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April 3, 2017

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Via E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings
April 3, 2017
Part of
Public Record

Re: ***Soo Line Railroad Company – Petition for Declaratory Order,
Finance Docket No. 36107***

Dear Ms. Brown:

Consolidated Rail Corporation has submitted, via e-filing, the enclosed Reply to
Soo Line Railroad Company's Petition for Declaratory Order.

Thank you for your assistance.

Sincerely,



Marc D. Machlin
Counsel for Consolidated Rail Corporation

CC: All Parties of Record
Whitney Redding (Pepper Hamilton)

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36107

SOO LINE RAILROAD COMPANY – PETITION FOR DECLARATORY ORDER

**CONSOLIDATED RAIL CORPORATION’S REPLY TO SOO LINE
RAILROAD COMPANY’S PETITION FOR DECLARATORY ORDER**

Consolidated Rail Corporation (“Conrail”) hereby submits this Reply to the Petition for Declaratory Order filed on March 13, 2017, by Soo Line Railroad Company d/b/a Canadian Pacific (“CP”). For the reasons set forth below, the Board should deny this Petition and should reject CP’s request to initiate a declaratory order proceeding at this time.

I. INTRODUCTION AND SUMMARY

CP’s petition stems directly from its contractual dispute with Norfolk Southern Railway Company (“NS”). That dispute involves the interchange agreement dated July 15, 2005, and executed by CP, NS, Conrail, and the Indiana Harbor Belt Railroad Company (“IHB”) (the “Interchange Agreement”). Conrail endorses and supports NS’s position in this proceeding. In Conrail’s view, there is no reason for the Board to become enmeshed in this contractual dispute.

As the owner of Gibson Yard, the Gibson Crossing Track, and several other rail lines used by IHB, Conrail has property interests and contractual rights that could be affected by the Board’s actions in this proceeding. Conrail submits this Reply to highlight the key points relating to the Board’s jurisdiction and to discourage any infringement on the property rights or contract rights held by Conrail.

CP seems to acknowledge, as it must, that Board approval is not required for the creation, modification, or termination of an interchange agreement. CP, however, offers two theories to support the exercise of jurisdiction by the Board. First, CP invites the Board to reclassify the Interchange Agreement as a trackage rights agreement or as an amendment to the pre-existing Michigan Trackage Rights Agreement (“MTRA”) between NS and CP. *See* CP Petition at 16-18. Yet the Interchange Agreement specifically provides that it does not grant trackage rights. Additionally, the Interchange Agreement was not submitted to the Board for approval, was subject to termination by IHB or CP on 90 days’ written notice, and does not contain any of the typical elements of a trackage rights agreement.

Furthermore, on its face, the Interchange Agreement did not modify the MTRA. The MTRA was created and executed only by NS and CP. By contrast, the Interchange Agreement was negotiated and signed by the four affected rail carriers (Conrail, IHB, CP and NS). If the Interchange Agreement was intended to function as an amendment to the pre-existing trackage rights agreement, it would have been so designated by the signatories; it also would have required Board approval and would have included many other terms. Overall, based upon the specific provision indicating the CP was receiving “operating rights,” not trackage rights, and based upon the decision by all four carriers not to seek Board approval, the only reasonable conclusion is that the Interchange Agreement is an interchange agreement and nothing more. Consequently, neither NS nor any of the other signatories needs Board approval under 49 U.S.C. § 10903 to exercise any contractual rights allowing termination.

Second, as an alternative theory, CP implies that the original MTRA should be interpreted creatively so as to give CP the right to use Gibson Yard and NS’s north-south line running from CP-502 into Gibson Yard or the Gibson Crossing Track. *See* CP Petition at 1-3,

