”) (attached as Exhibit A).

“Host railroad” is defined in the Metrics and Minimum Standards for Intercity Passenger Train Operations developed jointly by Amtrak and Federal Railroad Administration (“FRA”) as “a railroad that is directly accountable to Amtrak by agreement for Amtrak operations over a railroad line segment.” 49 C.F.R. § 273.3. CN does not meet that definition. Although the Sunset Limited service operates over 2.2 miles of track owned by CN between Southport Junction, LA and East Bridge Junction, LA (“EBJ-Southport Segment”), Amtrak and CN have no agreement regarding the Sunset Limited service and, in fact, Amtrak pays nothing to CN for the service. Before Amtrak began operations in 1971, UP’s predecessor Southern Pacific Transportation Company (“SP”) operated the Sunset Limited as its own passenger train over the EBJ-Southport Segment, which was then owned by CN’s predecessor, using trackage rights granted by that predecessor. Those trackage rights remain in force today between CN and UP. When Amtrak assumed the direct operation of the Sunset Limited in 1971, it continued operating over the EBJ-Southport Segment as SP had done, via SP’s trackage rights, and to this day Amtrak continues to operate via those rights (now UP’s trackage rights).³ CN therefore is not Amtrak’s host for the Sunset Limited service, as it is not “directly accountable to Amtrak by agreement” for the operation of that service.

It is important that FRA and Amtrak correctly reflect the fact that CN is not a host for the Sunset Limited service in their reporting and records. This issue has taken on new urgency with Amtrak’s filing with the Surface Transportation Board (“STB”) on December 8, 2022 of a “Complaint and Petition for Board Investigation and Other Relief” (designated Docket No. NOR 42175) with respect to the Sunset Limited service. That Complaint incorrectly refers to CN as a host railroad for the Sunset Limited service. CN intends to correct the record in that proceeding.

Another important required change is removing CN from any list of host railroads certifying or disputing the schedules of the Sunset Limited trains. By letter dated December 18, 2020, Amtrak requested that CN “confirm” its agreement to certify the schedules of 23 trains, the Sunset Limited trains among them.⁴ CN responded on April 7, 2021, and agreed to certify most of the schedules listed by Amtrak, including those of the Sunset Limited trains.⁵ Because CN is not a host railroad for those trains, however, Amtrak never should have sought CN’s certification and the exchange between the parties could not and did not have the effect of an Amtrak-host railroad schedule certification. Under FRA’s Metrics and Standards, a “certified schedule” is “a published train schedule that Amtrak *and the host railroad* jointly certify is aligned with the [COTP] standard in [49 C.F.R.] § 273.5(1) and (2).” 49 C.F.R. § 273.3 (emphasis added). CN reserves the right to express its views regarding the Sunset Limited train schedules (particularly with respect to the EBJ-Southport Segment), but disputing or certification of the Sunset Limited

³ UP pays CN a small flat annual fee for Amtrak’s operation of the Sunset Limited train via UP’s trackage rights over the EBJ-Southport Segment.

⁴ Letter from Jim Blair to Scott Kuxmann (Dec. 18, 2020) (attached as Exhibit B).

⁵ Letter from Michael A. Matteucci to Jim Blair at 1 (Apr. 7, 2021) (attached as Exhibit C, with original attachments to the letter omitted).

Michael W. Lestingi and Dennis Newman
January 26, 2023
Page 3

train schedules under FRA's rules is exclusively a matter for Amtrak and the host railroads of that service – not CN. In this instance, UP as host has disputed the schedules for the Sunset Limited.

Sincerely,



Michael A. Matteucci

cc: James Blair, (AVP Host Railroads, Amtrak)

Attachments

Exhibit A



Executive Vice-President & Chief
Operating Officer

Robert M. Reilly
Canadian National
935 de la Gauchetière Street West
Montreal QC Canada H3B 2M9
Telephone: (514) 399-5311
email: robert.reilly@cn.ca

March 23, 2022

Mr. Scot Naparstek
Executive Vice President
Service Delivery & Operations
1 Massachusetts Ave., N.W.
Washington, DC 20001

Dear Scot,

Thank you for your letter of March 8, 2022, attaching portions of a Quarterly Report for the 1st quarter of Amtrak's fiscal year 2022 (4th calendar quarter 2021). Like Amtrak, CN is closely monitoring the performance of the Amtrak trains hosted on CN's lines with the shared goal of having all of Amtrak's trains meet the 80% Customer OTP standard.

