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SOO LINE RAILROAD COMPANY—PETITION FOR DECLARATORY ORDER

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Soo Line Railroad Company d/b/a Canadian Pacific¹ (CP), pursuant to the Board's discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, respectfully petitions the Surface Transportation Board ("Board" or "STB") for a declaratory order that termination of the Indiana Harbor Beltway Interchange Agreement ("IHBIA") requires Board authorization.

This Petition is supported by the verified statements of Charles E. Hubbard, CP's Director; Interline and Passenger-South, and Nicholas Walker, CP's Superintendent - US East - Bensenville Terminal.

INTRODUCTION

This petition relates directly to a separate complaint for declaratory judgment filed by Norfolk Southern Railway Company ("NS") against CP, the Indiana Harbor Belt Railway Company ("IHB") and the Consolidated Rail Corporation ("Conrail") in the U.S. District Court for the Northern District of Indiana seeking a declaration that, under Indiana law, NS has the implied right to terminate the IHBIA upon giving ninety days' advance written notice to the other parties to the agreement.² The IHBIA, however, is not a stand-alone agreement. It was

¹ Canadian Pacific (CP) is a trade name under which Canadian Pacific Railway Company's United States subsidiaries, Soo Line Railroad Company, Dakota, Minnesota & Eastern Railroad Corporation, and Delaware and Hudson Railway Company, Inc. operate.

² See *Norfolk Southern Railway Company v. Soo Line Railroad Company d/b/a Canadian Pacific Railway, The Indiana Harbor Belt Railway Company, and The Consolidated Rail Corporation*, No. 2:17-cv-00015-PPS-PRC (N.D. Ind. Jan. 12, 2017).

executed in order to effectuate CP's trackage rights on NS's rail line between Detroit and Chicago via CP-502, one of the two Control Points in Chicago provided for in the Michigan Trackage Rights Agreement ("MTRA"). Under the terms of the MTRA, the IHBIA is necessary to CP's utilization of these trackage rights.

The MTRA is NS's real target. NS recently sought to block CP's movement of crude oil over CP-502, which led to an arbitration proceeding. The arbitration panel ruled unanimously for CP in September 2016 finding: (1) the IHBIA "is obviously related to the MTRA and plainly has an impact on the rights of [CP] under the MTRA;" (2) "NS does not have the right to limit or restrict [CP] traffic from entering or exiting the MTRA trackage via CP-502 based upon commodity, train type, [or] direction;" and (3) the IHBIA rights "grant essentially the same bundle of rights as a formal trackage rights agreement." Verified Statement of Charles E. Hubbard ("Hubbard V.S."), Ex. 4 at 9, 12, 22-23.³ NS's current assault on the IHBIA is an effort to circumvent the arbitration award. NS has no other reason to seek to terminate the IHBIA which imposes no duties or obligations on NS. Rather, the IHBIA governs the interchange of traffic between CP and IHB. In fact, NS does not even operate or maintain the track governed by the IHBIA; that track is operated and maintained by IHB. NS is a signatory to the IHBIA for the sole reason that, as owner of a portion of the underlying property, IHB required its consent to grant CP access.

By terminating the IHBIA, NS would be unilaterally eliminating Board-authorized provisions of the MTRA, which by their plain terms make clear that CP has *two* routes in and out of the Chicago terminal – one over Control Point 509 ("CP-509") and the other over Control

³ The arbitration award is attached to this Petition as Hubbard V.S. Ex. 4.

Point-502 (“CP-502”). Termination of the IHBIA is not for a court to authorize; that responsibility belongs with the Board.

CP handles a large amount of automotive traffic over CP-502 and customers have relied on this service for many years. Terminating the IHBIA would effectively foreclose CP’s ability to use CP-502 and would force it to reroute its traffic over a longer route via CP-509. This rerouting would have a significant and damaging impact on CP, rail congestion and fluidity in the Chicago terminal, and the overall health of the rail network. For these reasons, termination of the IHBIA would effect a partial discontinuance of CP’s MTRA trackage rights and therefore requires prior STB approval. Uncertainty as to the fate of the IHBIA is harmful to CP’s ability to compete.

Concurrently with this petition, CP is moving to dismiss NS’s declaratory judgment action in the U.S. District Court for the Northern District of Indiana on ripeness grounds, *i.e.*, that NS’s complaint does not allege a “case or controversy” which is required for an Article III court to exercise jurisdiction. Alternatively, CP moves to dismiss the case under the doctrine of primary jurisdiction. If, as CP believes, termination would require prior Board approval, this would support the conclusion that the court action is not ripe.

Accordingly, in light of NS’s apparent efforts to terminate the IHBIA and the uncertainty in the marketplace that its effort has engendered, and to help resolve the underlying controversy, CP requests that the Board issue an order declaring that termination of the IHBIA requires NS to seek and obtain prior Board authorization. To that end, CP asks the Board to initiate a declaratory order proceeding and adopt CP’s proposed procedural schedule.

FACTS

I. THE MTRA AND IHBIA.

The underlying dispute which gives rise to this Petition involves two interrelated agreements: (1) the June 2, 2005 MTRA between CP and NS and (2) the July 15, 2005 IHBIA among CP, NS, Conrail and IHB.⁴

A. CP's Network.

CP's North American rail network consists of approximately 12,500 miles of trackage from the Pacific to Atlantic coasts in Canada, from Vancouver to Chicago and Kansas City and from Montreal to Detroit and Albany, New York. Hubbard V.S. at 2. Between the Midwestern United States and Eastern Canada, CP carries merchandise traffic (including automotive vehicles and parts, forest products, chemicals and plastics, petroleum products and crude oil, metals, minerals, and consumer products), bulk traffic (including agricultural products and grain), and international and domestic intermodal traffic. *Id.*

B. Before the MTRA and IHBIA, CP's Chicago-Detroit Traffic Moved via Haulage.

Following its 1985 acquisition of the Milwaukee Road's assets from the bankruptcy trustee, CP sold the duplicative rail lines of its Lake States Division to Wisconsin Central Ltd. ("WCL") in 1987. *Id.* at 2–3. The WCL sale included CP's rail lines in the Upper Peninsula of Michigan which had provided CP a direct connection at Sault Ste. Marie between its operations in the Midwest United States and its corporate affiliate in Canada. *Id.* at 3. Consequently, the sale created a gap in CP's operations which increased in significance when CP acquired the Delaware and Hudson Railway assets in the Northeast United States in 1991. *Id.* CP initially

⁴ A copy of the public version of the MTRA that was filed with CP's June 6, 2005 STB Notice of Exemption is attached to this Petition as Hubbard V.S. Ex. 1. A copy of the IHBIA is attached as Hubbard V.S. Ex. 2.

addressed this gap by obtaining haulage rights between Chicago and Detroit. Hubbard V.S. at 3. Beginning in 1985, CP moved all of its traffic between Chicago and Detroit under a Joint Use Agreement with Chesapeake and Ohio Railway (“C&O”) and its successor CSX Transportation Company (“CSXT”). *Id.* Under the Joint Use Agreement, C&O and then CSXT provided haulage services for CP. *Id.*

C. The Genesis of the MTRA and IHBIA.

In the early 2000s, following NS’s and CSXT’s acquisition of Conrail, CP and NS negotiated a variety of strategic agreements that would restructure their respective operations in the Northeast and Midwest United States. *Id.* Among those strategic agreements were the MTRA and the related IHBIA. *Id.*

1. CP and NS Negotiate the MTRA to Provide CP with Trackage Rights from Chicago to Detroit.

The MTRA allowed CP to move its own traffic between Chicago and Detroit via trackage rights rather than relying on CSXT to move the traffic via haulage. *Id.* The agreement provided CP with improved access and control over its operations through the busy Chicago terminal. *Id.* CP has the right to operate its trains with its own crews between Detroit and Chicago. *Id.* In Chicago, CP may enter and exit NS’s line at either CP-509, its connection with the Belt Railway of Chicago (“BRC”), or at CP-502, its connection to the IHB.⁵ *Id.*; MTRA § 1(a)(iii); Hubbard V.S. Ex. 1. The MTRA specifies that it is CP’s choice whether to enter and exit the subject trackage at CP-502 or CP-509, and that NS is required to “use its best efforts to accommodate” CP’s choice for each train. Hubbard V.S. at 3; Ex. 1, §§ 2 (b), (c).

⁵ See Hubbard V.S. Ex. 3, which is a map depicting the relevant Control Points and two routes through the Chicago terminal contemplated by the MTRA.

