

SERVICE DATE – APRIL 8, 2025

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35743

APPLICATION OF THE NATIONAL RAILROAD PASSENGER CORPORATION UNDER  
49 U.S.C. § 24308(a)—CANADIAN NATIONAL RAILWAY COMPANY

Digest:<sup>1</sup> This decision directs the parties to submit additional information.

Decided: April 8, 2025

In a decision served on October 31, 2022, the Board explained that, based on its review of the record, it anticipated that it would require additional information from the National Railroad Passenger Corporation (Amtrak) and Illinois Central Railroad Company and Grand Trunk Western Railroad Company (collectively, Canadian National Railway Company (CN)) to resolve the matters presented in this proceeding and set the terms of a new operating agreement (OA). Application of the Nat'l Passenger R.R. Under 49 U.S.C. § 24308(a)—Canadian Nat'l Ry., FD 35743, slip op. at 3 (STB served Oct. 31, 2022). The Board issued a decision on February 19, 2025, describing the additional information it anticipated requiring and directing CN and Amtrak (collectively, the parties) to take part in a technical conference on March 11, 2025. Application of the Nat'l Passenger R.R. Under 49 U.S.C. § 24308(a)—Canadian Nat'l Ry., FD 35743, slip op. at 1-4 (STB served Feb. 19, 2025).

The technical conference was held as scheduled. Based on discussions at the technical conference, the Board has amended some of its planned requests. As described below, the parties are ordered to respond to certain information requests by May 8, 2025, and to respond to the remaining information requests by July 22, 2025. The parties may file replies by September 22, 2025.

**Requests for Additional Information**

**On-Time Performance and Schedules**

1. Tolerances: CN is ordered to explain why the additional tolerances in Section A.1.f of its proposed OA are justified. (See CN Opening Ex. 2 at App. V-3, Nov. 30, 2022.)

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<sup>1</sup> 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. Schedule status: The parties should seek to reach agreement on any uncertified schedules and provide the Board with the agreed-upon schedules by the time they file the second part of their responses to these information requests on July 22, 2025. If the parties cannot reach agreement by that date, they are each ordered to submit a response on July 22, 2025, explaining the remaining points of dispute and providing any additional information the party believes is relevant to its position. Based on this information, the Board will determine how to proceed. This may include making the schedules for the parties and adopting those schedules as part of the new OA. If the parties want to engage in alternative dispute resolution (ADR) prior to July 22, 2025, to assist in the process of resolving the remaining schedule disputes, they are free to do so. If ADR does not result in an agreement, either party may provide to the Board any written decision produced by the ADR process. See 49 C.F.R. § 273.3.

### **Incentives and Penalties**

3. Payment and penalty data: CN and Amtrak are each ordered to provide the calculations and underlying data for incentive and penalty payments for calendar year 2024 based on their proposed methodologies. The information should be broken down by month and by Amtrak route.<sup>2</sup>
4. Performance rates and multipliers: CN is ordered to explain how the performance rates and timeliness and lateness multipliers were derived and explain why its methodology is appropriate. (See CN Opening Ex. 2 at App. V-9 to V-11, Nov. 30, 2022.)
5. Sunset Limited route: The parties are each ordered to address whether the new OA should cover Amtrak service on the CN-owned portion of the Sunset Limited route and to explain the basis of their positions. If a party does not believe the new OA should apply to this route segment, that party is ordered to explain how accountability for delays on this segment will be accomplished.

### **Host Responsible Delays (HRDs)**

6. Relief item covering interlockings not controlled by CN: CN is ordered to provide an inventory of interlockings that are not controlled by CN on the portions of the Amtrak routes governed by the current OA and copies of the joint facility agreements covering each of these interlockings. (See CN Opening 46-47, Nov. 30, 2022.) CN is also ordered to provide an

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<sup>2</sup> For purposes of calculating the percentage of arrivals on time, CN's proposed methodology would weight checkpoints by the average number of riders of a train that disembarked at a checkpoint during the prior fiscal year. (See CN Opening Ex. 2 at App. V-8, Nov. 30, 2022.) During the technical conference, CN stated that it now has the ridership data for 2024 and can use that data to weight checkpoints for the 2024 calculation rather than using data from the prior year. However, because the Board seeks to understand what the incentive and penalty payments would have been under CN's proposed methodology in 2024, the Board directs CN to use the ridership data it would have used if its proposed methodology had been in effect in 2024 (i.e., the fiscal year 2023 data).

inventory of interlockings on these Amtrak routes that are controlled by CN but where the signals are activated automatically by approaching trains and to provide copies of any joint facility agreements covering these interlockings.