As you know, CN is the primary host for only two of the services listed in your report – the Illini/Saluki and City of New Orleans. In discussions with Amtrak over the past two years, CN has consistently pointed out that in order for the trains in these services to meet the 80% Customer OTP standard reliably under normal operating conditions their schedules must be modified to redistribute backloaded recovery time and also to add a modest amount of run time. The need for a redistribution of recovery time for these services in order to meaningfully apply Customer OTP is not a contentious issue – it has been recognized by both Amtrak and CN, and it is consistent with the views of FRA and the Surface Transportation Board. The parties, however, have been unable to agree upon changes to total run time. We thought the parties were close to agreement based on negotiations in 2020 and early 2021, but Amtrak never responded to CN's last proposal in April 2021.

Most recently, driven by concerns that published Customer OTP percentages for these trains are badly misleading without the redistribution of recovery time, CN proposed to your Host Railroad group that we immediately redistribute recovery time, and defer other schedule issues to a later time. In order to expedite that process, CN proposed adoption of a schedule for redistribution of recovery time that Amtrak proposed in 2020 for the Illini/Saluki trains (which Amtrak had tied at the time to concessions it sought from CN limiting added run time to an amount CN believes is insufficient). CN also made it clear that it would be flexible if Amtrak identifies any further improvements to the redistribution of recovery time. I hope you will support CN's proposal. It would immediately and significantly improve Customer OTP and benefit Amtrak's passengers by creating more accurate and meaningful scheduled station arrival times.

I trust you recognize that much of the rest of selected quarterly data you provided is not a meaningful reflection of CN's performance as a host. Even by Amtrak's own measures, CN is not a major source of delays or performance problems for the other services included in your report.

- CN is not a host for the Sunset Ltd., which is operated by UP via trackage rights over only a tiny segment of CN.

- CN hosts only a small portion of the Texas Eagle and Lincoln services (about 3% and 12%, respectively), and both services traverse only CN's Joliet Sub, where most delays are due to foreign cross traffic at interlockings CN does not control and late Amtrak arrivals that are caught behind Metra trains.
- CN hosts only a small portion of the Wolverine service (less than 10%), and by Amtrak's own measure, it is responsible for only a small portion of total delays (in Q1 FY 2022, ranging from 4% to 10% of total delays for the four trains in the service).
- Approximately 50% of the Blue Water's route miles are on CN, but CN-responsible delays – again, according to Amtrak itself – are disproportionately small (in Q1 FY 2022, just 11% of total delays for train #364 and 14% for train #365). Amtrak, third parties, and other host carriers each individually contribute more to delays for these trains than CN.

The delay data you provided is also misleading because, as we have pointed out before, it is based on biased coding by Amtrak's own personnel as well as on codes that were unilaterally defined by Amtrak and that systematically overstate host responsibility for Amtrak train delays. For example, Amtrak treats delays due to foreign cross traffic at interlockings CN does not control as freight-train interference ("FTI"). As noted above, that is the single largest source of CN "host" delay for the Texas Eagle and Lincoln services. Similarly misleading, Amtrak codes delays due to scheduled and unavoidable Amtrak train meets in single track territory as "passenger train interference" or "PTI," which Amtrak categorizes as host-responsible delay. The effect of that misattribution can be significant. For services on CN, the effect can be particularly significant for the Illini/Saluki and City of New Orleans services. For train #392, for example, over 50% of its total "host responsible delay" for the last quarter (Q1 FY 2022) was due to PTI.

Finally, although we disagree with Amtrak's delay coding, insofar as that coding is consistent across hosts, I note that it reflects well on CN. It shows that CN's "host responsible delay" per 10,000 train-miles is below the host average and also below Amtrak's target of 900. Further, it shows that CN's share of delay minutes for services on its tracks is below the host average.