Chicago is particularly important to CP. Hubbard V.S. at 4. In 2016, roughly 20% of all CP traffic touched Chicago and 48% of all CP interchange traffic was interchanged at Chicago. *Id.* As a result, CP's operational performance is tied directly to the fluidity of the Chicago terminal. *Id.* If there is a disruption in Chicago, it is likely to negatively affect CP operations well beyond Chicago. *Id.* During the winter of 2013–14, when strong freight volumes coupled with severe winter weather plunged the Chicago terminal into gridlock, the impact was felt across the national rail network and particularly by CP. *Id.* Recovery was difficult and slow, taking the better part of a year. *Id.*

Because the Chicago terminal is congested and vulnerable to disruption, CP's ability to enter and exit the terminal through two different points in either direction provides CP with invaluable operational flexibility and helps CP maintain fluidity in the area. *Id.* Having the option to use CP-502 helps CP avoid or ease congestion on one of the main arteries into Chicago via CP-509. *Id.* This flexibility is particularly important in instances of "alert levels" caused by snow storms and other unpredictable events, which negatively affect train operations in the Chicago terminal. *Id.* In addition, different types of traffic are naturally routed in different ways through the Chicago terminal. *Id.* Automotive traffic is routed via CP-502 for interchange with IHB at Gibson Yard for furtherance to western destinations by BNSF Railway ("BNSF") and Union Pacific Railroad ("UP"). *Id.* Some manifest traffic and crude oil traffic also moves via CP-502, but most of CP's manifest traffic, including crude oil unit trains, is routed via CP-509 over BRC and Metra trackage rights to Bensenville Yard. *Id.*

Once CP's trackage rights became effective, CP began moving its trains over CP-509 via its trackage rights over the BRC and Metra to reach CP's Bensenville Yard.⁶ Hubbard V.S. at 5. At the time the MTRA was executed, CP did not have a route west of CP-502 and therefore no way to enter or exit the NS trackage at that control point. *Id.* CP and NS contemplated that IHB would grant CP overhead trackage rights from CP-502 to connect with CP's existing IHB trackage rights between Dolton and Franklin Park. *Id.* This expectation is evidenced in Section 2(e)(i).⁷ *Id.* However, CSXT blocked the CP-IHB trackage rights agreement. As owner of the Gibson Yard to Calumet Park segment between CP-502 and Dolton, CSXT's consent to the CP-IHB trackage rights agreement was required. *Id.* After CP moved its haulage business away from CSXT to NS, CSXT refused to grant consent. *Id.* Thus, CP could not use CP-502, one of the two entrance and exit points in Chicago granted by the MTRA. *Id.* In response to CSXT's refusal, the parties looked for another solution to enable CP to enter and exit the NS trackage at CP-502. *Id.*

⁶ CP filed its notice of exemption for the MTRA with the Surface Transportation Board ("STB") on June 6, 2005; the STB served and published its notice on June 24, 2005.

⁷ Section 2(e)(i) of the MTRA provides:

SOO may use the trackage rights granted herein solely for the purposes of:
(i) subject to Section 16(c), the overhead movement of any commodity in the revenue waybill account of SOO or Canadian Pacific Railway Company ("CPRC") (SOO and CPRC are referred to collectively hereinafter as "CPR"); provided, that such traffic has both a prior and subsequent movement on CPR lines (including trackage rights held by CPR over other carriers): (A) east of, but not including, Detroit, MI; and (B) west of, but not including, CP-502 or CP-509 or such other End Point(s) in the vicinity of Chicago as may be permitted by this Michigan Trackage Rights Agreement, as applicable ("CPR Chicago-Detroit Traffic");

2. The IHBIA is Signed to Effectuate the Purposes of the MTRA.

That solution was the IHBIA. Hubbard V.S. at 5. Consequently, CP and NS engaged IHB and Conrail in negotiations to fully effectuate the MTRA's intent to permit CP to enter and exit at CP-502. *Id.* at 5-6. Those negotiations came to fruition six weeks after CP and NS signed the MTRA when the parties executed the IHBIA. *Id.* The IHBIA granted CP operating rights between CP-502 and Gibson Yard for interchange with IHB. *Id.* These "operating rights" did not require CSXT's consent.⁸ *Id.* at 6.

The IHBIA provides CP with operating rights on track operated and maintained by IHB between CP-502 and Gibson Yard in order to interchange with IHB. It is for all practical purposes a two-party agreement between CP and IHB, governing CP's operations on IHB track and interchange operations between the carriers. NS and Conrail are signatories because, as owners of relevant portions of the underlying property, their consent to an agreement granting a third party access was required.

D. History of Usage Prior to Crude Oil Dispute with NS.

Since 2005, CP has operated a variety of traffic smoothly and efficiently over CP-502 and CP-509 pursuant to its rights under the MTRA and IHBIA. Hubbard V.S. at 6. This traffic has included approximately 30,000 rail cars each year over CP-502. *Id.* In 2016, the traffic over CP-502 included approximately 24,000 loaded westbound automotive rail cars for interchange

⁸ The sole purpose of the IHBIA was to allow CP to exit the MTRA trackage at CP-502 as evidenced by the specific reference in the IHBIA's Recitals, which state:

CP has received trackage rights *between Eastern Canada and CP 502* for Interchange with the IHB, and

...

[T]he parties hereto desire to enter into a written agreement to provide for the method of said interchange, of rail traffic at Gibson Yard *routed via CP 502*.

IHBIA Recitals, Hubbard V.S. Ex. 2 (emphases added).

with IHB at Gibson Yard, westbound manifest traffic, and approximately 20,000 empty eastbound automotive rail cars returning to Eastern Canada. *Id.*

1. In 2014, NS Objected to CP's Movement of Oil Traffic Via CP-502.

In 2013, CP began moving loaded and empty crude oil unit trains that originated on BNSF via Gibson Yard over CP-502 and the MTRA trackage to Detroit for final delivery to points in the eastern United States. *Id.* On March 31, 2014, however, NS questioned for the first time whether CP's movement of these crude oil trains over CP-502 via Gibson Yard was permitted by the MTRA and IHBIA. *Id.* Shortly thereafter, NS refused to accept an eastbound loaded CP oil train leaving Gibson Yard destined for CP-502. *Id.* NS's refusal to allow CP's oil train to enter the MTRA trackage at CP-502 imposed immediate and severe consequences for CP, its customers, and the other railroads operating in the Chicago terminal. *Id.* NS demanded a \$323 premium per loaded and empty car to allow CP's crude oil traffic to move over CP-502 via Gibson Yard. *Id.* This premium payment was not authorized in the MTRA or the IHBIA. *Id.* However, in order to move CP's oil traffic and not disrupt its customers, CP agreed to pay subject to an agreement that NS would refund the premium if CP was successful in arbitration. *Id.*

2. In 2016, CP Prevailed In Arbitration.

In October 2014, CP filed a Demand for Arbitration with the American Arbitration Association to adjudicate the scope of its rights under the MTRA and IHBIA.⁹ Hubbard V.S. at 7. In June 2016, an arbitration hearing was held in Chicago and on September 8, 2016, the arbitration panel unanimously ruled in CP's favor. *Id.* The arbitration award states "[t]he only

⁹ Subsequently, CP and NS entered into a private arbitration agreement where CP appointed Ronald Lane, NS appointed Paul Keenan, and Messrs. Lane and Keenan appointed Robert Opal.

rights [CP] has west of CP-502 for the traffic in question are the rights granted by the IHBIA, an agreement which is obviously related to the MTRA and plainly has an impact on the rights of [CP] under the MTRA.” Hubbard V.S. at 7, Ex. 4 at 9. The arbitrators also held that the IHBIA’s operating rights must be read as satisfying the MTRA’s requirement of a “prior and subsequent movement” on CP tracks or CP trackage rights and that “the IHBIA’s ‘operating rights’ grant essentially the same bundle of rights as a formal trackage rights agreement” because the IHBIA permits CP “to operate its trains with its own crews.” Hubbard V.S. at 7; Ex. 4 at 11–12. The arbitrators found the “operating rights” similar to “trackage rights” for other reasons as well including: CP’s trains can enter/exit the MTRA trackage without stopping on NS for crew change or interchange; NS’s franchise is not affected by operating rights any more than it is affected if CP had obtained trackage rights; and, at the time the MTRA was executed, NS did not object to the grant of trackage rights from CP-502 to Bensenville. Hubbard V.S. at 7; Ex. 4 at 12, 13. Ultimately, the panel concluded that “NS does not have the right to limit or restrict [CP] traffic from entering or exiting the MTRA trackage via CP-502 based upon commodity, train type, direction, or prior or subsequent movement via IHBIA operating rights.” Hubbard V.S. at 7; Ex. 4 at 22, 23.

