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December 23, 2024

VIA E-FILING

Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
395 E Street, SW
Washington, DC 20423

Re: STB 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

Dear Ms. Brown:

Enclosed for e-filing in the above-referenced proceeding is a Public version of BNSF's Reply to Amtrak's Opening Statement, with appropriate redactions that the Board can place in its docket. We are concurrently filing a highly confidential version of the submission to be filed under seal.

The entire Public version has been stamped with a page header stating "PUBLIC VERSION – REDACTED – TO BE PLACED ON PUBLIC FILE." Double brackets indicate highly confidential information ("{{ }}") that has been redacted from the Public version.

Please contact me with any questions.

Respectfully submitted,

/s/ Peter W. Denton

Peter W. Denton

Attorney for BNSF Railway Company

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42175

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

BNSF'S REPLY TO AMTRAK'S OPENING STATEMENT

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Dated: December 23, 2024

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BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42175

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

BNSF'S REPLY TO AMTRAK'S OPENING STATEMENT

BNSF Railway Company ("BNSF") hereby replies to the opening statement filed by Amtrak in this proceeding on October 7, 2024, as supplemented on October 24, 2024. BNSF recognizes the critical role we serve in moving goods for our nation's supply chain while also hosting passenger rail trains, such as Amtrak's *Sunset Limited* service. BNSF values its collaborative partnership with Amtrak. BNSF also appreciates the work of the Surface Transportation Board ("STB" or "Board") to establish a fair and transparent process that has allowed the Board and the parties to develop an extensive record in Stage One of this proceeding and for the parties to present their cases to the Board.

BNSF's reply focuses primarily on the proper interpretation of certain statutory terms that neither the Board nor courts have definitively resolved in the past. The Board's application of its statutory interpretations to the facts of this case will control whether the Board moves to Stage Two of this proceeding, where the Board would evaluate whether to assess damages against any of the parties.

First, BNSF agrees with Amtrak that the Board should rely on the Federal Railroad Administration ("FRA") definition of "host railroad" for the purposes of identifying "host rail carriers" under 49 U.S.C. § 24308(f). BNSF explains here that, contrary to Amtrak's arguments, BNSF is **not** the properly-designated "host rail

carrier” for the segment of the Amtrak *Sunset Limited* route between Live Oak, La., and West Bridge Junction, La., because BNSF is not “directly accountable to Amtrak by agreement for Amtrak operations” over that segment.¹ Indeed, BNSF believes that *Sunset Limited* trains should not run on BNSF-owned tracks between those two points.

Second, BNSF replies to Amtrak’s proposed meaning of “preference” for the purposes of Section 24308(c) and Board proceedings under Section 24308(f). The “absolute” approach proposed by Amtrak to interpreting a host rail carrier’s statutory obligation to provide Amtrak with preference over freight traffic is not supported by the statute or its legislative history. BNSF believes that the Board has previously identified the correct framework for understanding the preference requirement – a more comprehensive approach that accounts for the complex realities of railroad operations while still providing Amtrak trains and passengers with the preference that they deserve and that the statute demands. The Board should follow that comprehensive framework here.

Third, BNSF explains that the record developed in Stage One of this proceeding shows that BNSF has **not** failed to provide the required preference to Amtrak’s *Sunset Limited* trains during the Relevant Period and that any “delays or failure to achieve minimum standards” are **not** “due to causes that could reasonably be addressed” by BNSF.² BNSF demonstrates that its dispatcher training materials instruct dispatchers to prioritize Amtrak in dispatching decisions. Further, BNSF explains that its schedule-building practices prioritize Amtrak trains with the highest ranking amongst all trains.

¹ 49 C.F.R. § 273.3.

² 49 U.S.C. § 24308(f)(1).

Fourth, BNSF replies to Amtrak's proposal regarding the extent of the Board's legal authority to award damages in this and other Section 24308(f) proceedings. The Board's remedial authority here is limited to monetary damages for any failures to provide preference that would cause Amtrak to fall below 80 percent on-time performance for any two consecutive calendar quarters. In other words, the statute does not authorize the Board to impose non-monetary damages or to award damages for any delays attributable to a rail carrier's failure to provide preference, if the preference violation would not, standing alone, cause Amtrak to fall below the 80 percent on-time performance threshold.

Finally, BNSF addresses the non-binding "recommendations" that Amtrak has asked the Board to make in Stage One of this proceeding in order to improve the service, quality, and on-time performance of the *Sunset Limited* service. BNSF explains that certain of the Amtrak-proposed recommendations are sensible approaches that BNSF already follows. But many of the Amtrak-proposed recommendations are ill-defined and overly prescriptive. If implemented, they would have sweeping negative effects to both freight trains and passenger trains. BNSF believes that the Board should narrowly tailor any recommendations made in this Stage One to address the causes for delays or failures to achieve minimum standards that could be reasonably addressed by a host rail carrier on its portion of the *Sunset Limited* route, to the extent that the Board finds that host culpable in this proceeding.

1. Background and Procedural History

At its heart, this proceeding involves a dispute between a complainant, Amtrak, and a respondent, Union Pacific Railroad Company ("UP"). On December 8, 2022, Amtrak filed a Complaint with the Board regarding the substandard on-time performance of the *Sunset Limited* service from October 1, 2021 through

September 30, 2022.³ In that Complaint, Amtrak alleged that the substandard on-time performance of *Sunset Limited* trains was a result of causes that could be addressed by UP, and that UP had violated Amtrak's right to preference over freight transportation.⁴ While the Complaint discussed other rail carriers associated with the *Sunset Limited* service, the Complaint did not attribute to BNSF any failures to achieve on-time performance or preference violations.

UP hosts the overwhelming majority (nearly 90%) of the approximately 1,997-mile *Sunset Limited* route. BNSF and other railroads also host small portions of the Amtrak service at the eastern and western ends of the *Sunset Limited* route. Amtrak submitted this map of the *Sunset Limited* route in its Complaint, depicting BNSF's limited role as host to the *Sunset Limited*:⁵

Diagram 1. Entire *Sunset Limited* Route



³ See generally *Complaint & Pet. of the Nat'l R.R. Passenger Corp. Under 49 U.S.C. § 24308(f) – for Substandard Performance of Amtrak's Sunset Limited Trains 1 and 2*, NOR 42175 (“*Complaint*”) (Amtrak served Dec. 8, 2022). The Board later expanded the “Relevant Period” for this proceeding to October 1, 2021 through December 8, 2022.

⁴ See *Complaint*, ¶ 8.

⁵ See *Complaint*, ¶ 27, Map 1: Entire *Sunset Limited* Route.

The Board issued a decision initiating this proceeding on July 11, 2023. The Board properly determined that BNSF and the other host rail carriers are parties to this proceeding. The Board has also directed other railroads that do not formally host *Sunset Limited* service to participate as parties and to contribute to the Board's record-development efforts.

The Board has indicated that, in Stage One of this proceeding, the Board will attempt to determine causation and attribution for *Sunset Limited* delays or failure to achieve minimum standards and will make recommendations for service improvement. The Board's interpretation of key statutory terms will necessarily inform the Board's findings. If the Board finds in this Stage One that delays or failure to achieve minimum standards are attributable to preference violations by any of Amtrak's host rail carriers, the Board would move to Stage Two of this proceeding, where the Board would decide whether to award damages.

The Board directed BNSF and other parties to prepare responses to investigative questions from the Board.⁶ BNSF and other parties submitted their responses to the Board's investigative questions on September 25, 2023 and December 5, 2023. As part of its response to those questions, Amtrak provided the Board with more than 19,000 recorded delays to *Sunset Limited* Trains 1 and 2 during the Relevant Period.

On February 13, 2024, the Board issued a decision ordering the parties to provide root cause analyses for delays of 90 minutes or more, as well as explanations for an additional set of Board-selected illustrative delays to *Sunset*

⁶ Decision, *Complaint & Pet. of the Nat'l R.R. Passenger Corp. Under 49 U.S.C. § 24308(f) – for Substandard Performance of Amtrak's Sunset Limited Trains 1 and 2*, NOR 42175 ("July 11, 2023 Decision") (STB served July 11, 2023).

Limited Trains 1 and 2.⁷ Consistent with the limited geographic scope of the segment of the *Sunset Limited* route hosted by BNSF, Amtrak identified BNSF as the host for less than 7% of the Board-selected delays. BNSF and the other parties completed those submissions on July 24, 2024. As discussed below, the record developed in this proceeding demonstrates that BNSF has not failed to provide preference to Amtrak.

Along with the investigative questions posed by the Board, the Board also authorized a limited period for party-led discovery to supplement the record.⁸ Consequently, BNSF served Amtrak with several interrogatories related to the designation of the proper host rail carrier for the Live Oak, La. to West Bridge Junction, La. segment of the *Sunset Limited* Route.⁹ During the party-led discovery period, Amtrak and UP became engaged in a long-running discovery dispute. BNSF was not involved in this dispute.

The Board issued a decision on August 19, 2024, closing the discovery period and establishing a briefing schedule.¹⁰ In that decision, the Board instructed BNSF and the other railroads to reply to Amtrak's Opening Statement and all parties to address a number of statutory interpretation issues. Those issues include: (1) a proposed interpretation of preference under 49 U.S.C. § 24308(c); (2) a proposed interpretation of "host rail carriers" for the *Sunset Limited* Route; (3) the scope of

⁷ Decision, *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, ("February 13, 2024 Decision"), slip op. at 3, App'x Parts I-II (STB served Feb. 13, 2024).

⁸ See July 11, 2023 Decision, at 13.

⁹ See BNSF's First Set of Interrogatories to Amtrak (Oct. 17, 2023).

¹⁰ Decision, *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 ("August 19, 2024 Decision") (STB served Aug. 19, 2024).

the Board’s legal authority to award damages under 49 U.S.C. § 24038(f)(2); and (4) why any delays that Amtrak alleges constitute a preference violation do not constitute a preference violation. Amtrak’s Opening Statement addressed those statutory interpretation issues and alleged that “[t]he delays or failures to achieve minimum standards on the *Sunset Limited* were attributable primarily to freight train interference (“FTI”) from [UP].”¹¹

As with other adversarial adjudications that the Board regularly oversees, the Board has properly established a framework in this proceeding that involves the presentation of evidence and argument by the parties. The record in this case has been built through both party-led discovery (largely between Amtrak and UP) and Board-directed data and information development. Ultimately, however, this case is much like any other adjudication: the Board will make its findings based on the cases made by Amtrak and the other parties.¹² Tellingly, Amtrak has not accused BNSF of any wrongdoing in this proceeding, let alone any preference violations.

2. The meaning of “host rail carrier” and its application in this proceeding.

Turning to the statutory interpretation issues, the Board first asked the parties to discuss the extent to which the Board should rely on the definition of “host railroad” set forth by the FRA in 49 C.F.R. § 273.3 when identifying “host rail

¹¹ See Amtrak’s Opening Statement, *Complaint & Pet. of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. § 24308(f) – for Substandard Performance of Amtrak’s Sunset Limited Trains 1 and 2*, NOR 42175 (“Opening Statement”), at 2 (Amtrak served Oct. 7, 2024).

¹² The legislative history supports this understanding of Section 24308(f) proceedings as adversarial adjudications. See S. Rep. No. 110-67 at 26 (“The intent of this section is to provide a forum for both Amtrak and the freight railroads for the adjudication of service disputes, including on-time performance problems The Committee believes that STB will be able to consider disputes in an efficient and evenhanded manner.”).

carriers” for purposes of 49 U.S.C. § 24308(f).¹³ As explained in more detail below, BNSF agrees with Amtrak that the Board should use the FRA’s agreement-based definition of “host railroad” for these purposes, but BNSF disagrees with Amtrak’s application of that definition to the Avondale Yard Segment (defined below).

Applying the FRA’s definition, there is no dispute that BNSF **is** the host rail carrier for the *Sunset Limited* route from Live Oak, La. (MP C14.95) to Iowa Junction, La. (MP C205.4). The BNSF/Amtrak Operating Agreement clearly makes BNSF “directly accountable” to Amtrak for operations over that segment.¹⁴ But applying the same FRA definition, BNSF **is not** properly a “host rail carrier” for the Live Oak, La. (MP C14.95) to West Bridge Junction, La. (MP B10.5) segment of the *Sunset Limited* route (the “Avondale Yard Segment”).¹⁵ There is no agreement, informal or otherwise, by which BNSF is “directly accountable” to Amtrak for operations over that segment.¹⁶

Amtrak’s position is that the BNSF/Amtrak Operating Agreement causes BNSF to be a “host rail carrier” for Section 24308(f) purposes on any segment of

¹³ See 49 C.F.R. § 273.3 (“Host railroad means a railroad that is directly accountable to Amtrak by agreement for Amtrak operations over a railroad line segment. Amtrak is a host railroad of Amtrak trains and other trains operating over an Amtrak owned or controlled railroad line segment.”).

¹⁴ See 49 C.F.R. § 273.3.

¹⁵ As BNSF has explained, there are multiple ways for freight or passenger trains to traverse the Avondale Yard Segment. See BNSF’s Response to the Board’s June 4, 2024 Decision (“June 4, 2024 Submission”), at 5, 9 (June 4, 2024). The most direct and efficient route is via the SP “Legacy Route” now owned by UP, which consists of former SP mainline track that avoids the heart of Avondale Yard. Alternatively, trains could run on BNSF’s unsignaled mainline and yard tracks through Avondale Yard, consisting of former Missouri Pacific Railroad Company (“MP”) tracks that BNSF acquired from UP at the time of the UP/SP merger. BNSF has previously described the difficulties associated with *Sunset Limited* trains operating on BNSF’s tracks through this segment. See *id.*, at 5, 9. The SP Legacy Route avoids the congestion at Avondale Yard on BNSF’s tracks. See *id.*, at 5.

¹⁶ See 49 C.F.R. § 273.3.