7. Relief for freight train interference (FTI) when an Amtrak train arrives late to CN's line: CN proposes that it should get relief for FTI delays in situations where Amtrak arrives late to CN's line without sufficient notice. (See CN Opening 51-54, Nov. 30, 2022.) CN is ordered to clarify what information it believes Amtrak would be required to provide in a notice to CN in such situations.
8. Relief for slow orders imposed to address safety issues related to Amtrak's equipment: Each party is ordered to address whether it believes the short shunt issue has been resolved. (See CN Opening 56, Nov. 30, 2022.) In addition, each party is ordered to explain whether there are any other situations where CN imposes slow orders due to Amtrak's choice of equipment. (See *id.*)
9. Commuter train interference when Amtrak train arrives late: CN is ordered to explain whether there are any terms in any agreement it has with the Northeast Illinois Regional Commuter Railroad Corporation (Metra) that relate to whether Metra should be given preference over Amtrak by CN and, if so, what those terms state. (See CN Opening 54, Nov. 30, 2022.)
10. Do Not Counts (DNCs):
  - a. CN is ordered to clarify Section A.5.b of CN's proposed OA. (See CN Opening Ex. 2 at App. V-5, Nov. 30, 2022.) CN should explain (1) how Section A.5.b—which states that under certain circumstances, when a train fails to operate to a checkpoint, it “will be considered late at such [c]heckpoint, regardless of the actual arrival time”—would work with CN's proposed incentive/penalty system, which depends not only on whether a train is late but also on the degree of lateness; (2) why under Section A.5.b, a train is considered late on the first trip where it fails to operate to a checkpoint but is not counted “as late or operated at such [c]heckpoints” on subsequent trips; and (3) how Section A.5.b relates to Section A.5.c., (see *id.* at App. V-6 to App. V-7), including whether both sections could potentially apply to the same Amtrak trip.
  - b. Certain DNC provisions proposed by CN involve events that would not necessarily result in a significant delay. (See CN Opening 59, Nov. 30, 2022.) CN is ordered to propose a minimum delay threshold for all DNC categories or some other mechanism to ensure short delays do not result in DNCs. Amtrak may submit its own proposal for the Board's consideration, but it is not required to do so.

## Incremental Costs

11. Cost estimates for incremental freight delay costs: CN is ordered to provide estimates of the incremental freight train delay costs that it claims are incurred by CN and chargeable to Amtrak according to CN's proposal. (See CN Opening 82-94, Nov. 30, 2022.) The estimates should be broken down by incremental freight delay cost category and subcategory, by quarter or partial quarter, and by Amtrak route. CN should provide estimates for each quarter of actual operations for calendar year 2024. CN is also ordered to document its methodology in plain language, including all assumptions, formulas, and calculations underlying the above estimates, including freight and passenger rail traffic projections on which future delays are based.
12. Per-mile charge for incremental costs: CN and Amtrak are each ordered to submit a per-Amtrak-train-mile charge to account for incremental freight delay costs that could be applied in lieu of requiring the calculation of actual incremental freight delay costs if the Board includes incremental freight delay costs in the OA. The Board is requesting this information because a per-mile charge may help avoid potential future disputes and administrative burden associated with determining and verifying actual incremental freight delay costs, and hence be easier and fairer to apply. Each party should document its methodology in plain language, including all assumptions, formulas, and calculations underlying their proposed per-mile charge.<sup>3</sup> Parties may include proposals for adjustments that could be applied to the per-mile charge to account for changes, such as changes in costs or volume. If Amtrak believes it does not have sufficient information to calculate a specific per-mile charge, it may limit its response to a description of its preferred methodology.