3. In 2017, NS Filed a Declaratory Judgment Action in Federal Court in an Effort to Circumvent the Arbitration Decision.

On January 12, 2017, NS filed a declaratory judgment action in the Northern District of Indiana seeking a declaration that, under Indiana law, NS has the implied right to terminate the IHBIA at will. Although the IHBIA provides that either CP or IHB may terminate the IHBIA on ninety days’ notice, it does not afford NS or Conrail, who are nominal parties to the IHBIA, the same right. If the Court were to grant NS’s declaratory judgment action, NS could potentially

unilaterally terminate the IHBIA upon 90 days' written notice,¹⁰ without regard for the impact such termination would have on CP's rights granted to it in the MTRA. The MTRA specifically authorizes CP to enter and exit the MTRA trackage at CP-502 and the IHBIA is the instrument which effectuates that right. Simultaneous with the filing of this Petition, CP is seeking dismissal of the declaratory judgment action on ripeness and primary jurisdiction grounds.

E. Terminating the IHBIA Would Prevent CP From Utilizing One of the Routes Provided for in the MTRA, and Harm CP, Other Railroads and Customers.

Termination of the IHBIA would affect not only CP's operations but also the efficient movement of freight and passenger traffic in Chicago, the busiest and most congested rail hub in the country. CP operates between CP-509 and its Bensenville Yard over trackage rights on the BRC from CP-509 to Cragin Junction and over Metra's commuter line from Cragin Junction to Bensenville. Verified Statement of Nicholas Walker ("Walker V.S.") at 2. CP currently operates between 6 and 8 manifest service trains daily between CP-509 and Bensenville Yard. *Id.* at 2. Since 2005, CP has used the rights granted by the MTRA and IHBIA to transport a variety of traffic via CP-502 over the 4-mile segment of track into Gibson Yard. Hubbard V.S. at 6.

CP's primary traffic into Gibson Yard is westbound loaded automotive traffic which IHB interchanges to UP and BNSF. Walker V.S. at 2. Currently, CP operates 2 trains per day originating in Eastern Canada over CP-502 for interchange with IHB and processing at Gibson Yard—an 8,000' solid finished automotive train ("the 147 train") and a manifest service train

¹⁰ The IHBIA provides CP and IHB with the right to terminate upon 90 days' written notice. Hubbard V.S. Ex. 2, § 11. It does not provide NS or Conrail with the right to terminate but does require notice upon termination by either CP or IHB. *Id.* Notwithstanding the plain terms of the IHBIA termination provisions, CP does not raise in this Petition any contract interpretation issues that are currently pending before the U.S. District Court for the Northern District of Indiana.

(“the 141 train”). *Id.* Because CP’s trains are limited to 8,000’ between CP-502 and Gibson Yard, the 141 train sometimes includes additional automotive traffic that would otherwise cause the 147 train to exceed the 8,000’ restriction. *Id.* Transit time from when CP exits NS’s trackage at CP-502 until arrival at Gibson Yard is between 45 minutes and 1 hour. *Id.*

At Gibson Yard, IHB breaks up the 147 train and removes the automotive cars from the 141 train and processes the automotive traffic for interchange with UP and BNSF. *Id.* IHB delivers CP’s automotive traffic to UP and BNSF at Gibson Yard the day after it arrives on CP’s train. *Id.* at 2–3. BNSF also receives some of the 147 train’s automotive traffic for interchange at Blue Island Yard for routing to different destinations than the automotive traffic it receives at Gibson Yard. *Id.* IHB delivers this automotive traffic to BNSF at Blue Island Yard on the day following its delivery at Gibson Yard. *Id.* At Gibson Yard, IHB adds manifest and automotive traffic from other carriers to the 141 train, which its crews deliver with CP power to Bensenville Yard pursuant to a haulage agreement. *Id.* Transit time from Gibson Yard to Bensenville Yard for CP’s manifest traffic is approximately 8 hours. *Id.*

Without its ability to exit the MTRA trackage at CP-502, CP would no longer have access to Gibson Yard and its traffic would have to circle through the Chicago terminal before it could be interchanged with BNSF or UP. If the IHBIA were terminated, CP’s fastest and most direct route to interchange westbound traffic to UP and BNSF would be eliminated and CP would be forced to move the traffic via a circuitous, costly and time consuming route. *See map attached as Walker V.S. Ex. 1.*

CP’s 141 and 147 trains would have to exit the MTRA trackage at CP-509 and travel approximately 21.4 miles north on BRC trackage to Cragin Junction. *Walker V.S. at 3.* This would require operation over the 75th Street Corridor, which is widely considered to be one of

the worst choke points for rail movements in Chicago. *Id.* The 75th Street Corridor currently hosts 90 freight trains, 30 Metra commuter trains, and 2 Amtrak trains each day. *Id.* From Cragin Junction, the trains would travel west approximately 8.8 miles over Metra's Elgin line and CP's freight mainline to Bensenville Yard which are subject to significant capacity restrictions. *Id.* Under CP's trackage rights agreement with Metra, Metra commuter trains have priority and CP's operations on the Elgin line are restricted to 16 hours each day. *Id.* Although CP would interchange the 147 train with IHB at Norpaul Yard, approximately 1 mile south of Bensenville Yard, CP's freight main connects to IHB's mainline at B-12 in the southwest quadrant only, which does not permit a progressive westward movement to the south. *Id.* Consequently, instead of proceeding directly to Norpaul Yard with the 147 train, CP would have to continue further west to Bensenville Yard and reposition the locomotive power. *Id.*

At Bensenville Yard, CP's 141 and 147 would each require different handling. *Id.* at 4. As to CP's 147 trains, the current permissible train length over the MTRA trackage is 8,500'. *Id.* However, the corridor between Norpaul Yard and Blue Island Yard restricts trains to 7,800' for safety reasons due to highway crossing and interlocking spacing issues. *Id.* Consequently, CP would have to either reduce the capacity of the 147 train to 7,800' or remove the excess automotive cars at Bensenville Yard and combine them with the other automotive traffic from the 141 train. *Id.* After inspection and any necessary remarshalling of traffic, CP crews would reposition the locomotive power to the opposite end of the train and proceed east to the southwest connection at B-12 and then south to Norpaul Yard. *Id.* The above-described operation from CP-509 to Bensenville Yard for switching, inspection, re-crewing, and transit to Norpaul Yard would require approximately 18 hours. *Id.*

The limited size of Norpaul Yard, however, cannot accommodate the 147 trains without breaking them up and placing them on up to 5 separate tracks. Walker V.S. at 4. As this would severely restrict yard capacity and operations, IHB would likely require CP to leave the 147 trains with CP power attached on the mainline, adding a longer power cycle for the 147 service. *Id.* IHB crews would then deliver the 147 trains to Blue Island Yard, approximately 26 miles from Norpaul Yard. *Id.* There, IHB would process CP's automotive cars with other traffic for interchange with BNSF and reposition them within the yard for pick up by BNSF. *Id.* From the time the CP crew arrived at Norpaul Yard to when CP's automotive traffic was interchanged with BNSF at Blue Island Yard would take 2 days, for a total of 4 days' transit time from when the CP train exited the MTRA trackage at CP-509. *Id.* Compared to CP's current operations via CP-502, BNSF would receive the automotive traffic at least 1 day later if CP were required to operate via CP-509. *Id.* at 4-5.

