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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

**PETITION OF AMTRAK FOR A SHOW CAUSE ORDER WITH RESPECT TO THE
PRESERVATION OF DISPATCH PLAYBACK RECORDS**

The National Railroad Passenger Corporation (“Amtrak”) hereby requests that the Surface Transportation Board (“Board”) order Union Pacific Railroad Company (“UP”) to show cause as to why UP is not obligated to comply with the Board’s July 11, 2023 preservation order by suspending its 99-hour destruction policy for dispatch playback records (“dispatch playbacks” or “playbacks”) related to the *Sunset Limited* route.¹ UP has not provided any persuasive reason for its apparent failure to preserve this evidence, which is critical to the Board’s investigation into the causes of Amtrak delays.

I. INTRODUCTION

When the Board opened this investigation in response to Amtrak’s Complaint, it directed the Parties to preserve all documents and data related to the subject matter of the investigation during the pendency of the proceeding and through any appeals. That clear and unambiguous directive required the Parties to preserve dispatch playbacks for the rail lines at issue in this

¹ Because this matter involves the Board’s enforcement of its own order and does not involve ruling on party-led discovery matters, Amtrak is directing this Motion to the full Board rather than to Judge McCarthy. *See* July 11, 2023 Order at 17 [hereinafter “Initiating Order”].

proceeding.² Dispatch playbacks are videos that provide valuable evidence about dispatching decisions and train conflict resolution. They allow the viewer to quickly and reliably determine how a dispatching railroad prioritizes trains and uses available infrastructure. They also provide information about train movements that may not otherwise appear in electronic data, such as movements by foreign trains, light engine movements, and blocks of cars.

Through a lengthy discovery process, Amtrak learned that UP destroys its dispatch playbacks after 99 hours.³ Moreover, UP has claimed it has no obligation to preserve dispatch playbacks. That is inconsistent with the Board's Preservation Order and compromises the integrity of the Board's investigation. UP's 99-hour destruction policy for dispatch playbacks could also affect any future Section 213 investigations that involve UP by depriving the Board of access to essential evidence in those proceedings.

Even if UP had destroyed all dispatch playbacks for the Relevant Period defined by the Board by the time the Board's Preservation Order issued on July 11, 2023, UP indisputably had an obligation to begin preserving all dispatch playbacks related to the *Sunset Limited* route upon issuance of that order.⁴ Playbacks created after issuance of the Preservation Order relate to several matters that the Board is required to investigate under 49 U.S.C. § 24308(f), including efforts to determine the cause of delay, evaluate recommendations for improved on-time performance, and (should the Board find that any delays or failures to achieve the minimum standard are attributable

² For ease of reference, Amtrak will refer to this component of the Initiating Order as the Board's "Preservation Order."

³ See **Ex. C** (Amtrak's Motion to Compel Production of Documents from UP ("Motion to Compel")) at 9-10 (describing UP's initial commitment to make dispatch playbacks available, subsequent reversal, and initial obfuscation of the basis for reversal); see also **Ex. I** (Amtrak's Renewed Motion to Compel Production of Documents from UP (Jan. 23, 2024)) at 7 (describing UP's eventual disclosure that dispatch playbacks are destroyed after 99 hours).

⁴ Indeed, UP should have begun preserving dispatch playbacks even earlier, upon receipt of Amtrak's Complaint and Petition, which also included a Procedural Proposal that described the type of evidence that would be relevant in this proceeding.

to preference violations) fashion appropriate equitable relief. Although the Preservation Order does not contemplate exceptions based on cost or burden, ensuring the continued availability of dispatch playbacks does not impose cognizable cost or burdens. In fact, Amtrak keeps dispatch playbacks for at least six months, has kept playbacks for its hosted portions of the *Sunset Limited* dating back several years, and can provide screenshots from those materials. UP is not entitled to unilaterally decide that it would be too burdensome to suspend its 99-hour destruction policy for dispatch playbacks related to the *Sunset Limited*. To ensure compliance with the Board's Preservation Order, and ensure that UP is not actively destroying evidence that would help the Board complete its investigation, this Motion should be granted and UP ordered to show cause as to why UP is not complying with the Preservation Order by suspending its 99-hour destruction policy for dispatch playbacks.

II. FACTUAL BACKGROUND

On December 8, 2022, Amtrak filed a Complaint with the Board to initiate an investigation regarding the substandard on-time performance of *Sunset Limited* Trains.⁵ Along with the Complaint, Amtrak filed a proposed procedural framework for the investigation ("Procedural Proposal").⁶ On the same day that it filed both documents, Amtrak served them on UP.

The Complaint alleged that substandard on-time performance was due largely to causes that can and should be addressed by UP,⁷ and that delays or failures to achieve minimum standards were attributable to UP's failure to provide Amtrak passenger trains with preference over freight

⁵ Complaint and Petition for Board Investigation and Other Relief, No. NOR 42175 (S.T.B. Dec. 8, 2022) [hereinafter "Complaint"].

⁶ Amtrak's Proposed Procedures and Framework for Board Investigative and Remedial Phases of Proceeding Under 49 U.S.C. 49 U.S.C. § 24308(f), No. 42175 (S.T.B. Dec. 8, 2022) [hereinafter "Procedural Proposal"].

⁷ Complaint at ¶¶ 8, 73-119.

transportation.⁸ Among other things, Amtrak sought an injunction and other appropriate equitable relief to deter UP from taking future actions which might reasonably be expected to result in delays to *Sunset Limited* Trains. In its accompanying Procedural Proposal, Amtrak suggested that the Board take steps to ensure that host railroads preserve evidence pertinent to its investigation and evaluation of equitable remedies. More specifically, Amtrak suggested that the Board order host railroads to suspend automated processes that would delete documents relevant to the investigation during the ordinary course of business.⁹ Amtrak also suggested that the Board require host railroads to take affirmative steps to preserve relevant documents.¹⁰

On July 11, 2023, the Board opened this investigation pursuant to the mandatory provisions in 49 U.S.C. § 24308(f)(1).¹¹ In doing so, the Board observed that the parties might possess records relevant to the investigation and that they would not otherwise be required to retain. Accordingly, the Board issued the broad and unambiguous Preservation Order:

[T]he Board will order all documents and/or data that relate to the subject matter of this investigation be preserved during the pendency of this proceeding (including any appeals) by Amtrak, CN, UP, BNSF, SCRRA, and NOPB. Regardless of the retention periods stated in Part 1220 and regardless of any parties' ongoing document retention policy or other data destruction practices, parties must preserve such documents, even if they claim those documents or data are protected from discovery by privilege or otherwise.¹²

The Board emphasized its expectation that all parties implement the records Preservation Order professionally.¹³

⁸ Complaint at ¶¶ 120-140.

⁹ Procedural Proposal at 9.

¹⁰ *Id.*

¹¹ *See* Initiating Order at 16.

¹² *Id.* (citing 49 U.S.C. § 11144(c)).

¹³ *Id.*

In its Initiating Order, the Board directed investigative questions to each party. The Board also permitted a limited period for party-led discovery to augment its efforts to develop the record.¹⁴ Consistent with the Board’s Initiating Order, Amtrak served UP with targeted discovery concerning the causes of delay to *Sunset Limited* Trains or the failure to provide those trains with preference over freight transportation. One of those requests sought, among other things, dispatch playbacks for the Relevant Period.¹⁵

Dispatch playbacks are videos that provide valuable evidence about dispatching decisions and train conflict resolution.¹⁶ More specifically, playbacks distill the relative position of trains, track infrastructure, and other relevant operating conditions into a simple visual format that facilitates efficient and reliable analysis. In this respect, playbacks function like game tape for a sporting event. They depict real time decisions that dispatchers make based upon the available information and operational circumstances and can be reviewed to determine how the choices were carried out in a readily digestible format.

Playbacks also provide valuable evidence for another reason: They offer information about train movements that may not otherwise appear in electronic data, such as movements involving certain foreign trains, yard trains, light engines, and blocks of cars.¹⁷ As testimony from one freight railroad analyst confirms, “reviewing dispatch playback and documenting the actual train movements in the terminal area for local trains, foreign or interchange trains, and yard trains” is important because “their movements tend to be less accurate” in electronic data sources normally

¹⁴ *Id.* at 13.

¹⁵ See **Ex. D** (UP Responses & Objections to Amtrak’s First Set of Requests for Production of Documents) at Response 6. Amtrak only requested dispatch playbacks for UP rail lines that are traversed by *Sunset Limited* Trains.

¹⁶ Although Amtrak has real-time access to UP dispatch screens in the ordinary course of business, Amtrak does not have access to any playback capability.

¹⁷ See, e.g., CSX Transportation, Inc. & Norfolk Southern Railway Co.’s Joint Rebuttal Evidence at Ex. 3, 17-20, Nat’l R.R. Passenger Corp., No. FD 36496 (S.T.B. July 27, 2022).

kept by at least some freight railroads.¹⁸ The same analyst testified that access to dispatch playbacks can be imperative to understanding the nuances of train movements, including for a wide variety of trains.¹⁹

In response to an Amtrak discovery request seeking dispatching tapes, dispatching playbacks, and other documents logging or recording dispatching decisions for all trains that traversed relevant UP rail lines during the Relevant Period, UP initially represented that it would allow Amtrak representatives to review these dispatch playbacks at UP facilities in Omaha, Nebraska.²⁰ Because the time required to review dispatch playbacks in-person would have imposed significant logistical challenges and foreclosed access to important evidence during the pendency of this investigation, Amtrak requested that UP explore alternatives that would allow Amtrak continuing access to dispatch playbacks. Over subsequent weeks, UP repeatedly assured Amtrak that it was assessing the technical feasibility of producing the playbacks Amtrak had requested for the Relevant Period.²¹ But after six weeks of purported deliberation, and after the period for propounding discovery closed, UP suddenly reversed course and told Amtrak that dispatch playbacks for the Relevant Period were not, and in fact never had been, available. UP offered no explanation, except to blame an “apparent miscommunication or misunderstanding about the time period at issue.”²²

¹⁸ See, e.g., CSX Transportation, Inc. and Norfolk Southern Railway Co.’s Joint Supplemental Evidence at Ex. 2, 21-22, Nat’l R.R. Passenger Corp., No. FD 36496 (S.T.B. Dec. 23, 2021).

¹⁹ See *id.* at Ex. 2, 18.

²⁰ See **Ex. D** at Response 6.

²¹ See **Ex. E** (emails between A. Trepp and M. Rosenthal from October 26, 2023 to November 28, 2023) at 1 (addressing whether dispatch playbacks could be produced to Amtrak to facilitate continuing access).

²² See **Ex. F** (email from M. Rosenthal to A. Trepp on Dec. 14, 2023).

After Amtrak filed a motion to compel the production of other dispatch records, UP disclosed that it only retains playbacks “for the most recent 99 hours.”²³ In other words, after 99 hours, UP dispatch playbacks are destroyed, assertedly because of technological constraints and the amount of data involved in retaining playbacks.²⁴ In response to the Motion to Compel, UP produced two categories of material.

The first category of material that UP produced is called CADX Data. It includes output from UP’s computer-aided dispatching system.²⁵ An example of the CADX data is attached as **Exhibit A** to this Motion.²⁶ The second category of material that UP produced consists of dispatching records that UP must retain under 49 U.S.C. § 228.17 (“Trainsheets”). It includes output from several UP databases, and provides information about Engine Consist, Crew Consist, OS Times, Delays, and any Unusual Occurrences.²⁷ An example of the Trainsheets that UP produced is attached as **Exhibit B** to this Motion. The CADX Data and Trainsheets will facilitate important analysis during the investigative and remedial phases of this proceeding. Both offer unique data and will therefore permit Amtrak to undertake unique analysis. But both can be difficult to understand without dispatch playbacks,²⁸ the production of which would also allow the Board and Amtrak to more quickly and efficiently analyze the relative position of trains, track infrastructure, and other relevant operating conditions. Moreover, the CADX data and Trainsheets could lack information about train movements that are captured in dispatch playbacks.

²³ See **Ex. G** (UP’s Reply to Amtrak Motion to Compel (Jan. 9, 2024)) at 3.

²⁴ See *id.*

²⁵ See **Ex. H** (UP’s Reply to Amtrak’s Renewed Motion to Compel (Feb. 9, 2024)) at 8-9.

²⁶ The data shown in Exhibit A includes 37-row subset of the over 4 million rows in each file.

²⁷ See **Ex. H** at 4-5.

²⁸ Amtrak is still in the process of evaluating CADX data and Trainsheets.

When propounding discovery, Amtrak initially focused on obtaining dispatch playbacks and other dispatching records only for the Relevant Period.²⁹ However, after learning that dispatch playbacks for the Relevant Period had been destroyed, and after receiving the voluminous data described above concerning individual train movements, Amtrak requested that UP produce dispatch playbacks created after the Relevant Period so that Amtrak could obtain context about how CADX Data and Trainsheets can be used to reconstruct dispatching decisions, evaluate train conflict resolution, and otherwise evaluate operational practices critical to this proceeding.³⁰ In response, UP described the very suggestion that it was obligated to preserve dispatch playbacks created after the Relevant Period as “confused.”³¹ At a subsequent hearing before Judge McCarthy, UP represented that it would not be technologically feasible or cost effective for UP to retain playbacks for more than 99 hours. On April 9, 2024, Amtrak again asked UP whether playbacks for rail lines involving the *Sunset Limited* were available for any period other than the most recent 99 hours. UP responded by telling Amtrak that what UP had said in its prior filing about UP’s 99 hour destruction policy for dispatch playbacks “remains the case today.”³² Because it appears UP has not altered its document destruction policies for dispatch playbacks to comply with the Board’s Preservation Order, this Motion follows.

²⁹ Amtrak confined most of its discovery requests to the Relevant Period to comport with the Board’s instruction that party-led discovery be narrow, calculated to augment the Board’s investigative record, and tailored to permit the production of materials within 120 days from the Initiating Order.

³⁰ See **Ex. I** at 9.

³¹ See **Ex. J** (email from M. Rosenthal to Judge T. McCarthy on Jan. 29, 2024).

³² See **Ex. K** (email from M. Rosenthal to A. Trepp on Apr. 10, 2024).

III. ARGUMENT

The Board issues orders to show cause when necessary to ensure compliance with a Board order.³³ In this case, the Board issued a broad and unambiguous Preservation Order requiring that parties preserve all documents and data related to the subject matter of the investigation.³⁴ For reasons explained below, dispatch playbacks created after issuance of the Preservation Order are related to several matters within the scope of this investigation, and must be preserved. Accordingly, the Board should order UP to explain why it unilaterally concluded that it was not obligated to preserve dispatch playbacks pursuant to the Preservation Order, require UP to immediately suspend its 99-hour destruction policy for dispatch playbacks related to the *Sunset Limited* route, and require UP to keep the destruction policy suspended for the duration of this proceeding. Amtrak respectfully reserves the right to seek additional relief from the Board at an appropriate time for UP's apparent failure to comply with the Preservation Order.

A. Dispatch Playbacks Created After Issuance of the Preservation Order Relate to the Subject Matter of This Investigation and Must Be Preserved

After initiating an investigation concerning substandard on-time performance of intercity trains, the Board must obtain information from all parties involved.³⁵ To protect its ability to effectuate that mandate, the Board required parties to preserve “all documents and/or data that relate to the subject matter of the investigation” during the pendency of this proceeding and through any appeals.³⁶

³³ See, e.g., *R.R. Ventures, Inc.*, No. AB 556 (S.T.B. served Apr. 5, 2000) (finding that a party violated a “continuing duty” imposed by the Board, and thus was ordered to show cause as to why); *Cent. Kan. Ry.*, No. AB 406 (S.T.B. served June 23, 2000) (same); *New Eng. Cent. R.R., Inc.*, No. FD 31250 (S.T.B. served Oct. 2, 2014) (same).

³⁴ Complying with the Preservation Order should have been simple because UP was independently obligated to implement an appropriate litigation hold upon receiving the Complaint in this matter.

³⁵ See 49 U.S.C. § 24308(f)(1).

³⁶ Initiating Order at 16 (emphasis added).

The obligations imposed under that preservation requirement are broad. That is because Congress tasked the Board with evaluating several expansive issues when investigating substandard on-time performance under the Passenger Rail Investment and Improvement Act. For example, the Board must “determine whether and to what extent delays or failures to achieve minimum standards are due to causes that could reasonably be addressed by the passenger rail operator or the host railroad.”³⁷ As another example, the Board must “identify reasonable measures and make recommendations to improve the service, quality, and on-time performance of the train.”³⁸ As a final example, if the Board determines that any delays or failures to achieve minimum standards are attributable to violations of Amtrak’s right to preference over freight transportation, the Board may (in addition to awarding damages) consider reasonable and appropriate equitable relief.³⁹

Dispatch playbacks created after issuance of the Preservation Order relate to these and other aspects of the pending investigation.⁴⁰ *First*, playbacks postdating the Relevant Period will help the Board evaluate the causes of delay and whether they are attributable UP. During periods since Amtrak filed its Complaint, the on-time performance of *Sunset Limited* trains has fluctuated. There have been periods of significant improvement,⁴¹ and periods of regression. Continuing access to dispatch playbacks for the rail lines at issue would allow the Board to identify dispatching

³⁷ 49 U.S.C. § 24308(f)(1).

³⁸ *Id.*

³⁹ *See* 49 U.S.C. § 24308(f)(2)-(3).

⁴⁰ Moreover, the novel and continuing nature of this investigation weighs in favor of requiring preservation of unique evidence that may become essential as the Board identifies additional issues, propounds further requests, or otherwise refines its approach to fulfilling its statutory mandate.

⁴¹ For instance, on-time performance for *Sunset Limited* Trains improved dramatically immediately after Amtrak filed its Complaint.

practices that drive improved performance and would enable the Board to assess whether those practices were in place during the Relevant Period.

Second, playbacks postdating the Relevant Period will assist the Board in formulating recommendations about how to improve the on-time performance of *Sunset Limited* Trains. For example, those playbacks will allow the Board to assess whether particular dispatching decisions or practices have an outsized influence on on-time performance, allow the Board to identify operational practices that affect on-time performance and may not be accurately captured in electronic data, and allow the Board to evaluate whether and how recommendations might be implemented.

Third, playbacks postdating the Relevant Period will allow the Board to create a complete and accurate picture of all train movements and conditions in the affected areas, which will be essential in fashioning any equitable remedies should the Board find that delays or failures to achieve on-time performance are attributable to preference violations and move to Phase II of this proceeding. Dispatch playbacks could enable the Board to identify dispatching practices that can be addressed through injunctive relief and evaluate how proposed equitable remedies can be operationalized. Dispatch playbacks will facilitate that work for several reasons, for example because they permit a quick and reliable assessment of train conflict resolution, because they provide important information about the relative position of all trains and infrastructure affecting dispatching, and because they may provide information about train movements not adequately captured in other dispatching data.

Other portions of the Initiating Order, and subsequent Board orders in this proceeding, confirm that documents and information postdating the Relevant Period and issuance of the Preservation Order can be related to the subject matter of this investigation. Indeed, the Initiating

Order specifically requested that Amtrak disclose procedures currently in place to minimize the operational consequences of delays.⁴² It also requested that parties disclose their existing measures or plans to improve on-time performance of passenger trains.⁴³ And it requested that UP provide current track charts, employee timetables, general orders, general track bulletins, and special instructions,⁴⁴ as well as a current map for its portions of the route.⁴⁵ More recently, the Board has issued additional requests for documents and information postdating the Relevant Period, including requests concerning maximum operating speeds, capital improvements, communications between railroads, and the condition and operating speed for certain infrastructure from the beginning of the Relevant Period through the present.⁴⁶ All of these requests underscore that materials postdating the Relevant Period can “relate to the subject matter” of the investigation and, indeed, are critical to the resolution of matters within the Board’s statutory mandate.

In addition to requiring the parties to preserve documents relating to a wide range of subjects, the Preservation Order unambiguously requires that parties preserve a wide range of documents. To that end, the Order obligates each party to preserve “all documents” related to the subject matter of the investigation, without respect to the purported cost of preservation, and without respect to when documents were created. Consistent with that language, Amtrak has been preserving its own dispatch playbacks for the *Sunset Limited* route. Accomplishing that has not been time- or cost-prohibitive. And if UP had technical or cost concerns about preserving playbacks, the appropriate recourse would have been to petition the Board to modify its order.

⁴² Initiating Order at Appendix A-Part III Requests 2-3 (Amtrak).

⁴³ Initiating Order at Appendix A-Part III Request 43 (Amtrak); Appendix A-Part IV Request 21 (UP; BNSF).

⁴⁴ Initiating Order at Appendix A-Part IV Request 11 (UP; BNSF).

⁴⁵ Initiating Order at Appendix A-Part IV Requests 12-13 (UP; BNSF).

⁴⁶ See Feb. 13, 2024 Order at 4-6.

Parties are not permitted unilaterally to excuse themselves from compliance with Board-ordered preservation obligations.

B. Expedited Relief Will Ensure That Important Evidence is Preserved

As discussed above, dispatch playbacks created after the Relevant Period are important evidence for evaluating the causes of delay, evaluating recommendations to improve service, and fashioning equitable relief. To ensure dispatch playbacks are being preserved, and that evidence instrumental to the Board's investigative and remedial functions is not lost, Amtrak respectfully requests that the Board issue the show cause order on an expedited basis. Amtrak also respectfully requests that the Board confirm that all other parties to this proceeding have suspended any automatic destruction of dispatch playbacks related to *Sunset Limited* Trains.

IV. CONCLUSION

For the reasons stated above, Amtrak respectfully requests that the Board order UP to show cause as to why it concluded that dispatch playbacks were not subject to the Board's broad and unambiguous Preservation Order, and order UP to immediately suspend its automatic destruction policy for dispatch playbacks for rail lines used by *Sunset Limited* Trains for the duration of the proceeding. Amtrak respectfully reserves the right to seek additional and appropriate relief for UP's failure to comply with the Preservation Order, including for any spoliation of evidence.

Dated: April 10, 2024

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CERTIFICATE OF SERVICE

I, Jessica Ring Amunson, certify that copies of this document are simultaneously being provided by email to all parties identified on the service list for this proceeding, Docket Number NOR 42175.

April 10, 2024

/s/ Jessica Ring Amunson
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EXHIBIT A

REDACTED – HIGHLY CONFIDENTIAL

EXHIBIT B

REDACTED – HIGHLY CONFIDENTIAL

EXHIBIT C

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

**AMTRAK’S MOTION TO COMPEL PRODUCTION
OF DOCUMENTS FROM UNION PACIFIC RAILROAD COMPANY**

The National Railroad Passenger Corp. (“Amtrak”) hereby moves the Surface Transportation Board (“Board”) to compel Union Pacific Railroad Company (“UP”) to timely produce to Amtrak the following categories of documents that Amtrak requested in discovery on September 12, 2023, and that UP has failed to produce: (1) dispatching tapes and other documents logging or recording dispatching decisions; (2) communications pertaining to dispatching decisions; and (3) certain agreements between UP and freight customers.¹

Introduction

When the Board opened this investigation into the substandard performance of Amtrak’s *Sunset Limited* Trains 1 and 2 pursuant to 49 U.S.C. § 24308(f), the Board explained that it was well-suited to take the lead in developing an investigative record. The Board also explained that increased access to data would allow it to focus the investigation. To that end, the Board issued questions, data requirements, and instructions meant to guide development of the record, but also

¹ In making this motion, Amtrak does not waive and expressly reserves all rights to seek additional relief regarding the sufficiency of UP’s discovery responses and document productions. Until December 19, 2023, UP had produced just 23 documents in response to Amtrak’s September 12, 2023 document requests. UP produced six additional documents responsive to those requests late on December 19, 2023, and Amtrak is assessing the sufficiency of UP productions to date. Amtrak is also assessing the sufficiency of separate responses and objections to discovery that UP provided on December 19, 2023.

permitted a limited period for party-led discovery to augment the record development by the Board.² Consistent with the Board's Order, Amtrak served UP with targeted discovery concerning the causes of delay to *Sunset Limited* Trains or the failure to provide those trains with preference over freight transportation.

As pertinent here, Amtrak in its requests sought dispatching records and communications critical to evaluating UP's compliance with Amtrak's preference rights under 49 U.S.C. § 24308(c), and contracts necessary to evaluate UP incentives in directing traffic over its network. These documents are relevant and, to the extent preserved, are within UP's possession, custody, and control. Their timely production is necessary to ensure that the parties can provide the Board with a complete record. Their timely production is also necessary to address serious information asymmetries that will preclude the Board and Amtrak from testing important claims concerning, among other things, what caused delay to particular *Sunset Limited* Trains, why dispatchers chose to delay particular *Sunset Limited* Trains, whether financial incentives affect decisions to delay *Sunset Limited* Trains, and the purported absence of alternatives to dispatching moves by UP that prioritized the movement of freight traffic over *Sunset Limited* Trains.

Addressing these issues will be essential as this investigation proceeds and the Board fulfills its mandate under Section 213. By statute, the Board must determine the causes of delay to *Sunset Limited* Trains and identify reasonable measures and recommendations to improve *Sunset Limited* service.³ In this first phase of the proceeding, the Board will also decide whether delays or the failure to achieve minimum standards are attributable to UP's failure to provide preference to *Sunset Limited* Trains.⁴

² See July 11, 2023 Order ("Order") at 11.

³ See 49 U.S.C. § 24308(f).

⁴ See Order at 14.

Additionally, in its responses to the Board's investigative questions, UP made representations or claims that implicate each of these matters. For example, UP told the Board that its interpretation of preference involves balancing delays to Amtrak trains with impacts on other trains and the network as a whole. UP also informed the Board that dispatchers may decide to delay Amtrak trains and that they are required to communicate with their managers when doing so. And UP has made clear that it considers financial incentives in moving passenger trains over the rail network. Developing a complete record on these party-representations, and matters within the federally-mandated scope of this investigation, requires the timely production of UP's dispatching records, communications concerning dispatching decisions, and certain commercial contracts. For those reasons, and others set out below, Amtrak respectfully requests that the Board require that UP produce the requested documents immediately, so that this proceeding can continue without undue delay.

BACKGROUND

On July 11, 2023, the Board instituted an investigation into the substandard on-time performance of Amtrak's *Sunset Limited* Trains. In doing so, the Board adopted a procedural framework involving two stages, an investigative stage and a remedial stage.⁵ Order at 12. In its initiating Order, the Board concluded that "certain aspects of the data and information development in this proceeding should be directed by the Board." *Id.* at 11. It also emphasized that developments in regulatory structure and the unprecedented availability of detailed passenger train performance data would enable the Board to focus the investigation. *Id.*

⁵ The Board will only progress to the remedial stage should it find that delays or failures to achieve minimum standards are attributable to a rail carrier's failure to provide preference to Amtrak over freight transportation, as required under 49 U.S.C. § 24308(f).

Consistent with these goals, the Board issued “specific data requirements, questions, and instructions to guide development of the record.” *Id.* Each party to the investigation received submission requirements and questions from the Board, *see id.* at 19-38, and each party was ordered to preserve “all documents and/or data that relate to the subject matter of this investigation . . . during the pendency of this proceeding.”⁶ Order at 16. Amtrak was ordered to respond to 44 data submission requirements, document submission requirements, and questions. UP was ordered to respond to 30 data submission requirements, document submission requirements, and questions.⁷

The Board also permitted a limited period for party-directed discovery. Amtrak and UP have taken vastly different approaches in response to the Board’s directions. After issuance of the Order, UP served *150 additional discovery requests* on Amtrak. The sheer volume of these requests—more than three times the number issued to Amtrak by the Board—was flatly inconsistent with Board efforts to focus the investigation. Furthermore, many of UP’s requests sought to expand the scope of discovery beyond the route at issue in this investigation, to expand the time period applicable to discovery beyond the Relevant Period, or to impose production obligations that were unduly burdensome, disproportionate to the needs of the proceeding, and otherwise objectionable. Other UP requests were overlapping or entirely duplicative of Board requests, shifting to Amtrak the burden and expense of identifying the amount and extent of

⁶ The Board declined to require the parties to designate a point of contact responsible for overseeing the preservation of records because it expected the parties to implement the preservation order professionally. Order at 16. However, the Board reiterated that documents should be preserved “regardless of [any party’s] ongoing document retention policy or other data destruction practices.” *Id.* Additionally, Amtrak’s Complaint and Proposed Procedures, filed in December 2022, put UP on notice of the need to preserve documents related to the *Sunset Limited* and the allegations in Amtrak’s Complaint.

⁷ Among other things, the Board required that UP produce documentation about its dispatching procedures during the Relevant Period, produce documentation about any computer assisted dispatching used during the Relevant Period, and provide explanations for the rules or algorithms programmed into any computer system that determines or recommends dispatching solutions. *Id.* at 35.

cumulative discovery for a considerable number of requests. On September 1, 2023, Amtrak filed a Motion for a Protective Order seeking to address many of these issues. *See* Amtrak's Motion for a Protective Order Pursuant to 49 C.F.R. § 1114.21(c) (filed Sept. 1, 2023). Following a conference call regarding Amtrak's Motion for a Protective Order, Judge McCarthy ordered that duplicative discovery would not be permitted, that good cause would be required for discovery relating back to before November 16, 2020, and that Amtrak and UP meet and confer regarding the 150 UP discovery requests. *See* Order Memorializing September 7, 2023 Conference Call (S.T.B. served Sept. 15, 2023).

Pursuant to Judge McCarthy's Order, Amtrak and UP engaged in several lengthy discussions to address the appropriate scope of UP's discovery requests to Amtrak and then exchanged several rounds of correspondence. Notwithstanding the volume of UP requests that required evaluation, Amtrak addressed discovery matters promptly, including by setting out its position in correspondence dated October 5, October 31, and November 14, 2023. Amtrak also worked expeditiously to produce documents. As of December 8, 2023, Amtrak had largely completed its document productions to UP and produced over 2,000 documents, including over 1,000 emails and attachments, consisting of over 45,000 pages.⁸

Unlike UP, Amtrak served narrow and targeted discovery requests intended to develop the factual record without excessive litigation cost. In contrast to UP's 150 additional requests, Amtrak's First Set of Discovery Requests included just 24 document requests and eight interrogatories, designed to avoid duplicating the Board's inquiries and appropriately scoped to the proceeding. *See* **Ex. A** (Amtrak's First Set of Requests for Production of Documents to Union Pacific Railroad Company); **Ex. B** (Amtrak's First Set of Interrogatories to Union Pacific Railroad

⁸ After conducting further review, Amtrak identified and is today producing another 206 documents.

Company). Among other things, Amtrak requested that, for the Relevant Period as defined by the Board, UP produce three categories of documents addressed in this motion: (1) dispatching records; (2) communications concerning dispatching policies, practices, procedures, and decisions; and (3) agreements with freight customers involving certain types of variable compensation.⁹

On October 4, 2023, UP served responses and objections to Amtrak's First Set of Discovery Requests. In response to Amtrak's request for dispatch playbacks and other dispatching records from the Relevant Period, UP stated that it would "allow Amtrak representatives to review dispatching playbacks involving train movements on the UP Lines in person at Union Pacific's facilities in, Omaha Nebraska." *See, e.g., Ex. C* (UP's Responses and Objections to Amtrak's First Set of Requests for Production of Documents) at Response 6. In response to Amtrak's request for communications about dispatching decisions from the Relevant Period, UP generally objected to producing communications. *Id.* at Responses 3, 4, and 9. In response to Amtrak's request for agreements with shippers, UP objected to producing its agreements. *Id.* at Response 15.

On October 23, 2023, the parties met and conferred. One of the topics of discussion was the technical feasibility of providing Amtrak with dispatching playback tapes rather than having Amtrak personnel travel to Omaha. The parties also discussed production of communications and other categories of documents, including customer contracts. Promptly thereafter, Amtrak requested that UP provide its revised position on several of Amtrak's discovery requests. *See, Ex. D* at 2-5 (Oct. 26, 2023 Email from A. Trepp to Rosenthal). During subsequent discussions, UP represented that it would respond to Amtrak's October 26, 2023 correspondence, that UP was conducting searches for the materials that Amtrak requested, but that UP required more time to evaluate certain requests, including the technical feasibility of providing Amtrak with dispatching

⁹ *See Ex. A* at 8-9 (Request Nos. 3, 4, 9, and 15); *see also* Appendix A (including full requests, for ease of reference).

playbacks. *See id.* at 1 (Nov. 28, 2023 Email from M. Rosenthal to A. Trepp); **Ex. E** at 1 (Dec. 8, 2023 Email from M. Rosenthal to A. Trepp).

Over several weeks, Amtrak continued to press UP for its response on these issues. *See, Ex. D* at 1-2 (Nov. 22, 2023 Email from A. Trepp to M. Rosenthal); *id.* at 1 (Nov. 28, 2023 Email from A. Trepp to M. Rosenthal); **Ex. E** at 1 (Dec. 8, 2023 Email from A. Trepp to M. Rosenthal). Amtrak did not receive UP's position on these issues until December 11, 2023, more than six weeks after Amtrak asked UP to provide its position on outstanding discovery, and nearly three months after Amtrak propounded its first set of discovery requests.

In its response, UP completely reversed its position on dispatch playbacks, informing Amtrak for the first time that not only would UP not be providing dispatch playbacks to Amtrak, but also that it would be futile for Amtrak to come to Omaha to view dispatch playbacks because such playbacks apparently were no longer available for the Relevant Period. *See, Ex. F* at 6-7 (Dec. 11, 2023 Email from M. Rosenthal to A. Trepp).¹⁰

The parties exchanged additional correspondence. On December 14, 2023, UP asserted that its initial offer to allow Amtrak to view dispatch playbacks for the Relevant Period was based on "an apparent miscommunication or misunderstanding," indicated that it would not produce the requested agreements, and declined to provide a date certain even for beginning its production of communications. *Id.* at 2-3 (Dec. 14, 2023 Email from M. Rosenthal to A. Trepp).

ARGUMENT

I. Dispatching Records

¹⁰ UP also failed to commit to providing Amtrak with dispatching communications by the close of the discovery period and advised Amtrak that UP required still more time to evaluate whether it would produce the requested agreements. *See, id.* at 5-9 (Dec. 11, 2023 Email from M. Rosenthal to A. Trepp).

Amtrak seeks production of “All dispatching tapes, dispatching playbacks, and other documents logging or recording Dispatching Decisions, including but not limited to Dispatching Decisions related to the dispatching of all trains entering, exiting, continuing, or otherwise traversing” the rail lines dispatched by UP on which any *Sunset Limited* Train traveled during the Relevant Period.¹¹

There is no dispute that these documents (“Dispatching Records”) are relevant, nor could there be. The timely production of UP’s Dispatching Records is essential to the conduct of this investigation. UP either exclusively or jointly owns and controls nearly all of the 1,997-mile *Sunset Limited* route. Accordingly, obtaining the Dispatching Records and scrutinizing how UP dispatches *Sunset Limited* Trains is essential to (i) determining to what extent delays or the failure to achieve minimum standards are due to causes that could reasonably be addressed by the primary rail carrier over whose tracks the trains operate, (ii) determining whether delays or failures to achieve minimum standards are attributable to the failure to provide *Sunset Limited* Trains with preference over freight transportation, and (iii) making recommendations regarding reasonable measures to improve service. These determinations and recommendations are at the core of the Board’s responsibilities under the governing statutory framework.

Without Dispatching Records, Amtrak will be significantly hindered in its ability to provide the Board with briefing that further develops the record, including because certain information about dispatching decisions is uniquely in the possession of UP. And without Dispatching Records, the Board and Amtrak may be unable to test claims UP may make concerning what caused delay to particular *Sunset Limited* Trains, why dispatchers chose to delay

¹¹ Ex. A at 8 (Request No. 6).

particular *Sunset Limited* Trains, and the purported absence of alternatives to dispatching moves that prioritized the movement of freight over *Sunset Limited* Trains.

An order compelling the production of Dispatching Records is particularly appropriate in view of UP's discovery conduct. Amtrak propounded the request for Dispatching Records on September 12, 2023. UP responded on October 4, 2023, indicating that it would "allow Amtrak representatives to review dispatching playbacks involving train movements on the UP Lines in person at Union Pacific's facilities in Omaha, Nebraska." **Ex. C** (UP's Responses and Objections to Amtrak's First Set of Requests for Production of Documents) at Response 6. This response was inadequate, for example because it attempted (without explanation) to place significant constraints on Amtrak's ability to review important evidence, and was therefore at odds with the Board's interest in developing a complete and transparent record. Amtrak thus persisted in its request that UP produce the dispatching playbacks. However, in reliance on the availability of those documents, and with a view towards compromise, Amtrak did not press for other documents responsive to its request.

Over the next six weeks, Amtrak repeatedly asked for an update on whether UP had identified technical means to produce the dispatch playbacks, and was repeatedly assured that UP was still evaluating.¹² Then, on December 11, 2023, UP inexplicably reversed course, indicating that it had "determined that it does not possess dispatching playback documents for the Relevant Period."¹³ After Amtrak pressed for further information (reserving its rights to seek all documents responsive to the request for Dispatching Records in light of UP's sudden reversal), UP responded

¹² **Ex. D** at 1-2 (Nov. 22, 2023 Email from A. Trepp to M. Rosenthal); *id.* at 1 (Nov. 28, 2023 Email from A. Trepp to M. Rosenthal); **Ex. F** at 9 (Dec. 8, 2023 Email from A. Trepp to M. Rosenthal).

¹³ **Ex. F.** at 6-7 (Dec. 11, 2023 Email from M. Rosenthal to A. Trepp).

only that its initial response for dispatching playbacks was based on an apparent miscommunication or misunderstanding about the time period at issue.

To date, UP has not explained whether the dispatching playbacks previously existed, when they became unavailable, why they became unavailable, and why they were not retained pursuant to the {{ [REDACTED] }}.¹⁴

Nor has UP indicated that it has any intention of providing other materials responding to Amtrak's request for Dispatching Records.¹⁵ Responsive Dispatching Records must be produced, and Amtrak must have time to evaluate those records and the sufficiency of any production before it can prepare an opening brief. To avoid unduly delaying the Board's investigation, UP should be compelled to produce all Dispatching Records immediately.