BNSF track over which Amtrak operates, regardless of whether the segment is specifically identified in the operating agreement itself or whether BNSF actually agrees to host Amtrak trains on that segment. As BNSF explains below, the operating agreement only applies to specific line segments. The Avondale Yard Segment is not covered by that agreement and BNSF has repeatedly disclaimed any responsibility for acting as a host rail carrier for *Sunset Limited* service over that segment. Indeed, BNSF believes that *Sunset Limited* trains should run over the SP Legacy Route to traverse the Avondale Yard Segment, where the *Sunset Limited* operated before Amtrak's creation – not over BNSF's tracks through Avondale Yard.

2.1 A “host rail carrier” under Section 24308(f) should be directly accountable to Amtrak by agreement, consistent with the FRA’s definition of “host railroad.”

Section 207 of the Passenger Rail Investment and Improvement Act of 2008 (the “PRIIA”)¹⁷ required the FRA to establish metrics and minimum standards for measuring the performance and service quality of Amtrak's intercity passenger train operations. If those minimum standards set by the FRA are not met, Section 213 of the PRIIA authorized the Board to initiate proceedings such as the instant matter.¹⁸ In both sections of the PRIIA, Congress used the terms “host rail carrier”¹⁹

¹⁷ Pub. L. No. 110-432, 122 Stat. 4848, codified at 49 U.S.C. § 24101, note, 49 U.S.C. § 24308(f).

¹⁸ As the Board acknowledged, Section 213 contains two potential triggers for a Board proceeding. *See* 49 U.S.C. § 24308(f)(1); July 11, 2023 Decision, at 1 n.2. In addition to the failure to meet FRA-set minimum standards, the Board can initiate a proceeding if the on-time performance of any intercity passenger train averages less than 80 percent for any two consecutive calendar quarters. *See* 49 U.S.C. § 24308(f)(1). But because the sole minimum standard established by the FRA under PRIIA section 207 consists of on-time performance at no less than 80 percent, the two triggers are essentially the same for the purposes of determining when the Board can open a proceeding under PRIIA section 213.

¹⁹ PRIIA § 207(c); 49 U.S.C. §§ 24308(f)(2), (3), and (4).

and “host freight railroad”²⁰ somewhat interchangeably to refer to a railroad that hosts Amtrak passenger trains on its network. Importantly, Section 213 authorized the STB to award damages against a “host rail carrier” if the STB makes certain attribution determinations.²¹

In its rule establishing metrics and minimum standards pursuant to Section 207, the FRA defined the term “host railroad” to mean “a railroad that is directly accountable to Amtrak by agreement for Amtrak operations over a railroad line segment.”²² The STB has asked each party to “address which parties it believes the Board should consider ‘host rail carriers’ for the purposes of 49 U.S.C. § 24308(f).”²³ The STB directed the parties to “discuss the extent to which the Board should rely on the [FRA’s] definition of ‘host railroad.’”²⁴

In its opening statement, Amtrak stated that the Board should use the FRA’s definition of “host railroad” from 49 C.F.R. § 273.3 for the purpose of Section 24308(f) proceedings.²⁵ BNSF agrees. Specifically, BNSF believes that the STB should use the FRA’s definition of “host railroad” from 49 C.F.R. § 273.3 when the STB interprets and applies the terms “host freight railroad” and “host rail carrier” under 49 U.S.C. § 24308(f).

The FRA’s definition comes from a regulation that implements a portion of the PRIIA (Section 207) that is directly tied to the portion of the PRIIA (Section 213) at issue. So, it makes sense for both the FRA and the STB to use a consistent definition for similar terms. Additionally, the FRA’s definition is consistent with the

²⁰ 49 U.S.C. § 24308(f)(1).

²¹ 49 U.S.C. § 24308(f)(2).

²² 49 C.F.R. § 273.3.

²³ *See* August 19, 2024 Decision, at 3.

²⁴ *See id.*

²⁵ *See* Opening Statement, at 15.

general understanding between Amtrak and BNSF regarding their commercial relationship. Any broader definition of “host rail carrier” or “host freight railroad” for Section 24308(f) purposes outside of FRA’s “directly accountable to Amtrak by agreement” definition could unduly broaden the scope of the STB’s authority to award damages against a railroad where that railroad does not have contractual relationships with Amtrak.

2.2 BNSF is not a “host rail carrier” for Section 24308(f) purposes over the Avondale Yard Segment.

Amtrak’s position regarding whether BNSF hosts the Avondale Yard Segment has seemingly shifted throughout the course of this proceeding. Amtrak indicated in its complaint that UP is the host rail carrier for the Avondale Yard Segment.²⁶ More than a year ago, in a verified response to a BNSF interrogatory, Amtrak stated that “BNSF is not identified as the Host Railroad in Amtrak’s delay reporting database east of Live Oak.”²⁷ A few weeks later, Amtrak claimed in a response to a Board question that “[c]ontractually, operating agreements with both [UP and BNSF] address the use of Amtrak’s statutory right to operate *Sunset Limited* Trains over the [Avondale Yard Segment].”²⁸

Most recently, in its Opening Statement, Amtrak argued that both UP and BNSF are appropriately designated as host rail carriers through the Avondale Yard

²⁶ See Complaint, ¶ 27 (“Between East Bridge Junction and a location called ‘Live Oak’ (near Waggaman, Louisiana), UP serves as the contractual host for 9.6 miles.”).

²⁷ See Amtrak Responses and Objections to First Set of Interrogatories from BNSF Railway Company, at 7 (Nov. 8, 2023).

²⁸ See Amtrak’s Response to the Board’s Interrogatories and Document Requirements; Appenfix A – Part III, (“Amtrak December 5, 2023 Submission”), at 14 (Dec. 5, 2023).

Segment for Section 24308(f) purposes.²⁹ Amtrak claimed that BNSF is a host rail carrier for the Avondale Yard Segment because: (1) Amtrak's contract with BNSF allegedly covers this segment, (2) {{[REDACTED]}}

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]}³⁰

BNSF's position on this issue has been clear from the beginning: contrary to Amtrak's arguments, BNSF is not a "host rail carrier" for Section 24308(f) purposes with respect to the Avondale Yard Segment, because BNSF is not "directly accountable to Amtrak by agreement" for this segment. Indeed, BNSF has requested that the Board correct any Amtrak delay entries reported to have occurred on the Avondale Yard Segment that assign BNSF as the host rail carrier.³¹ None of Amtrak's latest claims lead to the conclusion that BNSF is "directly accountable to Amtrak by agreement" for the Avondale Yard Segment.

²⁹ See Opening Statement, at 22 ("Both BNSF and UP have contractual obligations to Amtrak and thus both are appropriately designated host railroads for this segment.").

³⁰ *Id.* at 24 (citing Amtrak December 5, 2023 Submission, at 16). Previously, Amtrak claimed that BNSF actually owned the SP Legacy Route. See Amtrak December 5, 2023 Submission at 16. BNSF and UP later clarified this issue, each confirming that UP (not BNSF) owns the SP Legacy Route. See UP's Responses to the STB's Requests for Additional Information, at 5 (Apr. 15, 2024); BNSF's Response to the Board's February 13, 2024 Decision, at 6 (Apr. 15, 2024). Given that Amtrak did not make this argument regarding ownership of the SP Legacy Route again in its Opening Statement, this point is apparently no longer in contention, although BNSF can provide further support for its lack of ownership if necessary.

³¹ See June 4, 2024 Submission, at 4; BNSF's Third Response to the Board's February 13, 2024 Decision ("July 24, 2024 Submission"), at 2-3 (July 24, 2024).

First, the BNSF/Amtrak Operating Agreement does not cover the Avondale Yard Segment and none of the provisions in that agreement identify that segment. Second, Amtrak's argument regarding {{[REDACTED]}} does not justify finding that BNSF is the host for that segment. Third, BNSF has not endorsed Amtrak's use of BNSF's trackage traversing the Avondale Yard Segment, and indeed has specifically disclaimed Amtrak's use of those tracks. Fourth, Amtrak has not established {{[REDACTED]}} it does not necessarily make BNSF a host rail carrier for that segment under Section 24308(f).³²

2.2.1 The BNSF/Amtrak Operating Agreement does not include the Avondale Yard Segment.

BNSF is "directly accountable to Amtrak by agreement for Amtrak operations over a railroad line segment" under the BNSF/Amtrak Operating Agreement. That Agreement does not govern Amtrak operations over the Avondale Yard Segment. The Agreement only describes the Iowa Junction to Live Oak segment in Appendix V, Table 1—nothing in the Agreement refers to stations east of Live Oak on the

³² Amtrak also claims that any "potential remedies" that the Board may order in this proceeding regarding the Avondale Yard Segment "would be applicable" to BNSF. Opening Statement, at 24. But because BNSF is not the "host rail carrier" under Section 24308(f) with respect to the Avondale Yard Segment, the Board cannot award damages against BNSF with respect to any delays or failures to achieve minimum standards associated with the Avondale Yard Segment pursuant to Section 24308(f)(2) in any Stage Two of this proceeding. Regardless, as discussed further below, the other necessary predicate to any such award of damages – a BNSF preference violation and the attribution of Amtrak "delays or failures to achieve minimum standards" to that violation – has neither occurred nor even been alleged in this proceeding.

Sunset Limited route or indicates that BNSF agreed to host Amtrak on the Avondale Yard Segment.³³

Nor do any of the Agreement's provisions govern that portion of trackage. In particular, the Avondale Yard Segment is absent from Appendix I to the Agreement, which outlines Maximum Passenger Train Speeds³⁴ for each BNSF-hosted subdivision and from Appendix V, Table 1, which provides for performance payments and penalties.³⁵

Lacking any specific reference to the Avondale Yard Segment in the contract, Amtrak cites {{[REDACTED]}} of the BNSF/Amtrak Operating Agreement as support for its claim that BNSF has contractual obligations to Amtrak across the Avondale Yard Segment. But {{[REDACTED]}} only states very generally that BNSF shall

{{[REDACTED]}}

{{[REDACTED]}}³⁶

Amtrak mistakenly claims that this Section "includ[es] trackage between Live Oak

³³ See generally Agreement Between Nat'l R.R. Passenger Corp. & Burlington N. R.R. Co. & Atchison, Topeka, & Sante Fe Ry. Co. ("BNSF/Amtrak Operating Agreement") (AMTRAK_STB_0014354).

³⁴ *Id.* at AMTRAK_STB_0014475 - AMTRAK_STB_00144529.

³⁵ Further, {{[REDACTED]}}

{{[REDACTED]}}

{{[REDACTED]}} See *id.* at AMTRAK_STB_0014439. {{[REDACTED]}}

{{[REDACTED]}}

{{[REDACTED]}}

{{[REDACTED]}}

Id. at AMTRAK_STB_0014453. {{[REDACTED]}}

{{[REDACTED]}} *Id.* {{[REDACTED]}}

{{[REDACTED]}} *Id.* Accordingly, the BNSF/Amtrak Operating Agreement does not support Amtrak's claim that BNSF serves as the contractual host for the Avondale Yard Segment.

³⁶ *Id.* at AMTRAK_STB_0014359.

and West Junction [sic].”³⁷ In doing so, Amtrak has relied on the obligations imposed {{[REDACTED]}} provision of that Agreement and improperly extrapolated that provision to bind BNSF as a host for segments not included in the contract. Amtrak’s position would allow Amtrak to unilaterally designate BNSF as a “host rail carrier” wherever Amtrak sees fit. By contrast, Amtrak’s Operating Agreement with UP contains explicit provisions that govern the Avondale Yard Segment, presumably over the SP Legacy Route (now owned by UP) that traverses this segment.³⁸

2.2.2 Amtrak’s argument regarding {{[REDACTED]}} does not justify finding that BNSF is the “host rail carrier” for the Avondale Yard Segment.

Amtrak claims that, {{[REDACTED]}}

{{[REDACTED]}}

{{[REDACTED]}}³⁹ As support for its position, Amtrak cited {{[REDACTED]}}

³⁷ See Opening Statement, at 23.

³⁸ Appendix I, Table A of the UP/Amtrak Operating Agreement lists {{[REDACTED]}}. See Agreement Between Nat’l R.R. Passenger Corp. & Union Pacific R.R. Co. (“UP/Amtrak Operating Agreement”) AMTRAK_STB_0000716 at 752. That Appendix includes {{[REDACTED]}}

{{[REDACTED]}} *Id.* Amtrak also cited this same provision in its December 5, 2023 Supplemental Response to the Board as evidence that UP is the contractual host for this segment of the *Sunset Limited*. Amtrak explicitly stated in that supplemental response that it understands the term “BNSF Conn.” to refer to the Live Oak checkpoint. See Amtrak December 5, 2023 Submission, at 15, n.16. Amtrak further cited in its supplemental response to the Board that the UP/Amtrak Operating Agreement {{[REDACTED]}}. See UP/Amtrak Operating Agreement at AMTRAK_STB_0000804.

³⁹ See Opening Statement, at 23 (citing Letter from J. Blair to DJ Mitchell at 3, Exhibit A (Feb. 26, 2015) (AMTRAK_STB_0001222)).

[REDACTED]}⁴⁰ {[REDACTED]

[REDACTED]

[REDACTED]}⁴¹

To be clear, Amtrak's support on this point consists of {[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]} Additionally, the {[REDACTED]} is belied by

later correspondence from 2015 between Amtrak and BNSF where BNSF expressly disclaimed "any contract operating rights" for Amtrak over the Avondale Yard

Segment:

[I]t [had] come to BNSF's attention that Amtrak's Sunset Limited service [was] operating on the BNSF mainline between Live Oak and West Bridge Jct., near Avondale, LA, without any contract operating rights to do so. Amtrak service operates between Houston and New Orleans under an agreement with Union Pacific's predecessor Southern Pacific. Under that agreement, Amtrak trains should be operating on the former Southern Pacific mainline for the entire route, including between Live Oak and West Bridge Jct.⁴²

Regardless, even if true, Amtrak's claim about {[REDACTED]

[REDACTED]

[REDACTED]} does not equate to BNSF being "directly accountable to Amtrak by agreement" for this segment.

