

SERVICE DATE –OCTOBER 19, 2022

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36397

WISCONSIN CENTRAL, LTD.—PETITION FOR DECLARATORY ORDER—
INTERCHANGE WITH SOO LINE RAILROAD COMPANY

Digest:¹ The Board denies the request of Soo Line Railroad Company to strike the post-remand brief of Wisconsin Central, Ltd., and solicits public comments regarding the broad legal issues presented by this proceeding.

Decided: October 18, 2022

This proceeding derives from an April 14, 2020 petition for declaratory order filed by Wisconsin Central, Ltd. (CN), regarding the interchange of traffic from Soo Line Railroad Company (CP) to CN in the Chicago, Ill., area. On October 30, 2020, the Board served a decision denying the relief sought by the petition. CN appealed the Board's decision to the United States Court of Appeals for the Seventh Circuit, which vacated the Board's decision and remanded the matter to the Board.

On February 2, 2022, CN filed a post-remand brief. CP moved to strike CN's post-remand brief on February 14, 2022, and later filed a separate reply to it. Thereafter, CN filed a reply to CP's reply, which CP then asked the Board to reject.

For the reasons explained below, the Board will deny CP's motion to strike CN's post-remand brief and CP's request to reject CN's reply to reply. The Board also will solicit comments from stakeholders and other interested persons on the issues presented in this proceeding.

BACKGROUND

From 2010 to 2019, CP and CN mainly interchanged Chicago-area traffic at Spaulding,² near Bartlett, Ill. Soo Line R.R.—Pet. for Declaratory Ord. & Prelim. Inj.—Interchange with

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 CN states that during that time, some traffic, especially toxic-by-inhalation hazardous materials, was moved by the parties to Clearing Yard, owned by the Belt Railway of Chicago, for interchange. (CN Post-Remand Brief 1, 4.)

Canadian Nat'l, FD 36299, slip op. at 1-2 (STB served Nov. 29, 2019). However, in 2019 CN sought to move the Spaulding interchange traffic elsewhere. Id. at 1-2. CN first designated Kirk Yard in Gary, Ind., but CP objected and sought relief from the Board, requesting that the Board order CN to continue to receive CP cars at Spaulding unless a replacement location was agreed upon or the Board prescribed a replacement location. Id. at 2. Pending the Board's decision regarding Kirk Yard in Docket No. 36299, the parties signed an interim agreement in August 2019 in which they agreed to move the Spaulding interchange traffic to Clearing Yard (Clearing), owned by the Belt Railway of Chicago (BRC)³. Id. at 2-3. Subsequently, the Board concluded that CN could not designate Kirk Yard for interchange with CP because it was not a reasonable interchange location, while also declining to address the reasonableness of interchange at Clearing. Id. at 3-4, 7.

On April 14, 2020, CN filed a petition for a declaratory order seeking a ruling under 49 U.S.C. § 10742, which states:

A rail carrier providing transportation subject to the jurisdiction of the Board under this part shall provide reasonable, proper, and equal facilities that are within its power to provide for the interchange of traffic between, and for the receiving, forwarding, and delivering of passengers and property to and from, its respective line and a connecting line of another rail carrier or of a water carrier providing transportation subject to chapter 137.

CN asked the Board to declare that: (1) CN may designate Clearing to receive interchange traffic from CP; and (2) each railroad must bear its own costs for those interchanges, including payment by the delivering carrier of BRC's switching fees. (Pet. 1, 3-4.) By decision served on October 30, 2020, the Board held that CN could not unilaterally designate Clearing as the interchange point and it therefore was not necessary to reach the issue of whether CN and CP must bear their own costs. Wis. Cent. Ltd.—Pet. for Declaratory Ord.—Interchange with Soo Line R.R., FD 36397, slip op. at 4 (STB served Oct. 30, 2020). The Board found that, pursuant to precedent, when two carriers physically intersect, the receiving carrier is required to designate a point on its own line where it will receive traffic and to provide a free route over its tracks to that point but that when the carriers do not physically intersect, the receiving carrier has neither the right nor the obligation to designate an interchange point. Id. at 5. Accordingly, the Board held that if CP's and CN's lines physically intersected, CN was required to designate an interchange point on its own line and provide a free route for CP to travel to that point, but if the lines did not physically intersect, § 10742 would not apply and the case would be moot. Id. at 6-7, 9. In doing so, the Board rejected CN's argument that the language of § 10742 permitted CN to designate Clearing as the interchange based on CN's status as co-owner of BRC, which does intersect with CP at Clearing. Id. at 7. The Board reasoned that CN and BRC were distinct entities and, by designating a third party's rail line as the interchange point and forcing CP to pay a switching fee, CN would not be "providing" interchange facilities that are within its "power to provide" as required by § 10742. Id. at 7-8, 10.