CN will continue to work with Amtrak to address schedule, delay, and performance issues with the goal of achieving the 80% Customer OTP standard for every Amtrak train we host. The most immediate and pressing action item at this time is the proposed redistribution of recovery time for the Illini/Saluki and City of New Orleans services. I hope I can rely on your support for those critical schedule updates.

Sincerely yours,



Robert Reilly

Exhibit B



December 18, 2020

Mr. Scott Kuxmann
NRPC Operations Officer
Canadian National
17641 South Ashland Ave.
Homewood, Illinois 60430-1345

Dear Mr. Kuxmann,

As you know, the *Metrics and Minimum Standards for Intercity Passenger Rail Service* final rule published on November 16, 2020 (the "Final Rule") introduces a certified schedule metric that requires Amtrak to report to the Federal Railroad Administration ("FRA") the number of certified schedules, uncertified schedules, and disputed schedules, by train, by route, and by host railroad.

The Final Rule defines a "certified schedule" as a published train schedule that Amtrak and the host railroad jointly certify is aligned with the customer on-time performance ("OTP") metric and standard set forth in the Final Rule.

Appendix A provides the list of train schedules that Amtrak proposes to jointly certify with Canadian National are aligned to the customer OTP metric and standard on Canadian National. Each train listed has been reviewed and meets one or more of the following criteria:

- The schedule is already aligned or was modified to align with the customer OTP metric and standard.
- Customer OTP regularly exceeded 80% in FY 2020.
- The placement of the recovery time is correlated with the locations of detraining passengers.
- The recovery time is distributed to the benefit of detraining passengers.

Please confirm Canadian National's agreement to certify the train schedules listed in Appendix A pursuant to the Final Rule. Please contact Chris Zappi, Director Host Railroads, at Christopher.Zappi@amtrak.com if you have any questions. Thank you.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jim Blair", with a large, stylized flourish underneath.

Jim Blair
Amtrak
Sr. Director, Host Railroads

December 18, 2020

Page 2

cc: Dennis Newman Amtrak
Shawn Gordon Amtrak
Jason Maga Amtrak
Bruce Davidson Amtrak
Christopher Zappi Amtrak

Appendix A

Train Schedules Aligned to the Customer On-Time Performance Metric and Standard

Service	Train
Blue Water	364
Blue Water	365
City Of New Orleans	58
City Of New Orleans	59
Illini / Saluki	390
Illini / Saluki	392
Lincoln Service	300
Lincoln Service	301
Lincoln Service	302
Lincoln Service	303
Lincoln Service	304
Lincoln Service	305
Lincoln Service	306
Sunset Limited	1
Sunset Limited	2
Texas Eagle	21
Texas Eagle	22
Wolverine	350
Wolverine	351
Wolverine	352
Wolverine	353
Wolverine	354
Wolverine	355

Exhibit C



United States Region

Michael A. Matteucci
Region Director Contracts and Administration

17641 So. Ashland Avenue
Homewood, IL 60430-1345
T 708.332.3598
F 708.332.3673

April 7, 2021

Jim Blair
Senior Director, Host Railroads
National Railroad Passenger Corporation
30th Street Station
4th Floor, 4N-163
Philadelphia, PA 19104

Dear Jim:

This letter responds to your December 18, 2020 letter to Scott Kuxmann proposing to certify various Amtrak schedules in accordance with the *Metrics and Minimum Standards for Intercity Passenger Rail Service* final rule published by FRA on November 16, 2020. It also follows up on a related exchange of letters between our CEO's regarding proposed schedule changes (Attachment 1).

As you know, the final FRA rule makes Customer on-time performance ("OTP") the sole metric for measuring Amtrak OTP. The final rule instructs and Administrator Batory has urged Amtrak and its host railroads to align schedules, as necessary, with that metric, which is consistent with the work our railroads have jointly undertaken on long-term schedules during the past 10 months. If we agree that a schedule is aligned with the Customer OTP metric, we are to certify the schedule. If we cannot agree, we have the option either of leaving the schedule uncertified or initiating a non-binding dispute resolution process.

