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SERVICE DATE – AUGUST 19, 2024
SURFACE TRANSPORTATION BOARD

DECISION

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

Digest:¹ The Board establishes a schedule for the filing of pleadings and provides guidance on subjects to be addressed in those pleadings. The Board also denies a petition filed by Amtrak requesting that the Board issue a show-cause order to Union Pacific Railroad Company (UP) regarding certain records. Finally, the Board directs UP to resubmit a filing and redact only information that is properly considered confidential.

Decided: August 19, 2024

By decision issued on July 11, 2023 (July 2023 Decision), the Board initiated an investigation under section 213 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), Pub. L. No. 110-432, 122 Stat. 4848, codified at 49 U.S.C. § 24308(f), to examine the cause(s) of substandard on-time performance of Amtrak’s *Sunset Limited* service from October 1, 2021, through December 8, 2022 (the Relevant Period). See July 2023 Decision, NOR 42175 (STB served July 11, 2023). The *Sunset Limited* is a 1,997-mile-long Amtrak passenger train service that runs three times weekly, in each direction, between New Orleans, La., and Los Angeles, Cal.

In the July 2023 Decision, the Board identified Union Pacific Railroad Company (UP), BNSF Railway Company (BNSF), Canadian National Railway Company (CN) (operating through its subsidiary Illinois Central Railroad Company), the New Orleans Public Belt Rail Commission for the Port of New Orleans (NOPB), and the Southern California Railroad Authority (SCRRA) as parties to the investigation² and, among other things, set forth a procedural framework under which the Board would conduct an initial round of fact-finding. July 2023 Decision, NOR 42175, slip op. at 10-13. That decision also required the parties to

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol’y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

² The Board subsequently directed that Canadian Pacific Kansas City Limited (CPKC) also participate as party to the investigation. Complaint & Pet. of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. § 24308(f)—for Substandard Performance of Amtrak’s Sunset Ltd. Trains 1 & 2, NOR 42175 (STB served Sept. 12, 2023).

submit certain information and documents, and to provide responses to Board-posed interrogatories. *Id.* at 14-15; *id.*, App. A. The Board assigned and authorized Administrative Law Judge Thomas McCarthy of the Federal Mine Safety and Health Review Commission to entertain and rule upon party-led discovery matters and to resolve initially any disputes concerning that discovery. July 2023 Decision, NOR 42175, slip op. at 17. In addition, the Board stated that once discovery was completed, it would issue a procedural schedule that includes an opening statement from Amtrak (~45 days after discovery ends), an opportunity for replies (~30 days after Amtrak’s opening is due), and a rebuttal from Amtrak (~15 days after replies are due). *Id.* at 13.³

Discovery was scheduled to end on December 20, 2023, but the parties requested eight extensions (ultimately for a period of over eight months) after Amtrak filed a motion to compel directed at UP, and while the parties resolved other discovery matters before Judge McCarthy. Pursuant to the most recent extension, the discovery period will close on August 23, 2024.

Concurrently, as discovery continued, the Board identified a set of 1,087 individual Amtrak train delays and directed the carrier parties associated with those delays to provide explanations about the root causes of those incidents by April 15, 2024. Complaint & Pet. of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. § 24308(f)—for Substandard Performance of Amtrak’s Sunset Ltd. Trains 1 & 2 (February 13 Decision), NOR 42175 (STB served Feb. 13, 2024). UP, which was associated with 991 of the delays in question, requested two extensions (which were granted, in part) and ultimately filed its responses in three batches, the last of which was received on July 24, 2024.

DISCUSSION AND CONCLUSIONS

In this decision, the Board (1) provides guidance to the parties on subjects to be addressed in their pleadings, (2) sets forth the procedural schedule for opening, replies, and rebuttal, (3) rules on Amtrak’s petition for a show-cause order, and (4) directs UP to reconsider and resubmit filings it has designated as “Highly Confidential.”

I. Briefing Guidance.

In the opening, reply, and rebuttal submissions, the parties will be free to address those topics they think relevant to the Board’s determination in this proceeding. However, included in their discussions, the parties will be required to address certain topics as explained below.