From Blue Island Yard, IHB crews would take CP's remaining automotive traffic to be interchanged with UP and BNSF at Gibson Yard, approximately 9.15 miles away. *Id.* at 5. At Gibson Yard, the automotive traffic would require additional switching and repositioning before receipt by UP and BNSF, adding approximately another 2 days. *Id.* As a general rule, one additional day of transit time is required every time a rail car requires switching and inspection within a rail yard. *Id.*

In all, exiting the MTRA trackage from CP-509 instead of CP-502 would require moving the automotive traffic nearly 70 miles through the Chicago terminal and processing at 3 busy rail yards – Bensenville, Norpaul, and Blue Island – before arriving at Gibson Yard. *Id.* Compared to CP's current operations via CP-502, the additional operating miles, inspection, and yard

switching would add at least 4 days to the transit time for interchange with BNSF and UP at Gibson Yard. *Id.*

As to CP's 141 trains, after inspection at Bensenville Yard, the manifest traffic for local delivery by IHB within the Chicago terminal would be switched and combined with other IHB interchange traffic on the next scheduled train to Norpaul Yard. *Id.* Due to the transit time from CP-509 and the additional inspection and switching at Bensenville Yard, it is likely the manifest traffic from the 141 train would miss the connection with the regularly scheduled train to Norpaul Yard. *Id.* Consequently, the local manifest traffic would wait an extra day in Bensenville Yard before CP could deliver it to Norpaul Yard, adding approximately 30 hours' transit time. *Id.*

If the IHBIA were terminated, CP would also lose its ability to enter the MTRA trackage at CP-502 with eastbound traffic. *Id.* As CP would no longer be able to receive interchange from IHB at Gibson Yard, the western carriers would lose the most efficient and cost effective return of empty automotive unit trains via the Chicago terminal to CP origins in Eastern Canada. *Id.* at 5–6. After receiving the empty unit trains at Gibson Yard, IHB would deliver them to CP at Bensenville Yard for interchange. *Id.* at 6. In addition to the increased handling and transit time from Gibson Yard, routing these eastbound empty automotive unit trains from Bensenville Yard over Metra and BRC trackage to enter the MTRA trackage at CP-509 would also increase congestion on Metra's commuter line and the 75th Street Corridor. *Id.*

Furthermore, the additional freight traffic over the 75th Street Corridor and the busy Metra commuter train corridor between Cragin Junction and Bensenville required by this circuitous routing would place intensified pressure on and magnify existing congestion in the already-strained Chicago terminal. Terminating the IHBIA would also deprive CP of its ability

to route traffic away from the BRC when congestion builds on the route over CP-509. The end result of terminating the IHBIA would be to add CP trains onto the route over CP-509, which would increase operating costs to CP and all railroads operating in Chicago, and cause delays to carriers and customers alike.

ARGUMENT

I. A DECLARATORY ORDER FROM THE BOARD IS APPROPRIATE TO REMOVE UNCERTAINTY SURROUNDING TERMINATION OF THE IHBIA, WHICH IS INCIDENTAL TO THE MTRA, AND ESSENTIAL TO ITS PURPOSE.

The Board has discretionary power to issue declaratory orders to eliminate controversy or to remove uncertainty. 5 U.S.C. § 554(e) and 49 U.S.C. § 721. In the federal court action, NS seeks a declaratory order that would permit NS to terminate the IHBIA upon 90 days' written notice. Termination of the IHBIA, as NS appears poised to do, would have the effect of substantially modifying the MTRA, thereby depriving CP of the ability to realize the full value and benefits of its Board-authorized trackage rights. Finally, termination would also broadly and negatively impact rail competition, as well as weaken the overall health of the rail network and exacerbate rail congestion in the Chicago Terminal.

This Petition therefore raises an issue that directly concerns the vitality of a fully functioning rail network, and poses for the Board's resolution the question of whether termination of the IHBIA, which is inextricably linked with the MTRA, would require NS to seek and obtain adverse partial discontinuance authority of CP's trackage rights. The implications for CP's operations, its customers, rail competition, and the rail network at large are considerable. The uncertainty as to CP's ability to continue to provide rail service over CP-502 is harmful to CP's ability to maintain existing customers and attract new customers.

Accordingly, the Board should exercise its discretion to resolve the uncertainty by initiating a proceeding, and issuing the requested declaratory order.

A. Termination of the IHBIA Requires Board Approval.

The Interstate Commerce Act, as amended by the Interstate Commerce Commission Termination Act of 1995 (ICCTA) grants the STB broad and exclusive jurisdiction over rail transportation including “exclusive and plenary” jurisdiction over the acquisition, modification, renewal and termination of trackage rights. *See Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 321-23 (1981); *see also Starke Cty. Farm Bureau Co-op. Ass’n, Inc. v. I.C.C.*, 839 F. Supp. 1329, 1332 (N.D. Ind. 1993). A carrier seeking to discontinue operation over trackage rights must seek prior Board authorization to do so. 49 U.S.C. § 10903;¹¹ *Howard v. Surface Transp. Bd.*, 389 F.3d 259, 268 (1st Cir. 2004) (“Rail carriers are subject to the jurisdiction of the STB, and when a rail carrier intends to abandon its underlying rail lines or discontinue rail transportation or trackage rights over a line, it must seek permission by filing an application with the STB”). Likewise, an action that has the effect of forcing a railroad to abandon its trackage rights requires STB authorization. *Id.* at 261 (bankruptcy trustee seeking to compel adverse abandonment of trackage rights held by non-debtors CN and Waterloo must obtain STB authorization under 49 U.S.C. 10903).

¹¹ 49 U.S.C. § 10903 provides in relevant part:

(a)(1) A rail carrier providing transportation subject to the jurisdiction of the Board under this part who intends to—

(A) abandon any part of its railroad lines; or

(B) discontinue the operation of all rail transportation over any part of its railroad lines,

must file an application relating thereto with the Board. An abandonment or discontinuance may be carried out only as authorized under this chapter.

As the Board has recognized, if it concludes that the public convenience and necessity “does not require or permit continued operations over the track by the carrier in question,” the Board’s jurisdiction is removed and the applicant “may pursue other legal remedies to force the carrier off the line.” *Yakima Interurban Lines Assoc.—Adverse Abandonment—In Yakima County, Wa*, STB Docket No. AB-600, slip op. at 4 (STB served Nov. 19, 2004).

In dispute here is NS’s right to terminate an agreement that would effectively terminate CP trackage rights between Detroit and Chicago via CP-502. Accordingly, NS must file an application with the Board and seek Board authorization to terminate the IHBIA. If the Board concludes that the public convenience and necessity does not require or permit CP to operate over CP-502, the Board’s jurisdiction is removed and NS may *then* pursue other legal remedies. *See id.*

B. The Board Has a Duty to Consider the Interests Implicated by Termination of the IHBIA.

In trackage rights discontinuance cases, the STB must consider whether “the present or future public convenience and necessity” require or permit the abandonment or discontinuance. 49 USC 10903(d). The Board is charged with the statutory duty of preserving and promoting continued rail service and providing “the public with a degree of protection against the unnecessary discontinuance, cessation, interruption, or obstruction of available rail service.” *N.Y. Cross Harbor R.R. v. Surface Transp. Bd.*, 374 F.3d 1177, 1187 (2004). In determining whether a party can terminate an agreement, the Board must assess the impact on the railroad, the shippers, interstate commerce and the rail system in general. *Id.* at 1183. The burden is on the party seeking to terminate the agreement. *Id.* at 1186 (concluding the Board impermissibly misapplied the burden of proof by placing it on the objecting railroad and shippers). An abandonment application may be granted, *only if*, after balancing all the relevant interests, the

Board finds “that the present or future public convenience and necessity require or permit the abandonment.” *Id.* at 1185 (quotation omitted).

Here, the implications of termination of the IHBIA on the railroad, the shippers, interstate commerce and the rail system in general is substantial and must be subject to scrutiny under the public convenience and necessity standard. Indeed, the termination of the IHBIA would have several impacts that the Board has previously found unacceptable in a variety of circumstances. Therefore, the Board should exercise its discretion to initiate a proceeding and issue the requested declaratory order so that these implications may be fully considered.

C. Termination of the IHBIA Would Result in Adverse Consequences for CP, Shippers, and Interstate Commerce and the Rail System Generally.

1. Termination of the IHBIA Would Result in a Longer and Less Efficient Route for CP and Its Customers.

The Board has found that actions which have the effect of foreclosing shorter and more efficient routing options for shippers are not in the public interest. *Consol. Rail Corp.—Exemption—Abandonment of the Weirton Secondary Track in Harrison & Tuscarawas Ctys, Oh (“Conrail Abandonment”)*, ICC Docket No. AB-167 (Sub-No. 1088X) (served June 7, 1989); *see also Sw. Gulf R.R. Co.—Constr. & Operation Exemption—Medina*, STB Docket No. 34284 (STB served Dec. 8, 2006) (stating that “a longer route would necessarily have more impacts in terms of noise, air quality and safety”). “Routing inefficiency harms carriers as well as shippers and harms the public interest generally.” *Conrail Abandonment*, ICC Docket No. AB-167, slip op. at 5.¹² Shorter routes are preferred as they “contribute to a sound transportation system.”

¹² The Board reached a similar conclusion in assessing routing of traffic on the stand alone railroad in a rate reasonableness challenge. *See Duke Energy Corp. v. CSX Transp., Inc.*, STB Docket No. 42070, slip. op. at 16 (STB served Feb. 4, 2004) (for reroutings that would result in a longer overall haul, the rebuttable presumption is that the longer route is less efficient; and the greater disparity in distance, the stronger the presumption.”); *see also Duke Energy Corp. v.*

Tongue River R.R. Co.—Constr. & Operation—W. Alignment, STB Finance Docket No. 30183 (Sub-3), slip op. at 3 (STB served Oct. 9, 2007).