⁴⁰ See *id.* at 23, n.73 (citing Correspondence from J. Blair to D. Mitchell, dated February 26, 2015, Exhibit A at AMTRAK_STB_0001224).

⁴¹ See Correspondence from J. Blair to D. Mitchell, dated February 26, 2015, at Exhibit A (AMTRAK_STB_0001224).

⁴² See Correspondence from DJ Mitchell to Jim Blair, dated February 21, 2015 (BNSF-SUNSET-0005002), Exhibit 1.

2.2.3 BNSF has not endorsed Amtrak's use of BNSF's trackage traversing the Avondale Yard Segment.

Amtrak next states that BNSF is the contractual host for the Avondale Yard Segment because Amtrak and BNSF {{REDACTED}}
{{REDACTED}}⁴³ BNSF, however, has {{REDACTED}}
{{REDACTED}} with Amtrak whereby BNSF voluntarily accommodated Amtrak on BNSF's tracks through this segment. Instead, Amtrak was routed over BNSF trackage because the tracks comprising the SP Legacy Route (now owned by UP) were often blocked, preventing Amtrak from taking their proper route through the Avondale Yard Segment.

As explained in BNSF's June 4, 2024 Submission, BNSF often accommodates *Sunset Limited* trains, solely as a courtesy for Amtrak, on BNSF mainline or yard tracks that traverse the Avondale Yard Segment.⁴⁴ BNSF has repeatedly challenged the existence of any formal or informal agreement between the parties regarding this accommodation. BNSF has not committed to shift *Sunset Limited* trains from the SP Legacy Route, onto BNSF's un-signalized Avondale Yard trackage.

Instead, BNSF has contested that Amtrak and BNSF had any established agreement that *Sunset Limited* trains would be routed over BNSF's Avondale Yard trackage. As discussed in Section 2.3.2, BNSF first challenged Amtrak's use of its trackage through the Avondale Yard Segment in February 2015. Since discovering this issue, BNSF has never acquiesced to Amtrak's use of its trackage, as Amtrak contends.

BNSF has also raised this issue with UP. On the same date that BNSF notified Amtrak of this routing issue, Assistant Vice President of Contracts and

⁴³ See Opening Statement, at 23-24.

⁴⁴ See June 4, 2024 Submission, at 5.

Joint Facilities at BNSF, Sarah Bailiff, circulated a letter to David Hughes at UP. That letter stated that BNSF:

[was] made aware that Amtrak's Sunset Limited service is operating on the BNSF mainline between Live Oak and West Bridge Jct., near Avondale, LA, without any contract rights to do so. It is my understanding Amtrak operates between Houston and New Orleans pursuant to a former [Southern Pacific] agreement for operation on the former [Southern Pacific] route, including between Live Oak and West Bridge Jct., and not over BNSF's mainline route between Live Oak and West Bridge Jct.⁴⁵

Consistent with that letter, no documentation exists between Amtrak and BNSF which would reflect an agreement (informal or otherwise) between those parties that BNSF would host Amtrak on its tracks that traverse the Avondale Yard Segment.

2.2.4 Amtrak has not established that a BNSF letter regarding {{REDACTED}} causes BNSF to be a host rail carrier for the Avondale Yard Segment.

Amtrak also claims in its Opening Statement that BNSF is the host for the Avondale Yard Segment because {{REDACTED}}

{{REDACTED}}⁴⁶ Amtrak cites its December 5, 2023

Supplemental Response at 16, where Amtrak claimed that BNSF once wrote to

Amtrak {{REDACTED}} But this letter does not have the effect that Amtrak claims.

⁴⁵ See Correspondence from Sarah Bailiff to John Hughes, dated February 21, 2015 (BNSF-SUNSET-0005003), Exhibit 2.

⁴⁶ See Opening Statement, at 24.

The BNSF letter referenced by Amtrak regarding maintenance charges is {{[REDACTED]}}

[REDACTED]

[REDACTED]} The purpose of the letter is {{[REDACTED]}}

[REDACTED]}⁴⁷ The 2004 letter clearly states that the amount was {{[REDACTED]}} for the *Sunset Limited* service. The remainder of the discussion regarding {{[REDACTED]}}

[REDACTED]

[REDACTED]} The {{[REDACTED]}} figure set out in the 2004 letter is less than the entire 194.9-mile BNSF Lafayette Subdivision segment from West Bridge Junction to Iowa Junction.⁴⁸ Regardless, given BNSF's specific disclaimer of any contract rights between Amtrak and BNSF regarding Amtrak's use of BNSF's tracks over the Avondale Yard Segment, the 2004 letter does not make BNSF "directly accountable to Amtrak by agreement" for this segment.

3. The meaning of "preference" and its application in this proceeding.

The Board has asked parties to this proceeding to propose an interpretation of "preference" within the context of 49 U.S.C. §§ 24308(c) and (f), acknowledging that "interpretation of these statutory terms is an issue of first impression and a matter of broad public interest."⁴⁹ Indeed, since Congress enacted Section 24308(c) in 1973, no court has interpreted or applied the preference language.

⁴⁷ See Correspondence from J. Blair to D. Mitchell, dated February 26, 2015, Exhibit C (AMTRAK_STB_0001226).

⁴⁸ The BNSF Red River Division timetable—which includes the BNSF Lafayette Subdivision— shows West Bridge Jct. at MP10.5 and Iowa Jct. at MP205.4, for a total distance of 194.9 miles. See BNSF-SUNSET-0002360 at 2406.

⁴⁹ See August 19, 2024 Decision, at 3.

But the Board has grappled with this issue in the recent past. In 2015, the Board issued a proposed Policy Statement that “provide[d] guidance regarding issues that may arise” in Section 24308(f) cases such as the instant proceeding. The Board stated that it “[did] not view the preference requirement as absolute,” and that “the Board would take a systemic, global approach in determining whether a host carrier has granted the intercity passenger trains preference.”⁵⁰ In 2016, the Board withdrew the proposed Policy Statement, noting that “its approach to preference issues can be developed and refined in the context of specific § 24308(f) cases.”⁵¹

Regardless of its later decision to withdraw the proposed Policy Statement, BNSF believes that the Board identified the correct framework for interpreting “preference” through that 2015 proposed statement. BNSF asks that the Board reject Amtrak’s “absolute” interpretation proposed in this case in favor of a more comprehensive (or in the Board’s 2015 words “systemic, global”) approach.

Under Amtrak’s absolute approach, a host railroad must resolve every individual dispatching decision with Amtrak trains proceeding first. Moreover, Amtrak now insists that its statutory preference right serve as the first principle underpinning all aspects of a host railroad’s internal procedures, policies, and operational systems. In contrast, a comprehensive interpretation supported by BNSF now and by the Board in 2015 “focuses on minimization of total delays affecting intercity passenger train movements while on the host carrier’s network,

⁵⁰ See Decision, *Policy Statement on Implementing Intercity Passenger Train On-Time Performance and Preference Provisions of 49 U.S.C. § 24308(c) and (f)*, EP 728 (“Proposed Policy Statement”), at 3-4 (STB served Dec. 28, 2015).

⁵¹ See Decision, *Policy Statement on Implementing Intercity Passenger Train On-Time Performance and Preference Provisions of 49 U.S.C. § 24308(c) and (f)*, EP 728, at 3 (STB served July 28, 2016).

consistent with the statute.”⁵² As the Board correctly noted in 2015, “a requirement of absolute preference might not, in the long run, promote efficient passenger service.”⁵³

3.1 The preference requirement is not equivalent to absolute deference.

Amtrak’s absolute interpretation of the preference requirement should be disfavored for several reasons: (1) the absolute approach ignores that Amtrak was created to facilitate a *cohesive* system between freight and passenger rail service; (2) the absolute approach is unsupported by the rest of 49 U.S.C. § 24308; (3) the absolute approach does not achieve the congressional rail policy goal of overall network fluidity; (4) the absolute approach is underinclusive in scope because it only analyzes dispatching decisions in isolation; and (5) the absolute approach is also overinclusive because it improperly factors in data irrelevant to the preference analysis, such as undisputed delay minutes.

3.1.1 The absolute approach mischaracterizes the public bargain that created Amtrak.

Contrary to Amtrak’s assertion, Amtrak was created in 1970 to establish a reciprocal relationship between freight and passenger service for the mutual benefit of freight railroads and Amtrak. Congress did not place Amtrak as hierarchically superior to freight railroads on the rail network. Congress originally created Amtrak to “preserve a basic level of intercity passenger rail service while relieving private railroad companies of the obligation to maintain a business” that had resulted in “the bankruptcies of several major railroads.”⁵⁴ In exchange for this

⁵² See Proposed Policy Statement, at 4.

⁵³ See *id.*

⁵⁴ See Intercity Passenger Rail: Federal Policy and Programs, Congressional Research Service Report, at 1 (Mar. 23, 2023) (emphasis added).

relief, Congress required that freight railroads permit Amtrak to operate over their tracks and use their facilities.⁵⁵ Amtrak was then required to “pay host railroads for the incremental costs specific to Amtrak’s usage of tracks” – e.g., the additional maintenance costs of hosting passenger trains.⁵⁶

This original bargain did not establish *universal supremacy* of passenger service over freight transportation. Freight railroads were required to host Amtrak on their tracks, and in exchange, Amtrak paid for the incremental costs incurred by its service. It was not until 1973 that Congress passed 49 U.S.C. § 24308, which granted Amtrak “preference” over freight trains in using a rail line, junction, or crossing.⁵⁷ The full text of that section states:

Except in an emergency, intercity and commuter rail passenger transportation provided by or for Amtrak *has preference over freight transportation in using a rail line, junction, or crossing* unless the Board orders otherwise under this subsection. A rail carrier affected by this subsection may apply to the Board for relief. If the Board, after an opportunity for a hearing under section 553 of title 5, decides that preference for intercity and commuter rail passenger transportation materially will lessen the quality of freight transportation provided to shippers, the Board shall establish the rights of the carrier and Amtrak on reasonable terms.⁵⁸

Amtrak claims that the preference requirement applies “in making individual dispatching decisions *at any* rail line, junction, or crossing[.]”⁵⁹ Additionally, outside of the dispatching context, Amtrak argues that “a host railroad also must have

⁵⁵ See 45 U.S.C. §§ 561, 562 (1970 ed.), P.L. 91-518, 84 Stat. 1327 (the “Rail Passenger Service Act of 1970” or “RPSA”).

⁵⁶ See Improving Intercity Passenger Rail Service in the United States, Congressional Research Service Report, at 2 (Feb. 8, 2021).

⁵⁷ P.L. 93-146, § 10(2), 87 Stat. 548.

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

⁵⁹ Opening Statement, at 64 (emphasis added).

internal procedures, practices, and personnel that facilitate rather than frustrate Amtrak's priority of access to the enumerated infrastructure."⁶⁰ Thus, Amtrak's proposed interpretation of "preference" requires that: (1) every individual dispatching decision must result in Amtrak "going first" over freight trains *and* (2) every component of a host railroad's business model and operational system must advance Amtrak's priority.

This unprecedented "absolute" approach both ignores and upends the original 1970 arrangement between passenger service and freight rail transportation. That deal did not create a draconian landscape in which host railroads must submit to Amtrak's priority, full stop. Indeed, one of Congress's purposes in enacting RPSA was to free freight railroads from shouldering the burden of uneconomical intercity passenger service. The RPSA House Report stated, "[i]n order to achieve economic viability in a basic rail passenger system, the Secretary [of Transportation] stated that there will have to be a 'paring of uneconomic routes.'"⁶¹ To do so, Congress found that "the remaining service must be organized into a *cohesive system* requiring a management which takes into consideration *the needs and abilities of the entire system* which will be a replacement for the diverse managements of the present unintegrated and in many instances unwanted [] passenger service."⁶²

Amtrak's proposed absolute approach to preference simply does not work with the intentionally "balanced transportation system"⁶³ that Congress designed between Amtrak and freight railroads.

⁶⁰ *Id.* at 64-65.

⁶¹ H.R. Rep. No. 91-1580, 91st Cong., 2d Sess., at 3 (1970).

⁶² *Id.* (emphasis added).

⁶³ S. Rep. No. 91-765, 91st Cong., 2d Sess., at 19 (1970).

3.1.2 The text of 49 U.S.C. § 24308(c) supports the comprehensive approach.

The Board's comprehensive reading from 2015 is strongly supported by the text of Section 24308(c). Amtrak's absolute approach can only be justified if the Board now: (1) accepts a false equivalency between "preference" and "going first" and (2) superimposes a requirement that mandates that Amtrak trains go first *in every single instance*. Neither premise is supported by the language of the statute.

First, while Congress does not define "preference" in the statute, the "ordinary meaning" of preference necessarily includes a *comparative* element – meaning that one thing is favored over another.⁶⁴ Implicit in the definition, therefore, is a *choice* between multiple options, with one option being weighted. The "ordinary meaning" of preference, therefore, is not one which suggests unyielding *submission* to Amtrak. Ultimately, to constitute a preference violation, the delay must indicate favoritism for freight transportation relative to Amtrak. This means that the delay could have been avoided through a different host railroad dispatching decision.⁶⁵

Second, beyond the "ordinary meaning" of preference, the statute does not contain any language mandating that the requirement apply to each individual dispatching decision.⁶⁶ Nor does the statute refer to individual Amtrak trains. While

⁶⁴ See Preference, Britannica World Language Dictionary 994 (1960); see also Preference, The Random House Dictionary of the English Language 1045 (defining "preference" as "a practical advantage given to one over others"); Preference, Webster's New World Dictionary of the American Language 1122 (2d College ed. 1970) (defining "preference" as "a giving of priority or advantage to one person, country, etc. over others").