## Miscellaneous Items

13. Lookback: CN is ordered to address how, if at all, a lookback provision increases or decreases incentives for CN non-management or management staff to meet performance goals. As part of its response, CN should address whether management compensation or non-management compensation is tied to CN earning incentives under the OA. CN should also explain in what situations, if any, a lookback provision eliminates or reduces incentives for non-management or management employees to achieve on-time performance.
14. Reopener: The Board generally agrees with each party that the other's proposed reopener is unreasonable. In the Board's view, the process proposed by CN would take too long and may not result in any concrete action likely to improve on-time performance, while Amtrak's proposal involves changes that would be far too intrusive on CN operations. Accordingly, each party is ordered to submit an alternative reopener provision consistent the Board's previous guidance on the issue, see Application of the Nat'l Passenger R.R. Under 49 U.S.C. § 24308(a)—Canadian Nat'l Ry., FD 35743, slip op. at 17 (STB served Aug. 9, 2019) (a reopener should "result in concrete action in order to resolve potential future performance

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<sup>3</sup> The parties may propose an alternative, simplified methodology, such as a "per-hour charge" as suggested by CN at the technical conference. The party proposing an alternative must explain clearly both the methodology and why it is superior to a per-mile charge.

disputes and to prevent sustained poor performance”). Each party should also consider and comment on a reopener provision that, in response to a given period of poor on-time performance, would either (1) remove the lookback provision entirely, or (2) replace it with one having terms less favorable to CN (e.g., a longer lookback term and/or the ability to offset incentives earned on one route with penalties incurred on other routes). However, the parties’ newly submitted reopener provisions do not have to be linked to the lookback provision.

### **Procedural Schedule**

The procedural schedule will be:

|                    |                                            |
|--------------------|--------------------------------------------|
| May 8, 2025        | Responses to requests 1, 4-10, 13, and 14. |
| July 22, 2025      | Responses to requests 2, 3, 11, and 12.    |
| September 22, 2025 | Replies.                                   |

It is ordered:

1. The parties’ responses to the information requests and replies are due according to the procedural schedule above.
2. This decision is effective on the date of service.

By the Board, Board Members Fuchs, Hedlund, Primus and Schultz. Board Member Hedlund concurred with a separate expression.

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BOARD MEMBER HEDLUND, concurring:

While I approve today’s decision, I write separately to note two concerns.

First, recent reports have suggested that in the event of passenger train cancellations due to circumstances that are legitimately characterized as the responsibility of the line owner (i.e., the freight railroad), reimbursement may not be provided to passenger customers for expenses necessitated by such cancellations (e.g., more expensive alternative transportation options, the provision of temporary accommodations, etc.). I query whether such expenses should appropriately be borne by the party with ultimate responsibility for such cancellations. While today’s decision requires neither CN nor Amtrak to affirmatively confront this issue, it is my sincere hope that each party will (a) address whether this concern is misplaced, and (b) if it is not, submit a proposed mechanism for reimbursing Amtrak specifically for passenger-related costs necessitated by train cancellations resulting from circumstances or activities outside of Amtrak’s control (e.g., freight derailments, other track closures, etc.).

Second, I am concerned that today's decision at best sends mixed signals with respect to the issue of incremental costs. The Board's 2019 decision in this proceeding found, as a definitional matter, "that incremental costs are those costs that CN has actually incurred...[and] that incremental costs do not include costs that CN cannot specifically and verifiably quantify," elaborating that "[i]f costs are not specific, verifiable, and quantifiable, it would be speculation to permit CN to collect such amounts, for there would be an insufficient basis on which the amount of the costs could reasonably be determined. The Board has previously found in multiple contexts that speculation is not an appropriate basis for decision making." Application of the Nat'l Passenger R.R. Under 49 U.S.C. § 24308(a)—Canadian Nat'l Ry., FD 35743, slip op. at 22 & n.41 (STB served Aug. 9, 2019) (citations omitted). And yet today's decision orders the parties "to submit a per-Amtrak-train-mile charge to account for incremental freight delay costs **that could be applied in lieu of requiring the calculation of actual incremental freight delay costs** if the Board includes incremental freight delay costs in the [Operating Agreement]. The Board is requesting this information **because a per-mile charge may help avoid potential future disputes and administrative burden associated with determining and verifying actual incremental freight delay costs, and hence be easier and fairer to apply.**" Decision, slip op. at 4 (emphases added). In my view, this is plainly inconsistent with the Board's prior conclusion on this specific issue, and today's decision fails to address or even acknowledge the inconsistency. Absent a compelling explanation as to why the Board's prior conclusion on this point was incorrect, the imposition of any such charge would be utterly unwarranted.