Thus, the Board’s predecessor, the ICC rejected an action by a railroad that would have foreclosed use of shorter and more efficient routing. See e.g., *Fibreboard or Pulpboard, Montana to California* (“*Fibreboard*”), 357 I.C.C. Docket No. 36501 (served July 27, 1977). In *Fibreboard*, UP sought to impose higher rates which resulted in closing “the shortest and most energy efficient route” for the shipper. *Id.* at 8. UP argued that the proposed cancellation did not impact the shipper because it still had several available alternative routes. The Board stated that when considering whether to close a route, it should “carefully compare the distance and expense involved before and after the proposed route closing and consider any reduction in energy consumption which may result from it.” *Id.* The Board also articulated the factors it traditionally considers when determining whether to allow a railroad to restrict the routing of traffic. Those factors include whether the retained route is:

shorter, more direct and efficient than the route to be closed . . . [is] less costly, involve[s] less switching, fewer yard interchanges, and shorter transit times than the route to be closed . . . and promote[s] economy and efficiency of operation.

Id. at 9.

The Board refused to permit UP to close the route because it failed to meet any of the enumerated factors – the route following the proposed closing was longer, more expensive, and involved more switching and interchanges. The Board further concluded that the route UP “intends to close commercially is needed to provide adequate and more efficient and more economical transportation than the routes it proposed to retain.” *Id.*

Norfolk So. Ry. Co., STB Docket No. 42069 (STB served Nov. 6, 2003), slip op. at 26 (discussing the presumption that longer routes are generally less efficient than shorter ones).

Here, all the factors considered by the Board in *Fibreboard* favor ensuring that CP retains the route over CP-502. Since 2005, CP has moved hundreds of thousands of rail cars over CP-502 for interchange at Gibson Yard. Currently, this traffic exits CP-502 and moves over a short, four-mile segment of track and arrives at Gibson Yard in less than one hour where it is processed and delivered within one day. Without the ability to utilize CP-502, CP must traverse a circuitous, nearly seventy mile route, through one of the most densely congested rail corridors in North America, to reach Gibson Yard which necessarily adds substantial costs. See *Norfolk & W. Ry. Co., & N.Y., Chicago & St. Louis R.R. Co.--Merger*, ICC Finance Docket No. 21510 (Sub-2), slip op. at 11 (served September 26, 1980) (“circuitous routes add to such important cost items as fuel consumption, labor costs, equipment maintenance, and per diem expense”). Even worse, the routing involves switching and interchanges at three busy rail yards and movements over some of the most congested rail lines in the nation, exacerbating congestion in the heart of the rail network. The additional mileage and processing results in a substantial increase in transit time, sizeable additional expense,¹³ decreased reliability of service, as well as various other costs¹⁴ and, undoubtedly would harm CP’s ability to provide rail service.¹⁵ See *Fibreboard*, 357 I.C.C. at 11 (“[i]ncrease in average transit time . . . represents a serious decrease in the quality of

¹³ The precise cost of operating over the hypothetical route is not clear at this time. Much of the hypothetical route is over IHB and discovery is necessary to determine the cost to operate over IHB’s track.

¹⁴ Other associated costs from longer routes include increase in pollution, fuel costs, and damage to freight.

¹⁵ Termination of the IHBIA would subject CP’s customers to having their traffic rerouted onto a circuitous pattern without any meaningful opportunity to voice their concerns on an issue which affects them. The Board should allow those affected by NS’s attempt to terminate the IHBIA to submit their comments.

service”). At the very least, the Board must have the opportunity to consider these impacts and hear from those who would be impacted before the IHBIA may be terminated.

2. Termination of the IHBIA Would Negatively Impact Interstate Commerce and the Rail System in General.

Termination of the IHBIA would force CP to move hundreds of thousands of rail cars over a much longer route which would negatively affect the flow of rail traffic throughout the Chicago terminal and, in turn, nationwide. As the Board well knows, the Chicago terminal is perennially congested and vulnerable to disruption. Even the smallest disruption to operations in the terminal can have significant consequences that cascade throughout the network. Termination of the IHBIA by NS would eliminate CP’s ability to route traffic over CP-502, substantially undermining both the efficiency and fluidity of CP’s rail operations by adding a significant increase to the volume of traffic moving over CP-509.

CP has moved approximately 30,000 rail cars over CP-502 into Gibson Yard each year. Without the IHBIA, CP will be forced to move that substantial volume of traffic over CP-509, increasing congestion on one of the main corridors through Chicago. This increased volume not only adds transit time for CP, but could likely increase transit times for other carriers as well.¹⁶ Additionally, if there is congestion building or other issues on the BRC, CP can help maintain and/or restore fluidity in the Chicago terminal by diverting traffic over CP-502. Termination of the IHBIA would eliminate this critical “relief valve.” The Board must have the opportunity to consider the harm to interstate commerce that termination of the IHBIA would inevitably cause.

Accordingly, CP requests that the Board issue an order declaring that termination of the IHBIA requires NS to seek and obtain prior Board authorization.

¹⁶ Other carriers should have the opportunity to be heard on how termination of the IHBIA would impact them.

PROPOSED PROCEDURAL SCHEDULE

Finally, CP requests that, given the significance of this proceeding, and the far-ranging effects that are implicated by NS's attempt to terminate the IHBIA, the Board have before it a robust and complete record. To that end, CP requests that the Board permit discovery in this case, and that it further adopt the following procedural schedule, which provides the parties with an opportunity to conduct discovery and to develop fully their positions:

- Day 1 – Board initiates proceeding; discovery begins;
- Day 120 – Discovery ends;
- Day 150 – CP opening evidence and brief due;
- Day 180 – NS substantive reply/public comment due;
- Day 210 – CP rebuttal due.

CONCLUSION

For the reasons stated herein, CP requests that the Board issue a declaratory order as described above. In advance of issuing such an order, CP further requests that the Board initiate a declaratory order proceeding, permit discovery, and establish a hearing schedule that provides for the development of a full and complete record, and that provides a reasonable and adequate time for CP to file rebuttal testimony.

Respectfully submitted,

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Counsel for Soo Line Railroad Company

Dated: March 13, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of March, 2017, I served the foregoing Petition for Declaratory Order of the Soo Line Railroad Company d/b/a Canadian Pacific by email and by first class mail, postage-prepaid, on the following:

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David F. Rifkind

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 36107

SOO LINE RAILROAD COMPANY -- PETITION FOR DECLARATORY ORDER

VERIFIED STATEMENT OF CHARLES E. HUBBARD

My name is Charles Hubbard. In 1986, I began working as an employee for Soo Line Railroad Company which, together with affiliated operating rail companies in the United States and Canada, does business as Canadian Pacific ("CP"). During my tenure with CP, I have served in a variety of roles including planning, accounting, operational, commercial, and management positions and currently serve as CP's Director; Interline and Passenger-South. Since 1992, I have been involved in various aspects of joint facilities contracts between railroads. From 2000 to 2007, I was CP's Manager of Interline Agreements. From 2007 to 2012, I held the position of Specialist-US. In 2013, I held the position of CP's Manager of Joint Facilities-US and in 2014, I was promoted to my current position.

In my positions at CP, I have become familiar with CP's rail networks, facilities and operations throughout North America. My responsibilities include ensuring that CP's joint facilities agreements with other railroads are properly drafted from a strategic perspective and properly administered from the operational, budgeting, and administrative perspectives. In particular, I am familiar with the history of CP's rail movements between Detroit and Chicago including the Michigan Trackage Rights Agreement ("MTRA") and the related Indiana Harbor Belt Interchange Agreement ("IHBLA") which delineate CP's rights in and out of the Chicago

terminal. I was personally involved at the time those agreements were negotiated and drafted. In addition, as described below, I was personally involved in a prior dispute related to the scope of the MTRA and IHBIA and testified at an arbitration hearing about their intent and implementation. A true and correct copy of the public version of the MTRA that was filed with CP's Notice of Exemption on June 6, 2005 is attached hereto as Exhibit 1. A true and correct copy of the IHBIA is attached hereto as Exhibit 2.

Purpose

The purpose of my statement is to explain the genesis of the MTRA and the rationale behind the IHBIA, and to describe the importance of those agreements to maintaining fluidity in the Chicago terminal, CP's traffic movements pursuant to those agreements since their execution, and the dispute that CP and NS recently arbitrated regarding the scope of those agreements.