Pursuant to 49 U.S.C. § 24308(f)(1), the Board is directed

³ The Board subsequently directed Amtrak, UP, and BNSF to clarify their responses to several of the Board’s requests for information from the July 2023 Decision. Complaint & Pet. of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. § 24308(f)—for Substandard Performance of Amtrak’s Sunset Ltd. Trains 1 & 2, NOR 42175 (STB served Nov. 20, 2023). In light of the requests for clarification, the Board extended the discovery period, and stated that it would establish the briefing schedule in a subsequent decision. *Id.* at 2.

to determine whether and to what extent delays or failure to achieve minimum standards are due to causes that could reasonably be addressed by a rail carrier over whose tracks the intercity passenger train operates or reasonably addressed by Amtrak or other intercity passenger rail operators.

49 U.S.C. § 24308(f)(1). As part of its investigation the Board will determine if “. . . delays or failures to achieve minimum standards investigated under [49 U.S.C. § 24308(f)(1)] are attributable to a rail carrier’s failure to provide preference to Amtrak over freight transportation as required under [49 U.S.C. § 24308(c)]” 49 U.S.C. § 24308(f)(2). Section 24308(c) states:

Except in an emergency, intercity and commuter rail passenger transportation provided by or for Amtrak has preference over freight transportation in using a rail line, junction, or crossing unless the Board orders otherwise under this subsection. A rail carrier affected by this subsection may apply to the Board for relief.

49 U.S.C. § 24308(c). If the Board finds that preference violations have occurred, it may “award damages against the host rail carrier, including prescribing such other relief to Amtrak as it determines to be reasonable and appropriate.” 49 U.S.C. § 24308(f)(2).

In light of this statutory language, in its opening statement, Amtrak should address what it alleges would constitute a “failure to provide preference to Amtrak” under 49 U.S.C. § 24308(f). Amtrak should also address which parties it believes the Board should consider “host rail carriers” for purposes of 49 U.S.C. § 24308(f). As part of its discussion, Amtrak should discuss the extent to which the Board should rely on the Federal Railroad Administration’s definition of “host railroad.” See 49 C.F.R. § 273.3 (defining “host railroad” as “a railroad that is directly accountable to Amtrak by agreement for Amtrak operations over a railroad line segment”). Amtrak should address whether, and under what circumstances, multiple rail carriers—each fulfilling one or more functions such as (but not limited to) ownership, dispatching, maintenance, and contractual accountability to Amtrak—could be considered “host railroads” on a given portion of the *Sunset Limited’s* route. Additionally, Amtrak should identify and address any other legal issues that it believes are relevant to whether preference violations by a host rail carrier have occurred on the *Sunset Limited* route during the Relevant Period.

Finally, Amtrak should address the extent of the Board’s legal authority to award damages. Section 24308(f)(2) states that “[i]f the Board determines that delays or failures to achieve minimum standards investigated under paragraph (1) are attributable to a rail carrier’s failure to provide preference to Amtrak over freight transportation as required under subsection (c), the Board may award damages against the host rail carrier, including prescribing such other relief to Amtrak as it determines to be reasonable and appropriate pursuant to paragraph (3) of this subsection.” Is this authority limited to damages for the failures to provide preference that would cause Amtrak to fall below 80 percent for any two consecutive calendar quarters? Or does the Board have authority to award damages for any delays attributable to the host rail carrier’s failure to provide preference, even if the host rail carrier’s failures to provide preference would not,

standing alone, cause Amtrak to fall below 80 percent for any two consecutive calendar quarters?

The rail carriers that the Board has found are necessary parties to this proceeding⁴—UP, BNSF, CN, NOPB, SCRRA, and CPKC—shall reply to Amtrak’s opening statement. Each of those parties should include in its reply either a proposed interpretation of “preference” and “host rail carriers,” including a description of how, if at all, its interpretations of those terms differ from Amtrak’s, or indicate that it takes no position on the definition of any of these terms. Additionally, those parties should address the Board’s legal authority to award damages, as specified above in the guidance to Amtrak. Given that the interpretation of these statutory terms is an issue of first impression and a matter of broad public interest, the Board will also allow non-parties to the investigation to submit replies to Amtrak’s opening statement and the railroad parties’ reply statements. The railroad parties will be permitted to file a rebuttal to non-party replies, and Amtrak will be permitted to file a consolidated rebuttal to all replies.