⁶⁵ See 49 U.S.C. § 24308(f)(1) (proceeding to determine whether and to what extent failure to achieve minimum standards are "due to causes that could reasonably be addressed by a rail carrier over whose tracks the intercity passenger train operates").

⁶⁶ See 49 U.S.C. § 24308(c).

Congress may have intended Amtrak to have priority over freight transportation, the statute is silent with respect to how “preference” is to apply in the context of dispatching decisions.

Third, any priority that the statute affords to Amtrak is balanced by a comparable consideration for freight transportation. Specifically, Section 24308(c) provides “[i]f the Board . . . decides that preference for intercity and commuter rail passenger transportation *materially will lessen the quality of freight transportation* provided to shippers, the Board shall establish the rights of the carrier and Amtrak on reasonable terms.”⁶⁷ If Congress had intended that host railroads resolve all individual dispatching decisions in favor of Amtrak, the section directing the Board to evaluate the resultant impact on the quality of freight transportation would be rendered meaningless. Instead, Congress made clear its intention that the preference requirement should not materially diminish the quality of freight transportation. An interpretation which requires that every dispatching decision result in Amtrak “going first” would violate Congress’s directive.

Finally, Amtrak’s interpretation incorrectly reads a statute that addresses preference in the context of competition between freight and passenger trains for *use of a particular rail line*, and extrapolates that requirement to encompass all aspects of a railroad’s operations.⁶⁸ Amtrak bases this conclusion on its mistaken assumption that “the text of the statute imposes an obligation on host rail carriers to prioritize Amtrak passengers over freight transportation, *without limitation*.”⁶⁹ But the obligation imposed by the statute is limited – preference only applies “*in*

⁶⁷ *Id.* (emphasis added).

⁶⁸ See Opening Statement, at 64-65 (“[A] host railroad also must have internal procedures, practices, and personnel that facilitate rather than frustrate Amtrak’s priority of access to the enumerated infrastructure.”).

⁶⁹ *Id.* at 64 (emphasis added).

using a rail line, junction, or crossing[.]”⁷⁰ Preference, therefore, only applies in the context of determining how a passenger train will use a railroad facility and does not create a broad obligation for host railroads to implement the policies and procedures requested by Amtrak.

Accordingly, while both the plain meaning of the term “preference” and the surrounding language of the statute support the argument that Amtrak trains are entitled to priority over freight trains in the context of dispatching trains, that priority is circumscribed by a comparable requirement that preference may not materially lessen the quality of freight transportation. This comprehensive approach is compatible with the language of the statute and Congress’s intent.

3.1.3 The comprehensive approach best furthers the congressional goal of maximizing network fluidity.

Not only is the absolute interpretation of preference contradictory to the language of the statute, it is incompatible with Congress’s intent expressed elsewhere regarding railroad operations. The comprehensive approach is bolstered by 49 U.S.C. § 10101, enacted in 1995, well after Section 24308(c). Section 10101 underscores three primary goals of the rail transportation policy of the United States: (1) minimizing regulation, (2) promoting efficient freight service, and (3) ensuring the development and continuation of a fluid rail transportation system.⁷¹ The absolute approach to preference would disrupt these Congressional goals.

3.1.4 The absolute approach does not maximize network fluidity.

One consequence of Amtrak’s absolute approach is that it ignores the forest for the trees – namely, that freight and passenger trains operate in the context of an

⁷⁰ See 49 U.S.C. § 24308(c) (emphasis added).

⁷¹ See 49 U.S.C. § 10101.

interconnected network of rail operations. Dispatching cannot take place in a vacuum, because an individual dispatching decision which appears to only directly affect two trains may have indirect consequences on the operations of the entire rail network. Indeed, a dispatching decision which, in isolation, appears to prioritize a freight train over a passenger train, may ultimately promote the on-time performance for Amtrak on the route and the network generally.

The Board acknowledged this through its proposed Policy Statement in the EP 728 proceedings in 2015.⁷² And this concept of the rail network as a fluid system is compatible with Congress's framing of the preference statute, as a balancing exercise between the equally important and competing needs of efficient passenger service and quality freight transportation.

If a dispatcher were required to ensure that Amtrak never waits for, or proceeds on the mainline subsequent to, a freight train, the consequences to overall network fluidity would be disastrous. The interconnected nature of the rail network means that congestion at one location can negatively impact the overall network at large. The Department of Transportation has previously stated:

The rail network operates 24 hours a day, 7 days a week. Delays in one part of the network can set off another type of delay later on in the network, which creates a 'ripple' effect. As delays accumulate, the likelihood of unplanned meets between Amtrak trains and other trains increases It can take up to 5 days, and sometimes up to 1 month, to restore service to normal operations after an unplanned disruption. Unlike the aviation system, which allows planes to be repositioned overnight, there is no 'down time' within which trains can be repositioned.⁷³

Dispatchers are afforded discretion when making dispatching decisions because the nature of the rail network is constantly in flux. "Each train dispatcher

⁷² See Proposed Policy Statement, at 4.

⁷³ DOT, Office of Inspector General, CR-2008-076, "Root Causes of Amtrak Train Delays," at 19 (Sept. 8, 2008) ("DOT OIG Report").

makes hundreds of decisions every day on how to handle the flow of train traffic . . . While dispatchers operate within the policies set by their supervisors, they have significant autonomy in making decisions because the situations impacting their decisions are constantly changing.”⁷⁴ Compounding this complexity is the fact that dispatchers are limited by the infrastructure on their territory.

Amtrak has even agreed that an absolute approach to preference would effectively cause the rail network to crash in certain circumstances.⁷⁵ Indeed, Amtrak’s president recognized in 1973 – at the time that Section 24308(c) was being considered by Congress – that a rigid preference requirement fails to account for the individualized facts and circumstances of the rail network:

Well, this question of freight train interference is complicated. There are cases in railroad operations, a number of them, where freight train interference might be justified . . . I feel and I have felt, that to try to legislate that and say, ‘You will always give preference to the passenger train, or never let a freight train interfere,’ is just not a real-world approach.⁷⁶

Underlying these positions is the principle that the *overall* health and fluidity of the rail network – which promotes the efficiency of both passenger and freight traffic – is of greater importance and in the public interest. Congress has, through various statutes, balanced the interests of Amtrak preference rights against efficient freight service and contractual obligation to freight customers. The statute explicitly acknowledges that preference could “materially lessen the quality of

⁷⁴ *See id.* at 5.

⁷⁵ *Id.* at 4 (“In addition, AAR strongly believes that adhering strictly to Amtrak’s definition of preference would quickly shut down the rail network. *Amtrak agrees that this could happen in some circumstances* but takes issues with how frequently those circumstances would arise.”) (emphasis added).

⁷⁶ Financial Assistance to Amtrak: Hearings Before the Subcomm. On Transp. and Aeronautics of the H. Comm. on Interstate and Foreign Commerce, 93d Cong. 32 (1973) (testimony of Amtrak president Roger Lewis).

freight transportation provided to shippers.”⁷⁷ This overall health of the rail network has to be the paramount priority, as the effective operation of freight and passenger service depends on it. Amtrak’s proposed “absolute” definition of preference risks impairing the overall health of the rail network, and would cause unintended consequences to the public and Amtrak. The comprehensive approach, by contrast, properly honors Amtrak’s preference rights while at the same time promotes those rights in the context of the overall health of the rail network.

3.1.5 Dispatchers can prioritize Amtrak outside of individual dispatching decisions.

The absolute approach also ignores that a dispatching decision that appears, in isolation, to disadvantage a passenger train may actually minimize long-term delay to the affected passenger train or to other passenger trains operating in the territory.

To illustrate this principle, consider a scenario where an eastbound Amtrak train may soon catch up to an eastbound freight train in single-track territory and the Amtrak train could pass the freight train at a siding. However, there is a westbound freight train that is nearing that area from the other direction. The best dispatching decision may be for the Amtrak train to pull into the siding behind the eastbound freight train and to allow the westbound freight train to proceed on the mainline. Amtrak could then back out of the siding in order to pass the eastbound freight train. This course of action could conceivably violate Amtrak’s absolute definition of preference, as Amtrak had to wait for the westbound train to clear and then pass the eastbound freight train. But the definition of preference cannot be that rigid. If the westbound train had to hold at a prior siding, it would needlessly

⁷⁷ See 48 U.S.C. § 24308(c).

congest the territory and could create cascading negative effects on passenger and freight train performance both on the territory and in the surrounding rail network.

Any absolute approach, applied at an individual decision level, may result in negative consequences for the entirety of the network, including other passenger trains. Often, these consequences will outweigh any singular benefit to Amtrak from an individual decision. Even if dispatching could be reduced to the simple aphorism that “Amtrak always goes first,” the reality of railroad infrastructure would prevent such a rule from operating in practice. The limited infrastructure and the sheer number of freight trains operating on a subdivision at any given time make the absolute approach unworkable.

3.1.6 Undisputed delay minutes do not indicate that a host railroad has waived its right to challenge the delay.

Amtrak also asserted in its Opening Statement that it, “relies on host railroads to **satisfy their obligation** to dispute any Host-Responsible Delays that are assigned to them and to request that Amtrak change any delay entry that the host believes is not actually its responsibility.”⁷⁸ Amtrak purports that 49 C.F.R. § 273.5(d) requires host railroads to dispute any delay minutes that Amtrak conductors have designated as Host-Responsible Delay (“HRD”) Minutes. That section, however, requires nothing of the sort.

Pursuant to 49 C.F.R. § 273.5(d), the “train delays metric” is reported using the Amtrak Conductor Delay Report codes by: “total minutes of delay; Amtrak-responsible delays; Amtrak’s host-responsible delays; Amtrak’s host responsible delays and Amtrak-responsible delays, combined; non-Amtrak host-responsible delays; and third party delays.” Nothing in that subsection or the final rule promulgating that subsection imposes an affirmative obligation on the host

⁷⁸ See Opening Statement, at 18 (emphasis added).

railroads to dispute HRD minutes assigned by Amtrak.⁷⁹ Amtrak cites that final rule as support for its claim that the “obligation to report disputed delays was meant to ensure transparent reporting and establish the expectation that Amtrak and host railroads would be in frequent communication about train delays.”⁸⁰ But that section of the Final Rule does not discuss any such obligation – it merely states that the train delays metric includes any reported disputed delays.⁸¹

Not only is Amtrak’s position unsupported by the text of the rule, it is impractical to require a railroad to challenge every delay minute where the railroad disagreed with either its host-assigned status or Amtrak’s cited delay code. As BNSF explained in its September 25, 2023 submission, reviewing delays codes is an laborious manual task, and Amtrak generates a large volume of delay data even for on-time trains.⁸² As a result, BNSF typically reviews delay codes where there is a service disruption, or when the delays impact BNSF’s performance in connection with the on-time performance metric set out in the BNSF/Amtrak Operating Agreement dated September 1, 1996 (“Contractual OTP”).⁸³ Contractual OTP measures delays within BNSF’s control and has long been used to determine significant financial components of the BNSF/Amtrak Operating Agreement.

If BNSF did not meet the Contractual OTP standards with respect to a specific train or train segment, the BNSF Passenger Operations Team will work with other BNSF operating teams to investigate an Amtrak-recorded delay and determine a root cause. This investigation may result in BNSF disagreeing with

⁷⁹ See 85 Fed. Reg. 72971 (Nov. 16, 2020).

⁸⁰ Opening Statement, at 18 n.50 (citing 85 Fed. Reg. at 72982).

⁸¹ See 85 Fed. Reg. at 72982.

⁸² See BNSF’s Response to the Board’s Interrogatories and Document Requirements; Appendix A – Part IV (“September 25, 2023 Submission”), at 3 (Sept. 25, 2023).

⁸³ See September 25, 2023 Submission, at 3.

Amtrak's delay coding. For example, BNSF may determine that the root cause of an Amtrak delay was congestion from a drawbridge opening rather than simply FTI. BNSF then has the ability to contest the disputed delay coding with Amtrak. This type of investigation is very labor intensive.

Even if BNSF undertook the laborious effort of challenging each delay code with which it disagreed, the task would be of limited utility in many circumstances. For example, BNSF now disputes delay minutes attributed to BNSF for the Avondale Yard Segment on a monthly basis because BNSF is not the proper host for that segment.⁸⁴ Highlighting the seeming futility of this exercise, Amtrak still refuses to remove BNSF as a host, and repeats the same boilerplate language as justification for the recorded delay minutes.⁸⁵

Accordingly, undisputed delay minutes are not a waiver on behalf of the host railroad that: (1) Amtrak's cited delay reason is accurate or (2) that the delay is attributable to that rail carrier. Undisputed delay minutes, therefore, cannot support a finding of a preference violation.

3.2 Amtrak delays attributed to BNSF do not reflect any preference violations.

Based on the framework set forth above, the Board should not find that any of the delays attributed to BNSF constitute a preference violation for several

⁸⁴ See *supra*, § 2.3.

⁸⁵ Amtrak's response to the disputed minutes is as follows: "BNSF is not identified as the Host Railroad for the segment of track between West Bridge Junction and Live Oak within Amtrak's delay reporting database. However, the operating agreement executed between Amtrak and BNSF includes terms for the operation of *Sunset Limited* Trains over BNSF trackage within that segment. Moreover, delays are assigned to BNSF when the *Sunset Limited* is dispatched over BNSF tracks. In other words, delays are assigned to BNSF when it is the rail carrier over whose tracks the *Sunset* operates within the segment. For those reasons, and because the Surface Transportation Board is actively investigating causes of delay between West Bridge Junction and Live Oak, Amtrak will not reassign delays that occur on BNSF trackage within the segment."

reasons: (1) BNSF instructs its dispatchers that Amtrak's priority status serves as the overarching principle guiding dispatcher decision-making and Amtrak's priority status serves as the baseline for BNSF's schedule-building process; (2) Amtrak's experience on the portion of the *Sunset Limited* route that BNSF hosts – both in terms of mean runtime and average speed – indicates that BNSF fulfilled its preference obligation; (3) none of the delays attributed to BNSF's in the Board's Appendices to its February 13, 2024 Decision exhibit favoritism of freight transportation over Amtrak; and (4) the April 3, 2022 and September 25, 2022 delays highlighted in Amtrak's supplement to its Opening Statement do not involve a dispatcher decision which actively favored freight traffic over Amtrak.⁸⁶

3.2.1 BNSF's dispatcher guidelines and operational practices minimize delays to Amtrak.

As a matter of first principle, BNSF ensures that all operations related to the movement of trains both prioritize Amtrak and minimize delays to passenger service to the fullest extent possible. BNSF advances those aims through two essential components of its operational systems: (1) its dispatcher training and protocols and (2) its schedule-building systems. Described in more detail below, the core tenet serving as the foundation for both of those systems is Amtrak's right to preference across BNSF's trackage.