CP's Rail Network

CP's North American rail network consists of approximately 12,500 miles of trackage from the Pacific to Atlantic coasts in Canada, from Vancouver to Chicago and Kansas City and from Montreal to Detroit and Albany, New York. Between the Midwestern United States and Eastern Canada, CP carries merchandise traffic (automotive vehicles and parts, forest products, chemicals and plastics, petroleum products and crude oil, metals, minerals, and consumer products), bulk traffic including agricultural products and grain, and international and domestic intermodal traffic.

The Gap Between Detroit and Chicago

Following its 1985 acquisition of the Milwaukee Road's assets from the bankruptcy trustee, CP sold the duplicative rail lines of its Lake States Division to Wisconsin Central Ltd.

("WCL") in 1987. The WCL sale included CP's rail lines in the Upper Peninsula of Michigan which had provided CP a direct connection at Sault Ste. Marie between its operations in the Midwest United States and its corporate affiliate in Canada. Consequently, the sale created a significant gap in CP's operations which increased in significance when CP acquired the Delaware and Hudson assets in the Northeast United States in 1991. CP initially addressed this gap by obtaining haulage rights between Chicago and Detroit. Beginning in 1985, CP moved all of its traffic between Chicago and Detroit under a Joint Use Agreement with Chesapeake and Ohio Railway ("C&O") and its successor CSX Transportation Company ("CSXT"). Under the Joint Use Agreement, C&O and CSXT provided haulage services for CP.

MTRA and IHBIA Fill the Gap

In the early 2000s, following Norfolk Southern Railway Company's ("NS") and CSXT's acquisition of Conrail, CP and NS negotiated a variety of strategic agreements that would restructure their respective operations in the Northeast and Midwest United States. Among those strategic agreements were the June 2, 2005 MTRA, signed by CP and NS, and the July 15, 2005 IHBIA, signed by CP, NS, IHB, and Conrail. I was personally involved in both the negotiation and drafting of the MTRA on behalf of CP and in CP's internal analysis of the IHBIA.

The MTRA moved CP's Chicago-Detroit service from haulage rights on CSXT to trackage rights on NS, which improved CP's access and control over its operations through the busy Chicago terminal. Under the MTRA, CP has the right to operate its trains with its own crews between Detroit and Chicago. In Chicago, CP has the choice of entering and exiting NS's line at CP-509, its connection with the Belt Railway of Chicago ("BRC") or CP-502, its connection to the Indiana Harbor Belt Railroad ("IHB"), and NS is required to "use its best efforts to accommodate" CP's choice for each train. Thus, the MTRA provides CP with two

routes through the Chicago terminal, one over CP-509 and another over CP-502. Attached hereto as Exhibit 3 is a map illustrating the two routes through the Chicago terminal contemplated by the MTRA.

Chicago is particularly important to CP. In 2016, roughly 20% of all CP traffic touched Chicago and 48% of all CP interchange traffic was interchanged at Chicago. As a result, CP's operational performance is tied directly to the fluidity of the Chicago Terminal. If there is a disruption in Chicago, it is likely to negatively affect CP operations well beyond Chicago. During the winter of 2013-14, when strong freight volumes coupled with severe winter weather plunged the Chicago Terminal into gridlock, the impact was felt across the national rail network and particularly by CP. Recovery was difficult and slow, taking the better part of a year.

Because the Chicago terminal is congested and vulnerable to disruption, CP's ability to enter and exit the terminal through two different points in either direction provides CP with invaluable operational flexibility and helps CP maintain fluidity in the area. Having the option to use CP-502 helps CP avoid or ease congestion on one of the main arteries into Chicago (CP-509). This flexibility is particularly important in instances of "alert levels" caused by snow storms and other unpredictable events, which negatively affects train operations in the Chicago terminal. In addition, different types of traffic are naturally routed in different ways through the Chicago terminal. Automotive traffic is routed via CP-502 for interchange with IHB at Gibson Yard for furtherance to western destinations by BNSF Railway ("BNSF") and Union Pacific Railroad ("UP"). Some manifest traffic and crude oil traffic also moves via CP-502, but most of CP's manifest traffic, including crude oil unit trains, is routed via CP-509 over BRC and Metra trackage rights to Bensenville Yard.

Once CP's MTRA trackage rights became effective, CP began moving its trains over CP-509 via its trackage rights over the BRC and Metra to reach CP's Bensenville Yard. At the time the MTRA was executed, CP did not have rights west of CP-502 and therefore no way to enter or exit the NS trackage at CP-502. CP and NS contemplated that IHB would grant CP overhead trackage rights from CP-502 to connect with CP's existing IHB trackage rights between Dolton and Franklin Park. This expectation is evidenced in Section 2(e)(i) which provides that CP may use the Detroit-Chicago trackage rights solely for "the overhead movement of any commodity in the revenue waybill account of SOO or Canadian Pacific Railway Company . . . provided, that such traffic has both a prior and subsequent movement on CPR lines (including trackage rights held by CPR over other carriers): (A) east of, but not including, Detroit, MI; and (B) west of, but not including, CP-502 or CP-509 or such other End Point(s) in the vicinity of Chicago as may be permitted by this Michigan Trackage Rights Agreement."

However, CSXT blocked the CP-IHB trackage rights agreement. As owner of the Gibson Yard to Calumet Park portion of the trackage between CP-502 and Dolton, CSXT's consent to the CP-IHB trackage rights agreement was required. After CP moved its haulage business away from CSX to NS, CSXT refused to grant consent. Thus, CP could not use CP-502, one of the two entrance and exit points in Chicago granted by the MTRA. In response to CSXT's refusal, the parties looked for another solution to enable CP to enter and exit the NS trackage at CP-502.

IHBIA is Executed to Enable CP to Use the MTRA Trackage Rights via CP-502

That solution was the IHBIA. Six weeks after the signing of the MTRA, CP executed the IHBIA with NS, IHB, and Conrail. The IHBIA granted CP operating rights between CP-502 and

Gibson Yard for interchange with IHB. These "operating rights" did not require CSXT's consent.

Since 2005, CP has operated a variety of traffic smoothly and efficiently over CP-502 and CP-509 pursuant to its rights under the MTRA and IHBIA. This traffic has included approximately 30,000 rail cars each year over CP-502. In 2016, the traffic over CP-502 included approximately 24,000 loaded westbound automotive rail cars for interchange with IHB at Gibson Yard, westbound manifest traffic, and approximately 20,000 empty eastbound automotive rail cars returning to Eastern Canada.

NS Seeks to Limit the Type of CP Traffic Moving Via CP-502

In 2013, CP began moving loaded and empty crude oil unit trains that originated on BNSF via Gibson Yard over CP-502 and the MTRA trackage to Detroit and points beyond. On March 31, 2014, however, NS questioned for the first time whether CP's movement of certain crude oil trains over CP-502 via Gibson Yard was permitted by the MTRA and IHBIA. Shortly thereafter, NS refused to accept an eastbound loaded CP oil train leaving Gibson Yard destined for CP-502. NS's refusal to allow CP's oil train to enter the MTRA trackage at CP-502 imposed immediate and severe consequences for CP, its customers, and the other railroads operating in the Chicago terminal. NS demanded a \$323 premium per loaded and empty car to allow CP's crude oil traffic to move over CP-502 via Gibson Yard. This premium payment was not authorized in the MTRA or the IHBIA. However, in order to move CP's oil traffic and not disrupt its customers, CP agreed to the premium payment under protest until arbitration of the issue could be completed. Both parties agreed NS would refund the premium if CP was successful in arbitration.

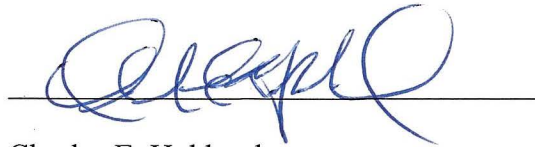
The Arbitration Panel Unanimously Rules for CP

In October 2014, CP filed a Demand for Arbitration with the American Arbitration Association to determine the scope of its rights under the MTRA and IHBIA. An arbitration hearing was held in Chicago in June 2016. I testified as a witness at the arbitration hearing about my involvement with the negotiations of the MTRA and the necessity of the IHBIA.

The arbitration panel unanimously ruled in CP's favor on September 8, 2016. Attached hereto as Exhibit 4 is a true and correct copy of the arbitration award. The arbitration award states "[t]he only rights CPR has west of CP-502 for the traffic in question are the rights granted by the IHBIA, an agreement which is obviously related to the MTRA and plainly has an impact on the rights of CPR under the MTRA." The arbitrators further determined that the IHBIA's operating rights must be read as satisfying the MTRA's requirement of a "prior and subsequent movement" on CP tracks or CP trackage rights and that "the IHBIA's 'operating rights' grant essentially the same bundle of rights as a formal trackage rights agreement" because the IHBIA permits CP "to operate its trains with its own crews." Ultimately, the panel concluded that "NS does not have the right to limit or restrict [CP] traffic from entering or exiting the MTRA trackage via CP-502 based upon commodity, train type, direction, or prior or subsequent movement via IHBIA operating rights."

