

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

STB FINANCE DOCKET NO. 36397

**CN'S RESPONSE TO THE BOARD'S
PUBLIC COMMENT REQUEST**

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INTRODUCTION

CN submits this response to the Board's request for public comment on eight broad questions related to the proper construction of the interchange statute.¹ Respectfully, CN believes the Board should not delay resolution of the single, case-specific question that remains for it to decide in this long-pending adjudication by exploring abstract hypothetical scenarios. The Board should answer the single, straightforward, and fact-specific question remaining here, which has been pending before the Board for two-and-a-half years, and whose answer is not affected by the policy questions on which the Board seeks public comment. If the Board wishes to consider any broader questions about § 10742's workings, it can do so in a separate Ex Parte proceeding, without further delaying this one.

CN's April 2020 petition asked the Board to decide that (1) CN can designate Clearing Yard to receive interchange traffic from CP, and (2) each railroad must bear its own costs for those interchanges, including the BRC's switching fees. The Board initially held that CN "cannot unilaterally designate Clearing Yard as an interchange point," and concluded that it "need not decide" who should pay the BRC's fees.² The Seventh Circuit disagreed. It noted three questions an interchange dispute can raise: (1) can the receiving carrier designate a willing third party to

¹ See *Wisc. Cent., Ltd.—Pet. for Decl. Order—Interchange with Soo Line R.R.*, No. FD 36397, slip op. 4–5 (STB served Oct. 19, 2022) ("Comment Order").

² 2020 Board Decision at 10.

receive traffic, (2) if so, is the location reasonable, and (3) if so, who pays the third party?³

The court answered the first question, holding that CN can designate Clearing Yard because CN, “the receiving line, is willing to accept traffic through the Belt Railway, and Belt Railway is willing to accept that traffic.”⁴ The second question, whether Clearing is a reasonable interchange point, is undisputed, because none of CP’s pleadings before or during the appeal contested the point; it raised the issue for the first time on remand, which is too late. In any event, CP cannot seriously dispute that it is reasonable to interchange via the BRC—co-owned by the Class I railroads for this very purpose. This is especially true given that CN and CP have historically interchanged Rail Sensitive Security Materials at Clearing Yard, with each side paying the BRC switch fees. And since 2019, CN and CP have interchanged *all* traffic via the BRC under the Interim Agreement. Finally, CP’s operating plan for its proposed merger with KCS states that it intends to continue interchanging traffic with CN via the BRC at Clearing.

So the Court’s remand leaves open only the third question: Does CP have to pay the Belt Railway’s fees for the CN-bound traffic it delivers to Clearing Yard, just as CN pays for its CP-bound traffic? The facts of this case provide a clear answer to that question: Consistent with industry custom, CP agreed in the Belt Operating Agreement to pay for the traffic it delivers to Clearing. That should be

³ *Wisc. Cent. Ltd. v. STB*, 20 F.4th 292, 294–95 (7th Cir. 2021).

⁴ *Id.* at 295.

the end of the matter, and there is no need to further delay the resolution of this dispute by considering abstract policy questions whose answers will not affect the outcome here. If the Board wishes to address those broader questions, it should do so in a separate proceeding.

ARGUMENT

I. The only issue left in this adjudication—who should pay for CP’s CN-bound Clearing traffic—has a clear, case-specific answer under the Belt Operating Agreement, which tracks industry custom and the parties’ prior practice.

The parties have fully briefed the remaining issue in this dispute—who should pay for CP-to-CN traffic interchanged at Clearing. As CN has explained, the Seventh Circuit already decided the key threshold issue of whether CN can designate Clearing: It can. That was the point of the appeal and the premise of the decision. And as the court noted, the only other *potential* issues in a dispute like this are (1) whether the designated interchange point is reasonable and (2) who pays for the traffic.⁵ Since CP forfeited any challenge to Clearing’s reasonableness, that question is not open on remand. And even if that issue remained open, it is fact-specific and governed by a long-standing test the court did not disturb, so general industry feedback could not help resolve it anyway. In any event, CP is talking out of both sides of its mouth—its sworn statements in the KCS merger proceeding belie its tardy claims on remand that Clearing is not an appropriate interchange location.