BNSF prioritizes Amtrak in dispatching decisions. BNSF's dispatching protocols, which govern the movement of trains, are based upon train type.⁸⁷ Those

⁸⁶ Because Amtrak did not allege in its complaint or opening statement that BNSF failed to provide preference to *Sunset Limited* trains, BNSF's discussion in this section necessarily covers elements of the record not discussed by Amtrak in its opening statement.

⁸⁷ See September 25, 2023 Submission, at 26 (citing Train Dispatcher New Hire Training Materials, Module 1, at BNSFSUNSET-0003785).

protocols instruct dispatchers to “give priority trains preference, and delay no trains unnecessarily.”⁸⁸ As an overarching guideline, BNSF’s dispatcher training materials specifically instruct that passenger trains are to receive the highest priority in BNSF’s priority grouping systems.⁸⁹ Therefore, BNSF dispatchers must prioritize the movements of passenger trains above all other train types. This principle applies regardless of train length – although dispatchers are still trained to locate holding areas for longer freight trains, and to optimize passing sidings to advance passenger trains ahead of freight trains, in order to minimize delays.

Other dispatcher materials explicitly require that dispatchers “[d]o not delay passenger trains for freight trains or maintenance work unless approved by the Chief Dispatcher.”⁹⁰ Beyond affirmatively prioritizing passenger trains, dispatchers must also actively prevent delays to Amtrak service by planning dispatching movements in advance.⁹¹ BNSF also recognizes, however, that there is no one-size-fits-all approach to dispatching, especially where unexpected events disrupt track activity. In these situations, BNSF trains its dispatchers to minimize any impact on passenger train movement.⁹²

The nature of BNSF’s rail territory over which the *Sunset Limited* operates further reduces the number of factors that could frustrate Amtrak’s preference

⁸⁸ *Id.* at 25-26 (quoting Train Dispatcher’s and Control Operator’s Manuals dated November 1, 2020, including updates through October 1, 2022 at BNSF-SUNSET-0000016).

⁸⁹ *Id.* at 26 (citing Train Dispatcher New Hire Training Materials, Module 1, at BNSF-SUNSET-0003785).

⁹⁰ *Id.* at 27 (quoting Train Dispatcher’s and Control Operator’s Manuals dated November 1, 2020, including updates through October 1, 2022, at BNSF-SUNSET-0000020).

⁹¹ *Id.* (citing Train Dispatcher’s and Control Operator’s Manuals dated November 1, 2020, including updates through October 1, 2022, at BNSF-SUNSET-0000020).

⁹² *Id.* at 28.

rights. As discussed in BNSF's September 25, 2023 and June 4, 2024 submissions to the Board, the BNSF Lafayette Subdivision is "Track Warrant Control" (TWC) / "Automatic Block Signals" (ABS) (collectively, "TWC-ABS") territory.⁹³

In TWC-ABS territory, train movements on a specific segment of mainline track are authorized through verbal communications between dispatchers for a specific period of time.⁹⁴ Those communications are memorialized via track warrants (written authority for access to a section of track) to a crew.⁹⁵ That crew then operates pursuant to the track warrant.⁹⁶ Train movements, therefore, are not automated through a computer-aided dispatching system. Instead, dispatchers issue track warrants intended to create a route that passenger trains may traverse freely, and uninhibited, from freight transportation. If any unexpected events or delays occur, BNSF dispatchers are trained to first minimize any resultant impact on passenger train movement.⁹⁷ Regardless of the rail environment at any given time, BNSF dispatchers apply the same principle: passenger trains are to receive the highest priority on the network.

BNSF builds schedules that prioritize Amtrak. Consistent with BNSF's directive that its dispatchers must afford passenger trains with the highest priority, the building blocks for BNSF's train schedules are Amtrak's arrival and departure times.⁹⁸ BNSF schedules trains on an individual basis. First, BNSF creates a "Base

⁹³ *Id.*; see also June 4, 2024 Submission, at 14.

⁹⁴ See September 25, 2023 Submission, at 28.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 10.

Train Schedule” for each individual train.⁹⁹ Base Train Schedules function as a skeleton or exemplary map of a train’s operating plan and define all rules indicating how that train is to be run.¹⁰⁰ The Base Train Schedule lists the stations the train is to travel through, the arrival and departure times, passing points, refueling points, and crew change locations. The Base Train Schedule does not contain the actual calendar dates that the train will run.¹⁰¹

When building the Base Train Schedule for any individual train, the most important factor is the train’s priority ranking.¹⁰² Because BNSF affords passenger trains with the highest priority, each Base Train Schedule is uniquely built to preserve Amtrak’s requested arrival and departure times.¹⁰³ The Base Train Schedules for all non-passenger trains, therefore, are constructed to facilitate and ensure those arrival and departure times. Next, each Base Train Schedule is designed to prioritize Amtrak. While BNSF does use a computer application – Transportation Support System or “TSS” – to build Base Train Schedules, the scheduling process is not itself automated. BNSF’s approach is designed to best accommodate the changing needs of the rail network and the resultant impacts on passenger transportation.

During this scheduling process, BNSF actively works to avoid any freight movements on the Lafayette Subdivision that would result in delays to Amtrak. As an example, BNSF schedules maintenance operations where they would least

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 4.

¹⁰¹ *Id.* at 5.

¹⁰² *Id.* at 11.

¹⁰³ *Id.*

disrupt Amtrak's requested arrival and departure times.¹⁰⁴ Even in unforeseen circumstances, BNSF will adjust schedules and train movements to minimize any delay to passenger trains. BNSF communicates with Amtrak in these circumstances, and collaborates with Amtrak to create contingency plans to minimize passenger disruption.¹⁰⁵ Where passenger trains are re-routed or adjusted in these scenarios, BNSF adjusts freight train schedules accordingly.

BNSF has coordinated with Amtrak to minimize delays. Beyond the principles that govern dispatching and schedule-building, BNSF proactively improves customer on-time performance by working directly with Amtrak. First and foremost, BNSF has set objectives regarding passenger train performance, including "Amtrak Customer OTP of 80% or better" and "'A' Grade on Host Report for Delay Avoidance."¹⁰⁶ BNSF also meets regularly with Amtrak to improve customer on-time performance by coordinating overall network recovery efforts and evaluating weekly passenger operations scorecards shared with BNSF stakeholders.¹⁰⁷ At the executive level, Amtrak and BNSF meet bi-monthly to discuss network and review performance. BNSF's passenger operations team regularly meets with Amtrak to discuss overall performance levels.¹⁰⁸

BNSF has several plans to improve on-time performance, including targeted issue resolution plans for challenged trains or locations on its territory identified by Amtrak.¹⁰⁹ Through those plans, BNSF can identify specific performance issues and

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 22 (quoting 2022 Transportation Team Key Objectives (BNSF-SUNSET-0003159)).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 23.

methods to remove those barriers to improve passenger on-time performance.¹¹⁰ BNSF also holds bi-monthly executive level reviews of passenger train performance.¹¹¹

3.2.2 Amtrak's experience on the BNSF-hosted portion of the *Sunset Limited* route indicates that BNSF has fulfilled its preference obligation.

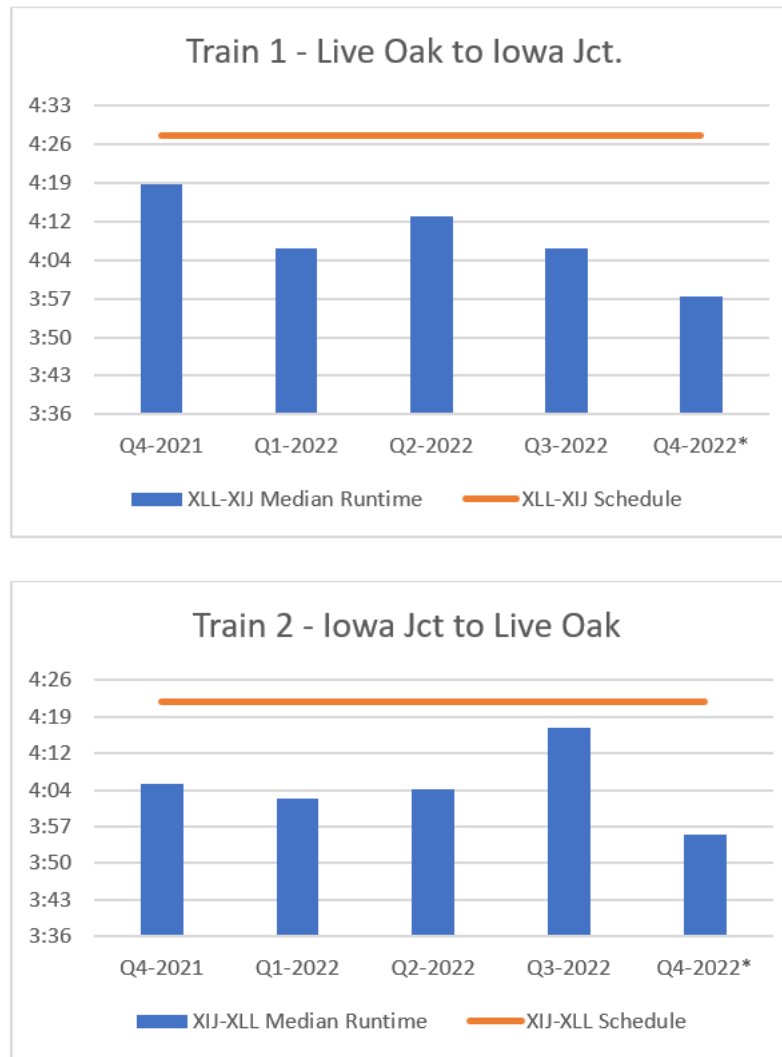
Amtrak's performance – including median runtime and average speed – on the BNSF-hosted portion of the *Sunset Limited* during the Relevant Period shows that BNSF has satisfied its preference obligations.

First, during the Relevant Period, the median actual run time for both Train 1 and Train 2 across the BNSF-hosted segments from Live Oak to Iowa Junction was faster than the BNSF certified scheduled run time.¹¹² The following graphs depict the *Sunset Limited's* median runtime as compared to schedule runtime on the BNSF-hosted portion of the route:

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² See Schedule Skeleton (AMTRAK_STB_NATIVE_0014). The schedule skeleton reflects that Train 1 is scheduled to depart from BNSF's tracks at Live Oak at 09:54 AM and arrive at Iowa Junction at 2:22 PM. Train 2 is scheduled to depart from BNSF tracks at Iowa Junction at 4:00 PM and arrive at Live Oak at 8:22 PM.

Diagram 2. Comparison of Median Runtime and Scheduled Runtime

*Q4 2022 through December 8, 2022

This performance is indicative of BNSF's appropriate handling of Amtrak's *Sunset Limited* trains across the BNSF territory and the systematic implementation of preference for those trains.¹¹³

Second, the average speed of Amtrak *Sunset Limited* trains across BNSF's Lafayette Subdivision far exceeds the average speed for freight trains. This too

¹¹³ For clarity, while actual median runtime performance that is faster than scheduled runtime indicates compliance with preference obligations, the inverse is not probative of a failure to provide preference, given the wide array of potential causes for train delay, including many outside of host railroad control or influence.

indicates that BNSF afforded the *Sunset Limited* trains with preference, consistent with BNSF's statutory obligation. Passenger trains inherently obtain faster average speeds, as compared to freight trains, because of faster track speed limits, faster acceleration and deceleration, and other train handling characteristics.

Nonetheless, the table below shows that Amtrak's speeds on the BNSF-hosted portion of the *Sunset Limited* route are multiple times faster than their freight counterparts – considerably faster than the differential that would be achieved based on track speed limit differences alone.

Table 1. Average Speeds by AEI Segment¹¹⁴

AEI Segment	Freight Speed (MPH rounded to tenths)	Amtrak Speed (MPH rounded to tenths)
NEWORLEAN to BOUEAEI	19.7	33.2
BOUEAEI to BEREAEI	25.8	48.6
BEREAEI to LAFAYETTE	22.7	46.4
LAFAYETTE to LAFWESAEI	8.9	23.8
LAFWESAEI to MIDEASAEI	20.5	51.5
MIDEASAEI to IOWSPWAEI	22.1	57.3
<i>Max Speeds</i>	60	70

If BNSF had not provided preference to Amtrak trains or if BNSF had provided equal treatment to freight and Amtrak trains, the average speed differential

¹¹⁴ BNSF previously described to the Board the methodology that it used to provide actual average freight train speeds between AEI readers. *See* September 25, 2023 Submission, at 21. Using that same logic, Table 1 details the average speed of Amtrak trains between those same AEI readers during the Relevant Period.

between Amtrak trains and freight trains during the Relevant Period would have been much lower.¹¹⁵

3.2.3 Significant drivers of Amtrak's failure to achieve minimum standards are unrelated to BNSF's conduct.

Until the customer on-time performance metric (Customer OTP Metric) was established by the FRA in *Metrics and Minimum Standards for Intercity Passenger Rail Service*, 85 Fed. Reg. 72,971 (Nov. 16, 2020), Amtrak's on-time performance on BNSF's routes was measured using only Contractual OTP. Contractual OTP is different than Customer OTP. First, under the BNSF/Amtrak Operating Agreement, an Amtrak train's on-time performance is based on {{REDACTED}}

REDACTED}}.¹¹⁶ {{REDACTED}} do not align with Amtrak customer stations. Second, under the contract, {{REDACTED}}

REDACTED}} So, under Contractual OTP, BNSF's performance metric is not penalized because it received the train late. This is not true for Customer OTP.