In the alternative, Amtrak respectfully requests that the Board prohibit UP from relying on any and all UP Dispatching Records in this proceeding. Specifically, UP may not argue that its dispatchers were forced to delay *Sunset Limited* Trains because they did not have adequate alternatives, nor may UP argue that a dispatching decision that results in a failure to provide Amtrak with preference in using a rail line, junction, or crossing was the only alternative available to a dispatcher.

¹⁴ See **Ex. G** at 23 (UP-SL-0012160).

¹⁵ UP noted its production of signal lining information to the Board, but that information cannot possibly substitute for Dispatching Records, {{ [REDACTED] }}. UP also offered to make inquiries about what Dispatching Records UP keeps to comply with its regulatory obligations under 49 CFR 228.17 and 49 CFR 228.9, which require that railroads keep dispatching records for at least two years. But UP has not explained why it waited until December to undertake this inquiry, when documents retained to comply with these obligations are clearly encompassed by Amtrak's request for Dispatching Records. Likewise, the proposal to evaluate what documents exist, rather than produce them expeditiously, presaged further delay and the need for Board intervention.

II. Communications

Amtrak seeks communications concerning policies, procedures, and practices applicable to dispatching decisions on the UP Lines.¹⁶ Amtrak also seeks communications concerning dispatching decisions involving *Sunset Limited* Trains.¹⁷ UP has agreed to produce communications responsive to the requests.¹⁸ However, more than three months after Amtrak propounded its discovery requests, UP has not produced a single communication. Although UP reports it has been running searches since the parties met and conferred in October,¹⁹ and although Amtrak has emphasized that it requires time to review the sufficiency of any production,²⁰ UP has not even committed to a date on which it will begin producing communications.²¹ That is untenable.

The communications that Amtrak seeks bear on important issues in this proceeding. For example, in its response to the Board's questions, UP stated that "[i]f a decision is made to delay an Amtrak Train, dispatchers must inform their Corridor Manager, who in turn notifies Union Pacific's Amtrak Corridor Desk."²² However, despite this representation to the Board, UP has told Amtrak that UP does not expect to produce a significant number of these (or other) communications.²³ That is surprising. Given the volume of delays to *Sunset Limited* Trains, Amtrak would expect to see a corresponding number of communications between dispatchers and

¹⁶ See **Ex. A** at 8 (Request Nos. 3 and 4).

¹⁷ See *id.* at 9 (Request No. 9).

¹⁸ **Ex. F** at 5-9 (Dec. 11, 2023 Email from M. Rosenthal to A. Trepp).

¹⁹ **Ex. D** at 3 (Oct. 26, 2023 Email from A. Trepp to M. Rosenthal).

²⁰ **Ex. F** at 3-5 (Dec. 12, 2023 Email from A. Trepp to M. Rosenthal).

²¹ *Id.* at 2-3 (Dec. 14, 2023 Email from M. Rosenthal to A. Trepp).

²² Union Pacific Railroad Company's Response to Appendix A, Part IV (filed Sept. 25, 2023) ("UP Response"), at 32.

²³ **Ex. F** at 2-3 (Dec. 14, 2023 Email from M. Rosenthal to A. Trepp).

corridor managers. To the extent such communications are produced, they should illustrate how UP characterizes the circumstances under which the decision to delay *Sunset Limited* is taken, and therefore assist the Board and Amtrak in evaluating causes of delay to *Sunset Limited* Trains and compliance with the statutory preference obligation. Even if few such communications are produced, that will be informative, enabling the Board to assess whether Union Pacific is adequately documenting the circumstances under which dispatchers make a choice to delay *Sunset Limited* Trains.

To take another example, UP has told the Board that its interpretation of preference requires balancing delays to *Sunset Limited* Trains against impacts on other trains and UP's rail network.²⁴ Communications concerning the policies, procedures, and practices applicable to dispatching decisions on the UP Lines, including the explicit communications to dispatcher supporting those policies, procedures, and practices, may provide insight into the consequences of implementing that (incorrect) view of preference for on-time performance, including by identifying the range of circumstances when UP has delayed *Sunset Limited* Trains because of impacts to other trains or the network as a whole.

Because the requested communications bear directly on important issues in this proceeding, Amtrak must have sufficient time to review them before preparing its opening brief. UP has not committed to providing such communications by the close of the discovery period. In fact, UP has not even committed to a date by which it will begin, let alone end, its production of communications. As UP continues to delay the production of these communications, the efficient conduct of this proceeding requires that they be compelled immediately.

²⁴ See UP Response at 32 (representing that dispatchers are taught that "Amtrak's preference does not mean they should disregard impacts to other trains or the network as a whole to ensure Amtrak trains are never slowed or stopped en route").

III. Contracts

In its September 12, 2023 discovery requests to UP, Amtrak sought agreements between UP and freight customers that shipped over the UP Lines and “for which UP’s compensation varies depending on the time or timeliness of the delivery of products or commodities, or depending on availability of loaded cars for unloading or empty cars for loading of customer products or commodities.”²⁵ UP objected to the request as irrelevant and unduly burdensome.²⁶ Those objections lack merit.

Amtrak explained to UP during the meet and confer process that the requested agreements are relevant to UP dispatching priorities and UP incentives. As its response to Board Investigative Question No. 4 makes clear, UP considers contractual incentives and penalties in moving passenger trains over its lines.²⁷ Even without that indication that financial incentives can impact dispatching decisions, Amtrak would be entitled to test the power of contrary commercial incentives, particularly because UP states that its interpretation of its statutory obligation to provide Amtrak with preference over freight transportation in using a rail line, junction, or crossing apparently involves weighing delays to the *Sunset Limited* against impacts on freight traffic and its network as a whole. If UP has powerful financial or other commercial incentives to dispatch certain freight trains ahead of the *Sunset Limited*, such as priority intermodal traffic, that information may bear on the causes of delay to the *Sunset Limited* and affect Board findings on those and other factual issues within the scope of its investigative mandate. *See Waterloo Ry.—Adverse Aban.—Lines of Bangor & Aroostook R.R. & Van Buren Bridge Co. in Aroostook Cnty.,*

²⁵ Ex. A at 9 (Request No. 15).

²⁶ Ex. C at 12 (Response to Request No. 15).

²⁷ *See e.g.*, UP Response at 11-12 (representing that Union Pacific had less incentive to seek adjustment of operating schedules when the consequence for failure to achieve on-time performance was defined by {{{[REDACTED]}}}).

Me., AB 124 (Sub.-No. 2), et al, slip. op. at 2. (STB served Nov. 14, 2003) (“The requirement of relevance means that the information might be able to affect the outcome of a proceeding.”)

With respect to burden, Amtrak tried to work with UP to address its concerns. When UP initially asserted that reviewing agreements to determine whether they contained variable compensation would impose undue burdens, Amtrak suggested that UP simply produce all agreements with shippers using the UP Lines at issue, and permit Amtrak to undertake the evaluation of variable compensation.²⁸ UP took more than six weeks to consider that proposed compromise, circling back to reject it on December 14, 2023.²⁹ In rejecting the compromise, and reiterating its objection to the original request, UP ostensibly argued that the process of identifying applicable documents would require a special study. But the need to take steps to identify agreements maintained in the ordinary course of business does not transform a request for those agreements into a special study. Moreover, UP has not substantiated the burden required to identify the agreements, with respect to either time or cost.³⁰ Given the importance of understanding whether and how decisions to slow or stop the *Sunset Limited* affect UP’s broader financial performance or commercial priorities, UP should be required to show why the production of these agreements is so burdensome. Even if the Board determines that UP has demonstrated undue burden here, Amtrak respectfully requests that UP be compelled to produce only those agreements with its “premium” trains.³¹

²⁸ Compare **Ex. C** at 12 (Response to Request No. 15) with **Ex. D** at 4 (Oct. 26, 2023 Email from A. Trepp to M. Rosenthal).

²⁹ Compare **Ex. D** at 4 (Oct. 26, 2023 Email from A. Trepp to M. Rosenthal), with **Ex. F** at 2-3 (Dec. 14, 2023 Email from M. Rosenthal to A. Trepp).

³⁰ **Ex. F** at 2-3 (Dec. 14, 2023 Email from M. Rosenthal to A. Trepp).

³¹ See e.g., <https://www.up.com/customers/premium/>.

Finally, UP in its most recent correspondence indicated that production of its agreements with customers was not justified because the agreements are highly confidential. But concerns about the confidentiality of responsive documents have been adequately addressed through entry of an appropriate protective order. *See Canadian Pac. Ry. Ltd., et al.—Control—Kansas City S., et al.*, FD 36500, slip op. at 2 (S.T.B. served April 13, 2022) (“The information is directly relevant to an issue that [the responding party] raised, and the Protective Order in this matter protects against any unauthorized disclosure.”). UP has not explained why the protective order is insufficient to protect agreements with its freight customers, and Amtrak sees no reason why the protective order is insufficient to protect such agreements, particularly given that the Board has already requested agreements between Amtrak and certain contractual counterparties, including UP and BNSF.³²

CONCLUSION

For the foregoing reasons, Amtrak respectfully requests that the Board grant the motion to compel and order UP to produce the request documents immediately, and without causing additional, undue delay to the proceeding.³³

³² *See* Order, App. A – Part III, at 30-31 (Request 40); Nov. 20, 2023 Order, App. – Part I, at 6 (Additional Question to Amtrak).

³³ Amtrak reserves the right to seek exclusion of any evidence that is responsive to these requests for production if it is not produced before the Board sets a briefing schedule and is offered in subsequent written, oral, or other submissions to the Board. Amtrak also reserves the right to seek an adverse inference should UP fail to provide discovery on the above three issues.

Dated: December 20, 2023

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APPENDIX A

Request No.	Request Type	Request Language
6	Dispatching Records	“All dispatching tapes, dispatching playbacks, and other documents logging or recording Dispatching Decisions, including but not limited to Dispatching Decisions related to the dispatching of all trains entering, exiting, continuing, or otherwise traversing” the rail lines dispatched by UP on which any <i>Sunset Limited</i> Train traveled during the Relevant Period. Ex. A at 8 (Request No. 6).
3, 4, 9	Communications	“All communications between or among current and/or former UP management, employees, or other personnel concerning policies, practices, and procedures applicable to Dispatching Decisions.” Ex. A at 8 (Request No. 3). “All communications between or among UP and BNSF, CN, NOPB, SCRRA, any governmental entity, and/or any third-party concerning policies, practices, and procedures applicable to Dispatching Decisions.” Ex. A at 8 (Request No. 4). “All communications between UP supervisors and dispatchers pertaining to Dispatching Decisions involving Sunset Limited Trains.” Ex. A at 9 (Request No. 9).
15	Agreements	All agreements with freight customers using any portion of the UP Lines for which UP’s compensation varies depending on the time or timeliness of the delivery of products or commodities, or depending on availability of loaded cars for unloading or empty cars for loading of customer products or commodities. Ex. A at 9 (Request No. 15).

CERTIFICATE OF SERVICE

I, Jessica Ring Amunson, certify that copies of this document are simultaneously being provided by email to all parties identified on the service list for this proceeding, Docket Number NOR 42175.

December 20, 2023

/s/ Jessica Ring Amunson
Jessica Ring Amunson

EXHIBIT A

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

**AMTRAK'S FIRST SET OF REQUESTS FOR PRODUCTION
OF DOCUMENTS TO UNION PACIFIC RAILWAY COMPANY**

Pursuant to 49 C.F.R. §§ 1114.30 and the Surface Transportation Board's Order in the captioned matter served July 11, 2023, the National Railroad Passenger Corporation ("Amtrak") serves this First Set of Requests for Production of Documents on Union Pacific Railroad Company ("UP"). These Requests are to be interpreted and answered in accordance with the Definitions and Instructions below. Amtrak requests that UP provide its responses and objections to these Requests within fifteen (15) days of service of these Requests, unless otherwise agreed upon by the parties.

DEFINITIONS

1. The terms "UP," "You," or "Your" refer to Union Pacific Railroad Company, as well as its corporate affiliates, parents, subsidiaries, business units, divisions, predecessors, representatives, officers, agents, counsel, employees, consultants, and any person authorized to act or acting on its behalf.
2. The term "BNSF" refers to BNSF Railway Company, as well as its corporate affiliates, parents, subsidiaries, business units, divisions, predecessors, representatives, officers, agents, counsel, employees, consultants, and any person authorized to act or acting on it.
3. The term "CN" refers to Canadian National Railway Company, its subsidiary Illinois Central Railroad Company, as well as each of their corporate affiliates, parents, subsidiaries,

business units, divisions, predecessors, representatives, officers, agents, counsel, employees, consultants, and any person authorized to act or acting on its behalf.

4. The term “SCRRA” refers to the Southern California Railroad Authority, as well as its corporate affiliates, parents, subsidiaries, business units, divisions, predecessors, representatives, officers, agents, counsel, employees, consultants, and any person authorized to act or acting on its behalf.

5. The term “NOPB” refers to New Orleans Public Belt Rail Corporation, as well as its corporate affiliates, parents, subsidiaries, business units, divisions, predecessors, representatives, officers, agents, counsel, employees, consultants, and any person authorized to act or acting on its behalf.

6. The term “2000 Operating Agreement” means the Agreement dated January 1, 2000, between Amtrak and UP, including all amendments to that Agreement.

7. The term “algorithm” refers to any program, software, or set of rules used to determine an outcome based on one or more factors.

8. The term “communication” means any oral, written, or electronic transmission of information, including but not limited to meeting, discussions, conversations, telephone calls, memoranda, white papers, letters, email messages, and notes.

9. The term “Contractual OTP” means on-time performance of trains as calculated for purposes of determining compensation owed to Union Pacific under the 2000 operating agreement.

10. The term “Customer OTP” means on time performance of trains as calculated under the customer on-time performance metric and/or minimum standard promulgated by the Federal Railroad Administration, and has the same meaning as in the Complaint. *See, e.g., Complaint ¶¶ 48-51.*

11. The term “dispatcher” refers to an individual who directs the movement of trains

within a division of trackage and coordinates their movement from one division to another, whether individually or in conjunction with a joint desk.

12. The term “Dispatching” refers to the direction of trains within a division of trackage and/or the coordination of movement of trains from one division to another, whether individually or in conjunction with a joint desk.

13. The term “Dispatching Decisions” refers to decisions that involve Dispatching of any freight or passenger train on the UP Lines.

14. The term “documents” shall be construed broadly, to include all material subject to discovery under 49 C.F.R. § 1114.30(a)(1) or any other Board rule or regulation, and to include every copy of a document not identical to the original or any other copy. For the avoidance of doubt, the term “documents” includes every writing, recording, photograph, summary, spreadsheet, or other record in any form, whether handwritten, printed, typed, taped, electronic, or in any other graphic, digital, magnetic, optical, or mechanical form, however produced, reproduced, or recorded, and includes electronic documents (such as electronic mail messages and all attachments to mail messages).

15. The term “HRD” refers to host-responsible delay(s) and has the same meaning as in the Complaint. *See, e.g.*, Complaint ¶ 52.

16. The term “Investigative Period” means the period of time beginning October 1, 2021 through and including December 8, 2022.

17. The term “on-time performance” means on-time performance as determined, discussed, recorded, or reported for any purpose, including without limitation Contractual OTP or Customer OTP.

18. The term “Pending Board Requests” refers to interrogatories and document requirements for UP that are set out in Appendix A – Part IV of the Surface Transportation Board’s

July 11, 2023 Decision in the above-captioned proceeding.

19. The term “Preference” refers to the statutory requirement that, 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 Surface Transportation Board orders otherwise under 49 U.S.C. § 24308(c).

20. The term “RPSA” means the Rail Passenger Service Act of 1970, Pub. L. No. 91-518, 84 Stat. 1327, including all amendments thereto (codified at 49 U.S.C. §§ 24101 *et seq.*).

21. The term “Sunset Limited Trains” refers to Amtrak Trains 1 and 2, as described more fully in Amtrak’s Complaint. Each of the Sunset Limited Trains is individually referred to as a Sunset Limited Train.

22. The term “UP Lines” means any rail line, junction, or crossing that is owned, dispatched, jointly dispatched, controlled, managed, directed, supervised, maintained, or administered by UP, and on which any Sunset Limited Train transited between October 1, 2021 and December 8, 2022.

INSTRUCTIONS

1. Amtrak has tried to minimize duplication between these Requests and the Pending Board Requests. If UP asserts that one or more of the following Requests is covered by a Pending Board Request, UP must identify the overlapping Pending Board Request in its response, and also produce all responsive documents not otherwise being produced to the Board.

2. Unless otherwise indicated, the Requests below cover the time period from October 1, 2021 through and including December 8, 2022.¹

3. Please provide separate written responses to all of the following Requests, and repeat each Request and the number of each Request with each response. If you object to any Request, identify the number of the Request to which you object, state the basis for your objection in sufficient detail so as to permit the adjudication of the validity of the objection, and produce any documents responsive to any portion or portions of the Request that you do not find objectionable.

4. Documents sought in these Requests include documents currently or previously within UP's possession, custody or control, as well as those documents which come into UP's possession subsequent to service thereof. Each of the following Requests is continuing in nature and Amtrak hereby requests that if you obtain any additional responsive documents at any later date, you promptly so inform Amtrak and produce those documents.

5. When any Request calls for the production of any portion of any document, the entire document containing any such portion must be produced.

6. Documents offered in response to these Requests must be furnished in as organized and usable form as possible, and should be produced in a manner organized and labeled to correspond to the following Requests. Electronically stored information shall be produced in a

¹ Amtrak reserves the right to revise this time period following any written decision from Judge McCarthy regarding the appropriate scope of discovery in this proceeding and/or following the parties' forthcoming meet and confer.

method and manner as agreed upon by the parties.

7. If any responsive document or communication has been destroyed, lost, or become beyond UP's possession, custody, or control, UP must provide a list identifying the document or communication as completely as possible, providing (1) the date the document or communication was destroyed, lost, or transferred beyond UP's control; (2) the manner of the destruction, loss, or transfer; (3) the reason for the destruction, loss, or transfer; (4) the person or entity authorizing the destruction, loss, or transfer; (5) the person or entity that destroyed, lost, or transferred the document or communication.

8. If UP asserts a claim of privilege regarding a document or communication, UP must provide a log identifying each document or communication as completely as possible, and UP must produce any portion of a document or communication that contains non-privileged and responsive material.

9. The present tense shall be construed to include the past and future tenses and the past and future tenses shall be construed to include the present tense as required by the context to elicit all information discoverable within the broadest scope of these Requests.

10. The singular shall be construed to include the plural and the plural shall be construed to include the singular, whenever context permits. The terms such as "and" and "or" have both conjunctive and disjunctive meanings, and shall be construed in the broadest and most inclusive manner, in order to bring into the scope of each Request all responsive information that might otherwise be construed to be outside the scope of the Request.

11. Words such as "include" and "including" are illustrative and not limitative, and shall be construed in the broadest and most inclusive manner, in order to bring into the scope of each Request all responsive information that might otherwise be construed to be outside the scope of the Request.

12. The terms “relating to,” “related to,” “concerning,” and “showing” are to be construed broadly, to include: addressing, referring to, concerning, showing, concerning, comprising, identifying, stating, consisting of, evidencing, alluding to, responding to, connected with, discussing, showing, describing, reflecting, analyzing, constituting, setting forth, in respect of, incorporating, mentioning, embodying, containing, studying, reporting on, commenting on, considering, recommending, constituting in any way, or having any logical or factual connection with the subject matter. Likewise, the terms “any” and “all” shall mean “each and every.”

13. Production must be made to outside counsel of record for Amtrak at Jenner & Block: Alex Trepp, 1099 New York Avenue N.W., Ste. 900, Washington, DC 20001, atrepp@jenner.com, with a copy to Albert Peterson, 1099 New York Avenue N.W., Ste. 900, Washington DC 20001 apeterson@jenner.com.

REQUESTS FOR PRODUCTION

1. All document management policies, retention policies, and/or retention schedules applicable to documents or communications relating or referring to (i) the On-Time Performance of Sunset Limited Trains, (ii) Dispatching Decisions, or (iii) policies, practices, and procedures that govern, affect, or apply to Dispatching Decisions, (iv) policies, practices, and procedures that govern, affect, or apply to the implementation of Preference.

2. All documents concerning UP policies, practices, and procedures relating to Dispatching Decisions, including but not limited to documents providing train or customer-specific instructions, or concerning or reflecting any modification of those policies, practices, and procedures during the Investigative Period.

3. All communications between or among current and/or former UP management, employees, or other personnel concerning policies, practices, and procedures applicable to Dispatching Decisions.

4. All communications between or among UP and BNSF, CN, NOPB, SCRRRA, any governmental entity, and/or any other third-party concerning policies, practices, and procedures applicable to Dispatching Decisions.

5. All documents constituting, concerning, or reflecting any Dispatching Decision that departed or deviated from the policies, practices, and procedures applicable to Dispatching Decisions, or otherwise failed to implement or comply with policies, practices, and procedures applicable to Dispatching Decisions.

6. All dispatching tapes, dispatching playbacks, and other documents logging or recording Dispatching Decisions, including but not limited to Dispatching Decisions related to the dispatching of all trains entering, exiting, continuing, or otherwise traversing the UP Lines.

7. All daily system, region, or division performance reports concerning any operations

on the UP Lines.

8. All documents concerning whether or under what circumstances a dispatcher responsible for Dispatching Decisions may override algorithmic Dispatching Decisions.

9. All communications between UP supervisors and dispatchers pertaining to Dispatching Decisions involved Sunset Limited Trains.

10. Documents sufficient to show any criteria used to evaluate or compensate dispatchers and all documents related to any evaluations, reviews, or other feedback provided to dispatchers responsible for Dispatching Decisions.

11. For the time period November 11, 2020 to Present, all documents relating to any investigations, audits, studies, reviews, analyses, or other similar evaluations conducted by UP regarding Dispatching Decisions, HRD, or Preference on the UP Lines.

12. All documents relating to any disciplinary actions taken or contemplated against a dispatcher and concerning one or more Dispatching Decisions.

13. All documents concerning any operational adjustment, scheduling adjustment, capital investment, or other similar action that UP has analyzed or considered to address, evaluate, or understand delays to freight or passenger trains traveling on the UP Lines, including all documents relating to the reason(s) UP did not implement any such adjustments, investment, or other similar actions.

14. All documents concerning UP efforts to obtain funds from federal, state, or other sources for capital expenditures on the UP Lines.

15. All agreements with freight customers using any portion of the UP Lines for which UP's compensation varies depending on the time or timeliness of the delivery of products or commodities, or depending on availability of loaded cars for unloading or empty cars for loading of customer products or commodities.

16. All documents constituting or concerning UP's current operating plan(s) for lines used by Sunset Limited Trains, and all documents constituting or concerning efforts to measure operational performance against UP's current operating plan(s) or operating schedule(s) for lines used by Sunset Limited Trains.

17. All corporate policies, protocols, guidance documents, or other materials related to the implementation of Preference, or used to evaluate the implementation of Preference.

18. Documents sufficient to show any procedures or systems used to implement or evaluate the implementation of Preference.

19. For the UP Lines, documents sufficient to associate locomotive numbers associated with each train that operated on a fixed schedule during the Investigative Period.

20. All documents analyzing, assessing, investigating, studying, reviewing or otherwise evaluating how the adoption and implementation of precision-scheduled railroading has affected the on-time performance of intercity passenger trains and/or affected the implementation of Preference.

21. All documents analyzing, assessing, investigating, studying, reviewing or otherwise evaluating how UP's network planning and design have affected, are affecting, or will affect the on-time performance of Sunset Limited Trains and/or implementation of Preference on the UP Lines, including but not limited to documents concerning any ongoing or anticipated capital investments that will affect UP's network capacity on the UP Lines.

22. All documents concerning policies, protocols, or procedures related to how You prioritize freight traffic on the UP Lines, or the dispatching of any intermodal or other trains carrying priority freight on the UP Lines.

23. For the time period November 11, 2020 to Present, all documents relating to any modeling, studies, reviews, analyses, investigations, or other similar evaluations conducted by UP regarding the Sunset Limited schedule or freight schedules on lines used by Sunset Limited Trains.

24. All documents reflecting or relating to UP's consideration of Sunset Limited Trains in determining, assessing, evaluating, studying, or otherwise considering freight volumes for lines used by the Sunset Limited Trains.

September 12, 2023

Respectfully submitted:

/s/ Jessica Ring Amunson

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*Counsel for National Railroad
Passenger Corporation*

CERTIFICATE OF SERVICE

I, Jessica Ring Amunson, certify that I have this day caused a copy of this document to be served upon UP by email to counsel for UP at the following email address:

Mrosenthal@Cov.Com

September 12, 2023

/s/ Jessica Ring Amunson
Jessica Ring Amunson

EXHIBIT B

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

AMTRAK'S FIRST SET OF INTERROGATORIES
TO UNION PACIFIC RAILWAY COMPANY

Pursuant to 49 C.F.R. §§ 1114.26 and the Surface Transportation Board's Order in the captioned matter served July 11, 2023, National Railroad Passenger Corporation ("Amtrak") serves this First Set of Interrogatories on Union Pacific Railroad Company ("UP"). These Interrogatories are to be interpreted and answered in accordance with the Definitions and Instructions below. Amtrak requests that UP provide its responses and objections to these Interrogatories within fifteen (15) days of service of these Interrogatories, unless otherwise agreed upon by the parties.

DEFINITIONS

1. The terms "UP," "You," or "Your" refer to Union Pacific Railroad Company, as well as its corporate affiliates, parents, subsidiaries, business units, divisions, predecessors, representatives, officers, agents, counsel, employees, consultants, and any person authorized to act or acting on its behalf.
2. The term "Sunset Limited Trains" refers to Amtrak Trains 1 and 2 as described more fully in Amtrak's Complaint. Each of the Sunset Limited Trains is individually referred to as a Sunset Limited Train.
3. The term "UP Lines" means any rail line, junction, or crossing that is owned, dispatched, jointly dispatched, controlled, managed, directed, supervised, maintained, or

administered by UP, and on which any Sunset Limited Train transited between October 1, 2021 and December 8, 2022.

4. The term “Dispatching Decisions” refers to decisions that involve Dispatching of any freight or passenger train on the UP Lines.

5. The term “algorithm” refers to any program, software, or set of rules used to determine an outcome based on one or more factors.

6. The term “dispatcher” refers to an individual who directs the movement of trains within a division of trackage and coordinates their movement from one division to another, whether individually or in conjunction with a joint desk.

7. The term “Dispatching” refers to the direction of trains within a division of trackage and/or the coordination of movement of trains from one division to another, whether individually or in conjunction with a joint desk.

8. The term “Pending Board Requests” refers to interrogatories and document requirements for UP that are set out in Appendix A – Part IV of the Surface Transportation Board’s July 11, 2023 Decision in the above-captioned proceeding.

9. The term “Preference” refers to the statutory requirement that, 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 Surface Transportation Board orders otherwise under Subsection 49 U.S.C. § 24308(c).

10. The term “Investigative Period” means the period of time beginning October 1, 2021 through and including December 8, 2022.

11. The terms “include” and “including” are illustrative and not limitative and shall be construed to elicit all information discoverable within the broadest scope of these Interrogatories.

12. The terms “and” and “or” have both conjunctive and disjunctive meanings as required

by the context to elicit all information discoverable within the broadest scope of these Interrogatories.

13. The terms “relating to,” “related to,” “concerning,” and “showing” are to be construed broadly, to include: addressing referring to, concerning, showing, concerning, comprising, identifying, stating, consisting of, evidencing, alluding to, responding to, connected with, discussing, showing, describing, reflecting, analyzing, constituting, setting forth, in respect of, incorporating, mentioning, embodying, containing, studying, reporting on, commenting on, considering, recommending, constituting in any way, or having any logical or factual connection with the subject matter.

14. The terms “any” and “all” shall mean “each and every.”

15. The present tense shall be construed to include the past and future tenses and the past and future tenses shall be construed to include the present tense as required by the context to elicit all information discoverable within the broadest scope of these Interrogatories.

16. The singular shall be construed to include the plural and the plural shall be construed to include the singular as required by the context to elicit all information discoverable within the broadest scope of these Interrogatories.

INSTRUCTIONS

1. Amtrak has endeavored to ensure that these Interrogatories do not duplicate those already submitted to UP by the Surface Transportation Board. To the extent UP asserts that one or more of the following Interrogatories is covered by a Pending Board Request, UP must provide citation to the relevant Board response and UP's answer for which information responsive to the Interrogatory may be found.

2. Unless otherwise indicated, the Interrogatories below cover the time period from October 1, 2021 through and including December 8, 2022.¹

3. Please provide separate written responses to each Interrogatory, and repeat the Interrogatory with each response. If you object to any Interrogatory, under 49 C.F.R. § 1114.26(a) state the basis for your objection in sufficient detail so as to permit adjudication of the validity of the objection, and respond to any portion or portions of the Interrogatory that you do not find objectionable.

4. If UP asserts a claim of privilege regarding a document otherwise called for by the below Interrogatories, state for each claim of privilege the following in addition to the information requested: (1) the date and type of the document; (2) the document's author's name; (3) the name of the document's addressee and other recipients; (4) a description of the document's subject matter; (5) the basis of UP's claim of privilege; and (6) the factual and legal basis UP will rely on in support of the claim of privilege in response to a motion to compel under 49 C.F.R. § 1114.31.

5. Whenever You are instructed to state a date, dollar amount, number, or quantification, if such date, dollar amount, number, or quantification is unknown to you, state your best estimate, indicate that the response is an estimate, and explain why you are unable to provide

¹ Amtrak reserves the right to revise this time period following any written decision from Judge McCarthy regarding the appropriate scope of discovery in this proceeding and/or following the parties' forthcoming meet and confer.

a more precise response and how you arrived at your estimate.

6. If UP is unable to answer any part of these Interrogatories in full after exercising due diligence to secure and provide the requested information, UP should so state and answer the Interrogatory as completely as possible.

7. Each of the following Interrogatories is continuing in nature. If you obtain any additional responsive information at a later date, promptly submit supplemental or amended responses to these Interrogatories.

8. Where UP is asked to “Identify” personnel, provide the individual’s name, title, and an explanation of their role and responsibilities.

9. Production must be made to outside counsel of record for Amtrak at Jenner & Block: Alex Trepp, 1099 New York Avenue N.W., Ste. 900, Washington, DC 20001, atrepp@jenner.com, with a copy to Albert Peterson, 1099 New York Avenue N.W., Ste. 900, Washington DC 20001 apeterson@jenner.com.

INTERROGATORIES

1. Explain, and provide examples of, the circumstances in which a dispatcher responsible for Dispatching Decisions may override an algorithmic Dispatching Decision.
2. Identify all personnel involved in preparing, reviewing, or approving corporate policies, protocols, procedures, guidance documents, or training materials that (i) are provided or applicable to dispatchers responsible for Dispatching Decisions, (ii) affect or relate to Dispatching Decisions, or (iii) affect the creation, programming, modification, or implementation of dispatching algorithms used in connection with Dispatching Decisions.
3. Explain the manner in which UP records and/or catalogs, for each individual Sunset Limited Train and Sunset Limited Trains in the aggregate, (a) the movements of Sunset Limited Trains on the UP Lines, (b) delays experienced by Sunset Limited Trains on the UP Lines, or (c) the alleged cause(s) of delays experienced by Sunset Limited Trains on the UP Lines.
4. Identify all management personnel involved in preparing, reviewing, or approving any corporate policies, protocols, guidance documents, or other materials related to implementation of Preference, or used to evaluate implementation of Preference.
5. Provide aggregated freight volumes moving on the UP Lines, broken down by any freight categories maintained in the ordinary course of business, for the following time periods:
 - (a) The Investigative Period.
 - (b) The Period October 1, 2015-December 8, 2016
 - (c) The Period October 1, 2010-December 8, 2011
 - (d) The Period October 1, 2005-December 8, 2006
 - (e) The Period October 1, 2000-December 8, 2001.
6. Identify the number of disciplinary actions taken against UP personnel for one or more Dispatching Decision related to a Sunset Limited Train and, if no such disciplinary actions

were taken against UP personnel during the Investigative Period, identify the last date on which such a disciplinary action was taken.

7. Identify how frequently dispatchers must receive training or retraining on policies, protocols, procedures concerning (a) the dispatching of freight trains on the UP Lines, (b) the dispatching of passenger trains on the UP lines, and (c) the implementation of Preference on the UP Lines.

8. Identify each freight train that traveled on the UP Lines during the Investigative Period, that could not fit into passing sidings that the train traveled past, and for each such train indicate whether the train was a UP train.

September 12, 2023

Respectfully submitted:
/s/ Jessica Ring Amunson

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*Counsel for National Railroad
Passenger Corporation*

CERTIFICATE OF SERVICE

I, Jessica Ring Amunson, certify that I have this day caused a copy of this document to be served upon UP by email to counsel for UP at the following email address:

Mrosenthal@Cov.Com

September 12, 2023

/s/ Jessica Ring Amunson

Jessica Ring Amunson

EXHIBIT C

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

**RESPONSES AND OBJECTIONS TO AMTRAK'S FIRST SET
OF REQUESTS FOR PRODUCTION OF DOCUMENTS**

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Attorneys for Union Pacific Railroad Company

October 4, 2023

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. NOR 42175

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

**RESPONSES AND OBJECTIONS TO AMTRAK'S FIRST SET
OF REQUESTS FOR PRODUCTION OF DOCUMENTS**

Union Pacific Railroad Company responds to Amtrak's First Set of Requests for
Production of Documents served on September 12, 2023, 2023, as follows:

GENERAL RESPONSES

The following General Responses apply to each of Amtrak's requests:

1. When Union Pacific says it will produce responsive documents, Union Pacific will produce responsive documents to the extent they exist and can be located in a reasonable search. Subject to the specific and general objections that follow, responsive documents will be produced on a rolling basis.

2. Production of documents does not necessarily imply that the documents are relevant to or admissible in this proceeding and is not to be construed as waiving any objection stated herein.

GENERAL OBJECTIONS

The following General Objections are made with respect to all of Amtrak's requests. Any additional specific objections are stated at the beginning of the response to each document request.

1. Union Pacific objects to the production of, and is not producing, documents subject to the attorney-client privilege, work-product doctrine, joint defense privilege, or any other applicable privilege or protection. Any production or disclosure of such information is inadvertent and should not be construed as a waiver. Union Pacific reserves all rights under applicable law, including the Protective Order in this case, to demand or require the return of all copies thereof and non-use by Amtrak or by any other person or entity in this or any other proceeding.

2. Union Pacific objects to the production of, and is not producing, documents prepared in connection with, or information relating to, possible settlement of this or any other proceeding.

3. Union Pacific objects to the production of documents that constitute or disclose confidential or proprietary or sensitive nonpublic information. Subject to and without waiving this objection, Union Pacific will produce such information, if not otherwise objectionable, designated “Confidential” or “Highly Confidential,” subject to the terms of the Protective Order in this case. Union Pacific reserves the right to seek additional protection as needed.

4. Union Pacific objects to the production of documents that are sensitive security information (SSI), classified or otherwise prohibited from disclosure, or documents whose public release could jeopardize the safety of the public and/or Union Pacific employees. Subject to and without waiving this objection, Union Pacific will only produce SSI information to the extent authorized by law and in the manner authorized by law, including the procedures set forth in FRA SSI Order 2011-06-FRA-01 (July 29, 2011) and the terms of the Protective Order in this case.

5. Union Pacific objects to the production of, and in general is not producing, public documents that are readily available to Amtrak, including but not limited to documents on public file at the Surface Transportation Board (the Board), the Securities and Exchange Commission (SEC), or in the Interstate Commerce Commission Archives, or clippings from newspapers or other public media. Any production by Union Pacific of documents in this category shall not be considered a waiver of this objection.

6. Union Pacific objects to the production of, and in general is not producing, documents that are readily obtainable by Amtrak from its own files or publicly available sources. Any production by Union Pacific of documents in this category shall not be considered a waiver of this objection.

7. Union Pacific objects to Amtrak's requests to the extent they call for the preparation of compilations, documents, summaries, analyses, or other special studies of any sort not already in existence, and Union Pacific by its responses does not, unless otherwise noted, undertake to prepare or produce any special studies. Any production by Union Pacific of documents in this category shall not be considered a waiver of this objection.

8. Union Pacific objects to Definition No. 1 to the extent it seeks to require Union Pacific to produce documents not in its possession, custody, or control.

9. Union Pacific objects to Definition No. 14 to the extent it seeks to impose obligations beyond, in addition to, or inconsistent with Union Pacific's discovery obligations under 49 C.F.R. Part 1114.

10 Union Pacific objects to Instruction Nos. 1, 4, 5, 7, and 8 as unduly burdensome and to the extent they seek to impose obligations on Union Pacific beyond, in addition to, or inconsistent with Union Pacific's discovery obligations under 49 C.F.R. Part 1114.12.

11. Union Pacific objects to Instruction No. 5 to the extent it purports to require Union Pacific to produce documents subject to the attorney-client privilege, work-product doctrine, joint defense privilege, or any other applicable privilege or protection.

12. Union Pacific's responses and objections are based upon information presently known to it. Union Pacific reserves the right to rely upon facts, documents, or other evidence it may develop or that may subsequently come to its attention; to assert additional objections; and to supplement or amend these responses at any time as this proceeding continues.

SPECIFIC OBJECTIONS AND RESPONSES

Request No. 1

All document management policies, retention policies, and/or retention schedules applicable to documents or communications relating or referring to (i) the On-Time Performance of Sunset Limited Trains, (ii) Dispatching Decisions, or (iii) policies, practices, and procedures that govern, affect, or apply to Dispatching Decisions, (iv) policies, practices, and procedures that govern, affect, or apply to the implementation of Preference.

Union Pacific Response:

Union Pacific objects to this Request as overbroad and unduly burdensome to the extent it seeks documents that do not reflect current policies.

Subject to and without waiving its objections, Union Pacific will produce copies of current document management policies, retention policies, and/or retention schedules.

Request No. 2

All documents concerning UP policies, practices, and procedures relating to Dispatching Decisions, including but not limited to documents providing train or customer-specific instructions, or concerning or reflecting any modification of those policies, practices, and procedures during the Investigative Period.