16-18. Yet Gibson Yard and the Gibson Crossing Track are both owned by Conrail, and Conrail was not a signatory to the MTRA. For that reason alone, CP could not possibly have obtained any rights to use Gibson Yard or the Gibson Crossing Track in the MTRA. Furthermore, if the original MTRA had given CP the rights it now claims, it would not have been necessary to execute the Interchange Agreement weeks later. Essentially, under the MTRA, CP was allowed to use two different entry or exit points (CP-502 and CP-509). Insofar as the most efficient use of CP-502 as an entry or exit point required CP to secure access into Gibson Yard under separate agreements with other rail carriers, CP was free to seek these agreements, but nothing in the MTRA guaranteed that CP's efforts would be successful. Nor could any Board approval or exemption of the MTRA expand CP's rights and give CP rights under the MTRA that it did not secure on its own. Finally, if, in the future, termination or renegotiation of the Interchange Agreement creates operational difficulties for CP in using CP-502, those difficulties stem entirely from the agreements that CP negotiated and accepted in 2005. Certainly, there is no basis for the Board to use its authority over voluntary trackage rights agreements or its authority over abandonments or discontinuances for the purpose of re-writing the agreements negotiated by CP and the other rail carriers.

II. BACKGROUND

A. The Rail Lines Utilized By IHB, And Conrail's Ownership Interest In IHB

The IHB operates many rail lines and yards owned by other rail carriers. Many of the key IHB lines are owned by NS, Conrail, and CSX Transportation, Inc. ("CSX"). The IHB-operated lines and facilities owned by Conrail include, but are not limited to, the Gibson Yard, the Gibson Crossing Track (adjacent to the Yard), and the Michigan Avenue Yard. The IHB-

operated lines owned by NS include, but are not limited to, the north-south line between CP-502 and Gibson Yard/Gibson Crossing Track.

IHB itself is jointly owned by Conrail and CP. Conrail holds fifty-one percent (51%) of IHB's common stock, and CP holds the remaining forty nine percent (49%).

B. The Timeline For The MTRA And The Interchange Agreement

Effective May 24, 2005, CP and NS entered into the MTRA. Conrail was not a party to the MTRA and had no involvement in negotiating its terms. As such, the MTRA did not grant CP any right to use track or facilities owned by Conrail. Nor did the MTRA grant to CP any rights over the north-south line owned by NS and running between CP-502 and the Gibson Yard or the Gibson Crossing Track.

CP, NS, the IHB, and Conrail entered into a separate agreement on July 15, 2005, which set forth the terms for interchange of railroad traffic in Gibson Yard. The Interchange Agreement grants CP the right to deliver specified trains “with its own power, [and] crew” to “the IHB via CP 502 in East Chicago, Indiana,” and clarifies that “[s]aid grant shall be considered a grant of operating rights and not trackage rights.” Verified Statement of Charles E. Hubbard, Ex. 2, Interchange Agreement § 1. The Interchange Agreement does not require CP to pay any additional fees for use of its “operating rights.” The Agreement, however, expressly grants termination rights to IHB and CP. Each carrier has the right to terminate the Interchange Agreement on ninety (90) days’ written notice. *See id.* § 11.

On January 12, 2017, NS initiated court proceedings in the U.S. District Court for the Northern District of Indiana, Case No. 2:17-cv-00015, seeking a declaration of its rights under Indiana contract law to terminate the Interchange Agreement. All four parties to the Interchange Agreement, including Conrail, were named as parties in the federal litigation.

III. ARGUMENT

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. The Board has “broad discretion” in determining whether to issue, or decline to issue, a declaratory order. *See Intercity Transp. Co. v. United States*, 737 F.2d 103, 106 (D.C. Cir. 1984). Generally, the Board will decline to institute a declaratory order proceeding when the core dispute involves the interpretation of private contracts or the determination of property rights under state law; the Board recognizes that these questions are more appropriately decided by courts. *See Petition of Union Pacific Railroad Company for Declaratory Order*, Finance Docket No. 35960, 2016 STB LEXIS 272, at *17-25 (Sept. 28, 2016); *Central Illinois Railroad Company – Petition for Declaratory Order*, Finance Docket Nos. 34518 and 34636, 2005 STB LEXIS 113, at *12-13 (Feb. 23, 2005).

This dispute involves NS’s ongoing efforts to terminate the Interchange Agreement. CP seeks to delay or block termination by invoking the Board’s jurisdiction. Yet CP has failed to show that termination of the Interchange Agreement will result in an abandonment or discontinuance of operations that is within the Board’s jurisdiction.