BNSF has consistently noted that the performance of a *Sunset Limited* train can be impacted when BNSF receives the train later than scheduled. During the Relevant Period, BNSF often received the Amtrak trains late. For Train 1 (westbound), only 44% of the trains arrived to BNSF at Live Oak within 15 minutes

¹¹⁵ While this significant speed differential indicates that BNSF complied with preference obligations, a lower differential would not be probative of a failure to provide preference, as there are many factors that can impact performance.

¹¹⁶ See BNSF/Amtrak Operating Agreement, at App. V (AMTRAK_STB_0014354).

¹¹⁷ See *id.* at App. V A.1.b {{REDACTED}}
REDACTED}}
REDACTED}}

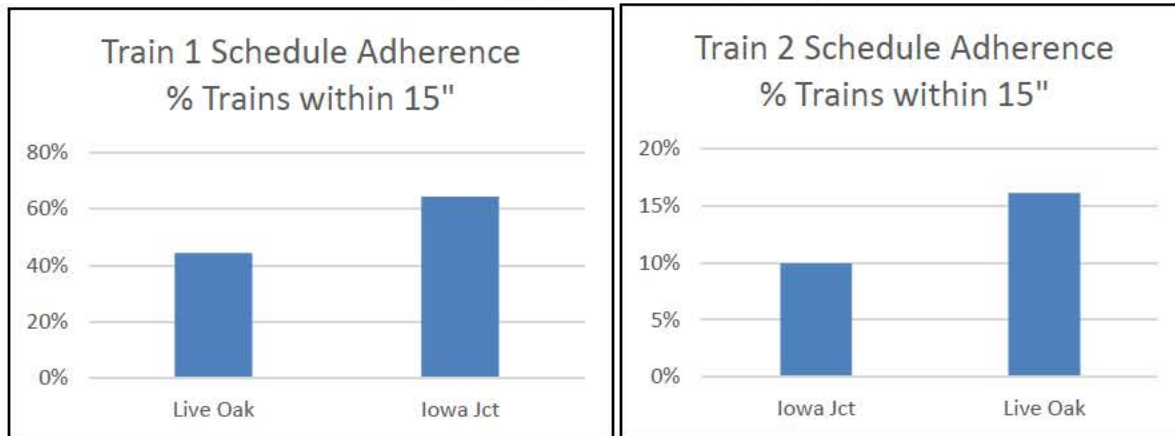
of the scheduled time (09:54). For Train 2 (eastbound), only 10% of the trains arrived to BNSF at Iowa Junction within 15 minutes of the scheduled time (16:00). For the majority of trips during the Relevant Period, *Sunset Limited* trains were failing to meet Customer OTP before BNSF even took control of dispatching. Performance under the Customer OTP metric suffers when a host railroad receives a train late, even if it is through no fault of the railroad.¹¹⁸

While late-arriving trains had a meaningful negative impact on Customer OTP performance, the schedule adherence of *Sunset Limited* trains generally improved across BNSF territory, meaning that the Amtrak train was less late when exiting the BNSF territory as compared to when it entered.¹¹⁹ For Train 1 (westbound), the number of trains exiting BNSF hosted territory at Iowa Junction within 15 minutes of schedule increased by 45% as compared to the entry statistic. For Train 2 (eastbound), the number of trains exiting BNSF hosted territory at Live Oak within 15 minutes of schedule increased by more than 62% as compared to the entry statistic.

¹¹⁸ Negative minutes assigned in the schedule skeleton compound this issue, as it is very common for BNSF to receive the Amtrak trains late. For example, BNSF is scheduled to receive Train 2 (eastbound) at Iowa Junction at 4:00 PM, but UP has until 4:54 PM to deliver that train to Iowa Junction. *See* Schedule Skeleton (AMTRAK_STB_NATIVE_0014). This inconsistency is created because the schedule skeleton applies 54 negative minutes to Train 2 at Iowa Junction.

¹¹⁹ This analysis compares performance to the checkpoint times listed in the BNSF Operating Agreement. *See* BNSF/Amtrak Operating Agreement, App. V (AMTRAK_STB_0014453).

**Diagram 3. Improvement in Schedule Adherence Over
BNSF-Hosted Territory**



Ultimately, performance under the Customer OTP metric does not reflect Amtrak's actual experience on the BNSF-hosted portion of the route.

3.2.4 None of the delays attributed to BNSF in the Board's Appendices constitute preference violations.

Consistent with BNSF's general operational practices, there are no specific delay examples raised by the Board during its investigation¹²⁰ or by Amtrak¹²¹ in which a BNSF dispatcher made a dispatching decision that impermissibly favored freight transportation over Amtrak in violation of 49 U.S.C. § 24308(c). The Board requested that BNSF provide root cause analysis for certain delays that were coded as FTI in Amtrak's Conductor Delay Reports. BNSF's analysis of these delays

¹²⁰ See *supra*, § 1. (explaining that the Board directed the parties provide root cause analyses for delays of 90 minutes or more, as well as explanations for an additional set of Board-selected illustrative delays to *Sunset Limited* Trains 1 and 2).

¹²¹ In the Supplement to its Opening Statement, Amtrak submitted that "UP, BNSF, or both host railroads failed to plan adequately for the arrival of Train 2 at Iowa Junction" on April 3, 2022 and September 25, 2022. See Amtrak's Supplement to Opening Statement, *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, ("Supplement to Opening Statement"), at 2 n.4, (Amtrak served Oct. 24, 2024). BNSF did not address these delays in the root cause analysis requested by the Board, other than to say that the delays occurred on UP-hosted territory. Given Amtrak's position, BNSF has prepared a root cause analysis for these two delays. See Appendix 1.

demonstrates that an Amtrak conductor's mere coding of a delay cause as FTI does not necessarily determine whether a preference violation has occurred. Delays coded as FTI can be attributable to a myriad of factors unrelated to BNSF merely dispatching a freight train ahead of Amtrak.

For example, certain delays coded as FTI can be the result of freight train maintenance issues, not the result of a dispatcher decision. One delay to *Sunset Limited* Train 2 coded as FTI and attributed to BNSF was the result of a dragging equipment detector, which stopped the freight train when it sensed an object dragging from the passing train. The train crew was forced to stop that train and inspect the issue (and ultimately located a dragging cap on a rail car).¹²² These instances in which freight trains must unexpectedly stop on the mainline do not involve dispatching decisions exhibiting favoritism for freight transportation over Amtrak.

As BNSF explained in its June 4, 2024, and July 24, 2024 submissions to the Board, the large majority of delays attributed to BNSF in the Board's Appendices and coded as FTI occurred as a result of overall congestion on the Lafayette Subdivision during the Relevant Period.¹²³ Congestion on the Lafayette Subdivision poses inherent difficulties to coordinating train movements given the structural limitations of that rail line. In particular, trains holding on the subdivision can limit the number of locations available for Amtrak to meet and pass freight trains and result in network delays.¹²⁴ These delays, therefore, are the result of the constraints of the Lafayette Subdivision, rather than proactive decisions by BNSF dispatchers to dispatch freight trains ahead of Amtrak or to place Amtrak in sidings. This type

¹²² See July 24, 2024 Submission, at 8.

¹²³ See generally, June 4, 2024 Submission and July 24, 2024 Submission.

¹²⁴ See June 4, 2024 Submission, at 17.

of delay is not uniquely felt by Amtrak – congestion affects all trains operating on the subdivision.

Further, delays attributed to BNSF and coded as FTI may be caused by the rail infrastructure of the territory. Because the Lafayette Subdivision is TWC-ABS territory, there is no real-time remote-control switch capability from a centralized dispatching office.¹²⁵ Instead, many of the passing sidings on the subdivision are equipped with spring switches.¹²⁶ As a result, trains must, in certain circumstances, stop to manually line those switches for routing adjustments.¹²⁷ These instances, in which freight trains or Amtrak must stop to make such adjustments, do not involve a preferential decision by a BNSF dispatcher to dispatch freight transportation ahead of, or more favorably than, Amtrak.

Finally, a large portion of the delays Amtrak experienced during the Relevant Period on the portion of the route hosted by BNSF related to interchange partners unable to accept trains arriving from the BNSF Lafayette Subdivision at New Orleans. As explained in BNSF's Second Response to the Board's February 13, 2024 Decision, the Lafayette Subdivision is BNSF's only route into New Orleans gateway.¹²⁸ This area is often subject to queuing and staging trains for interchange to eastern carriers when the New Orleans gateway becomes congested.¹²⁹ As discussed above in Section 2.2, trains traversing the Avondale Yard Segment, located just west of New Orleans, frequently suffer from such interchange-related delays. BNSF freight trains often queue in the sidings at Avondale Yard in that

¹²⁵ See June 4, 2024 Submission, at 14.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 3.

¹²⁹ *Id.*

portion of track because they must wait for BNSF's interchange partners to be available to accept the BNSF train.¹³⁰ This, as a result, limits the number of locations where Amtrak could perform an overtake or meet and pass maneuver and contributes to overall congestion.¹³¹ Again, these delays which involve freight trains do not present a scenario in which BNSF dispatchers gave freight transportation priority over Amtrak.

Accordingly, none of the delays that have been examined by the parties in this proceeding constitute a preference violation under 49 U.S.C. § 24308(f)(2).

4. The Board has limited authority to award damages under Section 24308(f)(2).

Turning to the next statutory interpretation question, the Board has asked Amtrak and the other parties to this proceeding to address the extent of the Board's legal authority to award damages, should the Board make the statutorily-required findings in Stage One of this proceeding regarding attribution of a preference violation to "delays or failures to achieve minimum standards" and thus move to Stage Two of this proceeding. Specifically, the Board posed the following questions:

Is the authority limited to damages for the failures to provide preference that would cause Amtrak to fall below 80 percent for any two consecutive calendar quarters? Or does the Board have authority to award damages for any delays attributable to the host rail carrier's failure to provide preference, even if the host rail carrier's failures to provide preference would not, standing alone, cause Amtrak to fall below 80 percent for any two consecutive calendar quarters?¹³²

In its opening statement, Amtrak addressed these Board-posed questions, but also went beyond them to argue that that the Board's authority to prescribe relief in this

¹³⁰ *Id.* at 9.

¹³¹ *Id.* at 22.

¹³² *See* August 19, 2024 Decision, at 3.

proceeding and other Section 24308(f) proceedings extends beyond an award of “damages” and includes the ability to prescribe other relief.

As an initial matter, the Board cannot and should not consider whether to award damages against BNSF in any Stage Two of this proceeding. The statute only authorizes the Board to award damages against BNSF if “the Board determines that delays or failures to achieve minimum standards investigated in [this Stage One] are attributable to [BNSF’s] failure to provide preference to Amtrak”¹³³ As discussed above, BNSF has established that the record developed in this Stage One shows that, regardless of the preference interpretation adopted by the Board, BNSF has **not** failed to provide the required preference to Amtrak’s *Sunset Limited* trains during the Relevant Period. Indeed, Amtrak has not made any such allegations with respect to BNSF. Therefore, because no BNSF preference violation has occurred, the Board cannot make the attribution to “delays or failures to achieve minimum standards” required by Section 24308(f)(2) with respect to BNSF.¹³⁴

Notwithstanding BNSF’s lack of culpability or exposure to damages in this proceeding, BNSF will address the Board-posed questions quoted above and Amtrak’s additional arguments, consistent with the Board’s direction to BNSF and the other parties in its scheduling order.¹³⁵

¹³³ 49 U.S.C. § 24308(f)(2).

¹³⁴ Furthermore, the Board may not award damages against BNSF resulting from any “delays or failures to achieve minimum standards” associated with the Avondale Yard Segment, because BNSF is not a “host rail carrier” for Section 24308(f) purposes with respect to that segment of the *Sunset Limited* route. See *supra*, note 32.

¹³⁵ See August 19, 2024 Decision, at 4.

4.1 The Board's remedial authority is limited to monetary damages.

Amtrak begins its discussion of the Board's remedial authority by addressing an issue not raised by the Board in its scheduling order. Amtrak argues that "the plain text of the statute makes clear that the Board's authority extends beyond an award of damages."¹³⁶ Amtrak claims that "the Board's remedial authority is not limited to 'damages' and instead encompasses broad equitable authority to, among other things, impose any and all measures the Board determines would 'adequately deter future actions which may reasonably be expected to be likely to result in delays to Amtrak on the route involved.'"¹³⁷

BNSF disagrees. A plain reading of the statutory text reveals that Congress granted the Board authority to award monetary damages, not to engage in sweeping new direct regulation of railroad operations. The law is clear that "[t]he damages remedy is a money remedy aimed at making good the plaintiff's losses."¹³⁸ Black's Law Dictionary defines "damages" as "[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury." Congress would have understood that "damages" means "monetary damages" when it wrote the statute.¹³⁹

¹³⁶ See Opening Statement, at 97.

¹³⁷ *Id.* at 97-98 (citing 49 U.S.C. § 24308(f)(3)(B)).

¹³⁸ Dan B. Dobbs & Caprice L. Roberts, *LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION*, at 3 (3d. ed. Nov. 9, 2017).

¹³⁹ Legislative history supports this reading. See, e.g., S. Rep. No. 110-67 at 16 ("The bill would authorize the STB to charge damages to freight rail carriers for refusing to give Amtrak such preference, and the bill would direct STB to provide those penalties to Amtrak.").