Union Pacific Response:

Union Pacific objects to this Request as overbroad and unduly burdensome in that it requests “[a]ll documents” concerning Union Pacific policies, practices and procedures relating to Dispatching Decisions. Union Pacific further objects to this request as unduly burdensome and not proportional to the needs of the case in that it is generally duplicative of Request Nos. 22 and 24 in Appendix A, Part IV, of the Board’s decision served July 11, 2023.

Request No. 3

All communications between or among current and/or former UP management, employees, or other personnel concerning policies, practices, and procedures applicable to Dispatching Decisions.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests “[a]ll communications” concerning policies, practices, and procedures applicable to Dispatching Decisions, and in that it requests communications not concerning dispatching of Sunset Limited Trains. Union Pacific further objects to this request as unduly burdensome and not proportional to the needs of the case in that it is generally duplicative of Request Nos. 22 and 24 in Appendix A, Part IV, of the Board’s decision served July 11, 2023.

Request No. 4

All communications between or among UP and BNSF, CN, NOPB, SCRRA, any governmental entity, and/or any third-party concerning policies, practices, and procedures applicable to Dispatching Decisions.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests “[a]ll communications” between or among the identified entities concerning policies, practices, and procedures applicable to Dispatching Decisions, and as seeking documents not relevant to any issue in this proceeding in that it requests documents not concerning dispatching of Sunset Limited Trains.

Request No. 5

All documents constituting, concerning, or reflecting any Dispatching Decision that departed or deviated from the policies, practices, and procedures applicable to Dispatching Decisions, or otherwise failed to implement or comply with policies, practices, and procedures applicable to Dispatching Decisions.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests “[a]ll documents” constituting, concerning, or reflecting certain Dispatching Decisions, and as seeking documents not relevant to any issue in this proceeding in that it requests documents not concerning dispatching of Sunset Limited Trains.

Request No. 6

All dispatching tapes, dispatching playbacks, and other documents logging or recording Dispatching Decisions, including but not limited to Dispatching Decisions related to the dispatching of all trains entering, exiting, continuing, or otherwise traversing the UP Lines.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests “[a]ll” dispatching tapes, dispatching playbacks, and other documents logging or recording Dispatching Decisions.

Subject to and without waiving its objections, Union Pacific will allow Amtrak representatives to review dispatching playbacks involving train movements on the UP Lines in person at Union Pacific’s facilities in Omaha, Nebraska.

Request No. 7

All daily system, region, or division performance reports concerning any operations on the UP Lines.

Union Pacific Response:

Union Pacific objects to this request as overbroad, unduly burdensome, and as seeking documents not relevant to any issue in this proceeding in that it requests “[a]ll” daily performance reports concerning “any operations” on the UP Lines.

Subject to and without waiving its objections, Union Pacific will produce responsive documents concerning train operations on the UP Lines.

Request No. 8

All documents concerning whether or under what circumstances a dispatcher responsible for Dispatching Decisions may override algorithmic Dispatching Decisions.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests “[a]ll documents” concerning whether and under what circumstances a dispatcher may override Dispatching Decisions. Union Pacific further objects to this request as unduly burdensome and not proportional to the needs of the case in that it is

generally duplicative of Request Nos. 22, 23, and 24 in Appendix A, Part IV, of the Board's decision served July 11, 2023.

Request No. 9

All communications between UP supervisors and dispatchers pertaining to Dispatching Decisions involving Sunset Limited Trains.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests "[a]ll communications" between Union Pacific supervisors and dispatchers pertaining to Dispatching Decisions involving Sunset Limited Trains. Union Pacific dispatchers dispatched hundreds of Sunset Limited Trains during the Investigative Period, and supervisors and dispatchers regularly communicate about dispatching decisions.

Request No. 10

Documents sufficient to show any criteria used to evaluate or compensate dispatchers and all documents related to any evaluations, reviews, or other feedback provided to dispatchers responsible for Dispatching Decisions.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests "all documents" related to any evaluations, reviews, or other feedback provided to dispatchers responsible for Dispatching Decisions, and as seeking documents not relevant to any issue in this proceeding in that it requests documents not concerning evaluations, reviews, or feedback related to dispatching of Sunset Limited Trains.

Subject to and without waiving its objections, Union Pacific will produce documents sufficient to show criteria used to evaluate or compensate dispatchers, to the

extent it has not already produced such documents in response to Request 22 in Appendix A, Part IV, of the Board's decision served July 11, 2023.

Request No. 11

For the time period November 11, 2020 to Present, all documents relating to any investigations, audits, studies, reviews, analyses, or similar evaluations conducted by UP regarding Dispatching Decisions, HRD, or Preference on the UP Lines.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests "all documents" relating to the requested materials, and as seeking documents not relevant to any issue in this proceeding in that it requests documents relating to Dispatching Decisions not involving Sunset Limited Trains.

Subject to and without waiving its objections, Union Pacific will produce any investigations, audits, studies, reviews, analyses, or similar evaluations regarding Dispatching Decisions involving Sunset Limited Trains, HRD, or Preference.

Request No. 12

All documents relating to any disciplinary actions taken or contemplated against a dispatcher and concerning one or more Dispatching Decisions.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests "all documents" relating to disciplinary actions taken or "contemplated," and as seeking documents not relevant to any issue in this proceeding in that it requests documents concerning Dispatching Decisions not involving Sunset Limited Trains.

Subject to and without waiving its objections, Union Pacific will produce documents sufficient to show any disciplinary actions taken against a dispatcher concerning Dispatching Decisions involving Sunset Limited Trains.

Request No. 13

All documents concerning any operational adjustment, scheduling adjustment, capital investment, or other similar action that UP has analyzed or considered to address, evaluate, or understand delays to freight or passenger trains traveling on the UP Lines, including all documents relating to the reason(s) UP did not implement any such adjustments, investment, or other similar actions.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests “[a]ll documents” concerning the actions that Union Pacific has analyzed or considered for a variety of purposes. Union Pacific also objects to this request as vague and unclear in that it suggests adjustments and investments could be used to evaluate or understand delays. Union Pacific further objects to this request as unduly burdensome and not proportional to the needs of the case in that it appears to be generally duplicative of Request No. 21 in Appendix A, Part IV, of the Board’s decision served July 11, 2023.

Request No. 14

All documents concerning UP efforts to obtain funds from federal, state, or other sources for capital expenditures on the UP Lines.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests “[a]ll documents” concerning efforts to obtain funds for capital expenditures on the UP Lines.

Subject to and without waiving its objections, Union Pacific will produce documents sufficient to show efforts to obtain funds for capital expenditures on the UP Lines, to the extent it has not already produced such documents in response to Request No. 21 in Appendix A, Part IV, of the Board’s decision served July 11, 2023

Request No. 15

All agreements with freight customers using any portion of the UP Lines for which UP's compensation varies depending on the time or timeliness of the delivery of products or commodities, or depending on availability of loaded cars for unloading or empty cars for loading of customer products or commodities.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that responding would require reviewing all agreements with the thousands of customers that use some portion of the UP Lines, and as seeking documents not relevant to any issue in this proceeding.

Request No. 16

All documents constituting or concerning UP's current operating plan(s) for lines used by Sunset Limited Trains, and all documents constituting or concerning efforts to measure operational performance against UP's current operating plan(s) or operating schedule(s) for lines used by Sunset Limited Trains.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests "[a]ll documents" concerning Union Pacific's current operating plans. Union Pacific further objects to this request as unduly burdensome and not proportional to the needs of the case in that it appears to be generally duplicative of Request No. 8 in Appendix A, Part IV, of the Board's decision served July 11, 2023.

Request No. 17

All corporate policies, protocols, guidance documents, or other materials related to the implementation of Preference, or used to evaluate the implementation of Preference.

Union Pacific Response:

Union Pacific will produce responsive documents, to the extent it has not already produced them in response to Request Nos. 22 and 24 in Appendix A, Part IV, of the Board's decision served July 11, 2023.

Request No. 18

Documents sufficient to show any procedures or systems used to implement or evaluate the implementation of Preference.

Union Pacific Response:

Union Pacific will produce responsive documents, to the extent it has not already produced them in response to Request Nos. 22 and 24 in Appendix A, Part IV, of the Board's decision served July 11, 2023.

Request No. 19

For the UP Lines, documents sufficient to associate locomotive numbers associated with each train that operated on a fixed schedule during the Investigative Period.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that more than 49,000 scheduled trains operated on the UP Lines during the Investigative Period, and as seeking information not relevant to any issue in this proceeding.

Request No. 20

All documents analyzing, assessing, investigating, studying, reviewing or otherwise evaluating how the adoption and implementation of precision-scheduled railroading has affected the on-time performance of intercity passenger trains and/or affected the implementation of Preference.

Union Pacific Response:

Union Pacific will produce responsive documents.

Request No. 21

All documents analyzing, assessing, investigating, studying, reviewing or otherwise evaluating how UP's network planning and design have affected, are affecting, or will affect the on-time performance of Sunset Limited Trains and/or implementation of Preference on the UP Lines, including but not limited to documents concerning any ongoing or anticipated capital investments that will affect UP's network capacity on the UP Lines.

Union Pacific Response:

Union Pacific objects to this request as vague and unclear in that documents requested in the phrase beginning "including" do not appear to be a subset of the primary request. Union Pacific also objects to this request to the extent it implicitly assumes "network planning and design" affects implementation of Preference. Union Pacific further objects to the request as overbroad and unduly burdensome to the extent it is intended to request "[a]ll documents" concerning capital investments that will affect Union Pacific's capacity on the UP Lines.

Request No. 22

All documents concerning policies, protocols, or procedures related to how You prioritize freight traffic on the UP Lines, or the dispatching of any intermodal or other trains carrying priority freight on the UP Lines.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests "[a]ll documents" concerning Union Pacific policies, practices and procedures relating to prioritizing freight traffic on the UP Lines. Union Pacific also objects to this request as duplicative of Request No. 2. Union Pacific further objects to this request as unduly burdensome and not proportional to the needs of the case in that it is generally duplicative of Request Nos. 22 and 24 in Appendix A, Part IV, of the Board's decision served July 11, 2023.

Request No. 23

For the time period November 11, 2020 to Present, all documents relating to any modeling, studies, reviews, analyses, investigations, or other similar evaluations conducted by UP regarding the Sunset Limited schedule or freight schedules on lines used by Sunset Limited Trains.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests “all documents” relating to any modeling studies or similar evaluations, and as seeking documents not relevant to any issue in this proceeding in that it requests documents involving freight schedules. Union Pacific further objects to this request as unduly burdensome and not proportional to the needs of the case in that it is generally duplicative of Request Nos. 3, 4, 5, 6, 7, 8, 9, and 10 in Appendix A, Part IV, of the Board’s decision served July 11, 2023. Union Pacific also objects to this request as premature to the extent it requests documents Union Pacific may submit in reply comments in this proceeding.

Subject to and without waiving its objections, will produce final modeling studies or similar evaluations conducted by Union Pacific regarding the Sunset Limited schedule.

Request No. 24

All documents reflecting or relating to UP’s consideration of Sunset Limited Trains in determining, assessing, evaluating, studying, or otherwise considering freight volumes for lines used by the Sunset Limited Trains.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests “all documents” reflecting or relating to Union Pacific’s consideration of Sunset Limited trains in considering freight volumes for lines used by those trains.

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Attorneys for Union Pacific Railroad Company

October 4, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of October, 2023, I caused a copy of the foregoing document to be served by email on Administrative Law Judge McCarthy and all parties of record in Docket No. NOR 42175.

/s/ Michael L. Rosenthal

EXHIBIT D

From: [Trepp, Alex S.](#)
To: [Rosenthal, Michael](#)
Subject: RE: Sunset Limited: Follow-Up on Meet and Confer re UP Responses
Date: Tuesday, November 28, 2023 8:02:00 PM

Thanks, Mike. When do you anticipate that UP will be able to provide its position on Request 6 and Request 19? And when do you anticipate that UP will provide any other responses on the below items?

Best,
Alex

From: Rosenthal, Michael <mrosenthal@cov.com>
Sent: Tuesday, November 28, 2023 9:40 AM
To: Trepp, Alex S. <ATrepp@jenner.com>
Subject: RE: Sunset Limited: Follow-Up on Meet and Confer re UP Responses

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Alex,

Sorry for the delay--still catching up on some stuff. We are continuing to explore whether it is even possible to produce the information requested with regard to Request 6 and if so, how we could do so practicably. Similarly, we are continuing to explore whether we have documents responsive Request 19.

Regards,
Mike

From: Trepp, Alex S. <ATrepp@jenner.com>
Sent: Wednesday, November 22, 2023 12:36 PM
To: Rosenthal, Michael <mrosenthal@cov.com>
Subject: RE: Sunset Limited: Follow-Up on Meet and Confer re UP Responses

[EXTERNAL]

Hey Mike:

When we spoke last week, and I asked whether a response on this would be forthcoming, you indicated that few disputes were anticipated, that you were following up with UP on Requests 6 and 19, and that you would circle back. Please confirm that UP will respond by Tuesday November 28. We will also need sufficient time to review the response and meet and confer.

Regarding Request 6: As mentioned last week, we confirmed that Amtrak does not have continuing access to the dispatch playbacks. While Amtrak appreciates the offer to review dispatch tapes live, and understands that this request may implicate a very large volume of data, we continue to think that proposal is unworkable because of the time required to review playbacks and the continuing

nature of Amtrak's evaluation of the record in this case. When last we spoke, UP was going to follow-up on whether there was a technical method for downloading and providing the dispatch playbacks. Please let us know where that effort stands and how much data is at issue.

I have some sporadic availability this afternoon if it would be helpful to discuss. I'm otherwise very flexible on Monday and Tuesday and hope you have a nice holiday.

Best,
Alex

From: Trepp, Alex S.

Sent: Thursday, October 26, 2023 8:48 AM

To: 'Rosenthal, Michael' <mrosenthal@cov.com>

Subject: Sunset Limited: Follow-Up on Meet and Confer re UP Responses

Mike:

Thank you for meeting and conferring on UP's responses to Amtrak's Requests for Production ("Requests"). Based on the discussion, we are optimistic that the parties can work collaboratively to resolve the appropriate scope of discovery responsive to the Requests. To expedite the parties' discussion, we write to memorialize some key points from that conversation and to follow-up on some items that we discussed. To avoid any confusion, Amtrak reserves the right to press each of its requests if the parties cannot reach an amicable resolution on whether and how UP will search for documents responsive to each request.

RFP 1: Amtrak continues to believe that the production of responsive policies should include all policies applicable during the Relevant Period, as defined by the Board. UP is evaluating whether the policies that it intends to produce were modified during the Relevant Period and will circle back.

RFP 2: Amtrak continues to believe that the production of formal and final decks, studies, reports, policies, presentations, memoranda, and other similar documents (together "Analyses") concerning policies, practices, and procedures relating to Dispatching Decisions is appropriate. The parties agreed that Amtrak would provide more granular examples of the type of Analyses requested. With that in mind, Amtrak provides the following illustrative examples of Analyses that would be responsive to this Request:

1. Analyses concerning compliance with movement planner business rules, pass protocols, train dispatcher rules, and other similar policies or protocols, including those produced in response to Board Request 22;
2. Analyses concerning the impact of movement planner business rules, pass protocols, train dispatcher rules, and other similar policies or protocols on network fluidity, including those produced in response to Board Request 22;
3. Analyses concerning the modification of movement planner business rules, pass protocols,

train dispatcher rules, and other similar policies or protocols, including those produced in response to Board Request 22.

RFP 3: Amtrak continues to believe that the production of communications responsive to this request is appropriate. UP indicated that it was already running preliminary searches to assess what could reasonably be located. The parties agreed to table discussion of objections until the results of searches are known and any issues related to burden can be discussed.

RFP 4: Amtrak continues to believe that the production of communications responsive to this request is appropriate. The parties again agreed to table discussion of objections until UP runs preliminary searches and evaluates preliminary returns.

RFP 5: Amtrak continues to believe that the production of documents responsive to this request is appropriate. Amtrak agreed to resolve concerns about the request for “all documents” by modifying its request to seek the production of Analyses. Please confirm that UP will not be limiting its search to Dispatching Decisions that involve a Sunset Limited Train.

RFP 6: Amtrak continues to believe that the proposal to require that Amtrak representatives (and experts) review dispatching playbacks involving train movements on the UP Lines in person is unworkable because of the time required to review playbacks and the continuing nature of Amtrak’s evaluation of the record in this case. Consistent with the parties’ discussion, Amtrak will investigate whether it has continuing access to dispatching playbacks for the UP Lines. UP indicated uncertainty about whether there exists a methodology to download and export dispatching playbacks and offered to revert on that issue and burden. Please let us know whether UP can produce the dispatching playbacks.

RFP 7: The parties agreed that—subject to modifying the request to seek daily system, region, or division performance reports for “train” rather than “any” operations on the UP Lines—UP will conduct a reasonable and diligent search for and produce non-privileged responsive documents.

RFP 9: Amtrak continues to believe that the production of communications responsive to this request is appropriate. UP indicated that it was already running preliminary searches to assess what could reasonably be located. UP agreed to table discussion of objections until the results of searches are known and issues related to burden can be addressed.

RFP 10: Amtrak continues to believe that—in addition to producing documents sufficient to show criteria used to evaluate or compensate dispatchers—UP must produce documents related to any evaluations, reviews, or other feedback provided to dispatchers responsible for Dispatching Decisions. Amtrak agreed to resolve concerns about the request for “all documents” by modifying its request to exclude a forensic search for email and to exclude feedback based on attendance. UP agreed to assess whether there exists a formal process for providing evaluations, reviews, or other feedback to dispatchers and then circle back.

RFP 11: For reasons articulated during our meet and confer, Amtrak continues to believe that Analyses related to Dispatching Decisions are relevant to this proceeding even if they do not

expressly reference a Dispatching Decision involving Sunset Limited Trains. Amtrak has also reviewed Requests 2 and 11 and does not believe that Request 11 is duplicative, since it focuses on Dispatching Decisions rather than policies, practices, and procedures governing those decisions. To the extent UP has conducted Analyses of Dispatching Decisions, for example to assess whether particular dispatching decisions concerning freight trains are (i) affecting network fluidity, (ii) creating congestion, (iii) affecting the availability of sidings, (iv) affecting compliance with any contractual obligations regarding timeliness, (v) affecting the availability or expiration of crews, or (vi) otherwise affecting operations on the UP Lines, those Analyses should be produced.

RFP 13: During the meet and confer, Amtrak agreed to resolve concerns about the request for “all documents” by modifying its request to seek only Analyses. In response to concerns about vagueness or lack of clarity, Amtrak offered to consider clarifying the requests and provides the following clarifications and limitations.

1. *Operational Adjustments.* Amtrak will limit its request to documents analyzing any operational adjustment implemented or considered to improve on-time performance of Sunset Limited trains or otherwise affecting the on-time performance of Sunset Limited Trains.
2. *Scheduling Adjustments.* Amtrak will limit its request to documents analyzing any scheduling adjustment implemented or considered to improve on-time performance of Sunset Limited Trains (including scheduling adjustments applicable to freight trains and considered for the purpose of improving on-time performance of Sunset Limited Trains).
3. *Capital Investments.* Amtrak will clarify its request to seek documents analyzing capital investments implemented or considered on the UP Lines.

RFP 15: During our meet and confer, the parties agreed to table discussion of each objection so that UP can consider whether to produce all agreements with freight customers using any portion of the UP Lines. Please confirm that UP will produce those agreements.

RFP 16: During the meet and confer, Amtrak agreed to resolve concerns about the request for “all documents” by modifying its request to seek only Analyses. Amtrak also explained why this request is not duplicative. UP agreed to search for Analyses constituting or concerning efforts to measure operational performance against UP operating plans or schedules for lines used by the Sunset Limited.

RFP 19: During the meet and confer, the parties agreed to table discussion of objections while UP evaluates the existence and burden of producing responsive information. Please confirm that UP will produce responsive material if it exists.

RFP 21: During the meet and confer, Amtrak agreed to resolve concerns about the request for “all documents” by modifying its request to seek only Analyses. Amtrak also explained why this request is not duplicative. Amtrak also clarifies that the request seeks Analyses that evaluate how network planning and design have affected, are affecting, or will affect the on-time performance of Sunset Limited Trains or the implementation of preference. Please confirm that UP will search for

documents responsive to the Request.

RFP 24: During the meet and confer, Amtrak agreed to resolve concerns about the request for “all documents” by modifying its request to seek only Analyses. Please confirm that UP will search for documents responsive to the Request.

We look forward to your response and hope the parties can resolve these remaining discovery disputes.

Best

Alex

Alex S. Trepp

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EXHIBIT E

From: [Rosenthal, Michael](#)
To: [Trepp, Alex S.](#)
Subject: RE: STB Docket No. NOR 42175
Date: Friday, December 8, 2023 3:19:42 PM

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Alex,

Union Pacific has also been working diligently in good faith to respond to Amtrak's discovery requests. While Union Pacific has produced fewer documents than Amtrak, the difference appears to reflect basic differences in the scope of each party's requests and the number of responsive documents in each party's possession. Further, as I've told you since you sent your October 26 email, Union Pacific is generally searching for everything Amtrak requested, with a few exceptions that we've discussed since the 26th. However, as you requested, I'll provide a request-by-request response to your email by Tuesday, if not sooner.

I'd be happy to talk on Monday about scheduling issues. Right now, I'm available all day, except from 2:00-3:00 pm.

Regards,
Mike

From: Trepp, Alex S. <ATrepp@jenner.com>
Sent: Friday, December 8, 2023 3:35 PM
To: Rosenthal, Michael <mrosenthal@cov.com>
Subject: STB Docket No. NOR 42175

[EXTERNAL]

Mike:

Amtrak has been working diligently and in good faith to respond to the more than 150 discovery requests that UP propounded. Amtrak has already produced more than 1,000 documents and anticipates producing approximately 850 more today. Amtrak has also worked to provide timely responses to issues raised in meet and confers on the voluminous and burdensome document requests that UP served. As you are aware, UP made its first production on Wednesday, providing just 23 documents. Moreover, UP still has not provided its position on discovery disputes raised in our email of October 26, 2023. We have been patient based on repeated assurances that UP is working through these issues. However, the efficient conduct of this proceeding requires that UP provide its position on outstanding discovery issues and confirm when it will complete its production of documents, so that Amtrak can assess next steps. Please provide us with UP's responses on these issues by Tuesday.

Please also let us know whether you have time next week to meet and confer on scheduling issues, in view of the Board's November 20, 2023 Order.

Best,
Alex

Alex S. Trepp

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EXHIBIT F

From: [Trepp, Alex S.](#)
To: [Rosenthal, Michael](#)
Subject: RE: STB Docket No. NOR 42175
Date: Tuesday, December 19, 2023 8:26:00 AM

Mike,

We have reviewed your note. Specific responses follow.

Communications. It is surprising to hear that you do not expect to produce a significant number of communications, for example because UP told the Board that when a decision is made to delay an Amtrak train, dispatchers must inform their Corridor Manager. Given the large number of delays to Amtrak trains, we would expect to see a corresponding number of communications between dispatchers and Corridor Managers. Moreover, Union Pacific has had more than three months to complete its review of communications. Even after that considerable length of time, Union Pacific has provided no information about when it will begin or complete its production of communications. As you are aware, the discovery period closes on December 20. Given Union Pacific's failure to even begin (let alone complete) the production of responsive communications, Amtrak reserves the right to seek all appropriate relief.

Dispatching Playbacks. Amtrak has for months been relying on the representations that UP made in its responses and objections and in subsequent discussions regarding the availability of dispatch playbacks. Your response provides no information about why those materials are not available for the Relevant Period, nor when those materials became unavailable. Nor does your response indicate that UP has any intention of providing other materials responsive to Amtrak's long-pending request for "dispatching tapes, dispatching playbacks, and other documents logging or recording Dispatching Decisions, including but not limited to Dispatching Decisions related to the dispatching of all trains entering, exiting, continuing, or otherwise traversing the UP Lines" by the close of discovery on December 20. It is surprising that you would only now begin inquiring of your client what documents UP retains to comply with its regulatory obligations to keep dispatching records given that these documents are clearly encompassed within Amtrak's request. Amtrak reserves the right to seek all appropriate relief.

Contracts (Request 15). The assertion that Amtrak did not address the relevance of these documents is mistaken. As Amtrak explained during our meet and confer, these documents are relevant to UP dispatching priorities and to UP incentives, including based on contractual provisions. In responses to the Board, UP has already made clear that it responds to contractual incentives in moving passenger trains over its lines. Amtrak is entitled to test the power of contrary commercial incentives. Additionally, concerns about the confidentiality of responsive documents have already been addressed through entry of an appropriate protective order. As to burden, the steps that you describe do not appear to constitute a special study, nor does the information provided sufficiently substantiate claims of undue burden. We note that Amtrak specifically offered more than six weeks ago to obviate the need for review to determine whether a document provides variable compensation. Amtrak again reserves all rights to seek appropriate relief.

Dispatching Evaluations. It is hard to understand how UP can apply the dispatching criteria

identified in UP_SL_0012239 without creating additional records specific to dispatchers, including those on the UP Lines. Amtrak reserves the right to seek appropriate relief.

Production on Request 13. UP has said that its production on this request is complete. However, we have not identified in the 23 documents produced to date any documents analyzing scheduling adjustments for the *Sunset Limited*, including those scheduling adjustments proposed to Amtrak and produced to the Board. Please direct us to those documents, wherever produced, or confirm that no such documents exist.

Production on Request 19. We have not heard back from Union Pacific on Request 19. Please confirm whether information responsive to that request will be included in the December 20, 2023 production.

As UP has not completed its production, Amtrak necessarily reserves all rights with respect to the sufficiency of those productions.

Best,
Alex

From: Rosenthal, Michael <mrosenthal@cov.com>
Sent: Thursday, December 14, 2023 7:14 PM
To: Trepp, Alex S. <ATrepp@jenner.com>
Subject: RE: STB Docket No. NOR 42175

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Alex,

Thanks for your email. Sorry for sending this response at a late hour, but it has been one of those days. I'll respond to your questions in order.

1. Union Pacific expects to complete its production of documents, other than emails responsive to Amtrak's requests for "communications," by December 20. With regard to the emails, based on my ongoing review of documents identified in the review process, I do not expect the process to yield a significant number of additional documents, but it takes time to work through the documents that have identified for review based on search terms.

2. Union Pacific's initial response to Amtrak's request for dispatching playbacks was based on an apparent miscommunication or misunderstanding about the time period at issue. Further investigation has established that Union Pacific does not have playback capability for the period requested by Amtrak. If necessary, Union Pacific can amend its discovery responses. With regard to your reference to 49 CFR 228.17 and 49 CFR 228.9, if you'd like, I can inquire about the documents Union Pacific retains in regard to those provisions, but just reading the list of information in section 228.17, it seems apparent it is very different from playback capability--which is what I understand Amtrak wanted. I will note, however, that Union Pacific's response to the STB's Request No. 23 included data showing changes to signals during the relevant period--if Amtrak is interested in that

level of detail.

3. Union Pacific is standing on its burden objection. Amtrak has not explained why the information it seeks is relevant, but it is impossible to imagine any reason that would justify the effort needed to identify responsive contracts, or that would justify the extensive production of highly confidential commercial information contained in Union Pacific's contracts with its customers. To provide the information requested by Amtrak, Union Pacific would first have to identify all rail cars that moved over the Sunset Limited Route using one database. Union Pacific would then have to take the car-by-car information and tie it back to customer waybills and rate document identifiers using a second database. Union Pacific would then have to take the rate document identifier information and use other databases to obtain the actual rate document. Union Pacific would then have to review each rate document to determine whether the document provides for compensation that varies depending on the time or timeliness of delivery. In some cases, particular rate documents are part of larger, master agreements, so Union Pacific would also have to identify and review the master agreements as well. Just the effort to identify applicable rate documents--tying car movement files to waybill files, then using the waybill information to identify rate documents--would involve a special study, not a mere document request, and would involve burdens vastly disproportionate to the needs of the proceeding.

4. Union Pacific does not have a formal process for providing evaluations, reviews, or other feedback to dispatchers other than the process reflected in the document showing the criteria used to evaluate dispatchers. To cut to the chase, Union Pacific does not maintain files on dispatchers that identify/track/discuss/critique individual dispatching decisions.

5. Union Pacific has completed its production as to Amtrak Request 13.

6. As noted in point #1 above, Union Pacific is continuing to work its way through documents identified in the email search process. Union Pacific is not withholding any documents identified as responsive based on burden objections. I trust Amtrak has taken the same approach to its production of communications.

Regards,
Mike

From: Trepp, Alex S. <ATrepp@jenner.com>
Sent: Tuesday, December 12, 2023 10:24 AM
To: Rosenthal, Michael <mrosenthal@cov.com>
Subject: RE: STB Docket No. NOR 42175

[EXTERNAL]

Thanks, Mike.

We appreciate the request-by-request response. We have several follow-up questions.

First, in response to several of the requests, Union Pacific indicates that it is searching for and will produce any responsive documents. UP has previously represented it will produce on a rolling basis. However, we need to know when the productions will be complete to ensure that Amtrak has enough time to review the sufficiency of the completed production and evaluate any next steps Amtrak may need to take with respect to the sufficiency of UP's production. Amtrak only served 25 requests and it served them three months ago. The efficient and expeditious conduct of this proceeding requires that the parties wrap that initial discovery. Please confirm when UP will complete its productions.

Second, your response indicates that Union Pacific has determined that it does not possess dispatching playback documents for the Relevant Period. That response is very hard to understand. As an initial matter, it flatly contradicts the UP responses and objections, which stated that UP would "allow Amtrak representatives to review dispatching playbacks involving train movements on the UP Lines in person at Union Pacific's facilities in Omaha, Nebraska." UP Responses and Objections at Response 7. It is also inconsistent with repeated representations that UP has been evaluating whether there exist technical methods for downloading and providing those dispatching playbacks. *See, e.g.*, attached correspondence. And the position is hard to square with UP's regulatory obligations under 49 C.F.R. §§ 228.9 and 228.17.

Please promptly explain the discrepancy between representations that UP made in its initial responses and objections and yesterday's representation that the documents do not exist. Additionally, please note that Amtrak's initial Request encompassed several types of documents other than dispatch playbacks. *See* Request No. 6 (seeking "dispatching tapes, dispatching playbacks, and other documents logging or recording Dispatching Decisions, including but not limited to Dispatching Decisions related to the dispatching of all trains entering, exiting, continuing, or otherwise traversing the UP Lines"). Based on Union Pacific's initial representation concerning the availability of those playbacks, Amtrak has not previously pressed for other documents responsive to its request. However, Amtrak reserves the right to do so if UP is now for the first time telling Amtrak that the dispatch playbacks do not exist. Amtrak also reserves all other rights in connection with this request.

Third, your response indicates that UP is continuing to evaluate the burdens of responding to Request 15. However, it has been more than six weeks since Amtrak proposed a straightforward compromise to resolve UP's initial objection to this request. If UP intends to stand on burden objections to producing agreements with freight customers that use the UP Lines, please let us know by Thursday December 14. Should UP stand on its burden objection, UP must provide enough detail about the asserted burden to permit Amtrak to evaluate whether the objection is merited.

Fourth, your response indicates that Union Pacific has produced a document showing the criteria used to evaluate dispatchers. As set forth in our October 26, 2023 email, Amtrak continues to believe that in addition to producing documents sufficient to show the pertinent criteria for evaluation, UP must produce documents related to any evaluations, reviews, or other feedback provided to dispatchers responsible for Dispatching Decisions. UP during our meet and confer agreed to assess whether there exists a formal process for providing evaluations, reviews, or other

feedback to dispatchers and then circle back on this portion of the request. Please do so by Thursday December 14.

Fifth, your response indicates that Union Pacific has produced responsive documents located in a reasonable search for Amtrak Request 13. Please confirm whether Union Pacific has completed its production as to that Request.

Finally, with respect to several requests concerning communications, UP continues to qualify its response based on potential burden issues. See Response to Requests 3, 4, and 9. Please confirm that UP is producing communications responsive to each request by December 14. If there are potentially responsive documents that UP is not producing based on objections about burdensomeness, please provide enough detail about the asserted burden to permit Amtrak to evaluate whether the objection is merited.

We remain optimistic that the parties can work collaboratively to resolve remaining issues. As our discussions continue, Amtrak necessarily reserves all rights with respect to the requests and the sufficiency of UP's productions. As to schedule, we cannot evaluate what to tell the Board about scheduling until we have responses to the above. We look forward to hearing from you promptly and are happy to schedule a call to discuss.

Best,
Alex

From: Rosenthal, Michael <mrosenthal@cov.com>

Sent: Monday, December 11, 2023 9:17 AM

To: Trepp, Alex S. <ATrepp@jenner.com>

Subject: RE: STB Docket No. NOR 42175

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Alex,

I've added responses in bold, capital letters.

Regards,
Mike

RFP 1: Amtrak continues to believe that the production of responsive policies should include all policies applicable during the Relevant Period, as defined by the Board. UP is evaluating whether the policies that it intends to produce were modified during the Relevant Period and will circle back.

UNION PACIFIC HAS PRODUCED THE REQUESTED DOCUMENTS.

RFP 2: Amtrak continues to believe that the production of formal and final decks, studies, reports, policies, presentations, memoranda, and other similar documents (together "Analyses") concerning policies, practices, and procedures relating to Dispatching Decisions is appropriate. The parties

agreed that Amtrak would provide more granular examples of the type of Analyses requested. With that in mind, Amtrak provides the following illustrative examples of Analyses that would be responsive to this Request:

UNION PACIFIC IS SEARCHING FOR AND WILL PRODUCE THE REQUESTED DOCUMENTS, TO THE EXTENT ANY EXIST AND ARE LOCATED IN UNION PACIFIC'S REASONABLE SEARCH.

1. Analyses concerning compliance with movement planner business rules, pass protocols, train dispatcher rules, and other similar policies or protocols, including those produced in response to Board Request 22;
2. Analyses concerning the impact of movement planner business rules, pass protocols, train dispatcher rules, and other similar policies or protocols on network fluidity, including those produced in response to Board Request 22;
3. Analyses concerning the modification of movement planner business rules, pass protocols, train dispatcher rules, and other similar policies or protocols, including those produced in response to Board Request 22.

RFP 3: Amtrak continues to believe that the production of communications responsive to this request is appropriate. UP indicated that it was already running preliminary searches to assess what could reasonably be located. The parties agreed to table discussion of objections until the results of searches are known and any issues related to burden can be discussed.

UNION PACIFIC IS SEARCHING FOR AND WILL PRODUCE THE REQUESTED DOCUMENTS, TO THE EXTENT ANY EXIST AND ARE LOCATED IN UNION PACIFIC'S REASONABLE SEARCH, SUBJECT TO POTENTIAL BURDEN ISSUES.

RFP 4: Amtrak continues to believe that the production of communications responsive to this request is appropriate. The parties again agreed to table discussion of objections until UP runs preliminary searches and evaluates preliminary returns.

UNION PACIFIC IS SEARCHING FOR AND WILL PRODUCE THE REQUESTED DOCUMENTS, TO THE EXTENT ANY EXIST AND ARE LOCATED IN UNION PACIFIC'S REASONABLE SEARCH, SUBJECT TO POTENTIAL BURDEN ISSUES.

RFP 5: Amtrak continues to believe that the production of documents responsive to this request is appropriate. Amtrak agreed to resolve concerns about the request for “all documents” by modifying its request to seek the production of Analyses. Please confirm that UP will not be limiting its search to Dispatching Decisions that involve a Sunset Limited Train.

UNION PACIFIC IS SEARCHING FOR AND WILL PRODUCE THE REQUESTED DOCUMENTS, TO THE EXTENT ANY EXIST AND ARE LOCATED IN UNION PACIFIC'S REASONABLE SEARCH.

RFP 6: Amtrak continues to believe that the proposal to require that Amtrak representatives (and experts) review dispatching playbacks involving train movements on the UP Lines in person is unworkable because of the time required to review playbacks and the continuing nature of Amtrak’s evaluation of the record in this case. Consistent with the parties’ discussion, Amtrak will investigate whether it has continuing access to dispatching playbacks for the UP Lines. UP indicated uncertainty

about whether there exists a methodology to download and export dispatching playbacks and offered to revert on that issue and burden. Please let us know whether UP can produce the dispatching playbacks.

UNION PACIFIC HAS DETERMINED THAT IT DOES NOT POSSESS DISPATCHING PLAYBACK DOCUMENTS FOR THE RELEVANT PERIOD.

RFP 7: The parties agreed that—subject to modifying the request to seek daily system, region, or division performance reports for “train” rather than “any” operations on the UP Lines—UP will conduct a reasonable and diligent search for and produce non-privileged responsive documents.

UNION PACIFIC HAS PRODUCED DOCUMENTS CONTAINING THE REQUESTED INFORMATION ON A WEEKLY BASIS. UNION PACIFIC DOES NOT HAVE EXISTING DOCUMENTS CONTAINING THE REQUESTED INFORMATION ON A DAILY BASIS.

RFP 9: Amtrak continues to believe that the production of communications responsive to this request is appropriate. UP indicated that it was already running preliminary searches to assess what could reasonably be located. UP agreed to table discussion of objections until the results of searches are known and issues related to burden can be addressed.

UNION PACIFIC IS SEARCHING FOR AND WILL PRODUCE THE REQUESTED DOCUMENTS, TO THE EXTENT ANY EXIST AND ARE LOCATED IN UNION PACIFIC'S REASONABLE SEARCH, SUBJECT TO POTENTIAL BURDEN ISSUES.

RFP 10: Amtrak continues to believe that—in addition to producing documents sufficient to show criteria used to evaluate or compensate dispatchers—UP must produce documents related to any evaluations, reviews, or other feedback provided to dispatchers responsible for Dispatching Decisions. Amtrak agreed to resolve concerns about the request for “all documents” by modifying its request to exclude a forensic search for email and to exclude feedback based on attendance. UP agreed to assess whether there exists a formal process for providing evaluations, reviews, or other feedback to dispatchers and then circle back.

UNION PACIFIC HAS PRODUCED A DOCUMENT SHOWING THE CRITERIA USED TO EVALUATE DISPATCHERS.