Amtrak and UP are also directed to address the following questions:

- 1) UP has indicated that it assigns both its premium intermodal trains and Amtrak trains the highest numeric in its “Movement Planner algorithm.” (See UP Second Response 34, Sept. 25, 2023.) Amtrak and UP should address in their statements how this practice should be analyzed, if at all, under a “preference” framework.
- 2) There is disagreement about precisely which rail carrier hosts Amtrak on a segment of the eastern end of the *Sunset Limited’s* route. Amtrak should specifically address in its opening statement the question of which parties should be considered “host rail carriers” for purposes of 49 U.S.C. § 24308(f)

⁴ In Complaint & Pet. of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. § 24308(f)—for Substandard Performance of Amtrak’s Sunset Limited Trains 1 & 2, NOR 42175 (STB served Sept. 12, 2023), the Board directed all of the parties to this investigative proceeding to notify the Board if they are aware of any entity not already a party to this docket that owns or leases rail tracks, or dispatches train movements, on any portion of the *Sunset Limited* route. By letter filed on September 22, 2023, Amtrak informed the Board that the City of New Orleans (City) is the owner of the New Orleans Union Passenger Terminal (NOUPT), which includes the rail yard along with approximately six miles of right-of-way. (Amtrak Letter 1, Sept. 22, 2023.) Amtrak states that the City leases its right, title, and interest in the Terminal to the New Orleans Building Corporation, which then subleases the Terminal to Amtrak, including all active railroad rights-of-way. (*Id.*) CN filed a reply stating that its understanding is that the City specifically owns the right-of-way between Southport Junction and the NOUPT, over which the *Sunset Limited* route operates. (CN Reply 1, Sept. 27, 2024.)

Considering the information on the current record, it appears that the City’s connection to the *Sunset Limited* route is attenuated and unlikely to be a factor in the substandard on-time performance being investigated here. As such, the Board finds that the City is not a necessary party to the investigative proceeding at this time. However, if the Board later determines that the City’s participation is necessary, it may order the City’s participation as a party at that time.

as it relates to the segment between Live Oak, La., and the NOUPT. Additionally, Amtrak should discuss and document in detail the nature of its relationship with the carriers that own the lines comprising this segment or operate over this segment, and which of these carriers it considers to be the host rail carrier(s) in the context of 49 U.S.C. § 24308(f). UP, BNSF, CN, and NOPB may respond to Amtrak's discussion in their replies.

- 3) According to the Federal Railroad Administration (FRA) reports, the UP-Amtrak schedule for the *Sunset Limited* is listed as "disputed." Federal Railroad Administration, FY23 Q4 Schedule Certification Tables, <https://railroads.dot.gov/elibrary/fy23-q4-schedule-certification-tables>. Under FRA regulations, disputed schedules are those "for which a specific change is sought" that is, or has been, the subject of non-binding dispute resolution. 49 C.F.R. § 273.3.
 - (a) As this schedule has been reported as "disputed," Amtrak and UP should explain what "specific change" was sought to the schedule and what non-binding dispute resolution specified in § 273.3 they engaged in. They should also produce any documents associated with the specific change(s) sought.
 - (b) Amtrak and UP should also explain whether Amtrak or UP has not consented to participation in the dispute resolution process under § 273.3(1)(ii) or (iii) respectively.
 - (c) If no change to the schedule has been sought or if no dispute resolution specified under § 273.3 is in the process of occurring, Amtrak and UP should explain why the schedule was reported as "disputed" instead of "uncertified."
 - (d) If the published train schedule is not a "disputed schedule" or "certified schedule" under § 273.3, Amtrak and UP shall confirm whether any joint letter and status report has been transmitted pursuant to 49 C.F.R. § 273.5(c)(2), including to the Chairman of the Board; and if a joint letter and status report has not been transmitted as required by law, Amtrak and UP shall provide an explanation and a plan for compliance.

The parties are reminded that the Board has divided this investigative proceeding into two stages. Stage One is for determining whether and to what extent delays or failure to achieve minimum standards are due to causes that could reasonably be addressed by a rail carrier over whose tracks the *Sunset Limited* operates, by Amtrak, or by another intercity passenger rail operator, and for making resultant recommendations for service improvement. Within this stage, the Board will address whether delays or failure 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(c). If the Board determines that delays or failure to achieve minimum standards are attributable to preference violations, Stage Two would be for determining the amount of damages and other relief. Currently, the investigation remains in Stage One and, as such, the parties should not brief the specifics of damages or other relief at this time, though they

may reference damages or other relief as necessary when discussing delays or failure to achieve minimum standards and to the extent necessary to answer the question presented about the Board's legal authority to award damages.

If necessary, the Board may seek additional briefing or direct additional questions to the parties as the investigation progresses.