Section 24308(f) contains one explicit grant of remedial authority to the Board, along with a number of explanatory descriptions. As shown below, Congress authorized the Board to “award damages against the host rail carrier”:

If the Board determines that delays or failures to achieve minimum standards investigated under paragraph (1) are attributable to a rail carrier’s failure to provide preference to Amtrak over freight transportation as required under subsection (c), **the Board may award damages against the host rail carrier**, including prescribing such other relief to Amtrak as it determines to be reasonable and appropriate pursuant to paragraph (3) of this subsection.¹⁴⁰

All other references in Section 24308(f) to the Board’s remedial authority are necessarily limited and informed by the Board’s explicit ability to award monetary damages set forth in Section 24308(f)(2).

For example, in the clause immediately following the “award damages” language of Section 24308(f)(2), the statute provides an example of what such damages might consist of: “**including** prescribing such other relief to Amtrak as it determines to be reasonable and appropriate pursuant to paragraph (3) of this subsection.”¹⁴¹ “Include” means “to contain between or within.”¹⁴² This sentence construction indicates that Congress intended any “other relief” prescribed by the Board to be **contained within** the Board’s authority to “award damages.”¹⁴³ And

¹⁴⁰ 49 U.S.C. § 24308(f)(2) (emphasis added).

¹⁴¹ *Id.*

¹⁴² Include, *Merriam-Webster Dictionary* (2024) (“to contain between or within.”), <https://www.merriamwebster.com/dictionary/include#:~:text=1,to%20contain%20between%20or%20within>.

¹⁴³ Similarly, paragraph (3) of Section 24308(f) lists factors that the Board must consider when exercising its authority under paragraph (2), pointing to compensatory damages and deterrence damages, but not direct regulation of rail operations, as Amtrak suggests. And paragraph (4) authorizes the Board to order the host rail carrier to remit the damages awarded under paragraph (2) directly to Amtrak, and limits the use of those funds to particular capital or operating expenditures. 49 U.S.C. §§ 24308(f)(3).

we know that “damages” means “monetary damages.” If Congress had intended to authorize the Board to award any other relief **beyond** monetary damages, then the statute would have specifically authorized the Board to do so. For example, if Congress had intended to authorize the Board to award equitable relief, the statute could have read that the Board, “may award damages **and** such other relief” Despite Amtrak’s best efforts, the word “including” simply does not have the same effect as “and.”

Additionally, nothing in the statute or legislative history gives any indication that Congress contemplated giving the Board broad new regulatory powers over rail operations. If Congress had intended to authorize such a major expansion in Board power, it would not have done so in such an indirect and obscure manner. Indeed, “Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes.”¹⁴⁴

Therefore, the Board should find that Congress has authorized the Board in Section 24308(f)(2) to award monetary damages if the Board makes the necessary preference violation attribution. In order to reach Amtrak’s broader conclusions, the Board would need to read words into the statute that do not exist.

4.2 The Board’s remedial authority is limited to damages for the failures to provide preference that would cause Amtrak to fall below 80 percent for any two consecutive calendar quarters.

Turning to the questions that the Board actually posed to Amtrak and the other parties, Amtrak argues that references to “delays or failures to achieve minimum standards” throughout Section 24308(f) means that Congress intended to give the Board remedial authority to address both “delays” and “failures to achieve minimum standards.” In other words, Amtrak believes that Congress did not intend

¹⁴⁴ *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001).

to limit the Board's remedial authority to situations in which failures to provide preference cause Amtrak to fall below 80 percent for any two consecutive calendar quarters.

Amtrak's argument is not consistent with the structure, logic, or policy of the statute. The best way to read the statutory language is to mean that the Board must attribute a preference violation to a failure to meet the applicable on-time performance threshold. Congress limited the Board's authority to award damages to any failures to provide preference that would cause Amtrak to fall below 80 percent on-time performance for any two consecutive calendar quarters. Congress did not intend for the Board to be able to award damages for **any** delays attributable to the host rail carrier's failure to provide preference, even if the host rail carrier's failures to provide preference would not, standing alone, cause Amtrak to fall below 80 percent for any two consecutive calendar quarters.

The structure of Section 24308(f). The structure of Section 24308(f) indicates that the reference to "delays" within the phrase "delays or failures to achieve minimum standards" means the first of two triggers for STB action set out at the beginning of Section 24308(f)(1), not to any "delay" that the STB may investigate in the course of a Section 24308(f) proceeding.

Congress provided two triggers for STB action at the beginning of Section 24308(f)(1). The first is a "delays-based" trigger: "[i]f the on-time performance of any intercity passenger train averages less than 80 percent for any 2 consecutive calendar quarters." The second is a "standards-based" trigger: if "the service quality of intercity passenger train operations for which minimum standards are established under section 207 of the PRIIA fails to meet those standards for 2 consecutive calendar quarters."

This two-trigger structure is then reflected in the language used throughout Section 24308(f): "delays or failures to achieve minimum standards." The use of the

word “delays” refers to the “delays-based” trigger quoted above, and the use of the phrase “failures to achieve minimum standards” refers to the “standards-based” trigger quoted above. The use of the word “delays” does not signify a departure from the two-part trigger set out at the beginning of Section 24308(f)(1) or the creation of new STB authority over “delays” that the statute never bothers to define or explain. The statute simply refers in a more direct way to the “delay-based” trigger and distinguishes it from the “standards-based” trigger.¹⁴⁵

The legislative history supports this use of the word “delays” in Section 24308(f) as a convenient and simplified way to refer to the “delay-based” trigger. In describing the language that would eventually be codified at Section 24308(f), Senate Report No. 110-67 at 25-26 first describes the two triggers for STB action. After noting that the STB may investigate if either trigger is met, the Report then notes that “Amtrak, freight railroads that host Amtrak trains, or states that financially support Amtrak services also would be permitted to petition STB directly for an investigation **of Amtrak delays**.”¹⁴⁶

Of course, the only “delays” that would permit the STB to conduct an investigation are failures to achieve the 80 percent on-time performance standard covered by the “delay-based” trigger. The use of the word “delays” was just a simpler and more direct way of referring to that trigger. Read in this manner, the statute limits the Board’s authority to award damages to any failures to provide preference that would cause Amtrak to fall below 80 percent on-time performance for any two

¹⁴⁵ The Eighth Circuit rejected an earlier STB attempt to use the two-trigger structure of Section 24308(f) to set the STB’s own rules – separate and apart from the FRA’s rules – to define “on-time performance” under the statute. *See Union Pac. R.R. Co. v. Surface Transp. Bd.*, 863 F.3d 816, 821 (8th Cir. 2017). That decision is not inconsistent with BNSF’s proposed interpretation of the two-trigger structure as it applies to the STB’s authority to award damages.

¹⁴⁶ S. Rep. No. 110-67, at 25 (2007) (emphasis added).

consecutive calendar quarters. Congress did not intend to authorize the STB to award damages related to any “delay” uncovered in the STB’s investigation.

The logic and policy of Section 24308(f). Amtrak’s proposed interpretation is also not consistent with the logic or policy of the statute. The logic of Section 24308(f) is that the STB’s authority is invoked only when either the “delay-based” trigger or the “standards-based” trigger is met. But the “standards-based” trigger is not relevant to this determination, because the FRA did not define any additional “minimum standards” beyond the 80 percent on-time performance standard.¹⁴⁷ In imposing an 80 percent on-time performance threshold, Congress recognized that railroad operations are inherently and unavoidably variable, and therefore the STB should become involved only when the variation exceeds a certain threshold.

Amtrak proposes that, after setting a meaningful threshold for regulatory intervention, Congress then discarded its concern about limits on regulatory intervention and the inherent variability of railroad operations and gave the STB authority over any Amtrak train delay attributed to a preference violation, regardless of the size or duration of the delay and regardless of its impact on Amtrak. This reading conflicts with Congress’s obvious desire to put limits on regulatory intervention by establishing a clear threshold.

Additionally, absurd results could flow if the Board accepted Amtrak’s argument. For example, the Board might determine in the course of its investigation that a single host rail carrier preference violation occurred, but that other reasons unrelated to those violations actually caused Amtrak to fall below the 80 percent performance threshold for the relevant period. In such a scenario,

¹⁴⁷ See 49 C.F.R. § 273.5(a)(2) (“The customer on-time performance minimum standard is 80 percent for any 2 consecutive calendar quarters.”).

Congress could not have intended that the host rail carrier be responsible for damages for the preference violation when the investigation would never have been triggered but for other non-preference related issues.

5. Amtrak’s proposed Board recommendations are overly broad in scope.

The Board has indicated that, in Stage One of this proceeding, the Board will attempt to determine causation and attribution for *Sunset Limited* delays or failure to achieve minimum standards and will make recommendations for service improvement.¹⁴⁸ In its Opening Statement, Amtrak offered a set of 19 initial recommendations that the Board “should make to improve the *Sunset Limited* service.”¹⁴⁹

Amtrak’s recommendations can be divided into four general categories: (1) operational recommendations; (2) supervision, training, and compliance recommendations; (3) maintenance recommendations; and (4) document preservation recommendations.¹⁵⁰ A number of the recommendations suggested by Amtrak – particularly the maintenance recommendations – are sensible approaches that BNSF already follows (e.g., Recommendation 14’s suggestion that railroads

¹⁴⁸ See August 19, 2024 Decision, at 5; 49 U.S.C. § 24308(f)(1).

¹⁴⁹ See Opening Statement, at 113-117.

¹⁵⁰ Amtrak’s **operational recommendations** include limitations on or suggestions for: trains that do not fit into available sidings (1); limiting trains that Amtrak is likely to catch up to (2); procedures for train meets (3); planning for meets (4); crew planning (5); utilization of the fastest route (6); directional movement of traffic (7); availability of platforms (9); computer aided dispatching (11); computer aided scheduling (12). Amtrak’s **supervision, training, and compliance recommendations** include limitations on or suggestions for supervisor approval of Amtrak delays (10); on-going training (15); dispatcher evaluation (16); and implementation of a compliance program (17). Amtrak’s **maintenance recommendations** include limitations on or suggestions for clearing maintenance crews (8); slow orders (13); train maintenance (14). Amtrak’s **document preservation recommendations** include limitations on or requirements for preservation of playback data (18); and documentation of decisions (19).

maintain trains to avoid breakdowns). But many of the recommendations are both overly prescriptive and ill-defined.

If implemented by the host rail carriers, these recommendations would have sweeping negative effects to both freight trains and passenger trains. The Board should narrowly tailor any recommendations made in this Stage One to address the causes for delays or failures to achieve minimum standards that could be reasonably addressed by a host rail carrier on its portion of the *Sunset Limited* route to the extent that the Board finds that host culpable in this proceeding.

5.1 BNSF agrees with, and currently implements, a number of Amtrak's proposed recommendations.

Amtrak requested that the Board issue three recommendations related to maintenance activities: ensuring that maintenance crews do not impede Amtrak (Recommendation 8); minimizing slow orders that impact Amtrak (Recommendation 13); and maintaining freight trains to avoid breakdowns that impact Amtrak (Recommendation 14). BNSF already has procedures in place to implement each of these suggestions.

Both Amtrak and BNSF recognize maintenance is required to provide a safe and reliability corridor for passenger trains. As BNSF explained in response to the Board's inquiry, BNSF meets with Amtrak quarterly to review maintenance activities on the network and potential impacts to passenger trains.¹⁵¹ While BNSF works to minimize the disruption to Amtrak by scheduling routine windows outside of passenger schedules, delays are possible due to disturbed track slow orders or residual congestion from prior windows.¹⁵² To offset some of these impacts, BNSF programs certain activities during the night to limit Amtrak delays.¹⁵³

¹⁵¹ See September 25, 2023 Submission, at 23.

¹⁵² *Id.*

¹⁵³ *Id.*

Likewise, BNSF already minimizes slow orders that impact Amtrak. To accomplish this, BNSF intentionally schedules maintenance operations (both routine and major capital projects) when it would least disrupt Amtrak operations.¹⁵⁴ Moreover, when slow order delays exceed certain thresholds, BNSF deploys additional focus and efforts to remedy track conditions with more significant impact to freight and passenger operations.¹⁵⁵

Similarly, BNSF has every incentive to reduce any breakdowns which may impede traffic – both passenger and freight traffic – on its mainline. To that end, BNSF has implemented systems to reduce unplanned train stoppage events, including utilizing data analytics and a continuous improvement team.

Much like the maintenance recommendations, BNSF has already implemented Amtrak’s suggestions with respect to dispatcher training (Recommendation 15). BNSF prioritizes passenger trains throughout its national rail network and has emphasized the importance of passenger service throughout the company. For example, the 2022 Transportation Team Key Objectives – a two-page summary that is distributed to all BNSF transportation managers and their supervisors – outlines key objectives for BNSF for 2022, including ‘Amtrak Customer OTP of 80% or better’ and ‘A’ Grade on Amtrak Host Report for delay avoidance.¹⁵⁶ As BNSF explaining in response to questions from the Board, BNSF trains its dispatchers to prioritize passenger trains above all other train types.¹⁵⁷ The first module of BNSF’s New Hire Training Materials for new train dispatchers,

¹⁵⁴ *Id.* at 11.

¹⁵⁵ See BNSF’s Response to the Board’s Requests for Information – Appendix, Part III, (“BNSF December 5, 2023 Submission”) at 6 (Dec. 5, 2023).

¹⁵⁶ See September 25, 2023 Submission, at 12.

¹⁵⁷ *Id.* at 26.

includes a graphic showing that passenger trains receive the highest priority in BNSF's priority grouping system.¹⁵⁸

5.2 Amtrak's proposed recommendations aimed at a host rail carrier's operational systems are overly prescriptive.

The majority of Amtrak's recommendations are overly prescriptive and would not allow railroads to use their judgment and resources to best manage the railroad. In particular, Amtrak's operations recommendations, if implemented, would have sweeping negative effects to both freight trains and passenger trains across the entire national rail network.