³ CN, CP, and four other Class I railroads are co-owners of BRC. Wis. Cent. Ltd., FD 36397, slip op. at 1 n.2.

The United States Court of Appeals for the Seventh Circuit vacated the Board's October 30, 2020 decision and remanded the matter to the Board. Wis. Cent. Ltd. v. STB, 20 F.4th 292 (7th Cir. 2021). The court held that the Board erred in interpreting § 10742 by: (1) concluding that carriers only have the "power to provide" facilities that they own; (2) finding that § 10742 only applies if two carriers physically intersect, (3) conflating an assumption about who pays the fees of a third-party carrier with the question of "whether a receiving carrier [can] ever designate a willing third party to receive traffic on its behalf"; and (4) relying on a "common-law norm" that a delivering railroad cannot compel a receiving railroad to exercise a voluntary contractual right to receive traffic on the line of a third party carrier. Id. at 294-95. The court also indicated that the word "reasonable" in § 10742 gives the Board interpretive leeway that the statutory phrase "that are within its power to provide" does not. Id. at 295.

CN filed a post-remand brief on February 2, 2022, arguing that the sole remaining issue in the case is whether CP should be required to pay BRC's switching fees for interchange traffic that CP will deliver to Clearing Yard. (CN Post-Remand Brief 1.) CN asserts the answer is yes, both under the BRC operating agreement and because requiring CP to pay would be fair and consistent with industry practice. (Id.) On February 14, 2022, CP filed a motion to strike CN's post-remand brief. CP argues that the Board has not directed the parties to file post-remand briefs, and it is for the Board, not CN, to decide what procedures to follow on remand. (CP Mot. to Strike 1-2.) CP further argues that CN's post-remand brief improperly asserts that the sole remaining issue on remand is whether CP must pay the BRC switching fees for CN-bound traffic that CP delivers to Clearing. (Id. at 2.) CP claims that the court did not consider or address whether CN's proffer of Clearing Yard satisfied its statutory obligation under § 10742 to "provide reasonable, proper, and equal facilities that are within its power to provide." (Id. at 3.) CP also asserts that the court did not reach the question of whether CN may require CP to exercise its permissive trackage rights to deliver its traffic to CN at Clearing Yard. (Id.) CP requests that the Board strike CN's post-remand brief from the record, set a procedural schedule for initial briefs and reply briefs, and identify what issues should be addressed in the briefs. (Id. at 4.) On March 21, 2022, CP filed a reply to CN's post-remand brief. On April 20, 2022, CN filed a reply to CP's reply and a motion for leave to file a reply to a reply. On April 25, 2022, the Commuter Rail Division of the Regional Transportation Authority d/b/a Metra (Metra) filed comments and a motion for leave to file comments out of time. On May 10, 2022, CP filed a reply to CN's April 20, 2022 reply requesting that the Board reject CN's reply because the Board has not authorized additional post-remand briefing and because CN's submission was filed nearly a month after CP's reply. (CP Reply 1, May 10, 2022.)

DISCUSSION AND CONCLUSIONS

The Board does not have specific regulations or procedures for cases following a judicial remand. While parties often do not file post-remand briefs without a directive from the Board or a petition for leave to file a brief, the Board will accept CN's post-remand brief and its April 20, 2022 reply brief because striking them would not serve a useful purpose. CP cites to Western Fuels Association v. BNSF Railway, NOR 42088 (STB served Feb. 1, 2011), for the proposition that unilaterally filing comments in a remand proceeding has been deemed inappropriate by the Board. (CP Mot. to Strike 1-2.) In that case, however, the Board did not state that the filing was inappropriate, and it accepted the comments into the record. W. Fuels Ass'n, NOR 42088, slip

op. at 2-3. CP also argues that CN's filing improperly arrogated the Board's authority to decide what action and procedures should be followed on remand. (CP Mot. to Strike 2.) However, the Board is now exercising its authority to set procedures in this remand proceeding, and the acceptance of CN's briefs will not interfere with those procedures or prejudice any party. In addition, to develop a more complete record, the Board invites CN, CP and any other rail carriers and other interested parties to file comments, as outlined below.