VERIFICATION

I, Charles E. Hubbard, declare under penalty of perjury that I am authorized to make this verification on behalf of Soo Line Railroad Company, and that the information included in the foregoing statement is true and correct to the best of my knowledge and belief.



Charles E. Hubbard
Director; Interline and Passenger-South
Soo Line Railroad Company

Dated: March 7, 2017

Exhibit 1
Michigan Trackage Rights Agreement

MICHIGAN TRACKAGE RIGHTS AGREEMENT

THIS TRACKAGE RIGHTS AGREEMENT ("Michigan Trackage Rights Agreement" or "Agreement") is made this 25th day of May, 2005 by and between SOO LINE RAILROAD COMPANY, a Minnesota corporation ("SOO"), and NORFOLK SOUTHERN RAILWAY COMPANY, a Virginia corporation ("NSR"). SOO and NSR each are sometimes referred to hereinafter individually as a "Party" and collectively as the "Parties".

WITNESSETH:

WHEREAS, NSR has agreed to grant to SOO, and SOO has agreed to acquire from NSR, trackage rights over certain of NSR's railroad lines between Delray Interlocking (Delray Tower) in Detroit, MI, on the one hand, and certain points on NSR's lines in Chicago, IL, on the other hand, as described in Section 1 of this Agreement; and

WHEREAS, the Parties desire to set forth the terms and conditions upon which NSR shall grant, and SOO shall exercise, such trackage rights;

NOW, THEREFORE, the Parties hereto, intending to be legally bound, agree as follows:

SECTION 1. GRANT OF TRACKAGE RIGHTS

(a) On the terms and subject to the conditions herein provided, NSR hereby grants to SOO the right to operate its trains, locomotives, cars and equipment with its own crews (such rights being referred to hereinafter as the "Subject Trackage Rights") over the following route on NSR railroad lines, all as shown in detail on Exhibit A to this Agreement:

(i) between Delray Interlocking in Detroit, MI at Milepost 4.4 $\pm$ of the Detroit District ("Delray Tower"), on the one hand, and the point of connection of the new 1982 foot (0.37 mile) long Butler Connecting Track at Milepost D113.65 $\pm$ of NSR's Huntingdon District Line, on the other hand (the "Detroit Segment"); and

(ii) between point of connection of the Butler Connecting Track at Milepost D113.65 $\pm$ of NSR's Huntingdon District Line and the point of connection of the Butler Connecting Track with NSR's Chicago Line at Milepost CD358.56 $\pm$ (the "Butler Segment"); and

(iii) between point of connection of the Butler Connecting Track with NSR's Chicago Line at Milepost CD358.56 $\pm$, on the one hand, and one of the following two points in Chicago, IL, on the other hand: (i) CP-502 at Milepost 502.8 $\pm$ and (ii) CP 509 at Milepost 509.7 $\pm$ (the "Chicago Segment"), a total distance of 253.9 miles (in the case of CP-502) and 260.8 miles (in the case of CP-509). The Detroit Segment, the Butler Segment and the Chicago Segment, which are referred to collectively hereinafter as the "Subject Trackage", are each non-separable segments of the single unified route over which the Subject Trackage Rights are granted. Delray Tower, CP-502 and CP-509 are referred to hereinafter as the "End Points".

SECTION 2. USE OF SUBJECT TRACKAGE

(a) SOO's use of Subject Trackage shall be in common with NSR, and NSR's right to use the Subject Trackage shall not be diminished by this Michigan Trackage Rights Agreement.

(b) SOO may operate trains in either direction over the Subject Trackage.

(c) SOO shall determine on a day-to-day, train-by-train, basis whether to enter and exit the Subject Trackage via CP-502 or CP-509 or such other End Point(s) in the vicinity of Chicago as may be permitted by this Michigan Trackage Rights Agreement. NSR shall use its best efforts to accommodate the routing specified by SOO for each SOO train.

(d) SOO shall advise NSR's designated operating officer of the intended routing for each SOO train in accordance with the operating protocols prescribed by the Services Standards Committee (as defined in Section 4(c)) from time to time. NSR's designated operating officer shall direct SOO, on a train-by-train basis, whether it should use the route via CP-502 or via CP-509; provided, that such instructions shall generally be consistent with the operating protocols prescribed by the Services Standards Committee. SOO shall have no claim against NSR for NSR's failure to accommodate SOO's requested routing, or for any delay to SOO train(s) caused by such failure or for any other claim arising out of an alleged breach of Section 2(c) or 2(d).

(e) SOO may use the trackage rights granted herein solely for the purposes of:

(i) subject to Section 16(c), the overhead movement of any commodity in the revenue waybill account of SOO or Canadian Pacific Railway Company ("CPRC") (SOO and CPRC are referred to collectively hereinafter as "CPR"); provided, that such traffic has both a prior and subsequent movement on CPR lines (including trackage rights held by CPR over other carriers): (A) east of, but not including, Detroit, MI; and (B) west of, but not including, CP-502 or CP-509 or such other End Point(s) in the vicinity of Chicago as may be permitted by this Michigan Trackage Rights Agreement, as applicable ("CPR Chicago-Detroit Traffic"); and

(ii) handling CPR Intermodal Traffic (as defined in Section 2(e)(ii)(B) herein) between a CPR Legacy Point (as defined in Section 2(e)(ii)(A) herein) and Livernois Yard in Detroit, MI (or Oak Yard, instead of Livernois Yard, should CPR make arrangements for continued operations at Oak Yard), moving by way of Chicago, and not interlined in the United States (directly or indirectly) with Union Pacific Railroad Company, Burlington Northern and Santa Fe Railway, CN, CSXT or any other carrier.

A. A "CPR Legacy Point" is a point located on CPRC or SOO, not including rail loading facilities in Anoka, Hennepin, Ramsey, Washington, Scott, Carver and Dakota Counties, MN, as those two railroads are physically configured (including both owned or leased lines and trackage rights) as of June 30, 2004.

B. "CPR Intermodal Traffic" is intermodal container or trailer traffic that does not contain finished autos or trucks.

(iii) handling CPR Intermodal Traffic between CPR Legacy Points and the proposed new public-private partnership Detroit Intermodal Freight Terminal (DIFT) or a similar future public/private consolidated Detroit-area rail facility handling intermodal traffic (container or trailer traffic) constructed instead of DIFT, regardless of whether that facility is located in Livernois Yard or otherwise; provided, however, that SOO's use of the Subject Trackage in conjunction with movements to or from such facility shall be subject to the terms and conditions governing the movement of CPR Intermodal Traffic set forth in this Michigan Trackage Rights Agreement; provided further that nothing herein shall be interpreted as requiring NSR to grant new rights in order to permit CPR to reach said terminal nor shall it be interpreted as specifying the terms and conditions of said rights if granted.

(f) SOO locomotives and crews operating over the Subject Trackage shall be equipped to communicate with NSR on radio frequencies normally used by NSR in directing train movements on the Subject Trackage.

(g) Procedures for qualification and occupancy of the Subject Trackage will be arranged by the local supervision of each carrier. SOO's operations over the Subject Trackage shall at all times be subject to the direction and control of the NSR operating officer in charge of the Subject Trackage and to applicable provisions of NSR's safety and operating rules.

(h) Before a SOO train enters the Subject Trackage, SOO shall confirm to NSR that the crew operating such SOO train has the ability to make a complete and continuous movement over the Subject Trackage either (i) to and beyond an End Point, or (ii) to a SOO crew relief point (in which case SOO shall also confirm that a relief crew will be available promptly upon arrival of such SOO train at the crew relief point).

(i) NSR shall use its best efforts to allow, at no charge to SOO, SOO operating (train and engine) crews to utilize NSR's personnel facilities at Elkhart, IN solely for changing crews on SOO trains moving over the Subject Trackage. If NSR's existing personnel facilities are not adequate to accommodate both NSR's and SOO's personnel, NSR shall permit SOO to construct or locate its own facilities for such purpose on or along the Subject Trackage at Elkhart, IN. In such event, SOO shall pay the cost to establish such facilities at Elkhart, IN, and NSR shall pay the cost of utilities provided to the facilities established by SOO.