For example, Amtrak suggests that "[e]xcept in the event of an emergency, rail carriers should not run trains that do not fit into available sidings on rail lines where the rail carrier knows or expects Amtrak trains are or will soon be operating."¹⁵⁹ First, this recommendation is unnecessary. BNSF's dispatching protocols for train movement are guided by two overarching principles: (1) dispatchers are to give priority trains preference and (2) delay no trains unnecessarily.¹⁶⁰ Passenger trains are to receive the highest priority status regardless of the length of freight trains operating on the same track.¹⁶¹ Dispatchers must consider many factors – including the length of other trains – when planning a path for a passenger train.¹⁶² As a result, BNSF trains dispatchers to locate holding

¹⁵⁸ *Id.*

¹⁵⁹ *See* Recommendation 1, Opening Statement, at 114 ("Except in the event of an emergency, rail carriers should not run trains that do not fit into available sidings on rail where the rail carrier knows or expects Amtrak trains are or will soon be operating.").

¹⁶⁰ *See* September 25, 2023 Submission, at 31.

¹⁶¹ *Id.*

¹⁶² *Id.*

areas for longer trains so as to not delay passenger trains.¹⁶³ If a passing siding is not long enough to accommodate a freight train, dispatchers use other techniques to minimize any passenger train delay, such as moving the passenger train in front of the freight train via a passing siding.¹⁶⁴

Second, the “non-fitting trains” recommendation as proposed by Amtrak is overly prescriptive and limits a dispatcher’s options to manage rail traffic on the network. There are various options for a railroad to accommodate trains that are longer than available sidings without negatively impacting Amtrak. For example, a host rail carrier may schedule longer trains to follow directly behind Amtrak. If Amtrak’s recommendation were implemented, host rail carriers would lose the ability to efficiently move long trains in a way that does not delay Amtrak.

Amtrak’s recommendation suggests that freight trains should be capable of fitting into every siding on a route. However, that suggestion ignores the fact that not all sidings are intended to be suitable for setting out a whole train. Dispatchers are trained to make use of all the strategies available on the territory to manage traffic. Ultimately, implementing an arbitrary limit on train length based on the shortest siding on the route would sub-optimize the network and would result in the

¹⁶³ *Id.*

¹⁶⁴ *Id.* The occasional need to have an Amtrak train pass through a siding at times, demonstrates that Amtrak’s third recommendation – that freight trains occupy a siding during a meet – is overly prescriptive. Typically, BNSF places freight trains in sidings for a meet to allow Amtrak to proceed on the mainline and to avoid delaying passenger trains. But a rigid application of this recommendation, thereby eliminating the possibility of allowing Amtrak to pass via a siding, could slow down Amtrak in certain circumstances. For example, passenger trains can often decelerate and accelerate faster than heavy freight trains, making it more efficient for them to use sidings in certain situations. Similarly, placing an Amtrak train in a siding may avoid unnecessarily blocking an at grade crossing for automobile traffic. Ultimately, a rigid application of this recommendation could reduce operational flexibility, leading to increased delays and inefficiencies for both passenger and freight operations.

need to run additional trains, creating congestion and unintended negative consequences to passenger trains.

Finally, while this “non-fitting trains” recommendation is overly prescriptive, it is also ill-defined. For example, Amtrak suggests a limitation on train length is appropriate when a railroad “knows or expects Amtrak trains are or will soon be operating.” However, there is no proposed standard for what “will soon be operating” means. Implementation of a recommendation that strips dispatchers of many tools available to them to manage traffic, while at the same time not providing concrete guidance, runs the risk of negatively impacting Amtrak’s experience by increasing congestion on the network, creating more frequent delays and increasing operational costs for the railroads, which may result in increased fees for freight shippers.

Many of Amtrak’s other operational recommendations would present these same challenges. For example, limiting the presence of freight trains to which Amtrak could “catch up” could create bottlenecks and inefficiencies. Implementing this suggestion would cause cascading delays across the network, impacting not just freight but also other passenger trains. Additionally, this would create additional terminal congestion and require additional queuing capacity and staging tracks, which would further strain infrastructure and resources.

In light of Amtrak’s proposed recommendations – which are simultaneously overly prescriptive and ill-defined – the Board should narrowly tailor any recommendations made in this Stage One to address the causes for delays or failures to achieve minimum standards that could be reasonably addressed by a host rail carrier on its portion of the *Sunset Limited* route to the extent that the Board finds that host culpable in this proceeding.

Under this approach, the Board should not make any recommendations to BNSF in this proceeding. As discussed above, BNSF has established that the record

developed in this Stage One shows that BNSF has **not** failed to provide the required preference to Amtrak's *Sunset Limited* trains during the Relevant Period. Indeed, Amtrak has not made any such allegations with respect to BNSF. Therefore, because no BNSF preference violation has occurred, the Board should not issue recommendations to BNSF.

CONCLUSION

Notwithstanding BNSF's lack of culpability in this case, BNSF appreciates the opportunity to reply to Amtrak's Opening Statement and provide its views on how the Board should interpret certain statutory terms and how the Board should apply those interpretations to the facts of this case.

Respectfully submitted,

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Peter W. Denton
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*Counsel for BNSF Railway
Company*

Dated: December 23, 2024

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42175

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

VERIFICATION

I, James Tylick, hereby certify that I am authorized to sign this verification on behalf of BNSF Railway Company.

I have read **BNSF's Reply to Amtrak's Opening Statement ("Reply")**. While I do not have personal knowledge of all of the facts recited therein, I have been informed that the Reply is based on information collected by others at or on behalf of BNSF, and is therefore necessarily limited to the records and information in existence, presently collected, and thus far discovered in the course of the preparation of the Reply.

I reserve the right to make any changes to the Reply if it appears at any time that omissions or errors have been made therein or that more accurate information is available.

Subject to the limitations set forth therein, I affirm that the Reply is true to the best of my knowledge, information and belief.

I verify under penalty of perjury that the foregoing is true and correct.

Executed on December 23, 2024, in Fort Worth, Texas.

/s/ James Tylick
James Tylick

CERTIFICATE OF SERVICE

I hereby certify that I have caused the BNSF's Reply to Amtrak's Opening Statement to be served electronically or by first-class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Jennie Askew
Jennie Askew

Attorney for BNSF Railway Company

December 23, 2024

APPENDIX 1

In the Supplement to its Opening Statement, Amtrak alleged that, “Amtrak was denied priority access to rail lines because UP, BNSF, or both host railroads failed to plan adequately for the arrival of Train 2 at Iowa Junction, forcing Amtrak passengers to endure lengthy delays while [REDACTED]

[REDACTED]”.¹ Amtrak did not specifically state that either delay of Train 2—on April 3, 2022 or September 25, 2022—were the result of BNSF failing to provide preference. These are the only two delays attributed to BNSF that Amtrak addressed in its Opening Statement or in the Supplement to that Opening Statement. This Appendix provides updated root cause information for the April 3, 2022 and September 25, 2022 delays to Train 2.

Amtrak had initially assigned BNSF as the host railroad for both of these Train 2 delays. In its July 24, 2024 Submission, BNSF requested that the Board correct these delay entries because they are reported to have occurred west of Iowa Junction (MP C205.4) and BNSF is not the host railroad for any segment west of Iowa Junction.² Union Pacific then provided narrative explanations for these delays in its Additional Root Cause Narratives. In both of the narratives for those delay events, UP stated that “BNSF would not accept” the Amtrak train at Iowa Junction until a separate freight train “cleared the BNSF Lafayette Subdivision because it did not have a location for the trains to meet on the BNSF Lafayette Subdivision.”³ UP’s cited root cause does not accurately depict the reason for the delay. BNSF has

¹ See Supplement to Amtrak Opening Statement Concerning Additional Delays Identified by the Board in Its September 25, 2024 Decision, at 2, n.4 (Oct. 24, 2024).

² See BNSF’s Third Response to the Board’s February 13, 2024 Decision, at 5 (July 24, 2024).

³ See Union Pacific Railroad Company’s Submission of Additional Root Cause Narratives, at 12-13 (Sept. 9, 2024).

further investigated the potential causes for these delays. Those analyses are set forth below.

BNSF Control #	Train	Origin Date	From	To	Host RR	Type	Mins	Delay Reason
22	2	4/03/2022	LCH	XIJ	BN	FTI	59	Meet BN 7270 W, Siding, Iowa

Delay No. 22 occurred on the Lake Charles, Louisiana to Iowa Junction, Louisiana segment of the *Sunset Limited* service. The Lafayette Subdivision was very congested on this date (April 5, 2022), with eight trains holding on the territory, including trains at the Crowley and Roanoke sidings. Trains holding on the subdivision can limit the number of locations available for Amtrak to meet and pass freight trains. This delay appears to have occurred because an eastbound BNSF freight train (H DYTAL1 05) arrived hours before Train 2 to pick up and set up cars for a customer at the Lacassine sidetrack. Because this work event took place on the sidetrack, the meet/pass location was unavailable for Amtrak. The combination of congestion and this work event resulted in single track operation of the mainline between Lafayette yard and Iowa Junction, a distance of more than 50 miles.

Further complicating the conditions of the rail network at the time, Amtrak was already delayed due to a service interruption west of Lake Charles. In particular, {{[REDACTED]}}⁴ As a result, it was unclear to BNSF when Amtrak would arrive at Iowa Junction for UP to hand off the passenger train. Therefore, a westbound BNSF freight train (H LALSSB1 05) departed from Lafayette when the Amtrak train was still west of Lake Charles. Because the Crowley, Roanoke, and Lacassine sidings were unavailable for meet/pass opportunities, the westbound BNSF freight train (H LALSSB1 05) had to proceed to Iowa Junction before Amtrak could enter BNSF territory. Because the westbound BNSF freight train (H LALSSB1 05) met Train 2 just west of Iowa Junction, Amtrak had an unimpeded run across the Lafayette Subdivision. Train 2 passed Iowa Junction eight hours and thirty-two minutes late, but made up time in the schedule across BNSF's hosted territory, passing Live Oak only seven hours and fifty-four minutes late.

⁴ See UP Host-Responsible Delays for Sunset Limited Train 2, at 56 (July 24, 2024).

BNSF Control #	Train	Origin Date	From	To	Host RR	Type	Mins	Delay Reason
23	2	9/25/2022	LCH	XIJ	BN	FTI	20	Meet Siding, Iowa, NS 4379 W

Delay No. 23 also occurred on the Lake Charles, Louisiana to Iowa Junction, Louisiana segment of the *Sunset Limited* service.

The Lafayette Subdivision was very congested on this date (September 27, 2022). There were a number of trains, both eastbound and westbound, on the west end of the Lafayette Subdivision. To accommodate the congestion on the mainline, a two-on-one meet at Roanoke was necessary to maximize fluidity and minimize overall delays. The meet required a single eastbound freight train to take the siding at Roanoke for two westbound freight trains to pass. It is unknown if the first westbound freight train would have been able to clear into Lacassine Yard for Amtrak. But even if that move had been possible, it would have resulted in needing the second westbound train to hold the mainline between switches at Roanoke, forcing Amtrak to operate via the siding. Accordingly, the two westbound trains were dispatched to clearing points for Amtrak, which allowed an unimpeded run for Amtrak through Roanoke.

Exhibit 1



DJ MITCHELL II
*Assistant Vice President
Passenger Operations*

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Fort Worth, Texas 76131
P.O. Box 961034
Email: DJ.Mitchell@BNSF.com
Phone: (817) 352-1230
Fax: (817) 234-7454

February 21, 2015

Mr. Jim Blair
Senior Director Host Railroads
Amtrak
30 St Station
4th Floor North, Box 20
Philadelphia, PA 19104

Re: Amtrak operation between Live Oak and West Bridge Jct.

Dear Jim:

It has come to BNSF's attention that Amtrak's Sunset Limited service is operating on the BNSF mainline between Live Oak and West Bridge Jct., near Avondale, LA, without any contract operating rights to do so. Amtrak service operates between Houston and New Orleans under an agreement with Union Pacific's predecessor Southern Pacific. Under that agreement, Amtrak trains should be operating on the former Southern Pacific mainline for the entire route, including between Live Oak and West Bridge Jct. This letter is to inform Amtrak that BNSF will consider requests for detours on a case by case basis, but after March 1, 2015, only trains for which detours have been requested by Union Pacific and/or Amtrak and granted by BNSF will be accommodated on BNSF's mainline between Live Oak and West Bridge Jct.

Sincerely,

A handwritten signature in black ink, appearing to read "DJ Mitchell II". The signature is stylized and cursive.

DJ Mitchell II
AVP Passenger Operations

Exhibit 2



SARAH W. BAILIFF
*Assistant Vice President
Contracts and Joint Facilities*

BNSF Railway Company
2600 Lou Menk Drive
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P.O. Box 961034
Email: Sarah.Bailiff@BNSF.com
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February 21, 2015

Mr. David Hughes
General Manager Joint Facilities
Union Pacific Railroad
1400 Douglas Street MS 1180
Omaha, NE 68179

Re: Amtrak operation between Live Oak and West Bridge Jct, LA

Dear David:

We were made aware that Amtrak's Sunset Limited service is operating on the BNSF mainline between Live Oak and West Bridge Jct., near Avondale, LA, without any contract rights to do so. It is my understanding Amtrak operates between Houston and New Orleans pursuant to a former SP agreement for operation on the former SP route, including between Live Oak and West Bridge Jct., and not over BNSF's mainline route between Live Oak and West Bridge Jct.

BNSF will consider requests for detours of Amtrak trains over BNSF's trackage between Live Oak and West Bridge Jct., on a case by case basis. However, after March 1, 2015, only trains for which detours have been requested by Union Pacific and granted by BNSF will be allowed to use the BNSF mainline between Live Oak and West Bridge Jct. Otherwise, UP must dispatch Amtrak trains over its own trackage in accordance with its Amtrak agreement.

Sincerely,

A handwritten signature in blue ink that reads "Sarah W. Bailiff". The signature is stylized and fluid.

Sarah W. Bailiff
AVP Contracts and Joint Facilities