RFP 11: For reasons articulated during our meet and confer, Amtrak continues to believe that Analyses related to Dispatching Decisions are relevant to this proceeding even if they do not expressly reference a Dispatching Decision involving Sunset Limited Trains. Amtrak has also reviewed Requests 2 and 11 and does not believe that Request 11 is duplicative, since it focuses on Dispatching Decisions rather than policies, practices, and procedures governing those decisions. To the extent UP has conducted Analyses of Dispatching Decisions, for example to assess whether particular dispatching decisions concerning freight trains are (i) affecting network fluidity, (ii) creating congestion, (iii) affecting the availability of sidings, (iv) affecting compliance with any contractual obligations regarding timeliness, (v) affecting the availability or expiration of crews, or (vi) otherwise affecting operations on the UP Lines, those Analyses should be produced.

UNION PACIFIC IS SEARCHING FOR AND WILL PRODUCE THE REQUESTED DOCUMENTS, TO THE EXTENT ANY EXIST AND ARE LOCATED IN UNION PACIFIC'S REASONABLE SEARCH.

RFP 13: During the meet and confer, Amtrak agreed to resolve concerns about the request for “all

documents” by modifying its request to seek only Analyses. In response to concerns about vagueness or lack of clarity, Amtrak offered to consider clarifying the requests and provides the following clarifications and limitations.

UNION PACIFIC HAS PRODUCED RESPONSIVE DOCUMENTS LOCATED IN A REASONABLE SEARCH.

1. *Operational Adjustments.* Amtrak will limit its request to documents analyzing any operational adjustment implemented or considered to improve on-time performance of Sunset Limited trains or otherwise affecting the on-time performance of Sunset Limited Trains.
2. *Scheduling Adjustments.* Amtrak will limit its request to documents analyzing any scheduling adjustment implemented or considered to improve on-time performance of Sunset Limited Trains (including scheduling adjustments applicable to freight trains and considered for the purpose of improving on-time performance of Sunset Limited Trains).
3. *Capital Investments.* Amtrak will clarify its request to seek documents analyzing capital investments implemented or considered on the UP Lines.

RFP 15: During our meet and confer, the parties agreed to table discussion of each objection so that UP can consider whether to produce all agreements with freight customers using any portion of the UP Lines. Please confirm that UP will produce those agreements.

UNION PACIFIC IS CONTINUING TO EVALUATE THE BURDENS OF RESPONDING TO THIS REQUEST, BUT CONTINUES TO ASSERT ITS OBJECTIONS.

RFP 16: During the meet and confer, Amtrak agreed to resolve concerns about the request for “all documents” by modifying its request to seek only Analyses. Amtrak also explained why this request is not duplicative. UP agreed to search for Analyses constituting or concerning efforts to measure operational performance against UP operating plans or schedules for lines used by the Sunset Limited.

THE DOCUMENTS UNION PACIFIC PRODUCED IN RESPONSE TO RFP 7 CONTAIN INFORMATION ON OPERATIONAL PERFORMANCE.

RFP 19: During the meet and confer, the parties agreed to table discussion of objections while UP evaluates the existence and burden of producing responsive information. Please confirm that UP will produce responsive material if it exists.

UNION PACIFIC IS CONTINUING TO EVALUATE THE BURDENS AND FEASIBILITY OF RESPONDING TO THIS REQUEST, AND INTENDS TO PRODUCE THE REQUESTED INFORMATION IF REASONABLY FEASIBLE.

RFP 21: During the meet and confer, Amtrak agreed to resolve concerns about the request for “all documents” by modifying its request to seek only Analyses. Amtrak also explained why this request is not duplicative. Amtrak also clarifies that the request seeks Analyses that evaluate how network planning and design have affected, are affecting, or will affect the on-time performance of Sunset Limited Trains or the implementation of preference. Please confirm that UP will search for documents responsive to the Request.

UNION PACIFIC IS SEARCHING FOR AND WILL PRODUCE THE REQUESTED DOCUMENTS, TO THE

EXTENT ANY EXIST AND ARE LOCATED IN UNION PACIFIC'S REASONABLE SEARCH.

RFP 24: During the meet and confer, Amtrak agreed to resolve concerns about the request for “all documents” by modifying its request to seek only Analyses. Please confirm that UP will search for documents responsive to the Request.

UNION PACIFIC HAS DETERMINED, BASED ON A REASONABLE SEARCH, THAT NO RESPONSIVE DOCUMENTS EXIST.

From: Trepp, Alex S. <ATrepp@jenner.com>
Sent: Friday, December 8, 2023 3:35 PM
To: Rosenthal, Michael <mrosenthal@cov.com>
Subject: STB Docket No. NOR 42175

[EXTERNAL]

Mike:

Amtrak has been working diligently and in good faith to respond to the more than 150 discovery requests that UP propounded. Amtrak has already produced more than 1,000 documents and anticipates producing approximately 850 more today. Amtrak has also worked to provide timely responses to issues raised in meet and confers on the voluminous and burdensome document requests that UP served. As you are aware, UP made its first production on Wednesday, providing just 23 documents. Moreover, UP still has not provided its position on discovery disputes raised in our email of October 26, 2023. We have been patient based on repeated assurances that UP is working through these issues. However, the efficient conduct of this proceeding requires that UP provide its position on outstanding discovery issues and confirm when it will complete its production of documents, so that Amtrak can assess next steps. Please provide us with UP's responses on these issues by Tuesday.

Please also let us know whether you have time next week to meet and confer on scheduling issues, in view of the Board's November 20, 2023 Order.

Best,
Alex

Alex S. Trepp

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EXHIBIT G

REDACTED – HIGHLY CONFIDENTIAL

EXHIBIT D

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

**RESPONSES AND OBJECTIONS TO AMTRAK'S FIRST SET
OF REQUESTS FOR PRODUCTION OF DOCUMENTS**

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October 4, 2023

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. NOR 42175

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

**RESPONSES AND OBJECTIONS TO AMTRAK'S FIRST SET
OF REQUESTS FOR PRODUCTION OF DOCUMENTS**

Union Pacific Railroad Company responds to Amtrak's First Set of Requests for
Production of Documents served on September 12, 2023, 2023, as follows:

GENERAL RESPONSES

The following General Responses apply to each of Amtrak's requests:

1. When Union Pacific says it will produce responsive documents, Union Pacific will produce responsive documents to the extent they exist and can be located in a reasonable search. Subject to the specific and general objections that follow, responsive documents will be produced on a rolling basis.
2. Production of documents does not necessarily imply that the documents are relevant to or admissible in this proceeding and is not to be construed as waiving any objection stated herein.

GENERAL OBJECTIONS

The following General Objections are made with respect to all of Amtrak's requests. Any additional specific objections are stated at the beginning of the response to each document request.

1. Union Pacific objects to the production of, and is not producing, documents subject to the attorney-client privilege, work-product doctrine, joint defense privilege, or any other applicable privilege or protection. Any production or disclosure of such information is inadvertent and should not be construed as a waiver. Union Pacific reserves all rights under applicable law, including the Protective Order in this case, to demand or require the return of all copies thereof and non-use by Amtrak or by any other person or entity in this or any other proceeding.

2. Union Pacific objects to the production of, and is not producing, documents prepared in connection with, or information relating to, possible settlement of this or any other proceeding.

3. Union Pacific objects to the production of documents that constitute or disclose confidential or proprietary or sensitive nonpublic information. Subject to and without waiving this objection, Union Pacific will produce such information, if not otherwise objectionable, designated “Confidential” or “Highly Confidential,” subject to the terms of the Protective Order in this case. Union Pacific reserves the right to seek additional protection as needed.

4. Union Pacific objects to the production of documents that are sensitive security information (SSI), classified or otherwise prohibited from disclosure, or documents whose public release could jeopardize the safety of the public and/or Union Pacific employees. Subject to and without waiving this objection, Union Pacific will only produce SSI information to the extent authorized by law and in the manner authorized by law, including the procedures set forth in FRA SSI Order 2011-06-FRA-01 (July 29, 2011) and the terms of the Protective Order in this case.

5. Union Pacific objects to the production of, and in general is not producing, public documents that are readily available to Amtrak, including but not limited to documents on public file at the Surface Transportation Board (the Board), the Securities and Exchange Commission (SEC), or in the Interstate Commerce Commission Archives, or clippings from newspapers or other public media. Any production by Union Pacific of documents in this category shall not be considered a waiver of this objection.

6. Union Pacific objects to the production of, and in general is not producing, documents that are readily obtainable by Amtrak from its own files or publicly available sources. Any production by Union Pacific of documents in this category shall not be considered a waiver of this objection.

7. Union Pacific objects to Amtrak's requests to the extent they call for the preparation of compilations, documents, summaries, analyses, or other special studies of any sort not already in existence, and Union Pacific by its responses does not, unless otherwise noted, undertake to prepare or produce any special studies. Any production by Union Pacific of documents in this category shall not be considered a waiver of this objection.

8. Union Pacific objects to Definition No. 1 to the extent it seeks to require Union Pacific to produce documents not in its possession, custody, or control.

9. Union Pacific objects to Definition No. 14 to the extent it seeks to impose obligations beyond, in addition to, or inconsistent with Union Pacific's discovery obligations under 49 C.F.R. Part 1114.

10 Union Pacific objects to Instruction Nos. 1, 4, 5, 7, and 8 as unduly burdensome and to the extent they seek to impose obligations on Union Pacific beyond, in addition to, or inconsistent with Union Pacific's discovery obligations under 49 C.F.R. Part 1114.12.

11. Union Pacific objects to Instruction No. 5 to the extent it purports to require Union Pacific to produce documents subject to the attorney-client privilege, work-product doctrine, joint defense privilege, or any other applicable privilege or protection.

12. Union Pacific's responses and objections are based upon information presently known to it. Union Pacific reserves the right to rely upon facts, documents, or other evidence it may develop or that may subsequently come to its attention; to assert additional objections; and to supplement or amend these responses at any time as this proceeding continues.

SPECIFIC OBJECTIONS AND RESPONSES

Request No. 1

All document management policies, retention policies, and/or retention schedules applicable to documents or communications relating or referring to (i) the On-Time Performance of Sunset Limited Trains, (ii) Dispatching Decisions, or (iii) policies, practices, and procedures that govern, affect, or apply to Dispatching Decisions, (iv) policies, practices, and procedures that govern, affect, or apply to the implementation of Preference.

Union Pacific Response:

Union Pacific objects to this Request as overbroad and unduly burdensome to the extent it seeks documents that do not reflect current policies.

Subject to and without waiving its objections, Union Pacific will produce copies of current document management policies, retention policies, and/or retention schedules.

Request No. 2

All documents concerning UP policies, practices, and procedures relating to Dispatching Decisions, including but not limited to documents providing train or customer-specific instructions, or concerning or reflecting any modification of those policies, practices, and procedures during the Investigative Period.

Union Pacific Response:

Union Pacific objects to this Request as overbroad and unduly burdensome in that it requests “[a]ll documents” concerning Union Pacific policies, practices and procedures relating to Dispatching Decisions. Union Pacific further objects to this request as unduly burdensome and not proportional to the needs of the case in that it is generally duplicative of Request Nos. 22 and 24 in Appendix A, Part IV, of the Board’s decision served July 11, 2023.

Request No. 3

All communications between or among current and/or former UP management, employees, or other personnel concerning policies, practices, and procedures applicable to Dispatching Decisions.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests “[a]ll communications” concerning policies, practices, and procedures applicable to Dispatching Decisions, and in that it requests communications not concerning dispatching of Sunset Limited Trains. Union Pacific further objects to this request as unduly burdensome and not proportional to the needs of the case in that it is generally duplicative of Request Nos. 22 and 24 in Appendix A, Part IV, of the Board’s decision served July 11, 2023.

Request No. 4

All communications between or among UP and BNSF, CN, NOPB, SCRRA, any governmental entity, and/or any third-party concerning policies, practices, and procedures applicable to Dispatching Decisions.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests “[a]ll communications” between or among the identified entities concerning policies, practices, and procedures applicable to Dispatching Decisions, and as seeking documents not relevant to any issue in this proceeding in that it requests documents not concerning dispatching of Sunset Limited Trains.

Request No. 5

All documents constituting, concerning, or reflecting any Dispatching Decision that departed or deviated from the policies, practices, and procedures applicable to Dispatching Decisions, or otherwise failed to implement or comply with policies, practices, and procedures applicable to Dispatching Decisions.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests “[a]ll documents” constituting, concerning, or reflecting certain Dispatching Decisions, and as seeking documents not relevant to any issue in this proceeding in that it requests documents not concerning dispatching of Sunset Limited Trains.

Request No. 6

All dispatching tapes, dispatching playbacks, and other documents logging or recording Dispatching Decisions, including but not limited to Dispatching Decisions related to the dispatching of all trains entering, exiting, continuing, or otherwise traversing the UP Lines.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests “[a]ll” dispatching tapes, dispatching playbacks, and other documents logging or recording Dispatching Decisions.

Subject to and without waiving its objections, Union Pacific will allow Amtrak representatives to review dispatching playbacks involving train movements on the UP Lines in person at Union Pacific’s facilities in Omaha, Nebraska.

Request No. 7

All daily system, region, or division performance reports concerning any operations on the UP Lines.

Union Pacific Response:

Union Pacific objects to this request as overbroad, unduly burdensome, and as seeking documents not relevant to any issue in this proceeding in that it requests “[a]ll” daily performance reports concerning “any operations” on the UP Lines.

Subject to and without waiving its objections, Union Pacific will produce responsive documents concerning train operations on the UP Lines.

Request No. 8

All documents concerning whether or under what circumstances a dispatcher responsible for Dispatching Decisions may override algorithmic Dispatching Decisions.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests “[a]ll documents” concerning whether and under what circumstances a dispatcher may override Dispatching Decisions. Union Pacific further objects to this request as unduly burdensome and not proportional to the needs of the case in that it is

generally duplicative of Request Nos. 22, 23, and 24 in Appendix A, Part IV, of the Board's decision served July 11, 2023.

Request No. 9

All communications between UP supervisors and dispatchers pertaining to Dispatching Decisions involving Sunset Limited Trains.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests "[a]ll communications" between Union Pacific supervisors and dispatchers pertaining to Dispatching Decisions involving Sunset Limited Trains. Union Pacific dispatchers dispatched hundreds of Sunset Limited Trains during the Investigative Period, and supervisors and dispatchers regularly communicate about dispatching decisions.

Request No. 10

Documents sufficient to show any criteria used to evaluate or compensate dispatchers and all documents related to any evaluations, reviews, or other feedback provided to dispatchers responsible for Dispatching Decisions.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests "all documents" related to any evaluations, reviews, or other feedback provided to dispatchers responsible for Dispatching Decisions, and as seeking documents not relevant to any issue in this proceeding in that it requests documents not concerning evaluations, reviews, or feedback related to dispatching of Sunset Limited Trains.

Subject to and without waiving its objections, Union Pacific will produce documents sufficient to show criteria used to evaluate or compensate dispatchers, to the

extent it has not already produced such documents in response to Request 22 in Appendix A, Part IV, of the Board's decision served July 11, 2023.

Request No. 11

For the time period November 11, 2020 to Present, all documents relating to any investigations, audits, studies, reviews, analyses, or similar evaluations conducted by UP regarding Dispatching Decisions, HRD, or Preference on the UP Lines.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests "all documents" relating to the requested materials, and as seeking documents not relevant to any issue in this proceeding in that it requests documents relating to Dispatching Decisions not involving Sunset Limited Trains.

Subject to and without waiving its objections, Union Pacific will produce any investigations, audits, studies, reviews, analyses, or similar evaluations regarding Dispatching Decisions involving Sunset Limited Trains, HRD, or Preference.

Request No. 12

All documents relating to any disciplinary actions taken or contemplated against a dispatcher and concerning one or more Dispatching Decisions.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests "all documents" relating to disciplinary actions taken or "contemplated," and as seeking documents not relevant to any issue in this proceeding in that it requests documents concerning Dispatching Decisions not involving Sunset Limited Trains.

Subject to and without waiving its objections, Union Pacific will produce documents sufficient to show any disciplinary actions taken against a dispatcher concerning Dispatching Decisions involving Sunset Limited Trains.

Request No. 13

All documents concerning any operational adjustment, scheduling adjustment, capital investment, or other similar action that UP has analyzed or considered to address, evaluate, or understand delays to freight or passenger trains traveling on the UP Lines, including all documents relating to the reason(s) UP did not implement any such adjustments, investment, or other similar actions.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests “[a]ll documents” concerning the actions that Union Pacific has analyzed or considered for a variety of purposes. Union Pacific also objects to this request as vague and unclear in that it suggests adjustments and investments could be used to evaluate or understand delays. Union Pacific further objects to this request as unduly burdensome and not proportional to the needs of the case in that it appears to be generally duplicative of Request No. 21 in Appendix A, Part IV, of the Board’s decision served July 11, 2023.

Request No. 14

All documents concerning UP efforts to obtain funds from federal, state, or other sources for capital expenditures on the UP Lines.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests “[a]ll documents” concerning efforts to obtain funds for capital expenditures on the UP Lines.

Subject to and without waiving its objections, Union Pacific will produce documents sufficient to show efforts to obtain funds for capital expenditures on the UP Lines, to the extent it has not already produced such documents in response to Request No. 21 in Appendix A, Part IV, of the Board’s decision served July 11, 2023

Request No. 15

All agreements with freight customers using any portion of the UP Lines for which UP's compensation varies depending on the time or timeliness of the delivery of products or commodities, or depending on availability of loaded cars for unloading or empty cars for loading of customer products or commodities.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that responding would require reviewing all agreements with the thousands of customers that use some portion of the UP Lines, and as seeking documents not relevant to any issue in this proceeding.

Request No. 16

All documents constituting or concerning UP's current operating plan(s) for lines used by Sunset Limited Trains, and all documents constituting or concerning efforts to measure operational performance against UP's current operating plan(s) or operating schedule(s) for lines used by Sunset Limited Trains.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests "[a]ll documents" concerning Union Pacific's current operating plans. Union Pacific further objects to this request as unduly burdensome and not proportional to the needs of the case in that it appears to be generally duplicative of Request No. 8 in Appendix A, Part IV, of the Board's decision served July 11, 2023.

Request No. 17

All corporate policies, protocols, guidance documents, or other materials related to the implementation of Preference, or used to evaluate the implementation of Preference.

Union Pacific Response:

Union Pacific will produce responsive documents, to the extent it has not already produced them in response to Request Nos. 22 and 24 in Appendix A, Part IV, of the Board's decision served July 11, 2023.

Request No. 18

Documents sufficient to show any procedures or systems used to implement or evaluate the implementation of Preference.

Union Pacific Response:

Union Pacific will produce responsive documents, to the extent it has not already produced them in response to Request Nos. 22 and 24 in Appendix A, Part IV, of the Board's decision served July 11, 2023.

Request No. 19

For the UP Lines, documents sufficient to associate locomotive numbers associated with each train that operated on a fixed schedule during the Investigative Period.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that more than 49,000 scheduled trains operated on the UP Lines during the Investigative Period, and as seeking information not relevant to any issue in this proceeding.

Request No. 20

All documents analyzing, assessing, investigating, studying, reviewing or otherwise evaluating how the adoption and implementation of precision-scheduled railroading has affected the on-time performance of intercity passenger trains and/or affected the implementation of Preference.

Union Pacific Response:

Union Pacific will produce responsive documents.

Request No. 21

All documents analyzing, assessing, investigating, studying, reviewing or otherwise evaluating how UP's network planning and design have affected, are affecting, or will affect the on-time performance of Sunset Limited Trains and/or implementation of Preference on the UP Lines, including but not limited to documents concerning any ongoing or anticipated capital investments that will affect UP's network capacity on the UP Lines.

Union Pacific Response:

Union Pacific objects to this request as vague and unclear in that documents requested in the phrase beginning "including" do not appear to be a subset of the primary request. Union Pacific also objects to this request to the extent it implicitly assumes "network planning and design" affects implementation of Preference. Union Pacific further objects to the request as overbroad and unduly burdensome to the extent it is intended to request "[a]ll documents" concerning capital investments that will affect Union Pacific's capacity on the UP Lines.

Request No. 22

All documents concerning policies, protocols, or procedures related to how You prioritize freight traffic on the UP Lines, or the dispatching of any intermodal or other trains carrying priority freight on the UP Lines.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests "[a]ll documents" concerning Union Pacific policies, practices and procedures relating to prioritizing freight traffic on the UP Lines. Union Pacific also objects to this request as duplicative of Request No. 2. Union Pacific further objects to this request as unduly burdensome and not proportional to the needs of the case in that it is generally duplicative of Request Nos. 22 and 24 in Appendix A, Part IV, of the Board's decision served July 11, 2023.

Request No. 23

For the time period November 11, 2020 to Present, all documents relating to any modeling, studies, reviews, analyses, investigations, or other similar evaluations conducted by UP regarding the Sunset Limited schedule or freight schedules on lines used by Sunset Limited Trains.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests “all documents” relating to any modeling studies or similar evaluations, and as seeking documents not relevant to any issue in this proceeding in that it requests documents involving freight schedules. Union Pacific further objects to this request as unduly burdensome and not proportional to the needs of the case in that it is generally duplicative of Request Nos. 3, 4, 5, 6, 7, 8, 9, and 10 in Appendix A, Part IV, of the Board’s decision served July 11, 2023. Union Pacific also objects to this request as premature to the extent it requests documents Union Pacific may submit in reply comments in this proceeding.

Subject to and without waiving its objections, will produce final modeling studies or similar evaluations conducted by Union Pacific regarding the Sunset Limited schedule.

Request No. 24

All documents reflecting or relating to UP’s consideration of Sunset Limited Trains in determining, assessing, evaluating, studying, or otherwise considering freight volumes for lines used by the Sunset Limited Trains.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests “all documents” reflecting or relating to Union Pacific’s consideration of Sunset Limited trains in considering freight volumes for lines used by those trains.

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Attorneys for Union Pacific Railroad Company

October 4, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of October, 2023, I caused a copy of the foregoing document to be served by email on Administrative Law Judge McCarthy and all parties of record in Docket No. NOR 42175.

/s/ Michael L. Rosenthal

EXHIBIT E

From: [Trepp, Alex S.](#)
To: [Rosenthal, Michael](#)
Subject: RE: Sunset Limited: Follow-Up on Meet and Confer re UP Responses
Date: Tuesday, November 28, 2023 8:02:00 PM

Thanks, Mike. When do you anticipate that UP will be able to provide its position on Request 6 and Request 19? And when do you anticipate that UP will provide any other responses on the below items?

Best,
Alex

From: Rosenthal, Michael <mrosenthal@cov.com>
Sent: Tuesday, November 28, 2023 9:40 AM
To: Trepp, Alex S. <ATrepp@jenner.com>
Subject: RE: Sunset Limited: Follow-Up on Meet and Confer re UP Responses

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Alex,

Sorry for the delay--still catching up on some stuff. We are continuing to explore whether it is even possible to produce the information requested with regard to Request 6 and if so, how we could do so practicably. Similarly, we are continuing to explore whether we have documents responsive Request 19.

Regards,
Mike

From: Trepp, Alex S. <ATrepp@jenner.com>
Sent: Wednesday, November 22, 2023 12:36 PM
To: Rosenthal, Michael <mrosenthal@cov.com>
Subject: RE: Sunset Limited: Follow-Up on Meet and Confer re UP Responses

[EXTERNAL]

Hey Mike:

When we spoke last week, and I asked whether a response on this would be forthcoming, you indicated that few disputes were anticipated, that you were following up with UP on Requests 6 and 19, and that you would circle back. Please confirm that UP will respond by Tuesday November 28. We will also need sufficient time to review the response and meet and confer.

Regarding Request 6: As mentioned last week, we confirmed that Amtrak does not have continuing access to the dispatch playbacks. While Amtrak appreciates the offer to review dispatch tapes live, and understands that this request may implicate a very large volume of data, we continue to think that proposal is unworkable because of the time required to review playbacks and the continuing

nature of Amtrak's evaluation of the record in this case. When last we spoke, UP was going to follow-up on whether there was a technical method for downloading and providing the dispatch playbacks. Please let us know where that effort stands and how much data is at issue.

I have some sporadic availability this afternoon if it would be helpful to discuss. I'm otherwise very flexible on Monday and Tuesday and hope you have a nice holiday.

Best,
Alex

From: Trepp, Alex S.

Sent: Thursday, October 26, 2023 8:48 AM

To: 'Rosenthal, Michael' <mrosenthal@cov.com>

Subject: Sunset Limited: Follow-Up on Meet and Confer re UP Responses

Mike:

Thank you for meeting and conferring on UP's responses to Amtrak's Requests for Production ("Requests"). Based on the discussion, we are optimistic that the parties can work collaboratively to resolve the appropriate scope of discovery responsive to the Requests. To expedite the parties' discussion, we write to memorialize some key points from that conversation and to follow-up on some items that we discussed. To avoid any confusion, Amtrak reserves the right to press each of its requests if the parties cannot reach an amicable resolution on whether and how UP will search for documents responsive to each request.

RFP 1: Amtrak continues to believe that the production of responsive policies should include all policies applicable during the Relevant Period, as defined by the Board. UP is evaluating whether the policies that it intends to produce were modified during the Relevant Period and will circle back.

RFP 2: Amtrak continues to believe that the production of formal and final decks, studies, reports, policies, presentations, memoranda, and other similar documents (together "Analyses") concerning policies, practices, and procedures relating to Dispatching Decisions is appropriate. The parties agreed that Amtrak would provide more granular examples of the type of Analyses requested. With that in mind, Amtrak provides the following illustrative examples of Analyses that would be responsive to this Request:

1. Analyses concerning compliance with movement planner business rules, pass protocols, train dispatcher rules, and other similar policies or protocols, including those produced in response to Board Request 22;
2. Analyses concerning the impact of movement planner business rules, pass protocols, train dispatcher rules, and other similar policies or protocols on network fluidity, including those produced in response to Board Request 22;
3. Analyses concerning the modification of movement planner business rules, pass protocols,

train dispatcher rules, and other similar policies or protocols, including those produced in response to Board Request 22.

RFP 3: Amtrak continues to believe that the production of communications responsive to this request is appropriate. UP indicated that it was already running preliminary searches to assess what could reasonably be located. The parties agreed to table discussion of objections until the results of searches are known and any issues related to burden can be discussed.

RFP 4: Amtrak continues to believe that the production of communications responsive to this request is appropriate. The parties again agreed to table discussion of objections until UP runs preliminary searches and evaluates preliminary returns.

RFP 5: Amtrak continues to believe that the production of documents responsive to this request is appropriate. Amtrak agreed to resolve concerns about the request for “all documents” by modifying its request to seek the production of Analyses. Please confirm that UP will not be limiting its search to Dispatching Decisions that involve a Sunset Limited Train.

RFP 6: Amtrak continues to believe that the proposal to require that Amtrak representatives (and experts) review dispatching playbacks involving train movements on the UP Lines in person is unworkable because of the time required to review playbacks and the continuing nature of Amtrak’s evaluation of the record in this case. Consistent with the parties’ discussion, Amtrak will investigate whether it has continuing access to dispatching playbacks for the UP Lines. UP indicated uncertainty about whether there exists a methodology to download and export dispatching playbacks and offered to revert on that issue and burden. Please let us know whether UP can produce the dispatching playbacks.

RFP 7: The parties agreed that—subject to modifying the request to seek daily system, region, or division performance reports for “train” rather than “any” operations on the UP Lines—UP will conduct a reasonable and diligent search for and produce non-privileged responsive documents.

RFP 9: Amtrak continues to believe that the production of communications responsive to this request is appropriate. UP indicated that it was already running preliminary searches to assess what could reasonably be located. UP agreed to table discussion of objections until the results of searches are known and issues related to burden can be addressed.

RFP 10: Amtrak continues to believe that—in addition to producing documents sufficient to show criteria used to evaluate or compensate dispatchers—UP must produce documents related to any evaluations, reviews, or other feedback provided to dispatchers responsible for Dispatching Decisions. Amtrak agreed to resolve concerns about the request for “all documents” by modifying its request to exclude a forensic search for email and to exclude feedback based on attendance. UP agreed to assess whether there exists a formal process for providing evaluations, reviews, or other feedback to dispatchers and then circle back.

RFP 11: For reasons articulated during our meet and confer, Amtrak continues to believe that Analyses related to Dispatching Decisions are relevant to this proceeding even if they do not

expressly reference a Dispatching Decision involving Sunset Limited Trains. Amtrak has also reviewed Requests 2 and 11 and does not believe that Request 11 is duplicative, since it focuses on Dispatching Decisions rather than policies, practices, and procedures governing those decisions. To the extent UP has conducted Analyses of Dispatching Decisions, for example to assess whether particular dispatching decisions concerning freight trains are (i) affecting network fluidity, (ii) creating congestion, (iii) affecting the availability of sidings, (iv) affecting compliance with any contractual obligations regarding timeliness, (v) affecting the availability or expiration of crews, or (vi) otherwise affecting operations on the UP Lines, those Analyses should be produced.

RFP 13: During the meet and confer, Amtrak agreed to resolve concerns about the request for “all documents” by modifying its request to seek only Analyses. In response to concerns about vagueness or lack of clarity, Amtrak offered to consider clarifying the requests and provides the following clarifications and limitations.

1. *Operational Adjustments.* Amtrak will limit its request to documents analyzing any operational adjustment implemented or considered to improve on-time performance of Sunset Limited trains or otherwise affecting the on-time performance of Sunset Limited Trains.
2. *Scheduling Adjustments.* Amtrak will limit its request to documents analyzing any scheduling adjustment implemented or considered to improve on-time performance of Sunset Limited Trains (including scheduling adjustments applicable to freight trains and considered for the purpose of improving on-time performance of Sunset Limited Trains).
3. *Capital Investments.* Amtrak will clarify its request to seek documents analyzing capital investments implemented or considered on the UP Lines.

RFP 15: During our meet and confer, the parties agreed to table discussion of each objection so that UP can consider whether to produce all agreements with freight customers using any portion of the UP Lines. Please confirm that UP will produce those agreements.

RFP 16: During the meet and confer, Amtrak agreed to resolve concerns about the request for “all documents” by modifying its request to seek only Analyses. Amtrak also explained why this request is not duplicative. UP agreed to search for Analyses constituting or concerning efforts to measure operational performance against UP operating plans or schedules for lines used by the Sunset Limited.

RFP 19: During the meet and confer, the parties agreed to table discussion of objections while UP evaluates the existence and burden of producing responsive information. Please confirm that UP will produce responsive material if it exists.

RFP 21: During the meet and confer, Amtrak agreed to resolve concerns about the request for “all documents” by modifying its request to seek only Analyses. Amtrak also explained why this request is not duplicative. Amtrak also clarifies that the request seeks Analyses that evaluate how network planning and design have affected, are affecting, or will affect the on-time performance of Sunset Limited Trains or the implementation of preference. Please confirm that UP will search for

documents responsive to the Request.

RFP 24: During the meet and confer, Amtrak agreed to resolve concerns about the request for “all documents” by modifying its request to seek only Analyses. Please confirm that UP will search for documents responsive to the Request.

We look forward to your response and hope the parties can resolve these remaining discovery disputes.

Best

Alex

Alex S. Trepp

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EXHIBIT F

From: [Trepp, Alex S.](#)
To: [Rosenthal, Michael](#)
Subject: RE: STB Docket No. NOR 42175
Date: Tuesday, December 19, 2023 8:26:00 AM

Mike,

We have reviewed your note. Specific responses follow.

Communications. It is surprising to hear that you do not expect to produce a significant number of communications, for example because UP told the Board that when a decision is made to delay an Amtrak train, dispatchers must inform their Corridor Manager. Given the large number of delays to Amtrak trains, we would expect to see a corresponding number of communications between dispatchers and Corridor Managers. Moreover, Union Pacific has had more than three months to complete its review of communications. Even after that considerable length of time, Union Pacific has provided no information about when it will begin or complete its production of communications. As you are aware, the discovery period closes on December 20. Given Union Pacific's failure to even begin (let alone complete) the production of responsive communications, Amtrak reserves the right to seek all appropriate relief.

Dispatching Playbacks. Amtrak has for months been relying on the representations that UP made in its responses and objections and in subsequent discussions regarding the availability of dispatch playbacks. Your response provides no information about why those materials are not available for the Relevant Period, nor when those materials became unavailable. Nor does your response indicate that UP has any intention of providing other materials responsive to Amtrak's long-pending request for "dispatching tapes, dispatching playbacks, and other documents logging or recording Dispatching Decisions, including but not limited to Dispatching Decisions related to the dispatching of all trains entering, exiting, continuing, or otherwise traversing the UP Lines" by the close of discovery on December 20. It is surprising that you would only now begin inquiring of your client what documents UP retains to comply with its regulatory obligations to keep dispatching records given that these documents are clearly encompassed within Amtrak's request. Amtrak reserves the right to seek all appropriate relief.

Contracts (Request 15). The assertion that Amtrak did not address the relevance of these documents is mistaken. As Amtrak explained during our meet and confer, these documents are relevant to UP dispatching priorities and to UP incentives, including based on contractual provisions. In responses to the Board, UP has already made clear that it responds to contractual incentives in moving passenger trains over its lines. Amtrak is entitled to test the power of contrary commercial incentives. Additionally, concerns about the confidentiality of responsive documents have already been addressed through entry of an appropriate protective order. As to burden, the steps that you describe do not appear to constitute a special study, nor does the information provided sufficiently substantiate claims of undue burden. We note that Amtrak specifically offered more than six weeks ago to obviate the need for review to determine whether a document provides variable compensation. Amtrak again reserves all rights to seek appropriate relief.

Dispatching Evaluations. It is hard to understand how UP can apply the dispatching criteria

identified in UP_SL_0012239 without creating additional records specific to dispatchers, including those on the UP Lines. Amtrak reserves the right to seek appropriate relief.

Production on Request 13. UP has said that its production on this request is complete. However, we have not identified in the 23 documents produced to date any documents analyzing scheduling adjustments for the *Sunset Limited*, including those scheduling adjustments proposed to Amtrak and produced to the Board. Please direct us to those documents, wherever produced, or confirm that no such documents exist.

Production on Request 19. We have not heard back from Union Pacific on Request 19. Please confirm whether information responsive to that request will be included in the December 20, 2023 production.

As UP has not completed its production, Amtrak necessarily reserves all rights with respect to the sufficiency of those productions.

Best,
Alex

From: Rosenthal, Michael <mrosenthal@cov.com>
Sent: Thursday, December 14, 2023 7:14 PM
To: Trepp, Alex S. <ATrepp@jenner.com>
Subject: RE: STB Docket No. NOR 42175

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Alex,

Thanks for your email. Sorry for sending this response at a late hour, but it has been one of those days. I'll respond to your questions in order.

1. Union Pacific expects to complete its production of documents, other than emails responsive to Amtrak's requests for "communications," by December 20. With regard to the emails, based on my ongoing review of documents identified in the review process, I do not expect the process to yield a significant number of additional documents, but it takes time to work through the documents that have identified for review based on search terms.
2. Union Pacific's initial response to Amtrak's request for dispatching playbacks was based on an apparent miscommunication or misunderstanding about the time period at issue. Further investigation has established that Union Pacific does not have playback capability for the period requested by Amtrak. If necessary, Union Pacific can amend its discovery responses. With regard to your reference to 49 CFR 228.17 and 49 CFR 228.9, if you'd like, I can inquire about the documents Union Pacific retains in regard to those provisions, but just reading the list of information in section 228.17, it seems apparent it is very different from playback capability--which is what I understand Amtrak wanted. I will note, however, that Union Pacific's response to the STB's Request No. 23 included data showing changes to signals during the relevant period--if Amtrak is interested in that

level of detail.

3. Union Pacific is standing on its burden objection. Amtrak has not explained why the information it seeks is relevant, but it is impossible to imagine any reason that would justify the effort needed to identify responsive contracts, or that would justify the extensive production of highly confidential commercial information contained in Union Pacific's contracts with its customers. To provide the information requested by Amtrak, Union Pacific would first have to identify all rail cars that moved over the Sunset Limited Route using one database. Union Pacific would then have to take the car-by-car information and tie it back to customer waybills and rate document identifiers using a second database. Union Pacific would then have to take the rate document identifier information and use other databases to obtain the actual rate document. Union Pacific would then have to review each rate document to determine whether the document provides for compensation that varies depending on the time or timeliness of delivery. In some cases, particular rate documents are part of larger, master agreements, so Union Pacific would also have to identify and review the master agreements as well. Just the effort to identify applicable rate documents--tying car movement files to waybill files, then using the waybill information to identify rate documents--would involve a special study, not a mere document request, and would involve burdens vastly disproportionate to the needs of the proceeding.

4. Union Pacific does not have a formal process for providing evaluations, reviews, or other feedback to dispatchers other than the process reflected in the document showing the criteria used to evaluate dispatchers. To cut to the chase, Union Pacific does not maintain files on dispatchers that identify/track/discuss/critique individual dispatching decisions.

5. Union Pacific has completed its production as to Amtrak Request 13.

6. As noted in point #1 above, Union Pacific is continuing to work its way through documents identified in the email search process. Union Pacific is not withholding any documents identified as responsive based on burden objections. I trust Amtrak has taken the same approach to its production of communications.

Regards,
Mike

From: Trepp, Alex S. <ATrepp@jenner.com>
Sent: Tuesday, December 12, 2023 10:24 AM
To: Rosenthal, Michael <mrosenthal@cov.com>
Subject: RE: STB Docket No. NOR 42175

[EXTERNAL]

Thanks, Mike.

We appreciate the request-by-request response. We have several follow-up questions.

First, in response to several of the requests, Union Pacific indicates that it is searching for and will produce any responsive documents. UP has previously represented it will produce on a rolling basis. However, we need to know when the productions will be complete to ensure that Amtrak has enough time to review the sufficiency of the completed production and evaluate any next steps Amtrak may need to take with respect to the sufficiency of UP's production. Amtrak only served 25 requests and it served them three months ago. The efficient and expeditious conduct of this proceeding requires that the parties wrap that initial discovery. Please confirm when UP will complete its productions.