II. Procedural Schedule for Pleadings.

In the July 2023 Decision, the Board established the timing for the submission of the parties' pleadings once discovery was complete. On December 19, 2023, UP filed a petition to modify this general procedural schedule by extending the due date for its reply from 30 days to 90 days after Amtrak files its opening statement. (UP Pet. 5, Dec. 19, 2023.) UP argues that the current schedule gives Amtrak an unfair advantage because Amtrak will have the entire period from the July 2023 Decision until the date its opening statement is due to prepare its opening statement. (*Id.* at 2.) UP argues that “[t]he novelty of the issues and substantial volume of data involved in this proceeding warrant granting Union Pacific far more than 30 days to file a reply[,]” the Board's order in July “was silent as to how the Board plans to use the requested data to determine whether a preference violation has occurred,” and “Amtrak's Complaint similarly fails to set forth with specificity the acts or evidence it believes constitute a preference violation.” (*Id.*) UP also argues that it needs additional time because it “cannot feasibly review every delay to a Sunset Limited train to prove the negative—to show why each delay does not constitute a preference violation—especially without knowing what the Board or Amtrak may consider to be a violation.” (*Id.* at 4.) On December 20, 2023, BNSF filed a letter stating that it does not oppose UP's request, so long as any reply deadline set by the Board applies equally to BNSF and the other parties of record. (BNSF Letter 1, Dec. 20, 2023.)

Amtrak replied to UP's petition on December 26, 2023. Amtrak disputes UP's assertion that only Amtrak has been able to begin preparing its filing. (Amtrak Reply 4, Dec. 26, 2023.) Amtrak notes that it has provided extensive materials to UP in discovery and that UP has more than enough evidence to consider and address the preference issues. (*Id.* at 4-5.) Amtrak also argues that the Board can determine if additional time for replies is needed after Amtrak files its opening statement. (*Id.* at 4 n.10 & 5.)

The Board recognizes this proceeding involves issues of first impression, and additional time and perspective would benefit the Board's ultimate consideration. Therefore, the Board will grant UP and all other railroad parties to the investigation a 45-day extension, giving them at least 75 days to file replies to Amtrak's opening statement. UP has already provided root cause narratives for specific Amtrak delays in response to an order of the Board, through the Acting Director of the Office of Passenger Rail (OPR). See Complaint & Pet. of the Nat'l R.R. Passenger Corp. Under 49 U.S.C. § 24308(f)—for Substandard Performance of Amtrak's Sunset Limited Trains 1 & 2 (Delays Order), NOR 42175 (STB served Feb. 13, 2024). In doing so, UP has had the opportunity to review many of the possible delays that Amtrak may consider a violation. But in their upcoming replies to Amtrak's opening statement, UP and the other responding railroads will need to argue why the delays that Amtrak alleges constitute preference violations do not constitute preference violations, either because they interpret the term

differently from Amtrak or because they claim the delay does not meet the standard under Amtrak’s interpretation (or both). An additional 45 days to reply should give the responding railroad parties sufficient time to address those issues.

At this stage of the proceeding, it is appropriate to set specific filing dates. At the parties’ request, discovery has been extended for eight additional months beyond the initial schedule. While the Board appreciates that discovery issues may have been complex, in the interest of advancing the proceeding, a procedural schedule is being set based on the current August 23, 2024 deadline for the close of discovery. If any party seeks a further extension from Judge McCarthy, they must do so in writing and file a copy with the Board, and the request must include a detailed explanation of the need for the requested relief. Further, the procedural schedule for pleadings will not be tolled or extended absent an order by the Board and, having considered the parties’ procedural requests below, any further extensions will be disfavored.

Accordingly, Amtrak’s opening statement is due by October 7, 2024. Railroad party replies to Amtrak’s opening statement are due by December 23, 2024. Non-party replies are due January 22, 2025. Railroad party rebuttals to non-party replies are due February 21, 2025. Amtrak’s rebuttal to all replies is due by February 21, 2025. The procedural schedule will therefore be as follows:

October 7, 2024	Amtrak Opening
December 23, 2024	Railroad Party Replies
January 22, 2025	Non-Party Replies
February 21, 2025	Railroad Rebuttal to Non-Party Replies; Amtrak (Comprehensive Rebuttal)

III. Amtrak Motion to Show Cause.

Upon filing its complaint, Amtrak asked the Board to “require that host railroads for the *Sunset Limited* suspend any automated processes that would delete relevant documents during the ordinary course of business.” (Amtrak Proposed Procs. & Framework 9, Dec. 8., 2022.) In the July 2023 Decision, the Board granted Amtrak’s request for “a records retention order.” July 2023 Decision, NOR 42175, slip op. at 18. Specifically, the Board directed that “[a]ll documents and/or data that relate to the subject matter of this investigation must be preserved. Regardless of any party’s 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.” Id. This aspect of the July 2023 Decision is referred to herein as the Preservation Order.