⁵ See *Wisc. Cent.*, 20 F.4th at 294–95.

That leaves only the who-pays question, which the court left to the Board to decide on remand. But that question, too, has a case-specific answer that implicates no broader questions of interchange policy: CP voluntarily agreed in the BRC Operating Agreement to pay for the traffic it delivers to Clearing. CP has never seriously disputed what the Operating Agreement provides. This agreement also tracks the parties' course of conduct in interchanging RSSM traffic at Clearing—each side pays for cars it delivers there. And it tracks settled industry custom. The Board should thus adhere to its longstanding preference for enforcing contractually agreed-upon interchange arrangements, without further delay.

The Comment Order suggested that broad public comment would be necessary because the Board's decision "has the potential to significantly alter . . . precedent and practices regarding the interchange of rail traffic."⁶ But the simple fact-specific question that remains for the Board to decide on remand will not alter any existing law. Indeed, the only decision in this matter that significantly altered the legal landscape was the Board's now-vacated 2020 order, with its proposed interpretation of § 10742 that both directly contradicted Supreme Court precedent and that opened a gap in the statutory scheme by drastically restricting § 10742 to situations where two carriers' wholly-owned lines physically touch. The Seventh Circuit's correction of that misstep has restored the law to what it was before. In the same vein, the Board's suggestion that its decision on remand might alter the "standard for designating interchange locations" in a way that could implicate rail

⁶ Comment Order at 4.

operations is incorrect.⁷ After the Seventh Circuit’s decision, there is no question about whether CN can designate Clearing to receive interchange traffic. The only question is whether CP has to comply with the previously agreed payment terms under the BRC Operating Agreement, or whether CP can convince the Board to allow CP to evade these preexisting contractual obligations.

As a result, addressing the eight general questions posed in the Board’s Comment Order is unnecessary to resolve the sole remaining issue in this adjudication. On Nos. 1 and 6: The Seventh Circuit conclusively construed the phrase “provide reasonable, proper, and equal facilities that are within its power to provide”⁸ as it applies here. The proper reading of the court’s decision has been extensively briefed by the parties, and the Board does not need public input to understand what the court held or to apply the court’s holding to the facts here. On Nos. 2, 4, 5, and 7, the court did not disturb the long-standing rule that “the receiving carrier necessarily has the right to designate where it will accept cars in interchange from its connections, provided ... [it] does not impose unusual, unreasonable, or impossible operating hazards or require the delivering carrier to do work which properly belongs to the receiving carrier.”⁹ That law is unchanged by the Seventh Circuit’s decision, and it is not implicated by the remaining question before the Board. No “unusual, unreasonable, or impossible operating hazards”

⁷ *Id.* at 5.

⁸ 49 U.S.C. § 10742.

⁹ *Kan. City S. Ry. v. La. & Ark. Ry.*, 213 I.C.C. 351, 359 (1935).

would result from keeping the CP-CN interchange at a major switching interchange yard that is extensively used by CP, has been used by the parties since August 2019 under the Interim Agreement, has historically been used by the parties for interchanging RSSM traffic with CP paying for the traffic it delivers, and that *CP witnesses pledged to use* in the proposed CPKC operating plan. And on No. 3, “[w]hether the Board has authority under any other statutory provision(s) to resolve a dispute regarding [interchange] costs” is irrelevant, since the parties agree the Board has and should exercise that authority under *this* provision and in *this* proceeding.

In turn, there is no basis for any “changes ... regarding the Board’s interpretation of § 10742” in this proceeding, let alone changes to “the Board’s interpretation of other statutory provisions and related precedent,” which disposes of No. 8. The Board should resolve this dispute now.

A. The Seventh Circuit held that CN can designate Clearing.

As CN has explained, the Seventh Circuit confirmed that CN has the power to designate Clearing to receive interchange traffic from CP.¹⁰ The court held that a receiving carrier can “designate a willing third party to receive traffic” “as a result of contract” and that this principle applies here because CN, “the receiving line, is willing to accept traffic through the Belt Railway, and Belt Railway is willing to accept that traffic.”¹¹

¹⁰ See CN Post-Remand Reply to Reply 1–5.