Your letter proposes to certify the schedules of 23 of the 26 daily Amtrak trains that operate over CN's lines in the United States during normal operations. Although we do not agree with your methodology for identifying schedules ready for certification, we do agree on certification for most of the schedules for the Amtrak trains we host. Assuming there are no changes to the arrival or start times at the beginning of CN's portion of the route, CN believes the schedules for the trains on its portion of the *Wolverine*, *Blue Water*, *Lincoln*, *Texas Eagle*, and *Sunset Limited* services are ready to be certified. We can therefore certify the schedules for 5 of the 7 services and 20 of the 26 daily trains that operate over CN's lines in the United States during normal operations.

What remains are the two trains on the *City of New Orleans* service and the four trains on the *Illini/Saluki* service. We believe a key reason for our difference in view is your use of high Customer OTP in FY 2020 as an independent basis for proposed certification. As discussed below, due to Amtrak's significant reductions in operations during the present

pandemic, Amtrak's temporarily improved performance is not an adequate or appropriate basis to establish long-term schedules. It is also evident that your list is over-inclusive as it includes schedules for two trains on the Illini/Saluki service that have been the subject of continuing discussions between our railroads and for which Amtrak itself has acknowledged require at least 10 minutes added to the schedule (see Flynn Letter to Ruest, Oct. 16, 2020, Attachment 1).

For CN's 930-mile *City of New Orleans* service, after a reallocation of recovery time, we believe only a small amount of additional run time (1-3%) is needed. I have attached a proposal (see Attachment 2) that shows the necessary changes that would allow us to also certify the schedule for these two trains.

This leaves only the schedules for the 4 trains on the *Illini/Saluki* service. Since June 2020, our executives have met multiple times and exchanged and discussed different schedule proposals for that service. They have appropriately focused their efforts on establishing long-term, standard schedules intended to work well into the future, when the pandemic is over, and Amtrak's operations have returned to normal (including operating 4 trains and without the speed restriction CN has imposed for the safe operation of Amtrak's single level equipment over grade crossings).

Most recently Amtrak proposed adopting temporary schedules for the *Illini/Saluki* service based only on a reallocation of existing schedule time, with longer standard schedules that would automatically take effect at a later date based on an objective measure. See Flynn Letter (Attachment 1). Given the extreme temporary changes to Amtrak operations caused by the pandemic, we are willing to use that proposed framework in an effort to resolve our differences. In addition, provided that Amtrak agrees to adopt CN's proposed standard schedules (see Attachment 3) based on one of the objective criterion proposed below, we are willing to accept the temporary schedules that Amtrak proposed during the June 9 meeting (see Attachment 4). As noted above, Amtrak proposed adding 10 minutes to the long-term standard schedule for these trains (Flynn Letter, Attachment 1). However, as I will explain, additional run time is required for these trains to reliably achieve the 80% Customer OTP standard once operations return to normal.

The FRA and Administrator Batory emphasized schedule adjustments must be focused on meeting the Customer OTP standard for the long-term under normal (non-pandemic) operating conditions. The longer-term standard schedules cannot be based on present temporary conditions. Over the past year, the COVID pandemic has transformed passenger and freight operations. Amtrak suffered a 95% reduction in ridership at the height of the pandemic, causing it to slash the number of trains it operates. On CN lines, Amtrak has reduced the number of trains by half: from 24 daily trains pre-pandemic to just 10 daily trains and 4 trains that operate every-other-day. With fewer riders, there are fewer station delays, and without opposing passenger train meets, passenger train interference has disappeared, and now that the Superliner equipment is the standard consist for this service (see Flynn Letter, Attachment 1), delays due to the short shunt speed restriction have also been eliminated.

As result of these changes, performance has temporarily improved on the *Illini/Saluki* service. But temporary improved performance due to these pandemic conditions does not provide a basis for establishing a standard schedule. A standard schedule must remain achievable when ridership and train volumes return to normal. That is the task that the FRA's final rule and Administrator Batory set for us, and that is the task our railroads have undertaken.

Accordingly, in order to develop our proposed standard schedules for the *Illini/Saluki* service, CN used data for arrivals, departures, and delays from the most recent past period of normal operations (2018-2019), and we then tested our schedule proposal against operations during that period. Starting with the schedules proposed by Amtrak on June 9, which shifted some existing recovery time to PRT, we added recovery time until the schedule could reliably achieve 80% Customer OTP during this period of normal operations. The resulting schedules would add 15, 26, 26, and 40 minutes to the current run times for the four trains in this service, which is, on average, only a modest 8% increase in average run time. This increase is even more modest when the 10 minutes of added run time proposed by Amtrak is taken into account – CN’s proposed schedules would be only 5, 16, 16, and 30 minutes longer, an average increase of only 5%. See Attachment 3.