On April 10, 2024, Amtrak filed a petition requesting that the Board order UP to show cause as to why UP is not obligated to comply with the Preservation Order by suspending its 99-hour destruction policy for dispatch “playback” records related to the *Sunset Limited* route. (Amtrak Pet. 1, Apr. 10, 2024.) Amtrak also requests that the Board confirm that all other parties to this proceeding have suspended any automatic destruction of dispatch playbacks related to the *Sunset Limited* service. (Id. at 13.)

Amtrak describes a dispatch playback as follows:

[P]laybacks 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. . . . 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.

(Id. at 5.) According to Amtrak, UP originally indicated that it could provide Amtrak access to these playbacks at UP’s offices in Omaha, Neb., but that several weeks later UP stated that the playbacks were not in fact available and that its prior statements were based on a “miscommunication or misunderstanding.” (Id.)⁵ Amtrak asserts that UP maintains playbacks for only 99 hours, after which time they are destroyed, and that it appears that UP has not altered this policy since the beginning of the investigation. (Id. at 2, 8.)

Amtrak argues that UP was required to preserve the playbacks once the Preservation Order was issued. (Id. at 8.) According to Amtrak, the playbacks that were generated after the issuance of the Preservation Order are relevant to the investigation, even if they do not cover events that occurred during the Relevant Period. (Id. at 10-11 (explaining that playbacks would allow the Board, among other things, to compare current dispatching decisions to ones that occurred during the Relevant Period).) Amtrak states that while UP has provided other materials relating to dispatching decisions—specifically “CADX data” and “trainsheets”—these materials could lack information about train movements that are captured in the playbacks. (Id. at 7.)

UP filed a reply on April 30, 2024. It asserts that it would need substantial processing and storage capabilities to preserve playbacks beyond 99 hours, which would be costly and not needed in its course of business. (UP Reply 2-3, 6, Apr. 30, 2024.) UP explains, however, that it retains the operations information that Amtrak seeks in the form of granular data (the CADX logs) and that it has already provided this data to Amtrak in discovery. (Id. at 3.) Additionally, the Preservation Order only required parties to retain data and documents related to the “subject matter of this investigation,” which UP argues encompasses only the Relevant Period. (Id. at 4.) To that end, UP points out that Amtrak itself sought data only relating to the Relevant Period in its initial discovery requests. (Id. at 5.) According to UP, Amtrak also has real-time access to UP’s dispatching screens and could record its own playbacks. (Id. at 5-6.)

The Board finds that the lack of playbacks for the post-Relevant Period will not preclude the Board from conducting a thorough investigation. Amtrak argues that the Board can use the post-Relevant Period playbacks to determine the cause of delays by comparing recent

⁵ Amtrak filed a motion to compel regarding dispatching records, including the playbacks, before Judge McCarthy on December 20, 2023, followed by a renewed motion to compel on January 23, 2024. According to Amtrak, it filed the current petition to show cause with the Board instead of before Judge McCarthy because this issue does not involve a ruling on party-led discovery but instead seeks enforcement of the Board’s own order. (Amtrak Pet. 1 n.1, Apr. 10, 2024.)

dispatching decisions to ones that occurred during the Relevant Period. (Amtrak Pet. 10-11, Apr. 10, 2024.) To be sure, playbacks from the Relevant Period, if extant, would provide an easy-to-understand visual demonstration of a dispatching decision that was made given the operational circumstances. However, the Board finds that any information in a post-Relevant Period playback would not be helpful in determining the cause of a delay that occurred months or years prior (particularly because a corresponding playback is not available for the Relevant Period delay being evaluated). Amtrak also claims that the post-Relevant Period playbacks would help the Board formulate recommendations on how to improve on-time performance or fashion remedies. (*Id.* at 11.) But once the Board identifies the root cause of delays that occurred during the Relevant Period, it should be able to take further action as reasonable and appropriate without the use of the playbacks. For these reasons, Amtrak’s petition for a show-cause order will be denied.⁶