¹¹ *Wisc. Cent.*, 20 F.4th at 294–95.

That holding necessarily rests on the BRC Operating Agreement, which is the “contract” establishing that the BRC is “willing to accept” this traffic. Both parties’ appellate briefs made this clear.¹² Indeed, CP itself told the court that “each railroad has its own right to utilize the Belt Railway for interchange pursuant to the governing Operating Agreement that also requires the delivering carrier to pay a fee.”¹³ Exactly. Every argument CP has made on remand about CN’s power to designate Clearing is foreclosed by the court’s decision.¹⁴ In any event, CP has never disputed CN’s showing that the Operating Agreement’s plain language provides for the BRC to receive cars on CN’s behalf at Clearing.¹⁵ This question is no longer open.

B. CP forfeited any argument that Clearing is an unreasonable interchange location, and could not make that showing anyway.

From the moment CN first filed its petition in April 2020, CP had every opportunity and incentive to dispute whether Clearing was a reasonable location to interchange this traffic. It did not.¹⁶ CP first raised this issue after remand from the

¹² See Br. for Pet’r Wisc. Cent. 12, 39, *Wisc. Cent.*, 20 F.4th 292 (No. 20-3507) (ECF No. 24) (arguing that the BRC Operating Agreement gives it the “power to provide” Clearing as the interchange location); Br. for Intervenor-Resp. Soo Line R.R. Co. 6–7, 40, 46, *Wisc. Cent.*, 20 F.4th 292 (No. 20-3507) (ECF No. 39) (providing the Court with the same understanding of the BRC Operating Agreement, but arguing that it’s not enough for the statutory requirement because the BRC is not CN’s “own line”).

¹³ Br. for Intervenor-Resp. 40.

¹⁴ See CN Post-Remand Reply to Reply 2–5.

¹⁵ *Id.* at 1–2.

¹⁶ CN Post-Remand Reply to Reply 5–7.

court, in February 2022, almost two full years into the litigation.¹⁷ After doing so, CP never disputed CN's explanation that CP was trying to inject a new issue into the case; it simply ignored the point.

CP's tardy argument is thus foreclosed by the rule that "the Board will not consider arguments or evidence that should have been submitted at an earlier stage."¹⁸ It also violates the rule that a remand may address only (1) remanded issues, (2) new issues arising on remand, and (3) issues "timely raised" in prior proceedings that "remain undecided."¹⁹ The Seventh Circuit nowhere remanded reasonableness to the Board, as that issue was never disputed or raised. Nor is reasonableness a new issue arising only now; it has been in the case since the start.²⁰ And CP did not timely raise the issue before the appeal; it did not raise the issue at all, despite having every reason to do so (just as when CN designated Kirk Yard and CP contested reasonableness at every stage).²¹ It cannot do so now.

In any event, CP's admissions elsewhere belie its claims about unreasonableness here. In this proceeding, CP says Clearing and the Chicago

¹⁷ CP Remand Reply 13–16.

¹⁸ *New Eng. Cent. R.R.—Trackage Rights Order—Pan Am S. LLC*, No. FD 35842, 2018 WL 1989070, at *4 (STB Apr. 24, 2018).

¹⁹ *United States v. Morris*, 259 F.3d 894, 898 (7th Cir. 2001).

²⁰ See CN Petition 22.