CN’s proposal, consistent with most other Amtrak services, provides for different schedules and schedule adjustments for individual trains because different trains encounter different levels and types of delay. For example, train 392, for which we have proposed an additional 40 minutes, tends to experience the highest levels of both passenger train interference and delays caused by Amtrak crews, passengers, and equipment.

With this small overall increase in schedule time, we anticipate large gains in Customer OTP. Our estimate is that Customer OTP would increase by approximately 55 percentage points, from 27% during the 2018-2019 period under the existing schedules to over 80% once the new schedules are implemented.

Importantly, the need for additional time in the schedule is not driven by delays caused by CN’s freight trains. CN analyzed Amtrak’s delay reports for the period 2018-2019 and found that delays caused by CN’s freight trains averaged only 11.4 minutes per trip during the 2018-2019 period. Even if CN could somehow eliminate *all* such delays, which would require eliminating freight trains and ceasing to provide key services to our shippers, there would still be far too little time in the schedule to reliably meet the Customer OTP standard, given other delays. In any event, eliminating all delays due to freight operations is unrealistic and infeasible. CN works hard to minimize freight train interference, but on a busy single-line, with shared freight and passenger operations, real world events are bound to result in some FTI delays. These events include such things as badly out of slot Amtrak trains, severe weather, mechanical malfunctions of freight or passenger trains, and network congestion. Indeed, Amtrak experiences FTI delays even when it dispatches and controls its own lines, such as in the Northeast Corridor.

In contrast to the relatively low levels of delay caused by CN’s freight trains, CN’s analysis showed that delays due to non-CN causes (including on the non-CN portion of the route) averaged 19.8 minutes per trip, which is 74% higher than the average delay caused by CN’s freight trains, and 42% of total delays, excluding delays attributable to the short shunt speed restriction. Delays due to interference from Amtrak’s other trains, which are inevitable where trains are scheduled to meet on single track territory, averaged a further 7.1 minutes per trip, equal to 15% of total delays.

Taken together, total delays that cannot reasonably be attributed to CN average 26.9 minutes per trip. These delays consume between 67% and 75% of the 36 to 40 total minutes of recovery (including miscellaneous) time in the current schedules. During normal operating conditions, it is impossible to meet an 80% Customer OTP standard when such a high percentage of recovery time is consumed by delays, such as these, that are beyond CN’s reasonable control.

As further evidence that our proposed standard schedules are reasonable, as we've noted previously, CN's proposed schedules for the *Illini/Saluki* service would remain shorter than almost every other Amtrak schedule of comparable length. The average run time for CN's proposed schedules are each 357 minutes, covering a 309 mile route. As shown in the table in Attachment 5, among the 14 Amtrak routes that are between 200 and 400 miles long, CN's proposed schedules would have the third smallest ratio of schedule time to distance. (The current schedule for the *Illini/Saluki* is second overall in this metric.) This strongly suggests that the total run times for the proposed schedules are not excessive, and that their transit times should be as attractive to Amtrak's passengers as other Amtrak services. The *Wolverine* service attracts customers with a 364 minute schedule over its 304 mile route between Chicago and Pontiac, and the *Cascades* service attracts customers with a 383 minute schedule over a 311 mile route between Seattle and Eugene. By comparison, the *Illini/Saluki* service would have a shorter schedule over its 309 mile route.

We believe our proposed standard schedules will benefit both Amtrak and its riders. Amtrak's Customer OTP would dramatically improve, and Amtrak's passengers will benefit from more realistic and reliable performance. The added time in the schedules would not lengthen trip times actually experienced by riders. It would simply align the schedule with Amtrak's actual operating times as experienced over many years. More generally, we believe riders will find the benefits of accurate and reliable schedules and enhanced OTP performance of the trains to greatly outweigh the modest lengthening of the schedule.