Second, your response indicates that Union Pacific has determined that it does not possess dispatching playback documents for the Relevant Period. That response is very hard to understand. As an initial matter, it flatly contradicts the UP responses and objections, which stated that UP would "allow Amtrak representatives to review dispatching playbacks involving train movements on the UP Lines in person at Union Pacific's facilities in Omaha, Nebraska." UP Responses and Objections at Response 7. It is also inconsistent with repeated representations that UP has been evaluating whether there exist technical methods for downloading and providing those dispatching playbacks. *See, e.g.*, attached correspondence. And the position is hard to square with UP's regulatory obligations under 49 C.F.R. §§ 228.9 and 228.17.

Please promptly explain the discrepancy between representations that UP made in its initial responses and objections and yesterday's representation that the documents do not exist. Additionally, please note that Amtrak's initial Request encompassed several types of documents other than dispatch playbacks. *See* Request No. 6 (seeking "dispatching tapes, dispatching playbacks, and other documents logging or recording Dispatching Decisions, including but not limited to Dispatching Decisions related to the dispatching of all trains entering, exiting, continuing, or otherwise traversing the UP Lines"). Based on Union Pacific's initial representation concerning the availability of those playbacks, Amtrak has not previously pressed for other documents responsive to its request. However, Amtrak reserves the right to do so if UP is now for the first time telling Amtrak that the dispatch playbacks do not exist. Amtrak also reserves all other rights in connection with this request.

Third, your response indicates that UP is continuing to evaluate the burdens of responding to Request 15. However, it has been more than six weeks since Amtrak proposed a straightforward compromise to resolve UP's initial objection to this request. If UP intends to stand on burden objections to producing agreements with freight customers that use the UP Lines, please let us know by Thursday December 14. Should UP stand on its burden objection, UP must provide enough detail about the asserted burden to permit Amtrak to evaluate whether the objection is merited.

Fourth, your response indicates that Union Pacific has produced a document showing the criteria used to evaluate dispatchers. As set forth in our October 26, 2023 email, Amtrak continues to believe that in addition to producing documents sufficient to show the pertinent criteria for evaluation, UP must produce documents related to any evaluations, reviews, or other feedback provided to dispatchers responsible for Dispatching Decisions. UP during our meet and confer agreed to assess whether there exists a formal process for providing evaluations, reviews, or other

feedback to dispatchers and then circle back on this portion of the request. Please do so by Thursday December 14.

Fifth, your response indicates that Union Pacific has produced responsive documents located in a reasonable search for Amtrak Request 13. Please confirm whether Union Pacific has completed its production as to that Request.

Finally, with respect to several requests concerning communications, UP continues to qualify its response based on potential burden issues. See Response to Requests 3, 4, and 9. Please confirm that UP is producing communications responsive to each request by December 14. If there are potentially responsive documents that UP is not producing based on objections about burdensomeness, please provide enough detail about the asserted burden to permit Amtrak to evaluate whether the objection is merited.

We remain optimistic that the parties can work collaboratively to resolve remaining issues. As our discussions continue, Amtrak necessarily reserves all rights with respect to the requests and the sufficiency of UP's productions. As to schedule, we cannot evaluate what to tell the Board about scheduling until we have responses to the above. We look forward to hearing from you promptly and are happy to schedule a call to discuss.

Best,
Alex

From: Rosenthal, Michael <mrosenthal@cov.com>

Sent: Monday, December 11, 2023 9:17 AM

To: Trepp, Alex S. <ATrepp@jenner.com>

Subject: RE: STB Docket No. NOR 42175

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Alex,

I've added responses in bold, capital letters.

Regards,
Mike

RFP 1: Amtrak continues to believe that the production of responsive policies should include all policies applicable during the Relevant Period, as defined by the Board. UP is evaluating whether the policies that it intends to produce were modified during the Relevant Period and will circle back.

UNION PACIFIC HAS PRODUCED THE REQUESTED DOCUMENTS.

RFP 2: Amtrak continues to believe that the production of formal and final decks, studies, reports, policies, presentations, memoranda, and other similar documents (together "Analyses") concerning policies, practices, and procedures relating to Dispatching Decisions is appropriate. The parties

agreed that Amtrak would provide more granular examples of the type of Analyses requested. With that in mind, Amtrak provides the following illustrative examples of Analyses that would be responsive to this Request:

UNION PACIFIC IS SEARCHING FOR AND WILL PRODUCE THE REQUESTED DOCUMENTS, TO THE EXTENT ANY EXIST AND ARE LOCATED IN UNION PACIFIC'S REASONABLE SEARCH.

1. Analyses concerning compliance with movement planner business rules, pass protocols, train dispatcher rules, and other similar policies or protocols, including those produced in response to Board Request 22;
2. Analyses concerning the impact of movement planner business rules, pass protocols, train dispatcher rules, and other similar policies or protocols on network fluidity, including those produced in response to Board Request 22;
3. Analyses concerning the modification of movement planner business rules, pass protocols, train dispatcher rules, and other similar policies or protocols, including those produced in response to Board Request 22.

RFP 3: Amtrak continues to believe that the production of communications responsive to this request is appropriate. UP indicated that it was already running preliminary searches to assess what could reasonably be located. The parties agreed to table discussion of objections until the results of searches are known and any issues related to burden can be discussed.

UNION PACIFIC IS SEARCHING FOR AND WILL PRODUCE THE REQUESTED DOCUMENTS, TO THE EXTENT ANY EXIST AND ARE LOCATED IN UNION PACIFIC'S REASONABLE SEARCH, SUBJECT TO POTENTIAL BURDEN ISSUES.

RFP 4: Amtrak continues to believe that the production of communications responsive to this request is appropriate. The parties again agreed to table discussion of objections until UP runs preliminary searches and evaluates preliminary returns.

UNION PACIFIC IS SEARCHING FOR AND WILL PRODUCE THE REQUESTED DOCUMENTS, TO THE EXTENT ANY EXIST AND ARE LOCATED IN UNION PACIFIC'S REASONABLE SEARCH, SUBJECT TO POTENTIAL BURDEN ISSUES.

RFP 5: Amtrak continues to believe that the production of documents responsive to this request is appropriate. Amtrak agreed to resolve concerns about the request for “all documents” by modifying its request to seek the production of Analyses. Please confirm that UP will not be limiting its search to Dispatching Decisions that involve a Sunset Limited Train.

UNION PACIFIC IS SEARCHING FOR AND WILL PRODUCE THE REQUESTED DOCUMENTS, TO THE EXTENT ANY EXIST AND ARE LOCATED IN UNION PACIFIC'S REASONABLE SEARCH.

RFP 6: Amtrak continues to believe that the proposal to require that Amtrak representatives (and experts) review dispatching playbacks involving train movements on the UP Lines in person is unworkable because of the time required to review playbacks and the continuing nature of Amtrak’s evaluation of the record in this case. Consistent with the parties’ discussion, Amtrak will investigate whether it has continuing access to dispatching playbacks for the UP Lines. UP indicated uncertainty

about whether there exists a methodology to download and export dispatching playbacks and offered to revert on that issue and burden. Please let us know whether UP can produce the dispatching playbacks.

UNION PACIFIC HAS DETERMINED THAT IT DOES NOT POSSESS DISPATCHING PLAYBACK DOCUMENTS FOR THE RELEVANT PERIOD.

RFP 7: The parties agreed that—subject to modifying the request to seek daily system, region, or division performance reports for “train” rather than “any” operations on the UP Lines—UP will conduct a reasonable and diligent search for and produce non-privileged responsive documents.

UNION PACIFIC HAS PRODUCED DOCUMENTS CONTAINING THE REQUESTED INFORMATION ON A WEEKLY BASIS. UNION PACIFIC DOES NOT HAVE EXISTING DOCUMENTS CONTAINING THE REQUESTED INFORMATION ON A DAILY BASIS.

RFP 9: Amtrak continues to believe that the production of communications responsive to this request is appropriate. UP indicated that it was already running preliminary searches to assess what could reasonably be located. UP agreed to table discussion of objections until the results of searches are known and issues related to burden can be addressed.

UNION PACIFIC IS SEARCHING FOR AND WILL PRODUCE THE REQUESTED DOCUMENTS, TO THE EXTENT ANY EXIST AND ARE LOCATED IN UNION PACIFIC'S REASONABLE SEARCH, SUBJECT TO POTENTIAL BURDEN ISSUES.

RFP 10: Amtrak continues to believe that—in addition to producing documents sufficient to show criteria used to evaluate or compensate dispatchers—UP must produce documents related to any evaluations, reviews, or other feedback provided to dispatchers responsible for Dispatching Decisions. Amtrak agreed to resolve concerns about the request for “all documents” by modifying its request to exclude a forensic search for email and to exclude feedback based on attendance. UP agreed to assess whether there exists a formal process for providing evaluations, reviews, or other feedback to dispatchers and then circle back.

UNION PACIFIC HAS PRODUCED A DOCUMENT SHOWING THE CRITERIA USED TO EVALUATE DISPATCHERS.

RFP 11: For reasons articulated during our meet and confer, Amtrak continues to believe that Analyses related to Dispatching Decisions are relevant to this proceeding even if they do not expressly reference a Dispatching Decision involving Sunset Limited Trains. Amtrak has also reviewed Requests 2 and 11 and does not believe that Request 11 is duplicative, since it focuses on Dispatching Decisions rather than policies, practices, and procedures governing those decisions. To the extent UP has conducted Analyses of Dispatching Decisions, for example to assess whether particular dispatching decisions concerning freight trains are (i) affecting network fluidity, (ii) creating congestion, (iii) affecting the availability of sidings, (iv) affecting compliance with any contractual obligations regarding timeliness, (v) affecting the availability or expiration of crews, or (vi) otherwise affecting operations on the UP Lines, those Analyses should be produced.

UNION PACIFIC IS SEARCHING FOR AND WILL PRODUCE THE REQUESTED DOCUMENTS, TO THE EXTENT ANY EXIST AND ARE LOCATED IN UNION PACIFIC'S REASONABLE SEARCH.

RFP 13: During the meet and confer, Amtrak agreed to resolve concerns about the request for “all

documents” by modifying its request to seek only Analyses. In response to concerns about vagueness or lack of clarity, Amtrak offered to consider clarifying the requests and provides the following clarifications and limitations.

UNION PACIFIC HAS PRODUCED RESPONSIVE DOCUMENTS LOCATED IN A REASONABLE SEARCH.

1. *Operational Adjustments.* Amtrak will limit its request to documents analyzing any operational adjustment implemented or considered to improve on-time performance of Sunset Limited trains or otherwise affecting the on-time performance of Sunset Limited Trains.
2. *Scheduling Adjustments.* Amtrak will limit its request to documents analyzing any scheduling adjustment implemented or considered to improve on-time performance of Sunset Limited Trains (including scheduling adjustments applicable to freight trains and considered for the purpose of improving on-time performance of Sunset Limited Trains).
3. *Capital Investments.* Amtrak will clarify its request to seek documents analyzing capital investments implemented or considered on the UP Lines.

RFP 15: During our meet and confer, the parties agreed to table discussion of each objection so that UP can consider whether to produce all agreements with freight customers using any portion of the UP Lines. Please confirm that UP will produce those agreements.

UNION PACIFIC IS CONTINUING TO EVALUATE THE BURDENS OF RESPONDING TO THIS REQUEST, BUT CONTINUES TO ASSERT ITS OBJECTIONS.

RFP 16: During the meet and confer, Amtrak agreed to resolve concerns about the request for “all documents” by modifying its request to seek only Analyses. Amtrak also explained why this request is not duplicative. UP agreed to search for Analyses constituting or concerning efforts to measure operational performance against UP operating plans or schedules for lines used by the Sunset Limited.

THE DOCUMENTS UNION PACIFIC PRODUCED IN RESPONSE TO RFP 7 CONTAIN INFORMATION ON OPERATIONAL PERFORMANCE.

RFP 19: During the meet and confer, the parties agreed to table discussion of objections while UP evaluates the existence and burden of producing responsive information. Please confirm that UP will produce responsive material if it exists.

UNION PACIFIC IS CONTINUING TO EVALUATE THE BURDENS AND FEASIBILITY OF RESPONDING TO THIS REQUEST, AND INTENDS TO PRODUCE THE REQUESTED INFORMATION IF REASONABLY FEASIBLE.

RFP 21: During the meet and confer, Amtrak agreed to resolve concerns about the request for “all documents” by modifying its request to seek only Analyses. Amtrak also explained why this request is not duplicative. Amtrak also clarifies that the request seeks Analyses that evaluate how network planning and design have affected, are affecting, or will affect the on-time performance of Sunset Limited Trains or the implementation of preference. Please confirm that UP will search for documents responsive to the Request.

UNION PACIFIC IS SEARCHING FOR AND WILL PRODUCE THE REQUESTED DOCUMENTS, TO THE

EXTENT ANY EXIST AND ARE LOCATED IN UNION PACIFIC'S REASONABLE SEARCH.

RFP 24: During the meet and confer, Amtrak agreed to resolve concerns about the request for “all documents” by modifying its request to seek only Analyses. Please confirm that UP will search for documents responsive to the Request.

UNION PACIFIC HAS DETERMINED, BASED ON A REASONABLE SEARCH, THAT NO RESPONSIVE DOCUMENTS EXIST.

From: Trepp, Alex S. <ATrepp@jenner.com>
Sent: Friday, December 8, 2023 3:35 PM
To: Rosenthal, Michael <mrosenthal@cov.com>
Subject: STB Docket No. NOR 42175

[EXTERNAL]

Mike:

Amtrak has been working diligently and in good faith to respond to the more than 150 discovery requests that UP propounded. Amtrak has already produced more than 1,000 documents and anticipates producing approximately 850 more today. Amtrak has also worked to provide timely responses to issues raised in meet and confers on the voluminous and burdensome document requests that UP served. As you are aware, UP made its first production on Wednesday, providing just 23 documents. Moreover, UP still has not provided its position on discovery disputes raised in our email of October 26, 2023. We have been patient based on repeated assurances that UP is working through these issues. However, the efficient conduct of this proceeding requires that UP provide its position on outstanding discovery issues and confirm when it will complete its production of documents, so that Amtrak can assess next steps. Please provide us with UP's responses on these issues by Tuesday.

Please also let us know whether you have time next week to meet and confer on scheduling issues, in view of the Board's November 20, 2023 Order.

Best,
Alex

Alex S. Trepp

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EXHIBIT G

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

**UNION PACIFIC RAILROAD COMPANY'S
REPLY TO MOTION TO COMPEL**

CRAIG V. RICHARDSON
JAMES B. BOLES
JOSEPHINE JORDAN
Union Pacific Railroad Company
1400 Douglas Street
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Attorneys for Union Pacific Railroad Company

January 9, 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

**UNION PACIFIC RAILROAD COMPANY'S
REPLY TO MOTION TO COMPEL**

The Board should deny the motion to compel filed by Amtrak on December 20, 2023. Union Pacific expects to produce certain documents responsive to two of the three categories of documents that Amtrak requested by January 15, 2024, so there is no need to compel their production. The Board should deny Amtrak's request for the third category of documents—Union Pacific's contracts with customers.

Union Pacific has worked cooperatively and diligently to respond to Amtrak's discovery requests. Union Pacific expects to complete its production of responsive material in essentially the same amount of time Amtrak took to respond to Union Pacific's discovery requests.

Union Pacific addresses Amtrak's specific complaints below.

I. Dispatching Records.

In response to Amtrak's request for Dispatching Records, Union Pacific is producing (i) dispatcher's records of movement of trains for Amtrak's Sunset Limited trains, and (ii) activity data from its computer-aided dispatching system. Union Pacific has already produced signal lining data reflecting dispatching decisions for the portions of the Sunset Limited Route dispatched by Union Pacific in response to investigative requests by the Board.

When Amtrak requested Dispatching Records, Union Pacific understood Amtrak was seeking the ability to “replay” past train movements on systems used by dispatchers (to which Amtrak has access). Union Pacific’s systems have some replay capability, but only for the most recent 99 hours of data. Union Pacific cannot produce what it does not have. However, Union Pacific’s systems retain the data underlying the activities shown on its dispatching systems. Union Pacific will produce the data to Amtrak. The amount of data being produced is substantial. Union Pacific has worked to divide the data into 17 Microsoft Access database files totaling nearly 20 gigabytes of data—the smallest database file contains nearly 1.5 million rows of data.

Amtrak’s motion also refers to train dispatching records that Union Pacific is required to retain under rules established by the Federal Railroad Administration. Union Pacific will produce train dispatching records for Amtrak’s Sunset Limited trains for the October 1, 2021, through December 8, 2022, period requested by Amtrak. Production of records for all trains that moved over any portion of the Sunset Limited route during that period would be unduly burdensome. Union Pacific does not have an automated process for retrieving these records: Union Pacific employees would need to retrieve records one train at a time for the nearly 42,000 non-Amtrak trains that moved over all or part of the Sunset Limited route from October 1, 2021, through December 8, 2022. Retrieving just the 366 dispatching records for the Amtrak trains that moved over the Sunset Limited route took Union Pacific employees more than two full business days. Union Pacific estimates it would take two to three weeks of time for an employee to develop a special computer program to automate the record retrieval process—time that would be taken away from other critical business responsibilities. Especially in light of Union Pacific’s

production of its actual activity data from its dispatching system, Union Pacific should not be required to undertake the costly, time-consuming effort required to retrieve train dispatching records. If Union Pacific is required to produce those records, Amtrak should be required to compensate Union Pacific for the costs.

II. Communications.

In response to Amtrak’s requests for “communications,” Union Pacific has been gathering and reviewing email—as the parties’ counsel discussed on several occasions. Amtrak complains about the pace of production, but it did not *itself* produce any documents responsive to Union Pacific’s requests for “communications” until December 8, 2023—108 days after Union Pacific first served its requests. When Amtrak filed its motion to compel, only 100 days had passed since it served its requests. Union Pacific will produce the requested communications, so there is no need to compel production.

III. Contracts.

The Board should deny Amtrak’s motion to compel Union Pacific to produce all agreements with customers using any portion of the Sunset Limited Route from October 1, 2021, through December 8, 2022, “for which UP’s compensation varies depending on the time or timeliness of the delivery of products or commodities, or depending on availability of loaded cars for unloading or empty cars for loading of customer products or commodities.” Amtrak Request No. 15. Complying with Amtrak’s contract request would impose an undue burden on Union Pacific, far outweighing the limited value of the information sought. When requested discovery is plainly burdensome, the Board “require[s] a substantial showing of relevance and need to outweigh the burden of producing [the] evidence.” *FMC Wyo. Corp. v. Union Pac. R.R.*, STB Docket No. 42022, slip op. at 5 (served Feb. 5, 1998). Here, the requested discovery is especially

burdensome because Union Pacific does not maintain contract information in a manner that would allow it to respond to Amtrak's request without conducting a special study to ascertain the specific information requested. That Union Pacific would need to conduct a special study to respond to Amtrak's request provides an additional ground for denying discovery. *See PPL Mont., LLC v. The Burlington N. & Santa Fe Ry.*, STB Docket No. 42054, slip op. at 3 (served Nov. 9, 2000) ("Our discovery rules, however, require parties to furnish information in their possession, not to prepare special studies.").

As Union Pacific explained to Amtrak, identifying and producing responsive contracts would involve a burdensome special study. Union Pacific would have to develop computer programming to identify all the rail cars that moved over the Sunset Limited Route, tie the car movement data to billing data residing in a second database, then use the billing data to retrieve rate documents residing in a third database. Union Pacific would then have to review each rate document to determine whether "Union Pacific's compensation varies depending on the time or timelines of the delivery of products or commodities, or depending on availability of loaded cars for unloading or empty cars for loading of customer products or commodities." Amtrak Document Request No. 15.

Even if Union Pacific went through the burden of identifying and producing the requested rate documents, they would have little or no relevance. Amtrak says it wants the rate documents to explore whether Union Pacific "has powerful financial or other commercial incentives to dispatch certain freight trains ahead of [Amtrak's] *Sunset Limited*." Amtrak Mot. at 14. However, Amtrak does not identify any examples of circumstance in which Union Pacific "dispatched certain freight trains ahead of the

Sunset Limited.” Moreover, even if Amtrak identified freight trains it believes were “dispatched . . . ahead of the *Sunset Limited*,” it could not determine whether the trains were moving freight under the contracts Amtrak requested: identifying a freight train is generally not sufficient to identify the freight cars or containers moving on the train, and identifying the cars and containers is generally not sufficient to identify the contract under which cars and containers moved.

In sum, Amtrak’s request would require Union Pacific to engage in a complex process to identify freight moving over certain lines during a certain period of time, then tie that traffic back to contracts with specific characteristics and produce those highly sensitive commercial documents. Amtrak then would have no specific ability to use those documents. At most, Amtrak would learn Union Pacific has certain contracts that provide various types of incentives for Union Pacific to meet various types of service commitments—a fact to which Union Pacific would be willing to stipulate.

IV. Conclusion

For the reasons stated above, the Board should deny Amtrak's motion to compel.

Respectfully submitted,

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January 9, 2024

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of January, 2024, I caused a copy of the foregoing document to be served by email on Administrative Law Judge McCarthy and all parties of record in Docket No. NOR 42175.

/s/ Michael L. Rosenthal

EXHIBIT H

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

**UNION PACIFIC RAILROAD COMPANY'S
REPLY TO RENEWED MOTION TO COMPEL**

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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

**UNION PACIFIC RAILROAD COMPANY'S
REPLY TO RENEWED MOTION TO COMPEL**

The Board should deny the renewed motion to compel filed by Amtrak on January 23, 2024. However, Union Pacific is willing to help Amtrak understand the CADX log information it produced. Union Pacific is also willing to accept Amtrak's proposed compromise regarding contracts that "reflect variable compensation." Union Pacific addresses the specific points raised by Amtrak's motion in the sections below.¹

I. The Board should not order Union Pacific to produce additional documents logging or recording "Dispatching Decisions."

Amtrak's request for production of additional Trainsheets seeks information that is not proportional to the needs of the case, and production of the requested information would impose burdens and expenses on Union Pacific that far outweigh the value of the information sought. However, Union Pacific is willing to take reasonable steps to help Amtrak understand the 20 gigabytes of dispatching-related data that Union Pacific produced in Microsoft Access database files.

¹ In accordance with the Board's Order served July 11, 2023, Highly Confidential material in this pleading is denoted with double brackets ("{{ }}") and redacted from the public version of this filing.

A. The Board should not order Union Pacific to produce Trainsheets for non-Amtrak trains.

Amtrak's Document Request No. 6 requested information about Union Pacific's

"Dispatching Decisions." Specifically, Amtrak requested:

All dispatching tapes, dispatching playbacks, and other documents logging or recording Dispatching Decisions, including but not limited to Dispatching Decisions related to dispatching of all trains entering, exiting, continuing, or otherwise traversing the UP Lines.

See Exhibit A at 8. Amtrak defined "Dispatching Decisions" as "decisions that involve Dispatching of any freight or passengers train on the UP Lines." *Id.* at 3. It defined "UP Lines" as the Union Pacific rail lines used by Amtrak's Sunset Limited Trains. *Id.* at 4. Amtrak's request covered the time period from October 1, 2021, through and including December 8, 2022. *Id.* at 5. The Board had defined that time period as the "Relevant Period" for this proceeding. *See* Decision served July 11, 2023, slip op. at 20.

Union Pacific understood Amtrak was primarily interested in obtaining what the parties refer to as dispatching playbacks. Dispatching playbacks are essentially a series of static images captured every few seconds containing information about the status of Union Pacific's network, including where trains are located and any path cleared by dispatchers to move them towards their destination. Union Pacific has the ability to replay captured images while focusing on specific portions of its network. However, because of the technology and amount of data involved, Union Pacific's playback capability is available only for a rolling 99-hour period.² Because of the 99-hour

² Storing 99 hours of data consumes approximately 288 gigabytes of in-memory data.

limitation, Union Pacific could not provide access to dispatching playbacks for the Relevant Period when Amtrak requested the information in September 2023.³

When Amtrak indicated an interest in reviewing other dispatching information, Union Pacific reminded Amtrak about its production of a substantial amount of detailed dispatching data in response to the Board's Investigative Request No. 23. *See* Exhibit B. When Amtrak continued to demand still more data, Union Pacific produced Trainsheets for all Sunset Limited Trains that moved during the Relevant Period.⁴

A sample Trainsheet is attached to this reply as Exhibit C. Each Trainsheet contains a variety of information about a train. Each train is identified using an alphanumeric code. For example, Exhibit C contains information for the westbound Sunset Limited train identified as "AMT1 02."

Union Pacific does not have an existing set of Trainsheets in a machine readable format or any other format. When Union Pacific needs a Trainsheet for a specific train, it creates one using a computer program that imports and combines information relating to the train from existing databases. As Exhibit C shows, the information combined to create a Trainsheet includes information regarding the train's Engine Consist (*i.e.*, the locomotives), Crew Consist (*i.e.*, the engineer, conductor, and other personnel); OS

³ For the same reason, Union Pacific had no dispatching playbacks from the Relevant Period that were subject to Board's July 11, 2023, Order instructing parties to retain records relevant to its investigation.

To the extent Amtrak is claiming it needs to be able to review more recent playbacks to understand Union Pacific's dispatching practices, *see* Renewed Mot. at 9, Amtrak does not need any additional discovery from Union Pacific. Amtrak employees already have access to a web display of Union Pacific dispatch information on a near real-time basis that shows network, train location, and train information and allows them to view activity on the portions of the Sunset Limited Route dispatched by Union Pacific.

⁴ Amtrak's motion refers to these documents as "Train Movement Data."

Times (*i.e.*, the arrival and departure times at reporting stations on the route); Delays (*i.e.*, delayed arrivals or departures from stations on the route, including any recorded Reasons and Comments), and any Unusual Occurrences. Union Pacific created and produced Trainsheets to Amtrak using the same process it uses when it creates and produces train sheets for its own business purposes.

Amtrak's renewed motion to compel seeks production of additional Trainsheets. Specifically, Amtrak seeks production of Trainsheets for all non-Amtrak trains that moved over the Sunset Limited Route during the Relevant Period. Based on Union Pacific's analysis, complying with Amtrak's request would require Union Pacific to create and produce Trainsheets for approximately 42,000 trains—several orders of magnitude more than the 366 Amtrak trains that moved over the route.

Amtrak has not justified imposing the substantial burden of producing additional Trainsheets on Union Pacific. *First*, Amtrak has not explained why the information is relevant. Union Pacific produced Trainsheets for Sunset Limited Trains in an effort to satisfy Amtrak's demand for additional dispatching-related information, but Trainsheets are not "documents logging or recording Dispatching Decisions," as Amtrak requested in its Document Request No. 6. Trainsheets sometimes identify delays that may in some sense involve Dispatching Decisions, such as delays relating to "train meets,"⁵ but they do not log or record dispatching decisions themselves. In any event, Union Pacific has produced Trainsheets for Sunset Limited Trains that operated in the Relevant Period, so to the extent Trainsheets address delays experienced by Amtrak trains, Amtrak has that

⁵ A "train meet" is a situation in which trains pass while traveling in opposite directions. When the trains are operating in a territory with just a single main line, a dispatcher must coordinate the pass so it occurs where one of the trains is on a passing siding.

information. Amtrak says Trainsheets contain other types of information that might bear on dispatching decisions indirectly, *see* Renewed Mot. at 9, but Amtrak's argument has no limiting principle—Amtrak could say the same of any Union Pacific data regarding operations on the Sunset Limited Route.

Second, with regard to the burden of production, Amtrak misrepresents Union Pacific's reply to Amtrak's initial motion to compel by claiming that "a single [Union Pacific] employee would retrieve the balance of its Train Movement Data in 2-3 weeks." Renewed Mot. at 10. Union Pacific's reply noted that creating and retrieving the 366 Amtrak Trainsheets took Union Pacific employees more than two business days. *See* Reply at 3. Basic math says producing 42,000 Trainsheets would take approximately 229 days. Union Pacific did estimate that employees could develop programming to automate the production process within 2 to 3 weeks, if they could devote their full time to the project. However, Union Pacific employees do not have capacity to devote their full time to such a project, and the Board's rules do not require Union Pacific to develop programming to produce data in a form in which it does not currently exist. *See PPL Mont., LLC v. The Burlington N. & Santa Fe Ry.*, STB Docket No. 42054, slip op. at 3 (served Nov. 9, 2000) ("Our discovery rules, however, require parties to furnish information in their possession, not to prepare special studies.").

Amtrak's responses to Union Pacific's showing of undue burden have no merit. Amtrak says Union Pacific would be done producing Trainsheets if it began producing them when Amtrak submitted its discovery requests in September 2023. *See* Renewed Mot. at 10. But Amtrak's assertion is irrelevant. Union Pacific's burden objection has

nothing to do with timing. Had Amtrak filed a motion to compel in September 2023, Union Pacific would have raised the same burden objection it raises here.⁶

Amtrak also suggests Union Pacific can be required to bear higher than usual discovery burdens because the case involves a “federal investigation.” Renewed Mot. at 10. But Amtrak made the discovery request at issue, not the Board. Union Pacific has already responded to the Board’s extensive discovery requests, which did not include a request for Trainsheets. Amtrak does not point to any authority granting interested parties heightened power to conduct their own discovery in parallel with federal investigations.

Finally, Amtrak says requiring Union Pacific to produce Trainsheets would help “cure the prejudice imposed by UP’s own failure to timely disclose that playbacks were unavailable.” Renewed Mot. at 10. However, Amtrak never identifies any prejudice from the misunderstanding involving availability of playbacks. Amtrak says it “was deprived of an opportunity to propound additional discovery.” *Id.* at 8. But Amtrak never identifies any additional discovery it would have propounded: Amtrak merely seeks information that it says it previously requested. Amtrak’s prejudice claim adds nothing to its claim that Union Pacific should be required to produce Trainsheets.

In sum, Amtrak has not shown its request that Union Pacific create and produce additional Trainsheets complies with the principles generally applicable to discovery—that it is proportional to the needs of the case, is important in resolving issues in this

⁶ In its October 4, 2023, responses and objections to Amtrak’s document requests, Union Pacific responded to Amtrak’s Document Request No. 6 as “overbroad and unduly burdensome.” *See* Exhibit D.

case, and would likely provide benefits outweighing the burdens of production. *See generally* Fed. R. Civ. P. 26(b)(1). The Board should deny Amtrak's request.

B. Union Pacific is willing to help Amtrak understand Union Pacific's CADX Logs.

Union Pacific could not produce dispatching playbacks for the Relevant Period, but it produced the next best thing—the underlying activity data maintained by Union Pacific.⁷ Union Pacific produced 17 Microsoft Access database files totaling nearly 20 gigabytes of data. In its renewed motion, Amtrak says it needs a “data dictionary” to understand the data. *See* Renewed Mot. at 15. Union Pacific is willing to work with Amtrak to help Amtrak understand how to read data that were produced.

Union Pacific has already tried to help Amtrak understand the data. First, Union Pacific produced the information as an Access database, so Amtrak is incorrect when it claims Union Pacific “has not explained the starting or ending positions for the fields reflected in the materials.” Renewed Mot. at 8. Further, when Union Pacific produced the data, it also produced a document created to explain similar data, though the document was created for the prior version of its dispatching system. *See* Exhibit E. Union Pacific believes Amtrak experts who are familiar with dispatching systems should be able to understand the information Union Pacific produced. For each row of information, the data include date and time information, the location involved, the activity involved, and a separate code indicating whether the activity involved a command sent to the field (identified by a “C”), an indication received from the field

⁷ Amtrak refers to this material as “Dispatching Records.”

(identified by an “I”), a train movement (identified by a “T”), or a request by a dispatcher (identified by an “R”).

However, Union Pacific is willing to answer any questions Amtrak might have about the terminology used to identify specific activities after reviewing the data.

II. Union Pacific fully complied with Amtrak’s request for dispatching communications.

The Board should deny Amtrak’s request that Union Pacific “be made to either produce additional communications related to the representations it made to the Board about dispatching or explain why none exist.” Renewed Mot. at 15.

Amtrak’s document requests contained three requests for “communications” that occurred from October 1, 2021, through and including December 8, 2022. *See* Exhibit A at 8–9 (Request Nos. 3, 4, and 9). Union Pacific also asked Amtrak to produce certain categories of communications. The parties agreed they would respond to such requests by undertaking reasonable searches for responsive emails and would not collect and search through other forms of communication (*e.g.*, texts, instant messages, etc.).

Union Pacific addressed its discovery obligations by using broad search terms to collecting email for the relevant time period from employees likely to have responsive information, developing more targeted searches designed to identify documents more likely to be responsive to individual requests,⁸ manually reviewing all documents identified as potentially responsive, and producing responsive documents.

⁸ For example, a search for all documents including both “Amtrak” and “dispatching” would identify all documents involving Amtrak that include a signature block from anyone in Union Pacific’s Harriman Dispatching Center—a universe far too large to review in the timeframe established by the Board’s procedural schedule.

Although Amtrak claims surprise at the relatively small number of documents produced, it should not be surprised. Amtrak's first request sought communications between or among Union Pacific employees "concerning policies, practices, and procedures applicable to Dispatching Decisions." Exhibit A at 8 (Request No. 3). Union Pacific separately produced a variety of documents regarding its dispatching policies, practices, and procedures in response to the Board's investigative requests and other document requests from Amtrak. As the documents show, Union Pacific's general dispatching policies, practices, and procedures are well established. As a result, there is no reason to expect Union Pacific's policies, practices, and procedures would have been the subject of significant email discussion from October 1, 2021, to December 8, 2022.

Amtrak's second request sought communications "between or among UP, BNSF, CN, NOPB, SCRRA, any governmental entity, and/or any other third-party concerning policies, practices, and procedures applicable to Dispatching Decisions." Exhibit A at 8 (Request No. 4). Union Pacific produced a few documents arguably responsive to this request. However, there is no reason to expect that policies, practices, and procedures applicable to "Dispatching Decisions"—defined as "decisions that involve Dispatching of any freight or passenger train on the *UP Lines*" Exhibit A at 3 (emphasis added), would be the subject of significant email traffic between Union Pacific and other entities.

Amtrak's third request sought communications "between UP supervisors and dispatchers pertaining to Dispatching Decisions involved [sic] Sunset Limited Trains." Exhibit A at 9 (Request No. 9). Amtrak's motion appears focused on this request. However, the absence of responsive emails is not surprising here either. In general,

Union Pacific's dispatchers work in the same facility as their supervisors. As a result, when dispatchers need to communicate with their supervisors, the communications are typically oral. In some circumstances, dispatchers and supervisors communicate using technology other than email, including Microsoft Teams. The Teams technology will generate follow-up emails if the recipient does not appear to have received the initial message. When Union Pacific identified responsive emails in the discovery process, they were produced. Union Pacific also produced emails it identified in the discovery process that were not between dispatchers and their supervisors, but that reported the substance of such communications.

In sum, Union Pacific responded reasonably and in good faith to Amtrak's discovery requests for "communications." Union Pacific has explained why the number of emails produced should not have surprised Amtrak. Union Pacific cannot be "made" to produce communications that cannot be located in a reasonable search. The Board should therefore deny Amtrak's request for relief relating to "dispatching communications."

III. Union Pacific is willing to accept Amtrak's proposed compromise regarding contracts that "reflect variable compensation."

Amtrak seeks irrelevant information in its request that Union Pacific produce agreements with customers using any portion of the Sunset Limited Route from October 1, 2021, through December 8, 2022, "for which UP's compensation varies depending on the time or timeliness of the delivery of products or commodities, or depending on availability of loaded cars for unloading or empty cars for loading of customer products or commodities." Exhibit A at 9 (Request No. 15). Amtrak says such contracts are relevant because Union Pacific "told the Board that it considers contractual incentives

and penalties in moving passenger trains over its lines.” Renewed Mot. at 13. However, in a footnote, Amtrak admits that what Union Pacific told the Board had *nothing* to do with contractual incentives for moving non-Amtrak trains. Rather, Union Pacific was addressing incentives in its contract with *Amtrak*. Union Pacific told the Board it had less incentive to seek adjustments to Amtrak’s operating schedules to achieve on-time performance at each passenger station on a route before adoption of the Federal Railroad Administration’s new on-time performance rules, because the consequences of failing to achieve on-time performance were defined by {{

}} See *id.* at 13 n.30.

Amtrak says Union Pacific’s customer contracts are also relevant because they would allow Amtrak and the Board to “evaluate the magnitude of contractual incentives that UP might have in directing traffic over its network, and the force those contractual incentives might have when dispatchers or their supervisors evaluate how to balance delays to *Sunset Limited* and other trains.” *Id.* at 13. However, neither Amtrak’s initial motion nor its renewed motion identify a single case in which Union Pacific favored a freight train over the *Sunset Limited*. After taking two bites at the apple, Amtrak still failed to show the requested contracts could have any bearing on an issue in this case.

Instead of squarely addressing relevance, Amtrak offers to reduce the burden of production on Union Pacific.⁹ In its renewed motion, Amtrak says it is willing to reduce

⁹ As Union Pacific explained in its reply to Amtrak’s initial motion, identifying and producing responsive contracts would involve a burdensome special study. Union Pacific would have to develop computer programming to identify all the rail cars that moved over the Sunset Limited Route, tie the car movement data to billing data residing in a second database, and then use the billing data to retrieve rate documents residing in a third database. Union Pacific would then have to review each rate document to determine whether it is responsive to Amtrak’s request for contracts in which Union (continued...)

the burden by requesting only Union Pacific's contracts with shippers that rely on trains "assigned the same numeric priority as Amtrak trains in UP's Movement Planner algorithm." *Id.* at 14. The Union Pacific trains assigned the same numeric priority as Amtrak trains in Union Pacific's Movement Planner algorithm are what Union Pacific calls "Z trains." *See* Union Pacific Railroad Company's Response to Appendix A, Part IV at 11. The "Z trains" that moved over the Sunset Limited Route during the Relevant Period {{

}} Solely to avoid the burdens of continuing to litigate this issue, and without waiving its relevance objection, Union Pacific is willing to review {{ to determine whether they contain a provision or provisions under which Union Pacific's "compensation varies depending on the time or timelines of the delivery of products or commodities, or depending on availability of loaded cars for unloading or empty cars for loading of customer products or commodities," and then address the process for producing responsive information, if any exists.¹⁰

Pacific's "compensation varies depending on the time or timelines of the delivery of products or commodities, or depending on availability of loaded cars for unloading or empty cars for loading of customer products or commodities."