²¹ Compare CP May 2020 Reply 8, 17 (CP arguing that Spaulding was a reasonable location but not that Clearing was unreasonable), *with* CP Post-Remand Reply 5 ("On April 30, 2019, CP asked the Board to declare that Kirk is not a reasonable interchange location.").

terminal are too congested, so traffic must be kept away.²² But CP’s Operating Plan submitted to the Board in the proposed KCS merger proceeding says that CP plans to deliver all interchange traffic to CN at Clearing: “Two major intermediate switching terminal railroads, the BRC and the IHB, play key roles in CP’s interchange traffic with other Class I railroads by providing the track infrastructure and classification services required to exchange carloads.”²³ CP also explained that “CP operates two interchange trains daily in and out of the BRC’s Clearing Yard via BRC’s Kenton Line Subdivision,” including “*all of CP’s traffic going to and from CN*” and other Class I railroads.²⁴ These amended operating plan statements were verified by CP and KCS officers months after CP claimed in this proceeding on remand that Clearing was not a reasonable interchange point.²⁵ CP cannot contend here that Clearing is operationally unworkable while at the same time telling the Board—in an attempt to obtain approval for its proposed merger—that the BRC “play[s] a key role[] in [its] interchange traffic” with CN by providing the “required” infrastructure.

CP has also been inconsistent about its train counts east of Bensenville Yard, including to and from BRC’s Clearing Yard. In this proceeding, CP complains that interchanging at Clearing may force it “to add an additional train to Clearing in

²² CP Post-Remand Reply 13–16.

²³ *Can. Pac. Rwy. Ltd.—Control—Kan. City S.*, No. FD 26400, CP Am. Operating Plan ¶ 27 (served May 13, 2022).

²⁴ *Id.* (emphasis added).

²⁵ *Id.*, Verifications of Raymond A. Elphick and John F. Orr.

order to handle CN bound traffic from Bensenville,” atop the two Bensenville-to-Clearing trains CP currently operates—though CP does not contend it has had to add a train since the interchange moved to Clearing in August 2019, over three years ago.²⁶ In seeking approval for the CP-KCS merger, however, CP told the Board that “the only increases will be west of the [Bensenville] yard” and that there will be “No Change” to the east (*e.g.*, at Clearing).²⁷ Indeed, Mr. Elphick assured the Board at the public hearing that “we do not anticipate any increase in trains to BRC” and that “there are no additional trains planned east of Bensenville.”²⁸ The Board should hold CP to the statements it made about CP-CN interchanges in the high-profile CPKC merger proceeding, and it should reject the contradictory claims it has made in this proceeding.

For that matter, even here CP says “the outcome of this proceeding is unlikely to change where the parties interchange traffic.”²⁹ If Clearing were an unreasonable choice because of congestion or operational constraints, it is hard to understand why CP would countenance the interchange staying there. The true reason, of course, is that Clearing is an eminently reasonable interchange point. Indeed, this is why the BRC exists, to facilitate this kind of interchange among its

²⁶ CP Post-Remand Reply 15 n.6; *see* Walker V.S. ¶ 18.

²⁷ No. FD 26400, CP Am. Operating Plan ¶ 211 & tbl.8; *see also* CP Rebuttal Hearing Slides at 23 (slide asserting that “0 Trains [will be] added” to east of Bensenville track on route to Clearing).

²⁸ Transcript of Public Hearing at 1665:2-4 & 1667:2-4, FD 36500 (October 6, 2022).

²⁹ CP Post-Remand Reply 4 n.1.

co-owner railroads. That is also surely why CP never hinted otherwise until it lost on the key issue on appeal.

And even now, CP does not argue that Clearing is outright unreasonable, only that Spaulding is *more* reasonable because it is free.³⁰ As CN has explained, that approach violates the settled rule that a receiving carrier may “offer only that option which best serves its own business interests,” which the Seventh Circuit did not disturb.³¹ And the BRC’s charges are not tolls—they compensate the BRC for performing work that CP would otherwise have to do. What’s more, CP’s arguments nowhere account for the interests of local stakeholders, from Metra to municipal fire departments and business leaders, who have urged the Board not to revive the routine blockages of three at-grade crossings that interchanging at Spaulding caused.³² So even if the Board could consider these belated arguments, they would fail.

C. CP has agreed to pay to interchange at Clearing.

Because the Seventh Circuit held that CN has the power through contract to designate Clearing as the interchange point,³³ and because Clearing’s reasonableness is undisputed, the only question left here is “who pays.”