As noted above, provided that Amtrak is willing to accept CN's proposed longer-term standard schedules based on one of the objective criterion proposed below, CN would be willing to accept Amtrak's proposed temporary schedules. The additional run time necessary during normal operations is not required today, when Amtrak's operations remain severely impacted by the COVID pandemic. CN proposes that the standard schedules automatically replace the temporary schedules proposed by Amtrak if and when Amtrak resumes operating 4 trains in the *Illini/Saluki* service. Alternatively, if Amtrak prefers, CN is willing to use actual Customer OTP as the sole basis for transitioning to standard schedules. Under that option, the transition to a standard schedule for a train in the *Illini/Saluki* service would only occur if on or after January 1, 2022, Customer OTP for that train falls below 85% for any calendar quarter.

Each of these proposed criterion is clear, objective, and easy to implement. Whichever Amtrak chooses, it will ensure that the standard schedule will not be implemented before it is necessary, and if the criterion chosen is not met, the "temporary" schedules would remain in place.

Our proposal to adopt both these permanent and temporary schedules is also predicated and conditioned on the absence of any delays due to the application of a short shunt slow order. As you know, Amtrak's recent use of the Superliner equipment has significantly increased the recent OTP on this service. In order that we may agree to schedules with no added time to compensate for such a slow order, Amtrak would need to agree to continue running the Superliner equipment it is currently running, at least until we have a functioning shunt enhancer or other solution to resolve the short shunt safety issue. We were encouraged in this regard by Mr. Flynn's statement that Amtrak's Superliner equipment is now "the standard consist for this service."

We hope you will review our compromise proposal with an open mind, as we believe the proposed schedules will serve the interests of all stakeholders. It reflects a sincere effort and desire by CN to resolve our long-standing schedule issues with Amtrak on this lone service, and

to incorporate and improve upon Amtrak's own proposal for temporary and permanent schedules.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Michael Matteucci", with a long horizontal flourish extending to the right.

Michael Matteucci

Attachments

VERIFICATION

I, Michael A. Matteucci, certify under penalties of perjury that I am Senior Director – Interline Services for Canadian National Railway Company and its U.S. rail carrier subsidiaries, including Illinois Central Railroad Company, that I have read Part II of the foregoing Response of Illinois Central Railroad Company to Amtrak’s Complaint and Proposed Procedures and that the facts stated therein are true as stated. I further declare under penalties of perjury that I am qualified and authorized to make this certification on behalf of Illinois Central Railroad Company and its affiliates.



Michael A. Matteucci

Dated: January 27th, 2023

VERIFICATION

I, Scott Kuxmann, certify under penalties of perjury that I am Manager Passenger Operations for Canadian National Railway Company's U.S. rail carrier subsidiaries, including Illinois Central Railroad Company, that I have read Part II of the foregoing Response of Illinois Central Railroad Company to Amtrak's Complaint and Proposed Procedures and that the facts stated therein are true as stated. I further declare under penalties of perjury that I am qualified and authorized to make this certification on behalf of Illinois Central Railroad Company and its affiliates.


Scott Kuxmann

Dated: January 27, 2023

CERTIFICATE OF SERVICE

I, James M. Guinivan, hereby certify that I have, this 27th day of January, 2023, caused the foregoing Response of Illinois Central Railroad Company to Amtrak's Complaint and Proposed Procedures to be served upon the following by email:

Jessica Ring Amunson
Jenner & Block LLP
1099 New York avenue, N.W., Suite 900
Washington, DC 20001
jamunson@jenner.com

Michael L. Rosenthal
Covington & Burling
One CityCenter
850 Tenth Street, N.W.
Washington, DC 20001-4956
mrosenthal@cov.com

Jill K. Mulligan
Vice President and General Counsel
BNSF Railway Company
2650 Lou Menk Drive
Fort Worth, TX 76131
jill.mulligan@bnsf.com

Peter W. Denton
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
pdenton@steptoe.com

Don Del Rio
General Counsel
Metrolink; Southern California Regional Rail
Authority
900 Wilshire Boulevard, Suite 1500
Los Angeles, CA 90017
delriod@scrra.net

/s/ James M. Guinivan
James M. Guinivan