¹⁰ {{

(continued...)

IV. Conclusion

For the reasons stated above, the Board should deny Amtrak's renewed motion to compel.

Respectfully submitted,

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February 9, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of February, 2024, I caused a copy of the foregoing document to be served by email on Administrative Law Judge McCarthy and all parties of record in Docket No. NOR 42175.

/s/ Michael L. Rosenthal

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

**AMTRAK'S FIRST SET OF REQUESTS FOR PRODUCTION
OF DOCUMENTS TO UNION PACIFIC RAILWAY COMPANY**

Pursuant to 49 C.F.R. §§ 1114.30 and the Surface Transportation Board's Order in the captioned matter served July 11, 2023, the National Railroad Passenger Corporation ("Amtrak") serves this First Set of Requests for Production of Documents on Union Pacific Railroad Company ("UP"). These Requests are to be interpreted and answered in accordance with the Definitions and Instructions below. Amtrak requests that UP provide its responses and objections to these Requests within fifteen (15) days of service of these Requests, unless otherwise agreed upon by the parties.

DEFINITIONS

1. The terms "UP," "You," or "Your" refer to Union Pacific Railroad Company, as well as its corporate affiliates, parents, subsidiaries, business units, divisions, predecessors, representatives, officers, agents, counsel, employees, consultants, and any person authorized to act or acting on its behalf.
2. The term "BNSF" refers to BNSF Railway Company, as well as its corporate affiliates, parents, subsidiaries, business units, divisions, predecessors, representatives, officers, agents, counsel, employees, consultants, and any person authorized to act or acting on it.
3. The term "CN" refers to Canadian National Railway Company, its subsidiary Illinois Central Railroad Company, as well as each of their corporate affiliates, parents, subsidiaries,

business units, divisions, predecessors, representatives, officers, agents, counsel, employees, consultants, and any person authorized to act or acting on its behalf.

4. The term “SCRRA” refers to the Southern California Railroad Authority, as well as its corporate affiliates, parents, subsidiaries, business units, divisions, predecessors, representatives, officers, agents, counsel, employees, consultants, and any person authorized to act or acting on its behalf.

5. The term “NOPB” refers to New Orleans Public Belt Rail Corporation, as well as its corporate affiliates, parents, subsidiaries, business units, divisions, predecessors, representatives, officers, agents, counsel, employees, consultants, and any person authorized to act or acting on its behalf.

6. The term “2000 Operating Agreement” means the Agreement dated January 1, 2000, between Amtrak and UP, including all amendments to that Agreement.

7. The term “algorithm” refers to any program, software, or set of rules used to determine an outcome based on one or more factors.

8. The term “communication” means any oral, written, or electronic transmission of information, including but not limited to meeting, discussions, conversations, telephone calls, memoranda, white papers, letters, email messages, and notes.

9. The term “Contractual OTP” means on-time performance of trains as calculated for purposes of determining compensation owed to Union Pacific under the 2000 operating agreement.

10. The term “Customer OTP” means on time performance of trains as calculated under the customer on-time performance metric and/or minimum standard promulgated by the Federal Railroad Administration, and has the same meaning as in the Complaint. *See, e.g.,* Complaint ¶¶ 48-51.

11. The term “dispatcher” refers to an individual who directs the movement of trains

within a division of trackage and coordinates their movement from one division to another, whether individually or in conjunction with a joint desk.

12. The term “Dispatching” refers to the direction of trains within a division of trackage and/or the coordination of movement of trains from one division to another, whether individually or in conjunction with a joint desk.

13. The term “Dispatching Decisions” refers to decisions that involve Dispatching of any freight or passenger train on the UP Lines.

14. The term “documents” shall be construed broadly, to include all material subject to discovery under 49 C.F.R. § 1114.30(a)(1) or any other Board rule or regulation, and to include every copy of a document not identical to the original or any other copy. For the avoidance of doubt, the term “documents” includes every writing, recording, photograph, summary, spreadsheet, or other record in any form, whether handwritten, printed, typed, taped, electronic, or in any other graphic, digital, magnetic, optical, or mechanical form, however produced, reproduced, or recorded, and includes electronic documents (such as electronic mail messages and all attachments to mail messages).

15. The term “HRD” refers to host-responsible delay(s) and has the same meaning as in the Complaint. *See, e.g.*, Complaint ¶ 52.

16. The term “Investigative Period” means the period of time beginning October 1, 2021 through and including December 8, 2022.

17. The term “on-time performance” means on-time performance as determined, discussed, recorded, or reported for any purpose, including without limitation Contractual OTP or Customer OTP.

18. The term “Pending Board Requests” refers to interrogatories and document requirements for UP that are set out in Appendix A – Part IV of the Surface Transportation Board’s

July 11, 2023 Decision in the above-captioned proceeding.

19. The term “Preference” refers to the statutory requirement that, 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 Surface Transportation Board orders otherwise under 49 U.S.C. § 24308(c).

20. The term “RPSA” means the Rail Passenger Service Act of 1970, Pub. L. No. 91-518, 84 Stat. 1327, including all amendments thereto (codified at 49 U.S.C. §§ 24101 *et seq.*).

21. The term “Sunset Limited Trains” refers to Amtrak Trains 1 and 2, as described more fully in Amtrak’s Complaint. Each of the Sunset Limited Trains is individually referred to as a Sunset Limited Train.

22. The term “UP Lines” means any rail line, junction, or crossing that is owned, dispatched, jointly dispatched, controlled, managed, directed, supervised, maintained, or administered by UP, and on which any Sunset Limited Train transited between October 1, 2021 and December 8, 2022.

INSTRUCTIONS

1. Amtrak has tried to minimize duplication between these Requests and the Pending Board Requests. If UP asserts that one or more of the following Requests is covered by a Pending Board Request, UP must identify the overlapping Pending Board Request in its response, and also produce all responsive documents not otherwise being produced to the Board.

2. Unless otherwise indicated, the Requests below cover the time period from October 1, 2021 through and including December 8, 2022.¹

3. Please provide separate written responses to all of the following Requests, and repeat each Request and the number of each Request with each response. If you object to any Request, identify the number of the Request to which you object, state the basis for your objection in sufficient detail so as to permit the adjudication of the validity of the objection, and produce any documents responsive to any portion or portions of the Request that you do not find objectionable.

4. Documents sought in these Requests include documents currently or previously within UP's possession, custody or control, as well as those documents which come into UP's possession subsequent to service thereof. Each of the following Requests is continuing in nature and Amtrak hereby requests that if you obtain any additional responsive documents at any later date, you promptly so inform Amtrak and produce those documents.

5. When any Request calls for the production of any portion of any document, the entire document containing any such portion must be produced.

6. Documents offered in response to these Requests must be furnished in as organized and usable form as possible, and should be produced in a manner organized and labeled to correspond to the following Requests. Electronically stored information shall be produced in a

¹ Amtrak reserves the right to revise this time period following any written decision from Judge McCarthy regarding the appropriate scope of discovery in this proceeding and/or following the parties' forthcoming meet and confer.

method and manner as agreed upon by the parties.

7. If any responsive document or communication has been destroyed, lost, or become beyond UP's possession, custody, or control, UP must provide a list identifying the document or communication as completely as possible, providing (1) the date the document or communication was destroyed, lost, or transferred beyond UP's control; (2) the manner of the destruction, loss, or transfer; (3) the reason for the destruction, loss, or transfer; (4) the person or entity authorizing the destruction, loss, or transfer; (5) the person or entity that destroyed, lost, or transferred the document or communication.

8. If UP asserts a claim of privilege regarding a document or communication, UP must provide a log identifying each document or communication as completely as possible, and UP must produce any portion of a document or communication that contains non-privileged and responsive material.

9. The present tense shall be construed to include the past and future tenses and the past and future tenses shall be construed to include the present tense as required by the context to elicit all information discoverable within the broadest scope of these Requests.

10. The singular shall be construed to include the plural and the plural shall be construed to include the singular, whenever context permits. The terms such as "and" and "or" have both conjunctive and disjunctive meanings, and shall be construed in the broadest and most inclusive manner, in order to bring into the scope of each Request all responsive information that might otherwise be construed to be outside the scope of the Request.

11. Words such as "include" and "including" are illustrative and not limitative, and shall be construed in the broadest and most inclusive manner, in order to bring into the scope of each Request all responsive information that might otherwise be construed to be outside the scope of the Request.

12. The terms “relating to,” “related to,” “concerning,” and “showing” are to be construed broadly, to include: addressing, referring to, concerning, showing, concerning, comprising, identifying, stating, consisting of, evidencing, alluding to, responding to, connected with, discussing, showing, describing, reflecting, analyzing, constituting, setting forth, in respect of, incorporating, mentioning, embodying, containing, studying, reporting on, commenting on, considering, recommending, constituting in any way, or having any logical or factual connection with the subject matter. Likewise, the terms “any” and “all” shall mean “each and every.”

13. Production must be made to outside counsel of record for Amtrak at Jenner & Block: Alex Trepp, 1099 New York Avenue N.W., Ste. 900, Washington, DC 20001, atrepp@jenner.com, with a copy to Albert Peterson, 1099 New York Avenue N.W., Ste. 900, Washington DC 20001 apeterson@jenner.com.

REQUESTS FOR PRODUCTION

1. All document management policies, retention policies, and/or retention schedules applicable to documents or communications relating or referring to (i) the On-Time Performance of Sunset Limited Trains, (ii) Dispatching Decisions, or (iii) policies, practices, and procedures that govern, affect, or apply to Dispatching Decisions, (iv) policies, practices, and procedures that govern, affect, or apply to the implementation of Preference.

2. All documents concerning UP policies, practices, and procedures relating to Dispatching Decisions, including but not limited to documents providing train or customer-specific instructions, or concerning or reflecting any modification of those policies, practices, and procedures during the Investigative Period.

3. All communications between or among current and/or former UP management, employees, or other personnel concerning policies, practices, and procedures applicable to Dispatching Decisions.

4. All communications between or among UP and BNSF, CN, NOPB, SCRRRA, any governmental entity, and/or any other third-party concerning policies, practices, and procedures applicable to Dispatching Decisions.

5. All documents constituting, concerning, or reflecting any Dispatching Decision that departed or deviated from the policies, practices, and procedures applicable to Dispatching Decisions, or otherwise failed to implement or comply with policies, practices, and procedures applicable to Dispatching Decisions.

6. All dispatching tapes, dispatching playbacks, and other documents logging or recording Dispatching Decisions, including but not limited to Dispatching Decisions related to the dispatching of all trains entering, exiting, continuing, or otherwise traversing the UP Lines.

7. All daily system, region, or division performance reports concerning any operations

on the UP Lines.

8. All documents concerning whether or under what circumstances a dispatcher responsible for Dispatching Decisions may override algorithmic Dispatching Decisions.

9. All communications between UP supervisors and dispatchers pertaining to Dispatching Decisions involved Sunset Limited Trains.

10. Documents sufficient to show any criteria used to evaluate or compensate dispatchers and all documents related to any evaluations, reviews, or other feedback provided to dispatchers responsible for Dispatching Decisions.

11. For the time period November 11, 2020 to Present, all documents relating to any investigations, audits, studies, reviews, analyses, or other similar evaluations conducted by UP regarding Dispatching Decisions, HRD, or Preference on the UP Lines.

12. All documents relating to any disciplinary actions taken or contemplated against a dispatcher and concerning one or more Dispatching Decisions.

13. All documents concerning any operational adjustment, scheduling adjustment, capital investment, or other similar action that UP has analyzed or considered to address, evaluate, or understand delays to freight or passenger trains traveling on the UP Lines, including all documents relating to the reason(s) UP did not implement any such adjustments, investment, or other similar actions.

14. All documents concerning UP efforts to obtain funds from federal, state, or other sources for capital expenditures on the UP Lines.

15. All agreements with freight customers using any portion of the UP Lines for which UP's compensation varies depending on the time or timeliness of the delivery of products or commodities, or depending on availability of loaded cars for unloading or empty cars for loading of customer products or commodities.

16. All documents constituting or concerning UP's current operating plan(s) for lines used by Sunset Limited Trains, and all documents constituting or concerning efforts to measure operational performance against UP's current operating plan(s) or operating schedule(s) for lines used by Sunset Limited Trains.

17. All corporate policies, protocols, guidance documents, or other materials related to the implementation of Preference, or used to evaluate the implementation of Preference.

18. Documents sufficient to show any procedures or systems used to implement or evaluate the implementation of Preference.

19. For the UP Lines, documents sufficient to associate locomotive numbers associated with each train that operated on a fixed schedule during the Investigative Period.

20. All documents analyzing, assessing, investigating, studying, reviewing or otherwise evaluating how the adoption and implementation of precision-scheduled railroading has affected the on-time performance of intercity passenger trains and/or affected the implementation of Preference.

21. All documents analyzing, assessing, investigating, studying, reviewing or otherwise evaluating how UP's network planning and design have affected, are affecting, or will affect the on-time performance of Sunset Limited Trains and/or implementation of Preference on the UP Lines, including but not limited to documents concerning any ongoing or anticipated capital investments that will affect UP's network capacity on the UP Lines.

22. All documents concerning policies, protocols, or procedures related to how You prioritize freight traffic on the UP Lines, or the dispatching of any intermodal or other trains carrying priority freight on the UP Lines.

23. For the time period November 11, 2020 to Present, all documents relating to any modeling, studies, reviews, analyses, investigations, or other similar evaluations conducted by UP regarding the Sunset Limited schedule or freight schedules on lines used by Sunset Limited Trains.

24. All documents reflecting or relating to UP's consideration of Sunset Limited Trains in determining, assessing, evaluating, studying, or otherwise considering freight volumes for lines used by the Sunset Limited Trains.

September 12, 2023

Respectfully submitted:

/s/ Jessica Ring Amunson

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Chief Legal Officer, General Counsel
& Corporate Secretary
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*Counsel for National Railroad
Passenger Corporation*

CERTIFICATE OF SERVICE

I, Jessica Ring Amunson, certify that I have this day caused a copy of this document to be served upon UP by email to counsel for UP at the following email address:

Mrosenthal@Cov.Com

September 12, 2023

/s/ Jessica Ring Amunson
Jessica Ring Amunson

Rosenthal, Michael

From: Rosenthal, Michael
Sent: Thursday, December 14, 2023 7:14 PM
To: 'Trepp, Alex S.'
Subject: RE: STB Docket No. NOR 42175

Alex,

Thanks for your email. Sorry for sending this response at a late hour, but it has been one of those days. I'll respond to your questions in order.

1. Union Pacific expects to complete its production of documents, other than emails responsive to Amtrak's requests for "communications," by December 20. With regard to the emails, based on my ongoing review of documents identified in the review process, I do not expect the process to yield a significant number of additional documents, but it takes time to work through the documents that have identified for review based on search terms.

2. Union Pacific's initial response to Amtrak's request for dispatching playbacks was based on an apparent miscommunication or misunderstanding about the time period at issue. Further investigation has established that Union Pacific does not have playback capability for the period requested by Amtrak. If necessary, Union Pacific can amend its discovery responses. With regard to your reference to 49 CFR 228.17 and 49 CFR 228.9, if you'd like, I can inquire about the documents Union Pacific retains in regard to those provisions, but just reading the list of information in section 228.17, it seems apparent it is very different from playback capability--which is what I understand Amtrak wanted. I will note, however, that Union Pacific's response to the STB's Request No. 23 included data showing changes to signals during the relevant period--if Amtrak is interested in that level of detail.

3. Union Pacific is standing on its burden objection. Amtrak has not explained why the information it seeks is relevant, but it is impossible to imagine any reason that would justify the effort needed to identify responsive contracts, or that would justify the extensive production of highly confidential commercial information contained in Union Pacific's contracts with its customers. To provide the information requested by Amtrak, Union Pacific would first have to identify all rail cars that moved over the Sunset Limited Route using one database. Union Pacific would then have to take the car-by-car information and tie it back to customer waybills and rate document identifiers using a second database. Union Pacific would then have to take the rate document identifier information and use other databases to obtain the actual rate document. Union Pacific would then have to review each rate document to determine whether the document provides for compensation that varies depending on the time or timeliness of delivery. In some cases, particular rate documents are part of larger, master agreements, so Union Pacific would also have to identify and review the master agreements as well. Just the effort to identify applicable rate documents--tying car movement files to waybill files, then using the waybill information to identify rate documents--would involve a special study, not a mere document request, and would involve burdens vastly disproportionate to the needs of the proceeding.

4. Union Pacific does not have a formal process for providing evaluations, reviews, or other feedback to dispatchers other than the process reflected in the document showing the criteria used to evaluate dispatchers. To cut to the chase, Union Pacific does not maintain files on dispatchers that identify/track/discuss/critique individual dispatching decisions.

5. Union Pacific has completed its production as to Amtrak Request 13.

6. As noted in point #1 above, Union Pacific is continuing to work its way through documents identified in the email search process. Union Pacific is not withholding any documents identified as responsive based on burden objections. I trust Amtrak has taken the same approach to its production of communications.

Regards,
Mike

From: Trepp, Alex S. <ATrepp@jenner.com>
Sent: Tuesday, December 12, 2023 10:24 AM
To: Rosenthal, Michael <mrosenthal@cov.com>
Subject: RE: STB Docket No. NOR 42175

[EXTERNAL]

Thanks, Mike.

We appreciate the request-by-request response. We have several follow-up questions.

First, in response to several of the requests, Union Pacific indicates that it is searching for and will produce any responsive documents. UP has previously represented it will produce on a rolling basis. However, we need to know when the productions will be complete to ensure that Amtrak has enough time to review the sufficiency of the completed production and evaluate any next steps Amtrak may need to take with respect to the sufficiency of UP's production. Amtrak only served 25 requests and it served them three months ago. The efficient and expeditious conduct of this proceeding requires that the parties wrap that initial discovery. Please confirm when UP will complete its productions.

Second, your response indicates that Union Pacific has determined that it does not possess dispatching playback documents for the Relevant Period. That response is very hard to understand. As an initial matter, it flatly contradicts the UP responses and objections, which stated that UP would "allow Amtrak representatives to review dispatching playbacks involving train movements on the UP Lines in person at Union Pacific's facilities in Omaha, Nebraska." UP Responses and Objections at Response 7. It is also inconsistent with repeated representations that UP has been evaluating whether there exist technical methods for downloading and providing those dispatching playbacks. *See, e.g.*, attached correspondence. And the position is hard to square with UP's regulatory obligations under 49 C.F.R. §§ 228.9 and 228.17.

Please promptly explain the discrepancy between representations that UP made in its initial responses and objections and yesterday's representation that the documents do not exist. Additionally, please note that Amtrak's initial Request encompassed several types of documents other than dispatch playbacks. *See* Request No. 6 (seeking "dispatching tapes, dispatching playbacks, and other documents logging or recording Dispatching Decisions, including but not limited to Dispatching Decisions related to the dispatching of all trains entering, exiting, continuing, or otherwise traversing the UP Lines"). Based on Union Pacific's initial representation concerning the availability of those playbacks, Amtrak has not previously pressed for other documents responsive to its request. However, Amtrak reserves the right to do so if UP is now for the first time telling Amtrak that the dispatch playbacks do not exist. Amtrak also reserves all other rights in connection with this request.

Third, your response indicates that UP is continuing to evaluate the burdens of responding to Request 15. However, it has been more than six weeks since Amtrak proposed a straightforward compromise to resolve UP's initial objection to this request. If UP intends to stand on burden objections to producing agreements with freight customers that use the UP Lines, please let us know by Thursday December 14. Should UP stand on its burden objection, UP must provide enough detail about the asserted burden to permit Amtrak to evaluate whether the objection is merited.

Fourth, your response indicates that Union Pacific has produced a document showing the criteria used to evaluate dispatchers. As set forth in our October 26, 2023 email, Amtrak continues to believe that in addition to producing documents sufficient to show the pertinent criteria for evaluation, UP must produce documents related to any evaluations, reviews, or other feedback provided to dispatchers responsible for Dispatching Decisions. UP during our

meet and confer agreed to assess whether there exists a formal process for providing evaluations, reviews, or other feedback to dispatchers and then circle back on this portion of the request. Please do so by Thursday December 14.

Fifth, your response indicates that Union Pacific has produced responsive documents located in a reasonable search for Amtrak Request 13. Please confirm whether Union Pacific has completed its production as to that Request.

Finally, with respect to several requests concerning communications, UP continues to qualify its response based on potential burden issues. See Response to Requests 3, 4, and 9. Please confirm that UP is producing communications responsive to each request by December 14. If there are potentially responsive documents that UP is not producing based on objections about burdensomeness, please provide enough detail about the asserted burden to permit Amtrak to evaluate whether the objection is merited.

We remain optimistic that the parties can work collaboratively to resolve remaining issues. As our discussions continue, Amtrak necessarily reserves all rights with respect to the requests and the sufficiency of UP's productions. As to schedule, we cannot evaluate what to tell the Board about scheduling until we have responses to the above. We look forward to hearing from you promptly and are happy to schedule a call to discuss.

Best,
Alex

From: Rosenthal, Michael <mrosenthal@cov.com>
Sent: Monday, December 11, 2023 9:17 AM
To: Trepp, Alex S. <ATrepp@jenner.com>
Subject: RE: STB Docket No. NOR 42175

External Email - Do Not Click Links or Attachments Unless You Know They Are Safe

Alex,

I've added responses in bold, capital letters.

Regards,
Mike

RFP 1: Amtrak continues to believe that the production of responsive policies should include all policies applicable during the Relevant Period, as defined by the Board. UP is evaluating whether the policies that it intends to produce were modified during the Relevant Period and will circle back.

UNION PACIFIC HAS PRODUCED THE REQUESTED DOCUMENTS.

RFP 2: Amtrak continues to believe that the production of formal and final decks, studies, reports, policies, presentations, memoranda, and other similar documents (together "Analyses") concerning policies, practices, and procedures relating to Dispatching Decisions is appropriate. The parties agreed that Amtrak would provide more granular examples of the type of Analyses requested. With that in mind, Amtrak provides the following illustrative examples of Analyses that would be responsive to this Request:

UNION PACIFIC IS SEARCHING FOR AND WILL PRODUCE THE REQUESTED DOCUMENTS, TO THE EXTENT ANY EXIST AND ARE LOCATED IN UNION PACIFIC'S REASONABLE SEARCH.

1. Analyses concerning compliance with movement planner business rules, pass protocols, train dispatcher rules, and other similar policies or protocols, including those produced in response to Board Request 22;

2. Analyses concerning the impact of movement planner business rules, pass protocols, train dispatcher rules, and other similar policies or protocols on network fluidity, including those produced in response to Board Request 22;
3. Analyses concerning the modification of movement planner business rules, pass protocols, train dispatcher rules, and other similar policies or protocols, including those produced in response to Board Request 22.

RFP 3: Amtrak continues to believe that the production of communications responsive to this request is appropriate. UP indicated that it was already running preliminary searches to assess what could reasonably be located. The parties agreed to table discussion of objections until the results of searches are known and any issues related to burden can be discussed.

UNION PACIFIC IS SEARCHING FOR AND WILL PRODUCE THE REQUESTED DOCUMENTS, TO THE EXTENT ANY EXIST AND ARE LOCATED IN UNION PACIFIC'S REASONABLE SEARCH, SUBJECT TO POTENTIAL BURDEN ISSUES.

RFP 4: Amtrak continues to believe that the production of communications responsive to this request is appropriate. The parties again agreed to table discussion of objections until UP runs preliminary searches and evaluates preliminary returns.

UNION PACIFIC IS SEARCHING FOR AND WILL PRODUCE THE REQUESTED DOCUMENTS, TO THE EXTENT ANY EXIST AND ARE LOCATED IN UNION PACIFIC'S REASONABLE SEARCH, SUBJECT TO POTENTIAL BURDEN ISSUES.

RFP 5: Amtrak continues to believe that the production of documents responsive to this request is appropriate. Amtrak agreed to resolve concerns about the request for “all documents” by modifying its request to seek the production of Analyses. Please confirm that UP will not be limiting its search to Dispatching Decisions that involve a Sunset Limited Train.

UNION PACIFIC IS SEARCHING FOR AND WILL PRODUCE THE REQUESTED DOCUMENTS, TO THE EXTENT ANY EXIST AND ARE LOCATED IN UNION PACIFIC'S REASONABLE SEARCH.

RFP 6: Amtrak continues to believe that the proposal to require that Amtrak representatives (and experts) review dispatching playbacks involving train movements on the UP Lines in person is unworkable because of the time required to review playbacks and the continuing nature of Amtrak's evaluation of the record in this case. Consistent with the parties' discussion, Amtrak will investigate whether it has continuing access to dispatching playbacks for the UP Lines. UP indicated uncertainty about whether there exists a methodology to download and export dispatching playbacks and offered to revert on that issue and burden. Please let us know whether UP can produce the dispatching playbacks.

UNION PACIFIC HAS DETERMINED THAT IT DOES NOT POSSESS DISPATCHING PLAYBACK DOCUMENTS FOR THE RELEVANT PERIOD.

RFP 7: The parties agreed that—subject to modifying the request to seek daily system, region, or division performance reports for “train” rather than “any” operations on the UP Lines—UP will conduct a reasonable and diligent search for and produce non-privileged responsive documents.

UNION PACIFIC HAS PRODUCED DOCUMENTS CONTAINING THE REQUESTED INFORMATION ON A WEEKLY BASIS. UNION PACIFIC DOES NOT HAVE EXISTING DOCUMENTS CONTAINING THE REQUESTED INFORMATION ON A DAILY BASIS.

RFP 9: Amtrak continues to believe that the production of communications responsive to this request is appropriate. UP indicated that it was already running preliminary searches to assess what could reasonably be located. UP agreed to table discussion of objections until the results of searches are known and issues related to burden can be addressed.

UNION PACIFIC IS SEARCHING FOR AND WILL PRODUCE THE REQUESTED DOCUMENTS, TO THE EXTENT ANY EXIST AND ARE LOCATED IN UNION PACIFIC'S REASONABLE SEARCH, SUBJECT TO POTENTIAL BURDEN ISSUES.

RFP 10: Amtrak continues to believe that—in addition to producing documents sufficient to show criteria used to evaluate or compensate dispatchers—UP must produce documents related to any evaluations, reviews, or other feedback provided to dispatchers responsible for Dispatching Decisions. Amtrak agreed to resolve concerns about the

PUBLIC VERSION - REDACTED

request for “all documents” by modifying its request to exclude a forensic search for email and to exclude feedback based on attendance. UP agreed to assess whether there exists a formal process for providing evaluations, reviews, or other feedback to dispatchers and then circle back.

UNION PACIFIC HAS PRODUCED A DOCUMENT SHOWING THE CRITERIA USED TO EVALUATE DISPATCHERS.

RFP 11: For reasons articulated during our meet and confer, Amtrak continues to believe that Analyses related to Dispatching Decisions are relevant to this proceeding even if they do not expressly reference a Dispatching Decision involving Sunset Limited Trains. Amtrak has also reviewed Requests 2 and 11 and does not believe that Request 11 is duplicative, since it focuses on Dispatching Decisions rather than policies, practices, and procedures governing those decisions. To the extent UP has conducted Analyses of Dispatching Decisions, for example to assess whether particular dispatching decisions concerning freight trains are (i) affecting network fluidity, (ii) creating congestion, (iii) affecting the availability of sidings, (iv) affecting compliance with any contractual obligations regarding timeliness, (v) affecting the availability or expiration of crews, or (vi) otherwise affecting operations on the UP Lines, those Analyses should be produced.

UNION PACIFIC IS SEARCHING FOR AND WILL PRODUCE THE REQUESTED DOCUMENTS, TO THE EXTENT ANY EXIST AND ARE LOCATED IN UNION PACIFIC'S REASONABLE SEARCH.

RFP 13: During the meet and confer, Amtrak agreed to resolve concerns about the request for “all documents” by modifying its request to seek only Analyses. In response to concerns about vagueness or lack of clarity, Amtrak offered to consider clarifying the requests and provides the following clarifications and limitations.

UNION PACIFIC HAS PRODUCED RESPONSIVE DOCUMENTS LOCATED IN A REASONABLE SEARCH.

1. *Operational Adjustments.* Amtrak will limit its request to documents analyzing any operational adjustment implemented or considered to improve on-time performance of Sunset Limited trains or otherwise affecting the on-time performance of Sunset Limited Trains.
2. *Scheduling Adjustments.* Amtrak will limit its request to documents analyzing any scheduling adjustment implemented or considered to improve on-time performance of Sunset Limited Trains (including scheduling adjustments applicable to freight trains and considered for the purpose of improving on-time performance of Sunset Limited Trains).
3. *Capital Investments.* Amtrak will clarify its request to seek documents analyzing capital investments implemented or considered on the UP Lines.

RFP 15: During our meet and confer, the parties agreed to table discussion of each objection so that UP can consider whether to produce all agreements with freight customers using any portion of the UP Lines. Please confirm that UP will produce those agreements.

UNION PACIFIC IS CONTINUING TO EVALUATE THE BURDENS OF RESPONDING TO THIS REQUEST, BUT CONTINUES TO ASSERT ITS OBJECTIONS.

RFP 16: During the meet and confer, Amtrak agreed to resolve concerns about the request for “all documents” by modifying its request to seek only Analyses. Amtrak also explained why this request is not duplicative. UP agreed to search for Analyses constituting or concerning efforts to measure operational performance against UP operating plans or schedules for lines used by the Sunset Limited.

THE DOCUMENTS UNION PACIFIC PRODUCED IN RESPONSE TO RFP 7 CONTAIN INFORMATION ON OPERATIONAL PERFORMANCE.

RFP 19: During the meet and confer, the parties agreed to table discussion of objections while UP evaluates the existence and burden of producing responsive information. Please confirm that UP will produce responsive material if it exists.

UNION PACIFIC IS CONTINUING TO EVALUATE THE BURDENS AND FEASIBILITY OF RESPONDING TO THIS REQUEST, AND INTENDS TO PRODUCE THE REQUESTED INFORMATION IF REASONABLY FEASIBLE.

RFP 21: During the meet and confer, Amtrak agreed to resolve concerns about the request for “all documents” by modifying its request to seek only Analyses. Amtrak also explained why this request is not duplicative. Amtrak also clarifies that the request seeks Analyses that evaluate how network planning and design have affected, are affecting, or will affect the on-time performance of Sunset Limited Trains or the implementation of preference. Please confirm that UP will search for documents responsive to the Request.

UNION PACIFIC IS SEARCHING FOR AND WILL PRODUCE THE REQUESTED DOCUMENTS, TO THE EXTENT ANY EXIST AND ARE LOCATED IN UNION PACIFIC'S REASONABLE SEARCH.

RFP 24: During the meet and confer, Amtrak agreed to resolve concerns about the request for “all documents” by modifying its request to seek only Analyses. Please confirm that UP will search for documents responsive to the Request.
UNION PACIFIC HAS DETERMINED, BASED ON A REASONABLE SEARCH, THAT NO RESPONSIVE DOCUMENTS EXIST.

From: Trepp, Alex S. <ATrepp@jenner.com>
Sent: Friday, December 8, 2023 3:35 PM
To: Rosenthal, Michael <mrosenthal@cov.com>
Subject: STB Docket No. NOR 42175

[EXTERNAL]

Mike:

Amtrak has been working diligently and in good faith to respond to the more than 150 discovery requests that UP propounded. Amtrak has already produced more than 1,000 documents and anticipates producing approximately 850 more today. Amtrak has also worked to provide timely responses to issues raised in meet and confers on the voluminous and burdensome document requests that UP served. As you are aware, UP made its first production on Wednesday, providing just 23 documents. Moreover, UP still has not provided its position on discovery disputes raised in our email of October 26, 2023. We have been patient based on repeated assurances that UP is working through these issues. However, the efficient conduct of this proceeding requires that UP provide its position on outstanding discovery issues and confirm when it will complete its production of documents, so that Amtrak can assess next steps. Please provide us with UP's responses on these issues by Tuesday.

Please also let us know whether you have time next week to meet and confer on scheduling issues, in view of the Board's November 20, 2023 Order.

Best,
Alex

Alex S. Trepp

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REDACTED**

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

**RESPONSES AND OBJECTIONS TO AMTRAK'S FIRST SET
OF REQUESTS FOR PRODUCTION OF DOCUMENTS**

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October 4, 2023

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. NOR 42175

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

**RESPONSES AND OBJECTIONS TO AMTRAK'S FIRST SET
OF REQUESTS FOR PRODUCTION OF DOCUMENTS**

Union Pacific Railroad Company responds to Amtrak's First Set of Requests for
Production of Documents served on September 12, 2023, 2023, as follows:

GENERAL RESPONSES

The following General Responses apply to each of Amtrak's requests:

1. When Union Pacific says it will produce responsive documents, Union Pacific will produce responsive documents to the extent they exist and can be located in a reasonable search. Subject to the specific and general objections that follow, responsive documents will be produced on a rolling basis.
2. Production of documents does not necessarily imply that the documents are relevant to or admissible in this proceeding and is not to be construed as waiving any objection stated herein.

GENERAL OBJECTIONS

The following General Objections are made with respect to all of Amtrak's requests. Any additional specific objections are stated at the beginning of the response to each document request.

1. Union Pacific objects to the production of, and is not producing, documents subject to the attorney-client privilege, work-product doctrine, joint defense privilege, or any other applicable privilege or protection. Any production or disclosure of such information is inadvertent and should not be construed as a waiver. Union Pacific reserves all rights under applicable law, including the Protective Order in this case, to demand or require the return of all copies thereof and non-use by Amtrak or by any other person or entity in this or any other proceeding.

2. Union Pacific objects to the production of, and is not producing, documents prepared in connection with, or information relating to, possible settlement of this or any other proceeding.

3. Union Pacific objects to the production of documents that constitute or disclose confidential or proprietary or sensitive nonpublic information. Subject to and without waiving this objection, Union Pacific will produce such information, if not otherwise objectionable, designated “Confidential” or “Highly Confidential,” subject to the terms of the Protective Order in this case. Union Pacific reserves the right to seek additional protection as needed.

4. Union Pacific objects to the production of documents that are sensitive security information (SSI), classified or otherwise prohibited from disclosure, or documents whose public release could jeopardize the safety of the public and/or Union Pacific employees. Subject to and without waiving this objection, Union Pacific will only produce SSI information to the extent authorized by law and in the manner authorized by law, including the procedures set forth in FRA SSI Order 2011-06-FRA-01 (July 29, 2011) and the terms of the Protective Order in this case.

5. Union Pacific objects to the production of, and in general is not producing, public documents that are readily available to Amtrak, including but not limited to documents on public file at the Surface Transportation Board (the Board), the Securities and Exchange Commission (SEC), or in the Interstate Commerce Commission Archives, or clippings from newspapers or other public media. Any production by Union Pacific of documents in this category shall not be considered a waiver of this objection.

6. Union Pacific objects to the production of, and in general is not producing, documents that are readily obtainable by Amtrak from its own files or publicly available sources. Any production by Union Pacific of documents in this category shall not be considered a waiver of this objection.

7. Union Pacific objects to Amtrak's requests to the extent they call for the preparation of compilations, documents, summaries, analyses, or other special studies of any sort not already in existence, and Union Pacific by its responses does not, unless otherwise noted, undertake to prepare or produce any special studies. Any production by Union Pacific of documents in this category shall not be considered a waiver of this objection.

8. Union Pacific objects to Definition No. 1 to the extent it seeks to require Union Pacific to produce documents not in its possession, custody, or control.

9. Union Pacific objects to Definition No. 14 to the extent it seeks to impose obligations beyond, in addition to, or inconsistent with Union Pacific's discovery obligations under 49 C.F.R. Part 1114.

10 Union Pacific objects to Instruction Nos. 1, 4, 5, 7, and 8 as unduly burdensome and to the extent they seek to impose obligations on Union Pacific beyond, in addition to, or inconsistent with Union Pacific's discovery obligations under 49 C.F.R. Part 1114.12.

11. Union Pacific objects to Instruction No. 5 to the extent it purports to require Union Pacific to produce documents subject to the attorney-client privilege, work-product doctrine, joint defense privilege, or any other applicable privilege or protection.

12. Union Pacific's responses and objections are based upon information presently known to it. Union Pacific reserves the right to rely upon facts, documents, or other evidence it may develop or that may subsequently come to its attention; to assert additional objections; and to supplement or amend these responses at any time as this proceeding continues.

SPECIFIC OBJECTIONS AND RESPONSES

Request No. 1

All document management policies, retention policies, and/or retention schedules applicable to documents or communications relating or referring to (i) the On-Time Performance of Sunset Limited Trains, (ii) Dispatching Decisions, or (iii) policies, practices, and procedures that govern, affect, or apply to Dispatching Decisions, (iv) policies, practices, and procedures that govern, affect, or apply to the implementation of Preference.

Union Pacific Response:

Union Pacific objects to this Request as overbroad and unduly burdensome to the extent it seeks documents that do not reflect current policies.

Subject to and without waiving its objections, Union Pacific will produce copies of current document management policies, retention policies, and/or retention schedules.

Request No. 2

All documents concerning UP policies, practices, and procedures relating to Dispatching Decisions, including but not limited to documents providing train or customer-specific instructions, or concerning or reflecting any modification of those policies, practices, and procedures during the Investigative Period.

Union Pacific Response:

Union Pacific objects to this Request as overbroad and unduly burdensome in that it requests “[a]ll documents” concerning Union Pacific policies, practices and procedures relating to Dispatching Decisions. Union Pacific further objects to this request as unduly burdensome and not proportional to the needs of the case in that it is generally duplicative of Request Nos. 22 and 24 in Appendix A, Part IV, of the Board’s decision served July 11, 2023.

Request No. 3

All communications between or among current and/or former UP management, employees, or other personnel concerning policies, practices, and procedures applicable to Dispatching Decisions.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests “[a]ll communications” concerning policies, practices, and procedures applicable to Dispatching Decisions, and in that it requests communications not concerning dispatching of Sunset Limited Trains. Union Pacific further objects to this request as unduly burdensome and not proportional to the needs of the case in that it is generally duplicative of Request Nos. 22 and 24 in Appendix A, Part IV, of the Board’s decision served July 11, 2023.