IV. UP’s Highly Confidential Filing.

On February 13, 2024, the Acting Director of OPR issued the Delays Order, a decision directing the parties to provide information concerning the root cause of certain Amtrak-identified delays on the *Sunset Limited* route for the Relevant Period. Specifically, the Delays Order identified two subsets of delays for which it required additional explanation. The first subset consisted of host-responsible delays that occurred on the 20 worst-performing *Sunset Limited* train runs per direction (40 runs in total during the Relevant Period).⁷ Delays Order, NOR 42175, slip op. at 2. The second subset consisted of individual host delays (not included in the first subset) that were 90 minutes or longer in duration. *Id.* at 3. In addition, the Board directed some of the carriers to address questions regarding slow orders on specific subdivisions and other questions specific to their systems. *Id.* at 3-7.

In accordance with the Delays Order, UP submitted its narrative explanations for the second subset of delays on April 15, 2024, along with its responses to the questions on slow orders and system specifics.⁸ Without explanation, UP designated as “Highly Confidential” its

⁶ Amtrak also 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. (Amtrak Pet. 13, Apr. 10, 2024.) Given that the Board has found that the record is sufficient without the playbacks, Amtrak’s request will be denied as unnecessary.

⁷ The Board excluded from the subset stand-alone delays of less than 15 minutes, those attributed to slow order delays, and those where a root cause was discernible based on the data in context and the conductor delay report (i.e., the “Delay Reason” notes submitted along with Amtrak’s delay data). Delays Order, NOR 42175, slip op. at 2.

⁸ By decision served on April 5, 2024, UP and BNSF were given extensions until April 29, 2024, to submit the supporting data, documents, and other materials underlying their April 15, 2024, narrative explanations of the root causes of the second subset of train delays. Complaint & Pet. of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. § 24308(f)—for Substandard Performance of Amtrak’s Sunset Ltd. Trains 1 & 2, NOR 42175, slip op. at 2 (STB served Apr. 5, 2024). In addition, the deadline for Amtrak, UP, BNSF, SCRR, and CN to provide narrative explanations of the root causes of the first subset of train delays was extended

entire narrative regarding the delays. On June 4, 2024, UP submitted its narrative explanations for the first subset of delays for Train 1 runs. UP again designated the narrative explanations as “Highly Confidential.”⁹

The Board has previously explained that it has an interest in ensuring that this investigative proceeding is transparent, as it will serve as a model for future cases and involves the public interest. Complaint & Pet. of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. § 24308(f)—for Substandard Performance of Amtrak’s Sunset Ltd. Trains 1 & 2, NOR 42175, slip op. at 6 n.9 (STB served Aug. 18, 2023). Accordingly, transparency should be pursued in this proceeding to the greatest degree possible and any information submitted by the parties should be made publicly available to the extent that it is not competitively sensitive.

In both the July 2023 Decision and the subsequent Protective Order issued in this docket, “Highly Confidential” is defined as “any information, data, documents, or other material produced in discovery to another party to this proceeding, or submitted material in pleadings, that the submitting party in good faith believes reflects competitively sensitive information.” July 2023 Decision, NOR 42175, App. A, Part I; Complaint & Pet. of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. § 24308(f)—for Substandard Performance of Amtrak’s Sunset Ltd. Trains 1 & 2, NOR 42175, App. A (STB served Aug. 18, 2023). “Confidential” is defined as “any information, data, documents, or other material produced in discovery to another party to this proceeding, or submitted material in pleadings, that the submitting party in good faith believes reflects proprietary or confidential information.” July 2023 Decision, NOR 42175, App. A, Part I; Complaint & Pet. of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. § 24308(f)—for Substandard Performance of Amtrak’s Sunset Ltd. Trains 1 & 2, NOR 42175, App. A (STB served Aug. 18, 2023). Based on an initial review, it is unclear why the entirety of UP’s narrative would meet the definition of “Highly Confidential” or “Confidential” under the Protective Order. Notably, while other parties submitting root cause narratives have designated supporting documents as “Confidential,” no other party, including other Class I railroads, has redacted its narrative explanations.

Accordingly, the Board will direct UP to review and then resubmit its narratives with revised designations that do not take a blanket approach regarding its entire response. UP must also include explanations for why it considers the information being redacted to be competitively sensitive or otherwise appropriate for “Confidential” or “Highly Confidential” designations

to May 30, 2024, and the deadline for the supporting data, documents, and other materials underlying their narrative explanations was extended to June 13, 2024. (Id.)