³⁰ CP Post-Remand Reply 14. This argument, as the Seventh Circuit said, errs by “smuggling an assumption about” cost into the location determination. *See Wisc. Cent.*, 20 F.4th at 294.

³¹ CN Reply to Reply 8.

³² CN Reply to Reply 9–11.

³³ *Wisc. Cent.*, 20 F.4th at 294,

CN and CP have briefed this question exhaustively.³⁴ Answering it merely requires applying a settled and undisputed principle—interchange arrangements should “be determined by agreement” whenever possible³⁵—to the specific facts here. In short, CP should pay for the CN-bound traffic, just as CN pays for CP-bound traffic, because CP and CN agreed to do so in the BRC Operating Agreement. Again, this is why the BRC, an intermediate switching railroad jointly owned by Chicago-area Class I railroads, exists. So the Board should simply adhere to its policy of respecting private contractual arrangements between carriers.

Indeed, no real dispute exists about what the BRC Operating Agreement provides. As CP acknowledges, “CP must pay the BRC a fee to use BRC’s facilities and services” and that it is “the delivering carrier,” *i.e.*, CP, who must “pay BRC’s fees.”³⁶ Indeed, that is what CP does for the RSSM traffic it delivers to Clearing. In other words, “the BRC Operating Agreement provides an administratively workable rule which contemplates that the delivering carrier pay BRC’s fees for cars interchanged using Clearing.”³⁷ Thus, there is no “disagreement about what the

³⁴ See CN Post-Remand Brief 10–21; CP Post-Remand Reply 16–25; CN Post-Remand Reply to Reply 11–16; CP Post-Remand Reply to Reply to Reply 13–14.

³⁵ STB 7th Cir. Br. 45; *see id.* (emphasizing the Board’s “clear preference for private resolution over agency involvement”); 2020 Board Decision at 5 (similar); *N.Y., Chi. & St. Louis R.R. v. N.Y. Cent. R.R.*, 314 I.C.C. 344, 346 (1961) (similar).

³⁶ CP May 2020 Reply 15–16 & n.12.

³⁷ CP Post-Remand Reply 6.

BRC Operating Agreement requires” that would need to be “resolved by a court, not the Board.”³⁸

CP’s only substantive response has been that “[r]ailroads can and do enter into separate reimbursement agreements” for costs like these.³⁹ True, but irrelevant. The only such agreement is the interim agreement, which merely moved the interchange to Clearing pending resolution of this dispute (and which requires CP to repay CN if CN ultimately prevails). So the question here is who pays the BRC’s fees *absent* a separate reimbursement agreement. And the BRC Operating Agreement supplies the answer.⁴⁰ In turn, deciding the remaining question here requires no broader rethink of the interchange statute.

II. If the Board concludes that a broader reconsideration of interchange policy is needed, it should initiate a separate rulemaking without delaying its decision in this matter.

The Board has postponed deciding the narrow question remaining in this two-party adjudication to seek “[i]nput from a wider variety of industry participants” on “the potential impacts of different approaches” to the Board’s consideration of interchange disputes.⁴¹ As explained above, this dispute does not require the Board to address any broader questions. If it wishes to do so anyway, it

³⁸ 2020 Board Decision 11 n.11.

³⁹ CP Post-Remand Reply 20–22.

⁴⁰ Even if a true contractual dispute existed here, the proper resolution would be to affirm CN’s ability to designate Clearing and let the parties resolve any contractual questions about payment in the appropriate forum.

⁴¹ 2022 Board Order at 4.

should pursue a separate rulemaking that does not delay the resolution of this matter any longer.