Request No. 4

All communications between or among UP and BNSF, CN, NOPB, SCRRA, any governmental entity, and/or any third-party concerning policies, practices, and procedures applicable to Dispatching Decisions.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests “[a]ll communications” between or among the identified entities concerning policies, practices, and procedures applicable to Dispatching Decisions, and as seeking documents not relevant to any issue in this proceeding in that it requests documents not concerning dispatching of Sunset Limited Trains.

Request No. 5

All documents constituting, concerning, or reflecting any Dispatching Decision that departed or deviated from the policies, practices, and procedures applicable to Dispatching Decisions, or otherwise failed to implement or comply with policies, practices, and procedures applicable to Dispatching Decisions.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests “[a]ll documents” constituting, concerning, or reflecting certain Dispatching Decisions, and as seeking documents not relevant to any issue in this proceeding in that it requests documents not concerning dispatching of Sunset Limited Trains.

Request No. 6

All dispatching tapes, dispatching playbacks, and other documents logging or recording Dispatching Decisions, including but not limited to Dispatching Decisions related to the dispatching of all trains entering, exiting, continuing, or otherwise traversing the UP Lines.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests “[a]ll” dispatching tapes, dispatching playbacks, and other documents logging or recording Dispatching Decisions.

Subject to and without waiving its objections, Union Pacific will allow Amtrak representatives to review dispatching playbacks involving train movements on the UP Lines in person at Union Pacific’s facilities in Omaha, Nebraska.

Request No. 7

All daily system, region, or division performance reports concerning any operations on the UP Lines.

Union Pacific Response:

Union Pacific objects to this request as overbroad, unduly burdensome, and as seeking documents not relevant to any issue in this proceeding in that it requests “[a]ll” daily performance reports concerning “any operations” on the UP Lines.

Subject to and without waiving its objections, Union Pacific will produce responsive documents concerning train operations on the UP Lines.

Request No. 8

All documents concerning whether or under what circumstances a dispatcher responsible for Dispatching Decisions may override algorithmic Dispatching Decisions.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests “[a]ll documents” concerning whether and under what circumstances a dispatcher may override Dispatching Decisions. Union Pacific further objects to this request as unduly burdensome and not proportional to the needs of the case in that it is

generally duplicative of Request Nos. 22, 23, and 24 in Appendix A, Part IV, of the Board's decision served July 11, 2023.

Request No. 9

All communications between UP supervisors and dispatchers pertaining to Dispatching Decisions involving Sunset Limited Trains.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests "[a]ll communications" between Union Pacific supervisors and dispatchers pertaining to Dispatching Decisions involving Sunset Limited Trains. Union Pacific dispatchers dispatched hundreds of Sunset Limited Trains during the Investigative Period, and supervisors and dispatchers regularly communicate about dispatching decisions.

Request No. 10

Documents sufficient to show any criteria used to evaluate or compensate dispatchers and all documents related to any evaluations, reviews, or other feedback provided to dispatchers responsible for Dispatching Decisions.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests "all documents" related to any evaluations, reviews, or other feedback provided to dispatchers responsible for Dispatching Decisions, and as seeking documents not relevant to any issue in this proceeding in that it requests documents not concerning evaluations, reviews, or feedback related to dispatching of Sunset Limited Trains.

Subject to and without waiving its objections, Union Pacific will produce documents sufficient to show criteria used to evaluate or compensate dispatchers, to the

extent it has not already produced such documents in response to Request 22 in Appendix A, Part IV, of the Board's decision served July 11, 2023.

Request No. 11

For the time period November 11, 2020 to Present, all documents relating to any investigations, audits, studies, reviews, analyses, or similar evaluations conducted by UP regarding Dispatching Decisions, HRD, or Preference on the UP Lines.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests "all documents" relating to the requested materials, and as seeking documents not relevant to any issue in this proceeding in that it requests documents relating to Dispatching Decisions not involving Sunset Limited Trains.

Subject to and without waiving its objections, Union Pacific will produce any investigations, audits, studies, reviews, analyses, or similar evaluations regarding Dispatching Decisions involving Sunset Limited Trains, HRD, or Preference.

Request No. 12

All documents relating to any disciplinary actions taken or contemplated against a dispatcher and concerning one or more Dispatching Decisions.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests "all documents" relating to disciplinary actions taken or "contemplated," and as seeking documents not relevant to any issue in this proceeding in that it requests documents concerning Dispatching Decisions not involving Sunset Limited Trains.

Subject to and without waiving its objections, Union Pacific will produce documents sufficient to show any disciplinary actions taken against a dispatcher concerning Dispatching Decisions involving Sunset Limited Trains.

Request No. 13

All documents concerning any operational adjustment, scheduling adjustment, capital investment, or other similar action that UP has analyzed or considered to address, evaluate, or understand delays to freight or passenger trains traveling on the UP Lines, including all documents relating to the reason(s) UP did not implement any such adjustments, investment, or other similar actions.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests “[a]ll documents” concerning the actions that Union Pacific has analyzed or considered for a variety of purposes. Union Pacific also objects to this request as vague and unclear in that it suggests adjustments and investments could be used to evaluate or understand delays. Union Pacific further objects to this request as unduly burdensome and not proportional to the needs of the case in that it appears to be generally duplicative of Request No. 21 in Appendix A, Part IV, of the Board’s decision served July 11, 2023.

Request No. 14

All documents concerning UP efforts to obtain funds from federal, state, or other sources for capital expenditures on the UP Lines.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests “[a]ll documents” concerning efforts to obtain funds for capital expenditures on the UP Lines.

Subject to and without waiving its objections, Union Pacific will produce documents sufficient to show efforts to obtain funds for capital expenditures on the UP Lines, to the extent it has not already produced such documents in response to Request No. 21 in Appendix A, Part IV, of the Board’s decision served July 11, 2023

Request No. 15

All agreements with freight customers using any portion of the UP Lines for which UP's compensation varies depending on the time or timeliness of the delivery of products or commodities, or depending on availability of loaded cars for unloading or empty cars for loading of customer products or commodities.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that responding would require reviewing all agreements with the thousands of customers that use some portion of the UP Lines, and as seeking documents not relevant to any issue in this proceeding.

Request No. 16

All documents constituting or concerning UP's current operating plan(s) for lines used by Sunset Limited Trains, and all documents constituting or concerning efforts to measure operational performance against UP's current operating plan(s) or operating schedule(s) for lines used by Sunset Limited Trains.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests "[a]ll documents" concerning Union Pacific's current operating plans. Union Pacific further objects to this request as unduly burdensome and not proportional to the needs of the case in that it appears to be generally duplicative of Request No. 8 in Appendix A, Part IV, of the Board's decision served July 11, 2023.

Request No. 17

All corporate policies, protocols, guidance documents, or other materials related to the implementation of Preference, or used to evaluate the implementation of Preference.

Union Pacific Response:

Union Pacific will produce responsive documents, to the extent it has not already produced them in response to Request Nos. 22 and 24 in Appendix A, Part IV, of the Board's decision served July 11, 2023.

Request No. 18

Documents sufficient to show any procedures or systems used to implement or evaluate the implementation of Preference.

Union Pacific Response:

Union Pacific will produce responsive documents, to the extent it has not already produced them in response to Request Nos. 22 and 24 in Appendix A, Part IV, of the Board's decision served July 11, 2023.

Request No. 19

For the UP Lines, documents sufficient to associate locomotive numbers associated with each train that operated on a fixed schedule during the Investigative Period.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that more than 49,000 scheduled trains operated on the UP Lines during the Investigative Period, and as seeking information not relevant to any issue in this proceeding.

Request No. 20

All documents analyzing, assessing, investigating, studying, reviewing or otherwise evaluating how the adoption and implementation of precision-scheduled railroading has affected the on-time performance of intercity passenger trains and/or affected the implementation of Preference.

Union Pacific Response:

Union Pacific will produce responsive documents.

Request No. 21

All documents analyzing, assessing, investigating, studying, reviewing or otherwise evaluating how UP's network planning and design have affected, are affecting, or will affect the on-time performance of Sunset Limited Trains and/or implementation of Preference on the UP Lines, including but not limited to documents concerning any ongoing or anticipated capital investments that will affect UP's network capacity on the UP Lines.

Union Pacific Response:

Union Pacific objects to this request as vague and unclear in that documents requested in the phrase beginning "including" do not appear to be a subset of the primary request. Union Pacific also objects to this request to the extent it implicitly assumes "network planning and design" affects implementation of Preference. Union Pacific further objects to the request as overbroad and unduly burdensome to the extent it is intended to request "[a]ll documents" concerning capital investments that will affect Union Pacific's capacity on the UP Lines.

Request No. 22

All documents concerning policies, protocols, or procedures related to how You prioritize freight traffic on the UP Lines, or the dispatching of any intermodal or other trains carrying priority freight on the UP Lines.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests "[a]ll documents" concerning Union Pacific policies, practices and procedures relating to prioritizing freight traffic on the UP Lines. Union Pacific also objects to this request as duplicative of Request No. 2. Union Pacific further objects to this request as unduly burdensome and not proportional to the needs of the case in that it is generally duplicative of Request Nos. 22 and 24 in Appendix A, Part IV, of the Board's decision served July 11, 2023.

Request No. 23

For the time period November 11, 2020 to Present, all documents relating to any modeling, studies, reviews, analyses, investigations, or other similar evaluations conducted by UP regarding the Sunset Limited schedule or freight schedules on lines used by Sunset Limited Trains.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests “all documents” relating to any modeling studies or similar evaluations, and as seeking documents not relevant to any issue in this proceeding in that it requests documents involving freight schedules. Union Pacific further objects to this request as unduly burdensome and not proportional to the needs of the case in that it is generally duplicative of Request Nos. 3, 4, 5, 6, 7, 8, 9, and 10 in Appendix A, Part IV, of the Board’s decision served July 11, 2023. Union Pacific also objects to this request as premature to the extent it requests documents Union Pacific may submit in reply comments in this proceeding.

Subject to and without waiving its objections, will produce final modeling studies or similar evaluations conducted by Union Pacific regarding the Sunset Limited schedule.

Request No. 24

All documents reflecting or relating to UP’s consideration of Sunset Limited Trains in determining, assessing, evaluating, studying, or otherwise considering freight volumes for lines used by the Sunset Limited Trains.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests “all documents” reflecting or relating to Union Pacific’s consideration of Sunset Limited trains in considering freight volumes for lines used by those trains.

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October 4, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of October, 2023, I caused a copy of the foregoing document to be served by email on Administrative Law Judge McCarthy and all parties of record in Docket No. NOR 42175.

/s/ Michael L. Rosenthal

**HIGHLY CONFIDENTIAL MATERIAL
REDACTED**

EXHIBIT I

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

**AMTRAK’S RENEWED MOTION TO COMPEL PRODUCTION
OF DOCUMENTS FROM UNION PACIFIC RAILROAD COMPANY**

Further to the January 16, 2024 conference (“Conference”) conducted before Judge McCarthy, the National Railroad Passenger Corporation (“Amtrak”) respectfully renews its Motion to Compel Union Pacific Railroad Company (“UP”) to timely produce documents that Amtrak requested on September 12, 2023, and that UP has failed to produce (the “Motion”). Amtrak seeks an order requiring that: (1) UP produce train movement data for non-Amtrak trains that used the UP rail lines at issue during the Relevant Period; (2) UP produce all train movement data in a native or machine readable format; (3) UP produce a data dictionary for certain dispatch records and make available for review all dispatch playbacks preserved pursuant to its litigation hold; (4) UP be made to either produce additional communications concerning dispatching policies, practices, procedures, or explain why none exist; (5) UP be required to produce agreements governing the economic terms applicable to “premium” trains that used the UP rail lines at issue during the Relevant Period; and (6) Amtrak receive two weeks from the date of any further productions to review those productions and determine whether additional relief is required to augment the Board’s investigative record.¹

¹ In making this Motion, Amtrak does not waive and expressly reserves all rights to seek additional relief regarding the sufficiency of UP’s discovery responses and document productions. In response to requests other than those

INTRODUCTION

Though this is a Board-led investigation under 49 U.S.C. § 24308(f), the Board has determined that party discovery should be permitted to further develop the Board's investigative record. Consistent with that direction, Amtrak served targeted discovery on UP meant to address particular gaps in the investigative record. Amtrak propounded that discovery on September 12, 2023.

Over the subsequent months, UP obfuscated and delayed. Three examples are pertinent to this renewed motion. First, in response to Amtrak's request for Dispatching Records, UP represented that dispatch playbacks were available and assured Amtrak that it was assessing technical means to produce them. After the period for propounding discovery closed, however, UP reversed itself and told Amtrak that dispatch playbacks for the Relevant Period had been destroyed and therefore had never actually been available. UP offered no explanation other than a "miscommunication" nor any indication that it would produce other Dispatching Records² responsive to Amtrak's initial document request. Further correspondence revealed that UP failed to assess the full scope of documents responsive to that request. After Amtrak filed the Motion, UP produced Dispatching Records that it admits are incomplete. This has hampered Amtrak's access to evidence at the core of this proceeding.

Second, UP initially objected to producing a single communication in this proceeding. After Amtrak pressed for communications related to dispatching decisions, policies, practices, and procedures, UP represented that it would search for and produce them. However, UP repeatedly

addressed in this Motion, UP has produced just 48 total documents. The parties are continuing to confer about the adequacy of that production.

² As in its Motion, Amtrak uses the term Dispatching Records to refer to all documents responsive to its initial document request, which sought dispatching tapes, dispatching playbacks, and other documents logging or recorded dispatching decisions, including but not limited to dispatching decisions related to dispatching of all trains entering, exiting, continuing, or otherwise traversing the UP Lines.

refused to indicate when the production of communications would begin. To promote the expeditious conduct of this proceeding, Amtrak was forced to file its Motion seeking an order compelling their production by a date certain. Only after Judge McCarthy held a hearing in this matter and pressed UP for a date certain for its production did UP finally produce communications. However, when UP finally made this production, after months of purported search and review, it contained just 63 substantive communications concerning its dispatching policies, procedures, practices, and decisions.

Third, UP has ignored or resisted Amtrak's offers to compromise on the production of agreements with shippers on the UP Lines at issue in this proceeding ("UP Lines"). In its initial request, Amtrak attempted to mitigate any burden on UP by limiting its request for agreements to those involving variable compensation. When UP complained that reviewing agreements to determine whether they contain variable compensation was too burdensome, Amtrak suggested that UP produce all agreements with shippers using the UP Lines and permit Amtrak to undertake the evaluation of variable compensation.

UP took more than six weeks to consider that proposed compromise, then rejected it based on an entirely different set of burden objections. None of those new burden objections had merit, and UP's additional delay deprived the parties of an opportunity to meaningfully confer. Nonetheless, Amtrak again attempted to find a reasonable compromise. In its Motion, Amtrak offered to narrow the document request to agreements concerning "premium" trains as defined on UP's website. UP ignored that proposal in its reply brief and offered no further solutions at the Conference. Instead, UP asserted at the hearing that it was incapable of identifying premium trains based on the definition of premium trains on UP's own website.

Amtrak has made good faith efforts to work with UP throughout discovery. It dedicated considerable time and resources to address the voluminous, overlapping, duplicative, and burdensome 150 discovery requests that UP propounded. Amtrak also met and conferred with UP on the discovery requests that Amtrak propounded, proposed compromises with respect to UP's objections, and exercised patience when UP represented that searches were underway.

UP should not be permitted to persist in this way. Its attempt to moot the motion to compel Dispatching Records through a partial production is insufficient and will cause further delay, for example because it excludes readily accessible and important data, information, and {{ [REDACTED] }} for non-Amtrak trains. UP's attempt to moot the motion to compel production of communications by providing just 63 communications raises questions about the adequacy of its search.³ And UP's continued refusal to engage on proposed compromises with respect to shipper contracts is also unacceptable. To ensure that the Board has a complete record, the Motion should be granted.⁴

BACKGROUND

On December 8, 2022, Amtrak filed and served its Complaint concerning the substandard on-time performance of *Sunset Limited* Trains. Pursuant to the mandatory provisions in 49 U.S.C. § 24308(f)(1), the Board then opened this investigation. In doing so, the Board established a procedural framework for the investigation, *see* Motion at 3-4, and ordered the parties to preserve all documents and data related to the subject matter of the investigation. Board's July 11, 2023 Order ("Order") at 16.

³ On January 22, 2023, UP informed Amtrak that UP is "still in the process of reviewing a small number of additional [communications] that might be responsive" to Amtrak's requests for dispatching communications, and that UP expects to produce any additional responsive communications by February 2, 2024.

⁴ Additionally, Amtrak should be given two weeks after any further productions to assess those productions and determine whether additional relief is necessary to augment the Board's investigative record.

Amtrak and UP have taken vastly different approaches to discovery. *See* Motion at 4-6. Unlike UP, Amtrak served targeted document requests. *See id.* Among other things, Amtrak sought three categories of material addressed in the Motion: (1) Dispatching Records; (2) communications concerning dispatching policies, practices, procedures, and decisions; and (3) agreements with freight customers involving certain types of variable compensation.⁵ Each of the relevant requests seeks documents that were not requested by or produced in response to the Board's own investigative questions.

Amtrak has previously recounted events precipitating the Motion. *See* Motion at 6-7.⁶ The Motion was filed December 20, 2023. UP replied on January 9, 2024. Later that day, UP made a partial production of Dispatching Records. The partial production included two categories of material. The first came from UP’s computer-aided dispatching system (“CADX Data”) and includes 20 gigabytes of data produced in native format. Amtrak is still reviewing this data. Based on its preliminary review, it appears that the data {{ [REDACTED] [REDACTED] }}. The second category of material includes dispatchers’ records of train movements (“Train Movement Data”). The Train Movement Data includes or appears to include, among other things, {{ [REDACTED] [REDACTED] [REDACTED] }}.⁷ *See* UP Reply at 3. UP produced Train Movement Data only for *Sunset Limited* Trains (not all of the other trains that used the UP Lines during the Relevant Period) and produced that data in PDF format. *See* **Ex. C**.

⁵ See **Ex. A** at 8-9 (Request Nos. 3, 4, 6, 9, and 15).

⁶ To avoid repetition, Amtrak respectfully incorporates the background section of its Motion by reference.

⁷ An example of one Train Movement Record is attached as **Ex. C**.

On January 16, 2024, the parties appeared before Judge McCarthy to address the Motion. During the Conference, Amtrak argued for the production of Train Movement Data for non-Amtrak trains, the production of Train Movement Data in native or machine-readable format,⁸ the production of communications by a date certain, and the production of shipper contracts with premium shippers.⁹ Amtrak also emphasized that it would require time to complete its preliminary review of the CADX Data, any additional Train Movement Data, and any communications, in order to assess whether further relief was needed. UP resisted the production of remaining Train Movement Data, committed to producing communications by January 19, and insisted that it did not know how to define “premium trains” that are advertised on UP’s own website.

During the Conference, Judge McCarthy found that the additional Train Movement Data went to the core of this proceeding, that communications should be produced promptly, and that the requested shipper contracts were relevant. In view of the partial production of Dispatching Records and the dispute concerning the definition of premium trains, Judge McCarthy instructed Amtrak to renew its motion to compel. The next day, UP produced 168 documents related to communications. However, as explained below, nearly two-thirds of those documents are junk files with no bearing upon this matter (e.g., an Apple or Microsoft logo).¹⁰

ARGUMENT

I. Dispatching Records

Dispatching Records are essential evidence in this proceeding.¹¹ Accordingly, Amtrak requested “[a]ll dispatching tapes, dispatching playbacks, and other documents logging or

⁸ Counsel for UP represented that UP would produce Train Movement Data in machine readable format if available in that format.

⁹ Judge McCarthy asked whether Amtrak would limit its request for shipper contracts to agreements with shippers in this category and Amtrak agreed to do so.

¹⁰ An example of one such file is attached as **Ex. D**.

¹¹ Amtrak respectfully incorporates by reference its previous discussion of Dispatching Records, including why they are critical to this investigation. *See* Motion at 8-10.

recording Dispatching Decisions, including but not limited to Dispatching Decisions related to the dispatching of all trains entering, exiting, continuing, or otherwise traversing the UP Lines.” See **Ex. A** at 8 (Request No. 6). In its responses and objections, UP unilaterally narrowed the scope of the request and said it would “allow” Amtrak to come to Omaha to view dispatching playbacks. See **Ex. B** at 7 (Response No. 6). The parties then engaged in lengthy negotiations over whether it was technically feasible for UP to provide Amtrak with the dispatch playbacks in a form that would not require Amtrak to travel to Omaha. Amtrak pressed for continuing access to the dispatch playbacks because they are critical evidence. Each playback visually depicts the real time decisions that dispatchers make and can be reviewed to determine how these choices were carried out on the ground, much like a game tape for a sporting event.

Months later, and only after the time to propound new discovery had passed, UP suddenly announced that the playbacks did not exist. In response to the subsequent Motion, UP disclosed that it destroys dispatch playbacks after 99 hours. Also in response to the Motion, UP made a partial production of Dispatching Records, providing the CADX data and providing Train Movement Data for *Sunset Limited* Trains. That production is not sufficient for at least three reasons. First, UP has not provided adequate information about how to interpret the CADX data,¹² and has not provided any information about how to interpret the Train Movement Data. Second, UP continues to withhold Train Movement Data for all non-Amtrak Trains. Third, UP produced Train Movement Data for Amtrak trains in a burdensome PDF format. These issues are addressed below.

A. Further relief is required to address the prejudice imposed by UP’s reversal on the availability of visual playbacks.

¹² Although UP produced an instructional document concerning the CADX data, it appears out of date. For example, {{ [REDACTED] }}.

As explained above, dispatch playbacks provide valuable evidence about dispatching decisions and train conflict resolution. They distill the relative position of trains, track infrastructure, and other relevant operating conditions into a simple visual format that facilitates efficient and reliable analysis. Amtrak reasonably relied on the representation that playbacks would be made available. Because UP did not correct that misrepresentation until December 14, 2023, Amtrak was deprived of an opportunity to propound additional discovery.

UP's partial production of Dispatching Records, also made after the expiration of time to propound party discovery, is not sufficient to address that prejudice. Using a large amount of data to reconstruct information ordinarily available through a simple visual will be challenging.¹³ Among many other things, it will require analyzing more than 20 GB (millions of rows) of CADX data and (should the motion be granted) Train Movement Data for nearly 42,000 trains. To compound the challenge, Amtrak currently lacks adequate information about how to read or interpret the data. For example, with respect to the CADX data, the instructional document UP provided appears out of date and {{ [REDACTED] }}. With respect to the Train Movement Data, UP has not explained the starting or ending positions for fields reflected in the materials, defined the data in those fields, described the data in those fields, or provided other information that would allow Amtrak to analyze the material more efficiently and reliably.

To address these challenges, UP should be ordered to provide data dictionaries for the CADX and Train Movement Data. Those data dictionaries should contain the same information required by the Board's instruction for data submitted in machine-readable format,¹⁴ which was designed to ensure the Board could make meaningful use of data submitted by the parties to this

¹³ If dispatch playbacks are like game tape, then Amtrak will be attempting to reconstruct the action based on information about the players and each individual movement on the field. This process, though important, will be time-consuming and costly.

¹⁴ See Order, App. A—Part I, Instruction No. 6.

investigation. UP should also be ordered to make available for review dispatch playbacks preserved pursuant to its litigation hold, which will provide valuable context about how CADX and Train Movement Data can be used to reconstruct and evaluate train conflict resolution and other matters critical to this proceeding.¹⁵

B. UP should be compelled to produce Train Movement Data for all trains.

Compelling production of UP Train Movement Data for all trains will address gaps in the investigative record. The Train Movement Data contains information related to several Board requests and not contained within the CADX data, prior productions to Amtrak, or prior productions to the Board. For example, the Train Movement Data contains {{[REDACTED] [REDACTED] [REDACTED] }}. Obtaining that information for all trains will ensure Amtrak and the Board can more reliably evaluate fundamental issues in this proceeding, including the cause of delay to a *Sunset Limited* Train, responsibility for that delay, and the role of any preference violation in the delay. Particularly with respect to freight trains that directly compete with *Sunset Limited* Trains for track infrastructure, it is important that Amtrak and the Board have access to {{[REDACTED] [REDACTED] [REDACTED] }}. For those reasons, Judge McCarthy found during the Conference that Train Movement Data is not only relevant but goes to the core issues in this proceeding.

UP claims that producing Train Movement Data for freight trains would be unduly burdensome. However, that claim lacks merit and appears designed primarily to support a

¹⁵ Amtrak respectfully reserves the right to seek additional relief, such as leave to take further discovery, if these measures prove insufficient to clarify how to interpret the Dispatching Records.

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conclusory request for cost-shifting.¹⁷ UP represents that a single employee could retrieve the balance of its Train Movement Data in 2-3 weeks. *See* UP Reply at 3. UP fails to explain how undertaking such an exercise constitutes an undue burden. Moreover, UP Train Movement Data was responsive to Amtrak's initial document request for Dispatching Records. Had UP begun working on this production when it received the request in September, 2023, it would already have had significantly more time than it purportedly needs to complete production. Requiring that UP bear the supposed burden of requiring that one employee shift or defer unspecified business responsibilities, in order to comply with discovery obligations in a federal investigation, is particularly reasonable because it will help cure the prejudice imposed by UP's own failure to timely disclose that playbacks were unavailable.

C. UP should be compelled to produce all Train Movement Data in Native or Machine-Readable Format.

In addition to placing improper limits on the scope of Train Movement Data that it produced, UP produced those records in PDF format. *See* Ex. C. Based on its review of the Train Movement Data produced, it appears that the source material was converted from a machine-readable format. If Train Movement Data is being converted to PDF for production, that necessarily delays production. It also renders the data almost impossible to analyze efficiently. Converting PDFs into machine-readable data is technologically challenging and unreliable. Accordingly, Amtrak will need to undertake a significant amount of manual data entry to analyze the material, a time consuming and costly process that also introduces risk of human error.

¹⁷ The Board should also reject UP's meritless request for cost-shifting, for several reasons. First, UP cites no authority for the request and should not be afforded any additional opportunity to do so at this late stage. Second, the ordinary presumption is that parties should pay their own such costs, and that is especially appropriate here because UP is undertaking this search to address prejudice cause by its own representations. Third, the costs involved cannot conceivably outweigh those required for Amtrak to respond to the 150 requests propounded by UP. Finally, the request concerns data that is relevant, readily accessible, and unavailable from other sources, on issues of importance to the Board's investigation.

Producing the data in machine-readable format will obviate the need for that considerable expenditure and assist the Board in its review of the data.¹⁸ For those reasons, UP should be compelled to produce all Train Movement Data in native format.

II. Dispatching Communications

Amtrak requested that UP produce communications concerning the UP policies, practices, and procedures applicable to dispatching decisions, and communications between UP supervisors and dispatchers pertaining to dispatching decisions involving *Sunset Limited* Trains. *See Ex. A* at 8-9 (Request Nos. 3, 4, 9). If dispatching playbacks are analogous to game tape, then these communications are like the gameplans and play calls. They will supplement Board investigative requests on dispatching issues, which did not seek communications.

After several months of purported search and review, UP has now produced 168 documents apparently related to the communications. But that number is misleading. Only about 63 of the documents contain substantive content. The remaining documents (105) contain nothing but the image of a company logo or an error message, all useless to this proceeding. *See Ex. D* and *Ex. E*.¹⁹

This small number of documents is surprising.²⁰ Even if most communications concerning decisions to delay the *Sunset Limited* Trains take place verbally or through an instant messaging application,²¹ which would raise serious questions about whether UP adequately documents decisions that implicate compliance with federal law, Amtrak requested internal and third-party

¹⁸ *Cf.* Order, App. A—Part III at Request Nos. 7-11, 36-38 (requesting data in machine-readable format); Order, App. A—Part IV at Request Nos. 8, 11, 19 (same).

¹⁹ As UP designated the junk files Confidential, Amtrak is not attaching them to the Public Version of this motion.

²⁰ UP has represented, contrary to its prior commitment to produce communications by January 19, that it is still reviewing documents for responsiveness. However, the number of documents under review is “small” and UP may determine that none require production.

²¹ As UP represented during the Conference, the parties agreed to forego the production of instant messages, given the limited time for party discovery.

communications concerning the policies, practices, and procedures applicable to those decisions.

UP has made several representations about those policies, practices, and procedures to the Board.

To take just a few examples, UP has told the Board that:

- UP interprets preference to require balancing delays to *Sunset Limited* Trains against impacts on other trains and UP's rail network;²²
- UP is continuing to refine and develop the functionality of both CADX and the Movement Planner algorithm to ensure that they appropriately account for and address the wide variety of issues that arise in planning for its network;²³
- UP dispatchers receive instruction regarding protocols for dispatching Amtrak Trains;²⁴
- UP dispatchers operate pursuant to protocols contained in several sources, including (among other things) its General Code of Operating Rules, its Train Dispatcher Rules, timetables, track bulletins, office notices, standard processes, and general orders;²⁵
- UP in its Movement Planner algorithm assigns Amtrak trains and UP's premium intermodal trains the highest numeric priority.²⁶

Each of these representations concern UP policies, practices, and procedures applicable to dispatching decisions on the UP Lines. However, few (if any) of the 63 communications produced to date address them. That strains credulity. UP should be ordered to expand its search for communications concerning UP policies, practices, and procedures applicable to dispatching decisions, and to specifically search for documents concerning each of the above representations. If such communications do not exist, then UP should be required to explain to the Board why they do not exist.

III. Contracts

²² UP Response at 32.

²³ *Id.* at 33-34.

²⁴ *Id.* at 31.

²⁵ *Id.*

²⁶ *Id.* at 34.

Amtrak requested that UP produce agreements between UP and freight customers that shipped over the UP Lines and reflect variable compensation depending on the timeliness of delivery or availability of train cars.²⁷ UP acknowledges that responsive agreements exist.²⁸ Their production is important. UP has told the Board that its (incorrect) interpretation of preference involves balancing delays to *Sunset Limited* Trains against impacts on other trains and UP's rail network.²⁹ UP has also told the Board that it considers contractual incentives and penalties in moving passenger trains over its lines.³⁰ Access to UP agreements with shippers is therefore necessary to ensure Amtrak and the Board can evaluate the magnitude of contractual incentives that UP might have in directing traffic over its network, and the force those contractual incentives might have when dispatchers or their supervisors evaluate how to balance delays to *Sunset Limited* and other trains. For precisely that reason, Judge McCarthy found the contracts relevant during the Conference.³¹

UP also complains that producing the agreements is unduly burdensome. Initially, UP claimed that the undue burden resulted from the need to determine which contracts involve variable compensation. When Amtrak obviated that concern,³² UP attempted to assert a different one, claiming that the process for identifying any of its commercial contracts was too burdensome. That argument lacks merit. First, UP has not substantiated the time or cost required to complete

²⁷ See Motion at 13-15; **Ex. A** at 9 (Request No. 15).

²⁸ UP Reply at 6.

²⁹ See UP Response at 32 (representing that dispatchers are taught that "Amtrak's preference does not mean they should disregard impacts to other trains or the network as a whole to ensure Amtrak trains are never slowed or stopped en route").

³⁰ See *id.* at 11-12 (representing that UP had less incentive to seek adjustment of operating schedules with Amtrak when the consequence for failure to achieve on-time performance was defined by {{[REDACTED]}}).

³¹ Perhaps anticipating this finding, UP offered to stipulate that some of its contracts provide incentives to meet service commitments. However, that stipulation is insufficient. Amtrak and the Board must have access to the financial terms of variable rate agreements to meaningfully evaluate their force and potential effect, including relative to {{[REDACTED]}}.

³² *Supra* at 3.

production. It should not be heard to do so now, after staying silent during the lengthy meet and confer process and in its reply. Second, UP has not been asked to perform a special study. Amtrak only asks that UP identify and produce contractual agreements kept in the ordinary course of business. That UP must perform some work to identify existing materials does not transform the request into one demanding the creation of data.³³

Although UP did not articulate cognizable burden in discovery correspondence or its reply, Amtrak has taken additional steps to drive a reasonable resolution. More specifically, Amtrak agreed to limit its request for contracts to premium shippers. UP asserts now that it does not know how to define that term, even though Amtrak applied the definition from UP's own website.³⁴ Amtrak nevertheless adds that UP appears to define premium trains to include freight transported in intermodal containers, finished vehicles, and automotive parts.³⁵ To facilitate a prompt resolution, Amtrak is willing to further limit its request to agreements with shippers that rely on those premium intermodal trains assigned the same numeric priority as Amtrak trains in UP's Movement Planner algorithm.³⁶ Because UP has told the Board and the public that "premium intermodal trains" receive the highest numeric priority in UP's computer aided dispatching system, and the same numeric priority as Amtrak passenger trains, UP should have no difficulty defining that term for purposes of the request.

CONCLUSION

For the foregoing reasons, the motion to compel should be granted and Amtrak respectfully requests entry of an order requiring that:

³³ Cf. UP Reply at 5 (citing Board decision concluding that request for creation of locomotive fuel consumption data was a special study).

³⁴ See Motion at 14, n.31. Had UP not waited until December 14, 2023 to articulate its burden argument, the parties could have evaluated proposed compromises and attempted to negotiate definitional issues without troubling the Board.

³⁵ See e.g., *Premium*, UP.COM, at <https://www.up.com/customers/premium/>.

³⁶ See UP Response at 34.

1. UP produce train movement data for non-Amtrak trains that used the rail lines at issue during the Relevant Period;
2. UP produce all train movement data in a native or machine readable format;
3. UP produce a data dictionary for Dispatching Records and make available for review all dispatch playbacks preserved pursuant to its litigation hold;
4. UP be made to either produce additional communications related to the representations it made to the Board about dispatching or explain why none exist;
5. UP be required to produce agreements governing the economic terms applicable to premium trains that used the UP rail lines at issue during the Relevant Period; and,
6. Amtrak receive two weeks from the date of any further productions to review those productions and determine whether additional relief is required to augment the Board's investigative record.

Dated: January 23, 2024

Respectfully submitted:

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CERTIFICATE OF SERVICE

I, Jessica Ring Amunson, certify that copies of this document are simultaneously being provided by email to all parties identified on the service list for this proceeding, Docket Number NOR 42175.

January 23, 2024

/s/ Jessica Ring Amunson
Jessica Ring Amunson

EXHIBIT A

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

**AMTRAK'S FIRST SET OF REQUESTS FOR PRODUCTION
OF DOCUMENTS TO UNION PACIFIC RAILWAY COMPANY**

Pursuant to 49 C.F.R. §§ 1114.30 and the Surface Transportation Board's Order in the captioned matter served July 11, 2023, the National Railroad Passenger Corporation ("Amtrak") serves this First Set of Requests for Production of Documents on Union Pacific Railroad Company ("UP"). These Requests are to be interpreted and answered in accordance with the Definitions and Instructions below. Amtrak requests that UP provide its responses and objections to these Requests within fifteen (15) days of service of these Requests, unless otherwise agreed upon by the parties.

DEFINITIONS

1. The terms "UP," "You," or "Your" refer to Union Pacific Railroad Company, as well as its corporate affiliates, parents, subsidiaries, business units, divisions, predecessors, representatives, officers, agents, counsel, employees, consultants, and any person authorized to act or acting on its behalf.
2. The term "BNSF" refers to BNSF Railway Company, as well as its corporate affiliates, parents, subsidiaries, business units, divisions, predecessors, representatives, officers, agents, counsel, employees, consultants, and any person authorized to act or acting on it.
3. The term "CN" refers to Canadian National Railway Company, its subsidiary Illinois Central Railroad Company, as well as each of their corporate affiliates, parents, subsidiaries,

business units, divisions, predecessors, representatives, officers, agents, counsel, employees, consultants, and any person authorized to act or acting on its behalf.

4. The term “SCRRA” refers to the Southern California Railroad Authority, as well as its corporate affiliates, parents, subsidiaries, business units, divisions, predecessors, representatives, officers, agents, counsel, employees, consultants, and any person authorized to act or acting on its behalf.

5. The term “NOPB” refers to New Orleans Public Belt Rail Corporation, as well as its corporate affiliates, parents, subsidiaries, business units, divisions, predecessors, representatives, officers, agents, counsel, employees, consultants, and any person authorized to act or acting on its behalf.

6. The term “2000 Operating Agreement” means the Agreement dated January 1, 2000, between Amtrak and UP, including all amendments to that Agreement.

7. The term “algorithm” refers to any program, software, or set of rules used to determine an outcome based on one or more factors.

8. The term “communication” means any oral, written, or electronic transmission of information, including but not limited to meeting, discussions, conversations, telephone calls, memoranda, white papers, letters, email messages, and notes.

9. The term “Contractual OTP” means on-time performance of trains as calculated for purposes of determining compensation owed to Union Pacific under the 2000 operating agreement.

10. The term “Customer OTP” means on time performance of trains as calculated under the customer on-time performance metric and/or minimum standard promulgated by the Federal Railroad Administration, and has the same meaning as in the Complaint. *See, e.g., Complaint ¶¶ 48-51.*

11. The term “dispatcher” refers to an individual who directs the movement of trains

within a division of trackage and coordinates their movement from one division to another, whether individually or in conjunction with a joint desk.

12. The term “Dispatching” refers to the direction of trains within a division of trackage and/or the coordination of movement of trains from one division to another, whether individually or in conjunction with a joint desk.

13. The term “Dispatching Decisions” refers to decisions that involve Dispatching of any freight or passenger train on the UP Lines.

14. The term “documents” shall be construed broadly, to include all material subject to discovery under 49 C.F.R. § 1114.30(a)(1) or any other Board rule or regulation, and to include every copy of a document not identical to the original or any other copy. For the avoidance of doubt, the term “documents” includes every writing, recording, photograph, summary, spreadsheet, or other record in any form, whether handwritten, printed, typed, taped, electronic, or in any other graphic, digital, magnetic, optical, or mechanical form, however produced, reproduced, or recorded, and includes electronic documents (such as electronic mail messages and all attachments to mail messages).

15. The term “HRD” refers to host-responsible delay(s) and has the same meaning as in the Complaint. *See, e.g.*, Complaint ¶ 52.