⁹ UP submitted narrative explanations for only 16 of the 20 Train 1 runs and stated it would submit the remaining four on a rolling basis. By decision issued June 13, 2024, the Director of OPR directed UP to (1) submit estimates of when it will submit each of the four remaining runs for Train 1 and, (2) if UP cannot meet any of its estimates, immediately inform the investigative liaison and submit a status report with an estimate update. Complaint & Pet. of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. § 24308(f)—for Substandard Performance of Amtrak’s Sunset Ltd. Trains 1 & 2, NOR 42175, slip op. at 2 (STB served June 13, 2024). UP submitted the remaining four narrative explanations on June 14, 2024.

under the Protective Order.¹⁰ UP’s submission will be due by September 9, 2024. The Board reminds UP that, although the Board attempts to avoid references to “Confidential” or “Highly Confidential” information in agency decisions, it reserves the right to rely upon and disclose such information in decisions when necessary. See Sanimax USA LLC v. Union Pac. R.R., NOR 42171, slip op. at 1 n.2 (STB served Nov. 3, 2023). The Board will more easily be able to avoid having to do so if UP identifies the specific information within the narrative that it identifies as confidential. Given the nature of this investigation and the requirements under 49 U.S.C. § 24308(f), the Board expects to discuss the root causes of Amtrak train delays in a public decision.

The Board raised a similar concern earlier in this proceeding when it ordered UP to show cause as to why UP designated station names as “Confidential.” See Complaint & Pet. of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. § 24308(f)—for Substandard Performance of Amtrak’s Sunset Ltd. Trains 1 & 2, NOR 42175 (STB served Aug. 18, 2023). In response, UP argued that it treats information about its specific network infrastructure as confidential in the ordinary course of its business for safety reasons, as well as due to commercial considerations. (UP Reply 2-3, Aug. 25, 2023.) Specifically, UP stated that it seeks to prevent the widespread circulation of information on precise locations of critical infrastructure elements along the *Sunset Limited* route that, if compromised or exploited, could result in significant operational disruption. (UP Reply 3, Aug. 25, 2023.)

If information contained in the narrative needs to be redacted for security reasons, UP should identify the specific information it considers security-sensitive and explain why (including reference to any relevant Federal, state, or local security or safety regulations). Additionally, if UP wishes to redact any information that is already publicly available, it must explain why doing so is necessary, even though such information is public.

It is ordered:

1. The parties are directed to prepare their briefs in this proceeding in the manner described above.
2. If any party seeks a further extension from Judge McCarthy, they must do so in writing and file a copy with the Board, and the request must include a detailed explanation of the need for the requested relief. Further, the procedural schedule for pleadings will not be tolled or extended absent an order by the Board.

¹⁰ Pursuant to the protective order issued in this proceeding, parties that have designated information as “Highly Confidential” may allow specific in-house personnel of a party with whom the producing party does not directly compete to access “Highly Confidential” information. Complaint & Pet. of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. § 24308(f)—for Substandard Performance of Amtrak’s Sunset Ltd. Trains 1 & 2, NOR 42175, App. A, Art. 4 (STB served Aug. 18, 2023). When UP resubmits its narrative (as discussed below), UP should state whether any “Highly Confidential” information from the narrative has been shared with Amtrak in-house personnel.

3. Amtrak's opening statement is due by October 7, 2024. Railroad party replies to Amtrak's opening statement are due by December 23, 2024. Non-party replies are due January 22, 2025. Railroad party rebuttals to non-party replies are due February 21, 2025. Amtrak's rebuttal to all replies is due by February 21, 2025.

4. The City of New Orleans is not a necessary party to this proceeding at this time.

5. Amtrak's petition requesting the Board to issue a show-cause order regarding UP's preservation of dispatch playback records is denied.

6. UP shall review and resubmit a version of its April 15, 2024, root cause narrative; its June 4, 2024, root cause narrative; and its June 14, 2024, root cause narrative with "Confidential" and/or "Highly Confidential" information redacted, including (where necessary) explanations for its redactions, in accordance with the direction in this decision, by September 9, 2024.

7. UP shall inform the Board if any "Highly Confidential" information from the narrative has been shared with Amtrak in-house personnel by September 9, 2024.

8. Notice of this decision will be published in the Federal Register.

9. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Primus, and Schultz.