Given the Seventh Circuit's discussion of the Board's reliance on agency precedent and industry practice as summarized above, a post-remand decision resolving the dispute between CN and CP has the potential to significantly alter such precedent and practices regarding the interchange of rail traffic. Because the resulting interpretation of § 10742 by the Board could have wide-reaching consequences for the rail industry, the Board is soliciting input from stakeholders and other interested persons. Input from a wider variety of industry participants will give the Board a better sense of the potential impacts of different approaches and enable it to make a more informed decision.

Accordingly, the Board invites interested parties to comment on the broader legal issues presented by this declaratory order proceeding. Specifically, commenters are invited to address any or all of the following issues:

1. How a carrier's obligations under 49 U.S.C. § 10742 to "provide reasonable, proper, and equal facilities that are within its power to provide" should be understood in light of the decision by the United States Court of Appeals for the Seventh Circuit, as well as the impact of that decision on existing ICC and Board precedent and current carrier practices.
2. Whether the Board can consider the costs to each railroad of using a particular interchange location designated by one carrier when determining whether interchange facilities are "reasonable" under § 10742 and, if so, whether the Board can allocate such costs between delivering and receiving railroads when resolving § 10742 disputes. If commenters believe that the Board may consider costs as part of a reasonableness determination under § 10742, commenters should address how the Board should consider costs and/or the allocation of costs in making such a determination.
3. Whether the Board has authority under any other statutory provision(s) to resolve a dispute regarding the costs associated with an interchange location and how the Board should apply any such statutory authority.
4. How the statutory term "reasonable" should be interpreted.
5. How the interests of delivering and receiving carriers should be balanced in the selection of an interchange location, particularly where the existing interchange location is well established or long-standing.
6. How a carrier's "power to provide" facilities relates to the other carrier's ability or rights to reach those facilities.

7. Generally what procedures and factors should apply when railroads cannot agree on an interchange location or one carrier unilaterally seeks to move an existing interchange location.⁴
8. Whether and how any changes a party recommends regarding the Board's interpretation of § 10742 should affect the Board's interpretation of other statutory provisions and related precedent (e.g., 49 U.S.C. § 10705(a)(2) and related precedent).

The Board recognizes that CN and CP have an interest in resolving their dispute in a timely manner. However, in light of the court's decision, because resolution of their dispute could potentially have a significant impact on the rail industry at large and because the industry will likely have insight regarding how any particular standard for designating interchange locations will impact rail operations, the Board believes that the delay necessary to obtain input from other stakeholders is warranted. Following the receipt of comments, the Board intends to work expeditiously to issue a decision. As always, the Board encourages the parties to settle their dispute privately without further Board action if possible.

Comments must be filed by December 19, 2022, and reply comments must be filed by January 17, 2023. To provide interested parties with notice of the opportunity to submit comments in this proceeding, this decision will be published in the Federal Register.

It is ordered:

1. CP's motion to strike CN's post-remand brief and request to reject CN's April 20, 2022 reply are denied.
2. CN's motion for leave to file a reply to a reply is granted.
3. Metra's motion for leave to file comments out of time is granted.
4. Interested parties may submit comments by December 19, 2022. Replies to those comments are due by January 17, 2023.
5. This decision will be published in the Federal Register.

⁴ As discussed above, CN, CP, and Metra have each already filed briefs or comments following the remand. In the interest of compiling a complete record, all post-remand briefs and comments filed to date will be accepted. In addition, parties that have already filed post-remand briefs or comments may also file initial comments and reply comments as requested by this decision. All comments should be limited to the broader legal issues discussed above and should not address the specific facts of this case; following the comments and replies permitted in this decision, CP and CN will be afforded an opportunity to further brief the application of the issues discussed to the facts of this case.

6. This decision is effective on its service date.

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