A. Interchange Agreements Can Be Established And Terminated Without Board Approval

It is well-settled that the formation or termination of a voluntary interchange agreement does *not* require Board approval. While rail carriers have a statutory obligation to provide reasonable facilities for the interchange of traffic (49 U.S.C. § 10742), rail carriers are free to enter into or terminate such interchange agreements without Board approval. *See, e.g., Black v. ICC*, 837 F.2d 1175, 1178 (D.C. Cir. 1988), *citing inter alia, Kansas City S. Ry. v. Louisiana & N. Ry.*, 213 I.C.C. 351, 356 (1935); *Southern Ry. v. Louisville & N. R.R.*, 185 F.

Supp. 645, 652 (W.D. Ky. 1960), *aff'd mem.*, 289 F.2d 934 (6th Cir. 1961). And while a rail carrier may obtain interchange rights allowing it to operate trains over rail lines owned by other carriers, these operating rights cannot be treated as trackage rights under 49 U.S.C. § 11323 or 49 U.S.C. § 10903. *See Black v. ICC*, 837 F.2d at 1178-79.

CP makes several efforts to avoid these basic principles. Initially, CP highlights the decision of a panel of arbitrators, who were called upon to interpret the MTRA and Interchange Agreement. *See* CP Petition at 9-10. The arbitrators apparently found that CP's operating rights were not limited to particular commodities and that NS could not prohibit or impose specific charges on movements of crude oil through Gibson Yard. The arbitrators even went as far as suggesting that the operating rights held by CP were similar to trackage rights and allowed CP to operate as if it has trackage rights.

Yet these arbitrators were not called upon to decide whether CP had trackage rights for purposes of 49 U.S.C. § 10903 or 49 U.S.C. § 11323. This is a regulatory question far beyond the purview of arbitrators called upon to evaluate NS's contractual rights relating to movements of crude oil. In fact, both the parties and the arbitrators fully understood that termination of the Interchange Agreement did *not* require Board approval. In the Award, the arbitrators noted that both NS and CP "agree[d] that the IHBIA grants 'operating rights', not 'trackage rights' requiring STB authorization." Verified Statement of Charles E. Hubbard, Ex. 4. Arbitration Award at 9; *see id.* at 12 ("Both parties agree that [CP] does not have STB-authorized 'trackage rights' west of CP-502.") After reviewing the evidence, the arbitrators concluded that "the purpose of the phrase 'operating rights but not trackage rights' [in the Interchange Agreement] was to distinguish the rights granted [CP] in the IHBIA from STB regulated trackage rights subject to 49 U.S.C. 11323(a)(6). *This meant that the rights could be*

implemented or terminated without STB approval or exemption” Id. at 11-12 (emphasis added); *see also id.* at 15-16 (“In sum, the only significant difference between the IHBIA ‘operating rights’ and formal ‘trackage rights’ is that some form of STB authority is necessary to implement or discontinue ‘trackage rights’.”).

As the arbitrators correctly observed, the Interchange Agreement was never intended to create trackage rights that could only be discontinued or abandoned with Board approval. By its terms, the 2005 Interchange Agreement grants only operating rights, not trackage rights. *See* Interchange Agreement § 1. These operating rights were granted for interchange purposes only, for the “operating convenience” of CP and IHB. *Id.*, Recitals. The Agreement did not provide for Board review and approval, and it was not submitted to the Board for approval or for an exemption. Furthermore, the Interchange Agreement did not impose additional fees or charges on CP. The Interchange Agreement acknowledged that IHB would continue to receive switching charges under separate agreements and tariffs. *Id.* § 9. No separate fees were imposed for the benefit of NS. Thus, by seeking to transform its operating rights into trackage rights, CP is impermissibly seeking to nullify (or have the Board nullify) the plain language of the Interchange Agreement.