16. The term “Investigative Period” means the period of time beginning October 1, 2021 through and including December 8, 2022.

17. The term “on-time performance” means on-time performance as determined, discussed, recorded, or reported for any purpose, including without limitation Contractual OTP or Customer OTP.

18. The term “Pending Board Requests” refers to interrogatories and document requirements for UP that are set out in Appendix A – Part IV of the Surface Transportation Board’s

July 11, 2023 Decision in the above-captioned proceeding.

19. The term “Preference” refers to the statutory requirement that, 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 Surface Transportation Board orders otherwise under 49 U.S.C. § 24308(c).

20. The term “RPSA” means the Rail Passenger Service Act of 1970, Pub. L. No. 91-518, 84 Stat. 1327, including all amendments thereto (codified at 49 U.S.C. §§ 24101 *et seq.*).

21. The term “Sunset Limited Trains” refers to Amtrak Trains 1 and 2, as described more fully in Amtrak’s Complaint. Each of the Sunset Limited Trains is individually referred to as a Sunset Limited Train.

22. The term “UP Lines” means any rail line, junction, or crossing that is owned, dispatched, jointly dispatched, controlled, managed, directed, supervised, maintained, or administered by UP, and on which any Sunset Limited Train transited between October 1, 2021 and December 8, 2022.

INSTRUCTIONS

1. Amtrak has tried to minimize duplication between these Requests and the Pending Board Requests. If UP asserts that one or more of the following Requests is covered by a Pending Board Request, UP must identify the overlapping Pending Board Request in its response, and also produce all responsive documents not otherwise being produced to the Board.

2. Unless otherwise indicated, the Requests below cover the time period from October 1, 2021 through and including December 8, 2022.¹

3. Please provide separate written responses to all of the following Requests, and repeat each Request and the number of each Request with each response. If you object to any Request, identify the number of the Request to which you object, state the basis for your objection in sufficient detail so as to permit the adjudication of the validity of the objection, and produce any documents responsive to any portion or portions of the Request that you do not find objectionable.

4. Documents sought in these Requests include documents currently or previously within UP's possession, custody or control, as well as those documents which come into UP's possession subsequent to service thereof. Each of the following Requests is continuing in nature and Amtrak hereby requests that if you obtain any additional responsive documents at any later date, you promptly so inform Amtrak and produce those documents.

5. When any Request calls for the production of any portion of any document, the entire document containing any such portion must be produced.

6. Documents offered in response to these Requests must be furnished in as organized and usable form as possible, and should be produced in a manner organized and labeled to correspond to the following Requests. Electronically stored information shall be produced in a

¹ Amtrak reserves the right to revise this time period following any written decision from Judge McCarthy regarding the appropriate scope of discovery in this proceeding and/or following the parties' forthcoming meet and confer.

method and manner as agreed upon by the parties.

7. If any responsive document or communication has been destroyed, lost, or become beyond UP's possession, custody, or control, UP must provide a list identifying the document or communication as completely as possible, providing (1) the date the document or communication was destroyed, lost, or transferred beyond UP's control; (2) the manner of the destruction, loss, or transfer; (3) the reason for the destruction, loss, or transfer; (4) the person or entity authorizing the destruction, loss, or transfer; (5) the person or entity that destroyed, lost, or transferred the document or communication.

8. If UP asserts a claim of privilege regarding a document or communication, UP must provide a log identifying each document or communication as completely as possible, and UP must produce any portion of a document or communication that contains non-privileged and responsive material.

9. The present tense shall be construed to include the past and future tenses and the past and future tenses shall be construed to include the present tense as required by the context to elicit all information discoverable within the broadest scope of these Requests.

10. The singular shall be construed to include the plural and the plural shall be construed to include the singular, whenever context permits. The terms such as "and" and "or" have both conjunctive and disjunctive meanings, and shall be construed in the broadest and most inclusive manner, in order to bring into the scope of each Request all responsive information that might otherwise be construed to be outside the scope of the Request.

11. Words such as "include" and "including" are illustrative and not limitative, and shall be construed in the broadest and most inclusive manner, in order to bring into the scope of each Request all responsive information that might otherwise be construed to be outside the scope of the Request.

12. The terms “relating to,” “related to,” “concerning,” and “showing” are to be construed broadly, to include: addressing, referring to, concerning, showing, concerning, comprising, identifying, stating, consisting of, evidencing, alluding to, responding to, connected with, discussing, showing, describing, reflecting, analyzing, constituting, setting forth, in respect of, incorporating, mentioning, embodying, containing, studying, reporting on, commenting on, considering, recommending, constituting in any way, or having any logical or factual connection with the subject matter. Likewise, the terms “any” and “all” shall mean “each and every.”

13. Production must be made to outside counsel of record for Amtrak at Jenner & Block: Alex Trepp, 1099 New York Avenue N.W., Ste. 900, Washington, DC 20001, atrepp@jenner.com, with a copy to Albert Peterson, 1099 New York Avenue N.W., Ste. 900, Washington DC 20001 apeterson@jenner.com.

REQUESTS FOR PRODUCTION

1. All document management policies, retention policies, and/or retention schedules applicable to documents or communications relating or referring to (i) the On-Time Performance of Sunset Limited Trains, (ii) Dispatching Decisions, or (iii) policies, practices, and procedures that govern, affect, or apply to Dispatching Decisions, (iv) policies, practices, and procedures that govern, affect, or apply to the implementation of Preference.

2. All documents concerning UP policies, practices, and procedures relating to Dispatching Decisions, including but not limited to documents providing train or customer-specific instructions, or concerning or reflecting any modification of those policies, practices, and procedures during the Investigative Period.

3. All communications between or among current and/or former UP management, employees, or other personnel concerning policies, practices, and procedures applicable to Dispatching Decisions.

4. All communications between or among UP and BNSF, CN, NOPB, SCRRRA, any governmental entity, and/or any other third-party concerning policies, practices, and procedures applicable to Dispatching Decisions.

5. All documents constituting, concerning, or reflecting any Dispatching Decision that departed or deviated from the policies, practices, and procedures applicable to Dispatching Decisions, or otherwise failed to implement or comply with policies, practices, and procedures applicable to Dispatching Decisions.

6. All dispatching tapes, dispatching playbacks, and other documents logging or recording Dispatching Decisions, including but not limited to Dispatching Decisions related to the dispatching of all trains entering, exiting, continuing, or otherwise traversing the UP Lines.

7. All daily system, region, or division performance reports concerning any operations

on the UP Lines.

8. All documents concerning whether or under what circumstances a dispatcher responsible for Dispatching Decisions may override algorithmic Dispatching Decisions.

9. All communications between UP supervisors and dispatchers pertaining to Dispatching Decisions involved Sunset Limited Trains.

10. Documents sufficient to show any criteria used to evaluate or compensate dispatchers and all documents related to any evaluations, reviews, or other feedback provided to dispatchers responsible for Dispatching Decisions.

11. For the time period November 11, 2020 to Present, all documents relating to any investigations, audits, studies, reviews, analyses, or other similar evaluations conducted by UP regarding Dispatching Decisions, HRD, or Preference on the UP Lines.

12. All documents relating to any disciplinary actions taken or contemplated against a dispatcher and concerning one or more Dispatching Decisions.

13. All documents concerning any operational adjustment, scheduling adjustment, capital investment, or other similar action that UP has analyzed or considered to address, evaluate, or understand delays to freight or passenger trains traveling on the UP Lines, including all documents relating to the reason(s) UP did not implement any such adjustments, investment, or other similar actions.

14. All documents concerning UP efforts to obtain funds from federal, state, or other sources for capital expenditures on the UP Lines.

15. All agreements with freight customers using any portion of the UP Lines for which UP's compensation varies depending on the time or timeliness of the delivery of products or commodities, or depending on availability of loaded cars for unloading or empty cars for loading of customer products or commodities.

16. All documents constituting or concerning UP's current operating plan(s) for lines used by Sunset Limited Trains, and all documents constituting or concerning efforts to measure operational performance against UP's current operating plan(s) or operating schedule(s) for lines used by Sunset Limited Trains.

17. All corporate policies, protocols, guidance documents, or other materials related to the implementation of Preference, or used to evaluate the implementation of Preference.

18. Documents sufficient to show any procedures or systems used to implement or evaluate the implementation of Preference.

19. For the UP Lines, documents sufficient to associate locomotive numbers associated with each train that operated on a fixed schedule during the Investigative Period.

20. All documents analyzing, assessing, investigating, studying, reviewing or otherwise evaluating how the adoption and implementation of precision-scheduled railroading has affected the on-time performance of intercity passenger trains and/or affected the implementation of Preference.

21. All documents analyzing, assessing, investigating, studying, reviewing or otherwise evaluating how UP's network planning and design have affected, are affecting, or will affect the on-time performance of Sunset Limited Trains and/or implementation of Preference on the UP Lines, including but not limited to documents concerning any ongoing or anticipated capital investments that will affect UP's network capacity on the UP Lines.

22. All documents concerning policies, protocols, or procedures related to how You prioritize freight traffic on the UP Lines, or the dispatching of any intermodal or other trains carrying priority freight on the UP Lines.

23. For the time period November 11, 2020 to Present, all documents relating to any modeling, studies, reviews, analyses, investigations, or other similar evaluations conducted by UP regarding the Sunset Limited schedule or freight schedules on lines used by Sunset Limited Trains.

24. All documents reflecting or relating to UP's consideration of Sunset Limited Trains in determining, assessing, evaluating, studying, or otherwise considering freight volumes for lines used by the Sunset Limited Trains.

September 12, 2023

Respectfully submitted:
/s/ Jessica Ring Amunson

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CERTIFICATE OF SERVICE

I, Jessica Ring Amunson, certify that I have this day caused a copy of this document to be served upon UP by email to counsel for UP at the following email address:

Mrosenthal@Cov.Com

September 12, 2023

/s/ Jessica Ring Amunson
Jessica Ring Amunson

EXHIBIT B

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

**RESPONSES AND OBJECTIONS TO AMTRAK'S FIRST SET
OF REQUESTS FOR PRODUCTION OF DOCUMENTS**

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October 4, 2023

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. NOR 42175

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

**RESPONSES AND OBJECTIONS TO AMTRAK'S FIRST SET
OF REQUESTS FOR PRODUCTION OF DOCUMENTS**

Union Pacific Railroad Company responds to Amtrak's First Set of Requests for
Production of Documents served on September 12, 2023, 2023, as follows:

GENERAL RESPONSES

The following General Responses apply to each of Amtrak's requests:

1. When Union Pacific says it will produce responsive documents, Union Pacific will produce responsive documents to the extent they exist and can be located in a reasonable search. Subject to the specific and general objections that follow, responsive documents will be produced on a rolling basis.
2. Production of documents does not necessarily imply that the documents are relevant to or admissible in this proceeding and is not to be construed as waiving any objection stated herein.

GENERAL OBJECTIONS

The following General Objections are made with respect to all of Amtrak's requests. Any additional specific objections are stated at the beginning of the response to each document request.

1. Union Pacific objects to the production of, and is not producing, documents subject to the attorney-client privilege, work-product doctrine, joint defense privilege, or any other applicable privilege or protection. Any production or disclosure of such information is inadvertent and should not be construed as a waiver. Union Pacific reserves all rights under applicable law, including the Protective Order in this case, to demand or require the return of all copies thereof and non-use by Amtrak or by any other person or entity in this or any other proceeding.

2. Union Pacific objects to the production of, and is not producing, documents prepared in connection with, or information relating to, possible settlement of this or any other proceeding.

3. Union Pacific objects to the production of documents that constitute or disclose confidential or proprietary or sensitive nonpublic information. Subject to and without waiving this objection, Union Pacific will produce such information, if not otherwise objectionable, designated “Confidential” or “Highly Confidential,” subject to the terms of the Protective Order in this case. Union Pacific reserves the right to seek additional protection as needed.

4. Union Pacific objects to the production of documents that are sensitive security information (SSI), classified or otherwise prohibited from disclosure, or documents whose public release could jeopardize the safety of the public and/or Union Pacific employees. Subject to and without waiving this objection, Union Pacific will only produce SSI information to the extent authorized by law and in the manner authorized by law, including the procedures set forth in FRA SSI Order 2011-06-FRA-01 (July 29, 2011) and the terms of the Protective Order in this case.

5. Union Pacific objects to the production of, and in general is not producing, public documents that are readily available to Amtrak, including but not limited to documents on public file at the Surface Transportation Board (the Board), the Securities and Exchange Commission (SEC), or in the Interstate Commerce Commission Archives, or clippings from newspapers or other public media. Any production by Union Pacific of documents in this category shall not be considered a waiver of this objection.

6. Union Pacific objects to the production of, and in general is not producing, documents that are readily obtainable by Amtrak from its own files or publicly available sources. Any production by Union Pacific of documents in this category shall not be considered a waiver of this objection.

7. Union Pacific objects to Amtrak's requests to the extent they call for the preparation of compilations, documents, summaries, analyses, or other special studies of any sort not already in existence, and Union Pacific by its responses does not, unless otherwise noted, undertake to prepare or produce any special studies. Any production by Union Pacific of documents in this category shall not be considered a waiver of this objection.

8. Union Pacific objects to Definition No. 1 to the extent it seeks to require Union Pacific to produce documents not in its possession, custody, or control.

9. Union Pacific objects to Definition No. 14 to the extent it seeks to impose obligations beyond, in addition to, or inconsistent with Union Pacific's discovery obligations under 49 C.F.R. Part 1114.

10 Union Pacific objects to Instruction Nos. 1, 4, 5, 7, and 8 as unduly burdensome and to the extent they seek to impose obligations on Union Pacific beyond, in addition to, or inconsistent with Union Pacific's discovery obligations under 49 C.F.R. Part 1114.12.

11. Union Pacific objects to Instruction No. 5 to the extent it purports to require Union Pacific to produce documents subject to the attorney-client privilege, work-product doctrine, joint defense privilege, or any other applicable privilege or protection.

12. Union Pacific's responses and objections are based upon information presently known to it. Union Pacific reserves the right to rely upon facts, documents, or other evidence it may develop or that may subsequently come to its attention; to assert additional objections; and to supplement or amend these responses at any time as this proceeding continues.

SPECIFIC OBJECTIONS AND RESPONSES

Request No. 1

All document management policies, retention policies, and/or retention schedules applicable to documents or communications relating or referring to (i) the On-Time Performance of Sunset Limited Trains, (ii) Dispatching Decisions, or (iii) policies, practices, and procedures that govern, affect, or apply to Dispatching Decisions, (iv) policies, practices, and procedures that govern, affect, or apply to the implementation of Preference.

Union Pacific Response:

Union Pacific objects to this Request as overbroad and unduly burdensome to the extent it seeks documents that do not reflect current policies.

Subject to and without waiving its objections, Union Pacific will produce copies of current document management policies, retention policies, and/or retention schedules.

Request No. 2

All documents concerning UP policies, practices, and procedures relating to Dispatching Decisions, including but not limited to documents providing train or customer-specific instructions, or concerning or reflecting any modification of those policies, practices, and procedures during the Investigative Period.

Union Pacific Response:

Union Pacific objects to this Request as overbroad and unduly burdensome in that it requests “[a]ll documents” concerning Union Pacific policies, practices and procedures relating to Dispatching Decisions. Union Pacific further objects to this request as unduly burdensome and not proportional to the needs of the case in that it is generally duplicative of Request Nos. 22 and 24 in Appendix A, Part IV, of the Board’s decision served July 11, 2023.

Request No. 3

All communications between or among current and/or former UP management, employees, or other personnel concerning policies, practices, and procedures applicable to Dispatching Decisions.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests “[a]ll communications” concerning policies, practices, and procedures applicable to Dispatching Decisions, and in that it requests communications not concerning dispatching of Sunset Limited Trains. Union Pacific further objects to this request as unduly burdensome and not proportional to the needs of the case in that it is generally duplicative of Request Nos. 22 and 24 in Appendix A, Part IV, of the Board’s decision served July 11, 2023.

Request No. 4

All communications between or among UP and BNSF, CN, NOPB, SCRRA, any governmental entity, and/or any third-party concerning policies, practices, and procedures applicable to Dispatching Decisions.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests “[a]ll communications” between or among the identified entities concerning policies, practices, and procedures applicable to Dispatching Decisions, and as seeking documents not relevant to any issue in this proceeding in that it requests documents not concerning dispatching of Sunset Limited Trains.

Request No. 5

All documents constituting, concerning, or reflecting any Dispatching Decision that departed or deviated from the policies, practices, and procedures applicable to Dispatching Decisions, or otherwise failed to implement or comply with policies, practices, and procedures applicable to Dispatching Decisions.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests “[a]ll documents” constituting, concerning, or reflecting certain Dispatching Decisions, and as seeking documents not relevant to any issue in this proceeding in that it requests documents not concerning dispatching of Sunset Limited Trains.

Request No. 6

All dispatching tapes, dispatching playbacks, and other documents logging or recording Dispatching Decisions, including but not limited to Dispatching Decisions related to the dispatching of all trains entering, exiting, continuing, or otherwise traversing the UP Lines.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests “[a]ll” dispatching tapes, dispatching playbacks, and other documents logging or recording Dispatching Decisions.

Subject to and without waiving its objections, Union Pacific will allow Amtrak representatives to review dispatching playbacks involving train movements on the UP Lines in person at Union Pacific’s facilities in Omaha, Nebraska.

Request No. 7

All daily system, region, or division performance reports concerning any operations on the UP Lines.

Union Pacific Response:

Union Pacific objects to this request as overbroad, unduly burdensome, and as seeking documents not relevant to any issue in this proceeding in that it requests “[a]ll” daily performance reports concerning “any operations” on the UP Lines.

Subject to and without waiving its objections, Union Pacific will produce responsive documents concerning train operations on the UP Lines.

Request No. 8

All documents concerning whether or under what circumstances a dispatcher responsible for Dispatching Decisions may override algorithmic Dispatching Decisions.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests “[a]ll documents” concerning whether and under what circumstances a dispatcher may override Dispatching Decisions. Union Pacific further objects to this request as unduly burdensome and not proportional to the needs of the case in that it is

generally duplicative of Request Nos. 22, 23, and 24 in Appendix A, Part IV, of the Board's decision served July 11, 2023.

Request No. 9

All communications between UP supervisors and dispatchers pertaining to Dispatching Decisions involving Sunset Limited Trains.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests "[a]ll communications" between Union Pacific supervisors and dispatchers pertaining to Dispatching Decisions involving Sunset Limited Trains. Union Pacific dispatchers dispatched hundreds of Sunset Limited Trains during the Investigative Period, and supervisors and dispatchers regularly communicate about dispatching decisions.

Request No. 10

Documents sufficient to show any criteria used to evaluate or compensate dispatchers and all documents related to any evaluations, reviews, or other feedback provided to dispatchers responsible for Dispatching Decisions.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests "all documents" related to any evaluations, reviews, or other feedback provided to dispatchers responsible for Dispatching Decisions, and as seeking documents not relevant to any issue in this proceeding in that it requests documents not concerning evaluations, reviews, or feedback related to dispatching of Sunset Limited Trains.

Subject to and without waiving its objections, Union Pacific will produce documents sufficient to show criteria used to evaluate or compensate dispatchers, to the

extent it has not already produced such documents in response to Request 22 in Appendix A, Part IV, of the Board's decision served July 11, 2023.

Request No. 11

For the time period November 11, 2020 to Present, all documents relating to any investigations, audits, studies, reviews, analyses, or similar evaluations conducted by UP regarding Dispatching Decisions, HRD, or Preference on the UP Lines.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests "all documents" relating to the requested materials, and as seeking documents not relevant to any issue in this proceeding in that it requests documents relating to Dispatching Decisions not involving Sunset Limited Trains.

Subject to and without waiving its objections, Union Pacific will produce any investigations, audits, studies, reviews, analyses, or similar evaluations regarding Dispatching Decisions involving Sunset Limited Trains, HRD, or Preference.

Request No. 12

All documents relating to any disciplinary actions taken or contemplated against a dispatcher and concerning one or more Dispatching Decisions.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests "all documents" relating to disciplinary actions taken or "contemplated," and as seeking documents not relevant to any issue in this proceeding in that it requests documents concerning Dispatching Decisions not involving Sunset Limited Trains.

Subject to and without waiving its objections, Union Pacific will produce documents sufficient to show any disciplinary actions taken against a dispatcher concerning Dispatching Decisions involving Sunset Limited Trains.

Request No. 13

All documents concerning any operational adjustment, scheduling adjustment, capital investment, or other similar action that UP has analyzed or considered to address, evaluate, or understand delays to freight or passenger trains traveling on the UP Lines, including all documents relating to the reason(s) UP did not implement any such adjustments, investment, or other similar actions.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests “[a]ll documents” concerning the actions that Union Pacific has analyzed or considered for a variety of purposes. Union Pacific also objects to this request as vague and unclear in that it suggests adjustments and investments could be used to evaluate or understand delays. Union Pacific further objects to this request as unduly burdensome and not proportional to the needs of the case in that it appears to be generally duplicative of Request No. 21 in Appendix A, Part IV, of the Board’s decision served July 11, 2023.

Request No. 14

All documents concerning UP efforts to obtain funds from federal, state, or other sources for capital expenditures on the UP Lines.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests “[a]ll documents” concerning efforts to obtain funds for capital expenditures on the UP Lines.

Subject to and without waiving its objections, Union Pacific will produce documents sufficient to show efforts to obtain funds for capital expenditures on the UP Lines, to the extent it has not already produced such documents in response to Request No. 21 in Appendix A, Part IV, of the Board’s decision served July 11, 2023

Request No. 15

All agreements with freight customers using any portion of the UP Lines for which UP's compensation varies depending on the time or timeliness of the delivery of products or commodities, or depending on availability of loaded cars for unloading or empty cars for loading of customer products or commodities.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that responding would require reviewing all agreements with the thousands of customers that use some portion of the UP Lines, and as seeking documents not relevant to any issue in this proceeding.

Request No. 16

All documents constituting or concerning UP's current operating plan(s) for lines used by Sunset Limited Trains, and all documents constituting or concerning efforts to measure operational performance against UP's current operating plan(s) or operating schedule(s) for lines used by Sunset Limited Trains.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests "[a]ll documents" concerning Union Pacific's current operating plans. Union Pacific further objects to this request as unduly burdensome and not proportional to the needs of the case in that it appears to be generally duplicative of Request No. 8 in Appendix A, Part IV, of the Board's decision served July 11, 2023.

Request No. 17

All corporate policies, protocols, guidance documents, or other materials related to the implementation of Preference, or used to evaluate the implementation of Preference.

Union Pacific Response:

Union Pacific will produce responsive documents, to the extent it has not already produced them in response to Request Nos. 22 and 24 in Appendix A, Part IV, of the Board's decision served July 11, 2023.

Request No. 18

Documents sufficient to show any procedures or systems used to implement or evaluate the implementation of Preference.

Union Pacific Response:

Union Pacific will produce responsive documents, to the extent it has not already produced them in response to Request Nos. 22 and 24 in Appendix A, Part IV, of the Board's decision served July 11, 2023.

Request No. 19

For the UP Lines, documents sufficient to associate locomotive numbers associated with each train that operated on a fixed schedule during the Investigative Period.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that more than 49,000 scheduled trains operated on the UP Lines during the Investigative Period, and as seeking information not relevant to any issue in this proceeding.

Request No. 20

All documents analyzing, assessing, investigating, studying, reviewing or otherwise evaluating how the adoption and implementation of precision-scheduled railroading has affected the on-time performance of intercity passenger trains and/or affected the implementation of Preference.

Union Pacific Response:

Union Pacific will produce responsive documents.

Request No. 21

All documents analyzing, assessing, investigating, studying, reviewing or otherwise evaluating how UP's network planning and design have affected, are affecting, or will affect the on-time performance of Sunset Limited Trains and/or implementation of Preference on the UP Lines, including but not limited to documents concerning any ongoing or anticipated capital investments that will affect UP's network capacity on the UP Lines.

Union Pacific Response:

Union Pacific objects to this request as vague and unclear in that documents requested in the phrase beginning "including" do not appear to be a subset of the primary request. Union Pacific also objects to this request to the extent it implicitly assumes "network planning and design" affects implementation of Preference. Union Pacific further objects to the request as overbroad and unduly burdensome to the extent it is intended to request "[a]ll documents" concerning capital investments that will affect Union Pacific's capacity on the UP Lines.

Request No. 22

All documents concerning policies, protocols, or procedures related to how You prioritize freight traffic on the UP Lines, or the dispatching of any intermodal or other trains carrying priority freight on the UP Lines.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests "[a]ll documents" concerning Union Pacific policies, practices and procedures relating to prioritizing freight traffic on the UP Lines. Union Pacific also objects to this request as duplicative of Request No. 2. Union Pacific further objects to this request as unduly burdensome and not proportional to the needs of the case in that it is generally duplicative of Request Nos. 22 and 24 in Appendix A, Part IV, of the Board's decision served July 11, 2023.

Request No. 23

For the time period November 11, 2020 to Present, all documents relating to any modeling, studies, reviews, analyses, investigations, or other similar evaluations conducted by UP regarding the Sunset Limited schedule or freight schedules on lines used by Sunset Limited Trains.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests “all documents” relating to any modeling studies or similar evaluations, and as seeking documents not relevant to any issue in this proceeding in that it requests documents involving freight schedules. Union Pacific further objects to this request as unduly burdensome and not proportional to the needs of the case in that it is generally duplicative of Request Nos. 3, 4, 5, 6, 7, 8, 9, and 10 in Appendix A, Part IV, of the Board’s decision served July 11, 2023. Union Pacific also objects to this request as premature to the extent it requests documents Union Pacific may submit in reply comments in this proceeding.

Subject to and without waiving its objections, will produce final modeling studies or similar evaluations conducted by Union Pacific regarding the Sunset Limited schedule.

Request No. 24

All documents reflecting or relating to UP’s consideration of Sunset Limited Trains in determining, assessing, evaluating, studying, or otherwise considering freight volumes for lines used by the Sunset Limited Trains.

Union Pacific Response:

Union Pacific objects to this request as overbroad and unduly burdensome in that it requests “all documents” reflecting or relating to Union Pacific’s consideration of Sunset Limited trains in considering freight volumes for lines used by those trains.

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(424) 332-4800

Attorneys for Union Pacific Railroad Company

October 4, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of October, 2023, I caused a copy of the foregoing document to be served by email on Administrative Law Judge McCarthy and all parties of record in Docket No. NOR 42175.

/s/ Michael L. Rosenthal

EXHIBIT C

REDACTED – HIGHLY CONFIDENTIAL

EXHIBIT D

REDACTED – CONFIDENTIAL

EXHIBIT E

REDACTED – CONFIDENTIAL

EXHIBIT J

From: [Rosenthal, Michael](#)
To: [Thomas McCarthy](#)
Cc: [Denton, Peter \(pdenton@Steptoe.com\)](#); [Fox, Molly Bruder](#); [Askew, Jennie](#); [David Meyer](#); [jp.escudier@portnola.com](#); [Michelle Scelson](#); [Hirsh, David A.](#); [BSmith@fletcher-sippel.com](#); [Hollinger, Chris](#); [fmiller@aar.org](#); [WMullins@bakerandmiller.com](#); [Amunson, Jessica Ring](#); [Kang, Michael B.](#); [Trepp, Alex S.](#); [Charles Tolbert](#); [Conner Brightwell](#)
Subject: RE: Conference Call with Judge McCarthy in, NOR 42175 Motion to Compel
Date: Monday, January 29, 2024 7:37:19 PM

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Judge McCarthy:

In accordance with your instructions during the conference conducted on January 16, Union Pacific is providing this statement describing its intent to reply to Amtrak's renewed motion to compel, which Amtrak submitted on January 23. Under the Board's rules at 49 CFR 1114.31(a)(1) and 1104.13(a), Union Pacific's reply is due on February 12, twenty days after Amtrak filed its motion with the Board. However, to try to expedite the resolution of discovery matters in this proceeding, Union Pacific will endeavor to file its reply on or before February 9.

Union Pacific's reply will address its objections to producing train dispatching records (which Amtrak confusingly calls "train movement data") for the approximately 42,000 non-Amtrak trains covered by Amtrak's request for dispatching records, as well as Amtrak's specific request to produce such records in "a native or machine readable format." Union Pacific's reply will also address Amtrak's erroneous description of Union Pacific's dispatch playbacks and Amtrak's new and confused suggestion that Union Pacific was obligated to preserve dispatch playbacks created after the Relevant Period established by the Board's July 11, 2023 order in this proceeding. Union Pacific's reply will also address Amtrak's commentary on Union Pacific's production of communications between dispatchers and their supervisors.

Finally, Union Pacific's reply will address Amtrak's proposed compromise regarding production of customer contracts. Amtrak's motion does not identify a single instance in which Amtrak claims a "premium intermodal train" was involved in a preference violation, and Amtrak's documents produced in response to Union Pacific's discovery requests do not include a single internal communication in which Amtrak identifies a preference violation on the Sunset Limited Route, much less a preference violation in favor of a "premium intermodal train." Nevertheless, in the spirit of compromise, Union Pacific is working to develop and present to Amtrak its own proposal for resolving this issue.

Regards,
Mike

From: Thomas McCarthy <tmccarthy@fmshrc.gov>
Sent: Thursday, January 18, 2024 9:14 AM
To: Trepp, Alex S. <ATrepp@jenner.com>; Charles Tolbert <ctolbert@fmshrc.gov>; Conner Brightwell <cbrightwell@fmshrc.gov>
Cc: Denton, Peter (pdenton@Steptoe.com) <pdenton@Steptoe.com>; Fox, Molly Bruder

<mbfox@steptoe.com>; Askew, Jennie <jaskew@Steptoe.com>; David Meyer <david@meyerlawdc.com>; jp.escudier@portnola.com; Michelle Scelson <Michelle.scelson@portnola.com>; Hirsh, David A. <david.hirsh@dentons.com>; BSmith@fletcher-sippel.com; Hollinger, Chris <chollinger@omm.com>; fmiller@aar.org; WMullins@bakerandmiller.com; Amunson, Jessica Ring <JAmunson@jenner.com>; Kang, Michael B. <MKang@jenner.com>; Rosenthal, Michael <mrosenthal@cov.com>
Subject: RE: Conference Call with Judge McCarthy in, NOR 42175 Motion to Compel

[EXTERNAL]

Hello all,

Thanks for the update. Those requests are granted.

Judge McCarthy

From: Trepp, Alex S. <ATrepp@jenner.com>
Sent: Wednesday, January 17, 2024 11:06 PM
To: Thomas McCarthy <tmccarthy@fmshrc.gov>; Charles Tolbert <ctolbert@fmshrc.gov>; Conner Brightwell <cbrightwell@fmshrc.gov>
Cc: Denton, Peter (<pdenton@Steptoe.com> <pdenton@Steptoe.com>; Fox, Molly Bruder <mbfox@steptoe.com>; Askew, Jennie <jaskew@Steptoe.com>; David Meyer <david@meyerlawdc.com>; jp.escudier@portnola.com; Michelle Scelson <Michelle.scelson@portnola.com>; Hirsh, David A. <david.hirsh@dentons.com>; BSmith@fletcher-sippel.com; Hollinger, Chris <chollinger@omm.com>; fmiller@aar.org; WMullins@bakerandmiller.com; Amunson, Jessica Ring <JAmunson@jenner.com>; Kang, Michael B. <MKang@jenner.com>; Rosenthal, Michael <mrosenthal@cov.com>
Subject: RE: Conference Call with Judge McCarthy in, NOR 42175 Motion to Compel

Judge McCarthy:

After the conference conducted yesterday, we had an opportunity to confer with Amtrak about the timing to submit a renewed motion. Based on that discussion, we respectfully request that Amtrak receive until Tuesday January 23 to submit.

We have conferred with Union Pacific. They consent to the request that Amtrak receive one additional day to file the renewed motion, so long as Union Pacific's time to file the statement describing its intent to reply is extended to January 29. Amtrak consents to that corresponding request.

Best,
Alex

From: Charles Tolbert <ctolbert@fmshrc.gov>
Sent: Tuesday, January 16, 2024 7:06 AM
To: Amunson, Jessica Ring <JAmunson@jenner.com>; Amunson, Jessica Ring

<JAmunson@jenner.com>; Trepp, Alex S. <ATrepp@jenner.com>; Kang, Michael B. <MKang@jenner.com>; Tramonte, Kyle N. <KTramonte@jenner.com>; Rosenthal, Michael <mrosenthal@cov.com>
Cc: Thomas McCarthy <tmccarthy@fmshrc.gov>; Conner Brightwell <cbrightwell@fmshrc.gov>; Charles Tolbert <ctolbert@fmshrc.gov>; Denton, Peter (pdenton@Steptoe.com) <pdenton@Steptoe.com>; Fox, Molly Bruder <mbfox@steptoe.com>; Askew, Jennie <jaskew@Steptoe.com>; David Meyer <david@meyerlawdc.com>; jp.escudier@portnola.com; Michelle Scelson <Michelle.scelson@portnola.com>; Hirsh, David A. <david.hirsh@dentons.com>; BSmith@fletcher-sippel.com; Hollinger, Chris <chollinger@omm.com>; fmiller@aar.org; WMullins@bakerandmiller.com
Subject: FW: Conference Call with Judge McCarthy in, NOR 42175 Motion to Compel
Importance: High

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Good morning,

This is a gentle reminder of your call this morning with Judge McCarthy.

Regards,

**Charles A. Tolbert, Management Analyst/
Legal Assistant** to Judge Thomas P. McCarthy
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Ave., NW, Suite 520N
Washington, DC 20004-1710
Phone: (202) 233-3896
ctolbert@fmshrc.gov

From: Charles Tolbert <ctolbert@fmshrc.gov>
Sent: Friday, January 12, 2024 12:51 PM
To: Amunson, Jessica Ring <jamunson@jenner.com>; Trepp, Alex S. <ATrepp@jenner.com>; Kang, Michael B. <MKang@jenner.com>; Tramonte, Kyle N. <KTramonte@jenner.com>; Rosenthal, Michael <mrosenthal@cov.com>; elsota@jenner.com
Cc: Thomas McCarthy <tmccarthy@fmshrc.gov>; Conner Brightwell <cbrightwell@fmshrc.gov>; Charles Tolbert <ctolbert@fmshrc.gov>; pdenton@Steptoe.com; mbfox@steptoe.com; jaskew@Steptoe.com; david@meyerlawdc.com; jp.escudier@portnola.com; Michelle.scelson@portnola.com; david.hirsh@dentons.com; bsmith@fletcher-sippel.com; chollinger@omm.com; fmiller@aar.org; Wmullins@Bakerandmiller.Com; David Meyer <david@meyerlawdc.com>
Subject: Conference Call with Judge McCarthy in, NOR 42175 Motion to Compel

Good afternoon,,

A conference call is scheduled with Judge McCarthy at **11:00 am EST on Tuesday January 16, 2024**, to discuss the status of NOR 42175 Motion to Compel.

Participants are directed to call in to **1-866-236-7472** and use Passcode: **341917**.

If you have any questions or concerns, please feel free to contact me.

Regards,

**Charles A. Tolbert, Management Analyst/
Legal Assistant** to Judge Thomas P. McCarthy
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Ave., NW, Suite 520N
Washington, DC 20004-1710
Phone: (202) 233-3896
ctolbert@fmshrc.gov

Alex S. Trepp

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EXHIBIT K

From: [Rosenthal, Michael](#)
To: [Trepp, Alex S.](#)
Subject: RE: STB Docket No. NOR 42175
Date: Wednesday, April 10, 2024 9:02:42 AM

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Alex, I've checked again, and I'm told that what we said in our February 9 filing remains the case today. If you're asking something else, then I'm not understanding what you're trying to get at.

Regards,
Mike

From: Trepp, Alex S. <ATrepp@jenner.com>
Sent: Tuesday, April 9, 2024 10:22 AM
To: Rosenthal, Michael <mrosenthal@cov.com>
Subject: RE: STB Docket No. NOR 42175

[EXTERNAL]

Thanks, Mike.

The fundamental question is: Are we right in concluding that, if Amtrak asked today to see dispatch playbacks for train movements along the Sunset Limited route, the only playbacks available would be from the last 99 hours.

Best,
Alex

From: Rosenthal, Michael <mrosenthal@cov.com>
Sent: Tuesday, April 9, 2024 10:02 AM
To: Trepp, Alex S. <ATrepp@jenner.com>
Subject: RE: STB Docket No. NOR 42175

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Alex,

So you're asking whether UP has changed its policy/practice regarding dispatch playbacks since filing its February 9, 2024 reply to Amtrak's renewed motion to compel?

Regards,
Mike

From: Trepp, Alex S. <ATrepp@jenner.com>

Sent: Tuesday, April 9, 2024 9:59 AM
To: Rosenthal, Michael <mrosenthal@cov.com>
Subject: RE: STB Docket No. NOR 42175

[EXTERNAL]

Thanks, Mike.

UP has told Judge McCarthy that it keeps dispatch playbacks for 99 hours. I just wanted to confirm that is still the case with respect to the rail lines at issue in this proceeding. In other words, if we asked today to see dispatch playbacks for train movements along the Sunset Limited line, the only playbacks available would be from the last 99 hours. If my understanding is incorrect, please let me know today.

Best,
Alex

From: Rosenthal, Michael <mrosenthal@cov.com>
Sent: Monday, April 8, 2024 4:09 PM
To: Trepp, Alex S. <ATrepp@jenner.com>
Subject: RE: STB Docket No. NOR 42175

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Alex,

I'll see what I can do. If you have a more specific question, that might be helpful, just so we can avoid misunderstandings.

Regards,
Mike

From: Trepp, Alex S. <ATrepp@jenner.com>
Sent: Monday, April 8, 2024 10:54 AM
To: Rosenthal, Michael <mrosenthal@cov.com>
Subject: STB Docket No. NOR 42175

[EXTERNAL]

Mike,

My understanding from UP's filings and our conferences with Judge McCarthy is that the only dispatch playbacks that would be available today for the Sunset Limited are from the past 99 hours. Can you confirm that is correct by noon tomorrow?

Best,
Alex

Alex S. Trepp

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