The Board, of course, has discretion to make law through adjudications. But when an agency makes law like a court, in the course of deciding a specific dispute, it should limit itself to the questions presented by and necessary to the resolution of that dispute.⁴² The ICC has explained the difference: “Adjudications are individual cases *decided on their individual facts* with reliance, where possible, on precedent and existing law.”⁴³ “Rulemakings,” by contrast, “are proceedings in which all interested parties are given an opportunity to comment on, and help develop, rules which will have a broad impact.”⁴⁴ In other words, adjudication “is concerned with the determination of past and present rights and liabilities,” while rulemakings “focus on policy or law to be implemented in the future.”⁴⁵

This, of course, is an adjudication. CN filed a petition asking the Board for specific relief, on specific facts, to resolve a concrete dispute with CP. As the Seventh Circuit explained, that petition potentially presented three specific legal questions—just one of which remains undecided. The Board should not reach

⁴² See *Neustar, Inc. v. FCC*, 857 F.3d 886, 893 (D.C. Cir. 2017) (“Informal adjudications may be used in highly fact-specific contexts, and lack the hallmarks of legislative rulemaking.” (internal quotation marks and citations omitted)).

⁴³ *Potomac Elec. Power Co.*, 367 I.C.C. 532, 545 (I.C.C. 1983) (emphasis added).

⁴⁴ *Id.*; see also *Bell Aerospace Co.*, 416 U.S. at 295 (noting that “rulemaking would [have] provide[d] the Board with a forum for soliciting the informed views of those affected in industry and labor before embarking on a new course”).

⁴⁵ *United States Rail Serv. Issues-Performance Data Reporting*, No. EP 724 (SUB-4), 2015 WL 6875316, at *1 n.4 (STB Nov. 6, 2015) (citing Attorney General's Manual on the Administrative Procedure Act, at 14 (1947)).

beyond deciding that question in the context of this specific dispute to address broader topics that are not implicated here.⁴⁶

If the Board believes a broader rethink is necessary in light of the Seventh Circuit’s opinion—even though the Court’s key holding merely rejected a rule the Board had never before espoused, the physical-connection requirement⁴⁷—it should not use this proceeding for that purpose. It should instead follow the “usual[] prefer[ence] to develop rules of general applicability in rulemakings and then apply those rules in specific adjudications.”⁴⁸

That is true especially because the Board’s decision in this adjudication will not merely be prospective. Under the Interim Agreement, CN has been paying CP’s fees pending the resolution of this dispute—and it is entitled to recover those amounts if it prevails. Adopting a new interpretation of the interchange statute and applying it to rule for CP would thus violate anti-retroactivity principles by improperly “attach[ing] new legal consequences to events [already] completed.”⁴⁹ In turn, while CN recognizes the Board’s instruction to “not address the specific facts

⁴⁶ *Cf. First Bancorp. v. Bd. of Govs. of Fed. Res. Sys.*, 728 F.2d 434, 438 (10th Cir. 1984) (concluding that “the Board abused its discretion by improperly attempting to propose legislative policy by an adjudicative order”); *Invenenergy Renewables LLC v. United States*, 422 F. Supp. 3d 1255, 1285 (CIT 2019), *modified*, 476 F. Supp. 3d 1323 (CIT 2020) (granting a preliminary injunction because the agency was engaged in rulemaking despite the agency’s contention that it had created law through adjudication).

⁴⁷ To be sure, the Board’s prior ruling could have had broad implications by unduly narrowing the statute’s scope. *See* CN 7th Cir. Br. 48–56. But the Seventh Circuit’s rejection of that ruling removed those stakes.

⁴⁸ *Potomac Elec.*, 367 I.C.C. at 545.

⁴⁹ *See Martin v. Hadix*, 527 U.S. 343, 357–58 (1999).

of this case” in these comments,⁵⁰ CN believes the Board’s decision in this proceeding must be limited to deciding this specific dispute under existing law.

CONCLUSION

For these reasons, CN urges the Board to resolve the narrow issue remaining in this fact-specific adjudication and hold that CP is responsible for paying the ordinary agreed fees under the BRC Operating Agreement for CP-CN interchange traffic it delivers to Clearing, just as CN pays such fees for CN-CP interchange traffic that it delivers to Clearing.

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⁵⁰ Comment Order 5 n.4.

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December 2022, I caused a copy of the foregoing document to be served by U.S. Postal Service or more expeditious means upon the service list for Finance Docket No. 36397.

/s/ Matthew J. Warren
Matthew J. Warren