B. The MTRA Provides For Interchange At CP-502, But Does Not Give CP Any Rights To Use Gibson Yard

CP’s alternative theory seems to be that CP received the rights to use Gibson Yard in the original MTRA because use of the Yard is necessary in order to fully and efficiently utilize CP-502 as an entry or exit point. *See* CP Petition at 16. This is misguided on several levels. To start with, as noted above, Conrail was not a signatory to the MTRA. Consequently, the MTRA could not possibly have given CP any access rights into Gibson Yard.

Furthermore, the MTRA specifies that trackage rights were granted to CP between specific mileposts. None of the rail segments identified by these segments included the north-south line owned by NS or the Gibson Yard facilities owned by Conrail.¹

Additionally, if, in the MTRA, CP had obtained trackage rights that authorized use of Gibson Yard or use of the north-south track feeding to Gibson Yard, CP would not have needed the separate Interchange Agreement signed many weeks later with a larger group of carriers. Effectively, CP is asking the Board to re-write the MTRA to cover the segment from CP-502 to Gibson Yard, but the Board does not have the power to grant this relief. Trackage rights agreements, such as the MTRA, are voluntary agreements. *See Magner-O'Hara Scenic Ry. v. ICC*, 692 F.2d 441, 445 (6th Cir. 1982); *Boston & Maine Corp. Trackage Rights Over Conrail*, 360 I.C.C. 239, 241 (1979); *City of Hialeah v. Florida East Coast Ry.*, 317 I.C.C. 34, 36 (1962). The Board has no authority to modify such voluntary agreements for the benefit of one of the signatories, particularly when such a modification would impact non-signatories such as Conrail. Under 49 U.S.C. § 11323(a)(6), the Board's role is to approve or disapprove voluntary trackage rights agreements negotiated by rail carriers. The Board has no authority to revise such agreements years after they are approved or exempted from regulation.

Similarly, CP argues that, without the Interchange Agreement, its rights to enter or exit the MTRA trackage at CP-502 will be impaired. *See* CP Petition at 1-3, 11-16. This suggests that in negotiating the MTRA, CP failed to secure all the rights needed to provide rail

¹ The color-coded map provided by CP is visually appealing, but it does not clearly identify all the rail lines and facilities operated by IHB. In addition, CP's map does not identify the rail carriers that own various portions of IHB's network.

service via CP-502 on the most efficient basis. Yet CP's argument does not and cannot expand the Board's authority under 49 U.S.C. § 11323. The Board has no authority to amend the MTRA retroactively, to grant additional trackage rights to CP, or to require that other rail carriers sign on to the MTRA for the purpose of granting additional rights to CP.

Finally, CP's argues that termination of the Interchange Agreement will lead to adverse consequences for CP and shippers by increasing congestion in the Chicago rail network. *See* CP Petition at 19-22. This argument completely ignores the fact that NS, IHB, and Conrail may be perfectly willing to grant CP continuing access into Gibson Yard under a different arrangement. If the Interchange Agreement is renegotiated and a new arrangement is established, CP may ultimately have to pay more to move its trains over particular track segments. Alternatively, CP may be asked to make other concessions. Such contractual negotiations are a business reality and do not justify Board action seeking to assert jurisdiction over the termination of the Interchange Agreement.

IV. CONCLUSION

For the foregoing reasons, the Board should dismiss CP's Petition and decline to institute declaratory order proceedings. Termination of the Interchange Agreement is a matter of contractual interpretation best left to the U.S. District Court to decide in the pending action. CP has not cited any precedent which would require a rail carrier to obtain Board approval prior to terminating an interchange agreement. Nor has CP shown that the Board has authority to expand the scope of CP's existing trackage rights under 49 U.S.C. § 11323. Contrary to CP's assertions,

there would be no point in allowing discovery, taking evidence, and considering whether to issue a declaratory order. CP's legal theory is fundamentally flawed and should be rejected now, without imposing further burdens on the Board or the parties.

Respectfully submitted,

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Dated: April 3, 2017

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CERTIFICATE OF SERVICE

I, Whitney R. Redding, hereby certify that on this 3rd day of April, 2017, I caused a copy of the foregoing to be served by First Class Mail, postage prepaid, upon the following:

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In addition, I have emailed a courtesy copy of the foregoing to the email addresses listed above.



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