(j) NSR shall provide SOO equal access to the NSR crew taxi services at Elkhart, IN, if that is possible under NSR's current contract for such services. If the provision of crew taxi services to SOO under NSR's current contract is not possible, NSR shall use its best efforts to obtain an amendment to its current contract to permit the provision of crew taxi services to SOO crews, and the incremental cost thereof shall be the responsibility of SOO. If NSR's current contract cannot be amended to permit the provision of crew taxi services to SOO, SOO may arrange for its own crew bus services at Elkhart, IN.

(k) SOO may set out cars bound to or from Canada ("Customs Cars") at NSR's Oakwood Yard in Detroit when United States Customs and Border Protection ("CBP") requires that such cars be held for (i) insufficient or incomplete documentation or (ii) inspection, and may pick up Customs Cars at Oakwood Yard upon their release by CBP. NSR may place Customs

Cars at such location in Oakwood Yard that is convenient pending customs clearance of the Customs Cars; provided that:

(i) where Customs Cars require physical inspection, NSR shall place such cars in a location suitable to CBP in Oakwood Yard;

(ii) where Customs Cars carrying intermodal units (containers or trailers) ("Intermodal Units") require physical inspection, NSR shall transfer such cars to Delray Intermodal Terminal, or such other location(s) in the Detroit area as may be designated by NSR in its discretion from time to time, and lift such Intermodal Units onto the ground at a location suitable to CBP in Delray Intermodal Terminal. If CBP requires that the contents of an Intermodal Unit be removed for inspection, NSR shall lift such Intermodal Unit onto a truck for transfer to an offsite location pursuant to arrangements paid for and made by SOO; and

(iii) should Customs Cars carrying Intermodal Units cause congestion at Oakwood Yard, NSR may transfer a sufficient number of such Customs Cars to Delray Intermodal Terminal to relieve such congestion.

NSR shall, if necessary, lift Intermodal Units onto Customs Cars at Delray Intermodal Terminal, and shall return Customs Cars from Delray Intermodal Terminal to Oakwood Yard, upon receiving notice from SOO that CBP has released such Customs Cars. NSR shall, upon receiving notice from SOO that CBP has released such Customs Cars, place such Customs Cars at a location in Oakwood Yard designated by NSR where SOO may switch such Customs Cars into SOO trains.

If NSR pursuant to section 2(k)(ii), at any time or from time to time, designates, in replacement of Delray Intermodal Terminal, a location or locations in the Detroit Area to which Customs Cars carrying Intermodal Units will be transferred for the purpose of CBP physical inspections or relieving congestion in Oakwood Yard, the Customs Lift Charge (as defined in section 5(c)(ii)) shall, if necessary, be amended to fully compensate NSR for the cost of each lift of an intermodal unit under this section 2(k), and such amended Customs Lift Charge shall thereafter be adjusted in accordance with the provisions of section 5(d).

SOO may also set out cars bound to Canada ("Misroute Cars") at NSR's Oakwood Yard in Detroit when such cars must be set off in Detroit from eastbound trains so as to prevent the cars from entering into Canada when such cars are misrouted from the United States to Canada. SOO may pick up Misroute Cars at Oakwood Yard when SOO has a westbound train available which the Misroute Cars may be switched into.

SECTION 3. RESTRICTIONS ON USE

(a) The Subject Trackage Rights are granted for the sole purpose of SOO using the Subject Trackage to operate its trains in overhead movements, with ingress and egress rights only at a Detroit-area End Point, on the one hand, and a Chicago-area End Point, on the other hand.

(b) SOO shall not have the right to enter or leave the Subject Trackage except at the End Points.

(c) SOO shall not perform any local freight service whatsoever at any point located on the Subject Trackage.

(d) SOO shall not interchange any traffic with any other carrier at any point on or along, or at the End Points of, the Subject Trackage.

(e) SOO shall not have the right to serve existing or future shippers at facilities located on or along, or at the End Points of, the Subject Trackage.

(f) Except as may otherwise be permitted by this Michigan Trackage Rights Agreement, SOO shall not use any part of the Subject Trackage for the purpose of switching, storage or servicing cars or equipment, or the making or breaking up of trains, except as necessary for the handling of locomotives, cars or cabooses which are bad order en route, or that must be set off for safety or regulatory reasons; provided, that SOO shall use such auxiliary Subject Trackage as may be designated by NSR for such purposes.

(g) SOO may not grant trackage rights of any nature on the Subject Trackage to other parties.

(h) Notwithstanding any other provision of this Michigan Trackage Rights Agreement to the contrary, SOO may not permit or admit any third party to the use of all or any part of the Subject Trackage, nor may SOO contract or make any agreement to provide haulage over the Subject Trackage of trains, locomotives, cars or cabooses of any third party which, in the normal course of business, would not be considered as the trains, locomotives, cars or cabooses of SOO, or in any other way provide haulage service for other carriers over the Subject Trackage; provided, that this Section 3(h) shall not be construed to prohibit SOO from using the locomotives, cars and cabooses of another railroad as its own in SOO trains pursuant to a run-through agreement with any railroad, or a bona fide equipment lease.

(i) Notwithstanding any other provision of this Michigan Trackage Rights Agreement to the contrary, SOO expressly agrees that it will not, under any circumstances, use the Subject Trackage to handle finished automobiles, trucks or vehicle parts (collectively, "Automotive Traffic") destined to or originating in the Detroit-Warren-Livonia MI Metropolitan Statistical Area (2004) ("Detroit MSA"). Further, SOO specifically agrees that, should the rights granted herein be modified in any way without NSR's consent, to permit CPRC, SOO or their successors or assigns to use the Subject Trackage Rights to handle Automotive Traffic to or from the Detroit MSA, then the Michigan Trackage Rights Charge set forth in Section 5(b) shall immediately and without action of any of the Parties, be increased, for any Automotive Traffic handled via the Subject Trackage Rights, to [

].

(j) The Parties agree that rebilling of traffic in the Detroit area or the Chicago area is not a permissible method of avoiding any direct traffic limitation set forth in this Agreement.

(k) This Michigan Trackage Rights Agreement is not intended to, and shall not operate to, expand or contract any Party's existing commercial access to, or right to serve (directly or through switching), any particular shipper facility. If, following the Commencement Date of this Agreement (as defined in Section 13(a) hereof), a new facility (including a transload facility) opens, or an existing facility expands or changes ownership (in each case, a "New Facility"), SOO's commercial access or right to serve such facility shall be the same as if such New Facility had existed prior to the Commencement Date of this Agreement, and shall be neither expanded nor reduced by this Agreement.

(l) The length of SOO trains (including locomotives and other motive power units) operating on the Subject Trackage shall not exceed 8500 feet subject to compliance with operating policies applied to NSR's own trains. The maximum train length set forth in this Section 3(l) may be adjusted by the Services Standards Committee (as defined in Section 4(c)) from time to time consistent with NSR's governing operating practices and procedures.

(m) SOO's use of the Subject Trackage pursuant to this Agreement shall be subject to the following maximum volume limitations (none of which may be exceeded at any time by SOO, each of which is referred to hereinafter as a "Maximum Volume Restriction"):

(i) SOO may move no more than an average of [] trains per calendar day (measured over a calendar week [Sunday to Saturday] period) over the Subject Trackage.

(ii) SOO may move no more than [] trains over the Subject Trackage on any calendar day. In doing so, SOO trains operating on any particular calendar day need not be directionally balanced; in other words, SOO need not move the same number of trains eastbound each day as it moves westbound. SOO may move up to [] trains per calendar day in the westbound direction, or up to [] trains per calendar day in the eastbound direction; provided that the total number of SOO trains operated over the Subject Trackage on any particular calendar day does not exceed the Maximum Volume Restrictions.

(iii) If the Subject Trackage is unavailable to SOO due to a derailment, line outage or other interruption of service on the Subject Trackage, or if CPR experiences a derailment, an unintended line outage or other unintended interruption of service on its own lines connecting to, and necessary to reach, the Subject Trackage, in each case for a period of time (the "Outage Period") greater than twenty-four (24) hours, and no detour is available, then NSR shall cooperate and consult with SOO in order to address any resulting backlog of trains over a period of time (the "Resolution Period") following the resolution of such derailment, line outage or other interruption of service (including the possibility of waiving the Maximum Volume Restrictions set forth in this Section 3(m) for the Resolution Period as may be required to reduce such backlog of SOO trains); provided, however, that the Maximum Volume Restriction set forth in Section 3(m)(i) shall not be exceeded as measured over an average of the Outage Period plus the Resolution Period.

SECTION 4. SERVICE STANDARDS

(a) The Parties anticipate that, upon the commencement of SOO operations under this Michigan Trackage Rights Agreement, the expected average transit time for movement between the Detroit-area End Points and the Chicago-area End Points of the Subject Trackage (subject to the vagaries of railroad operations) will be as set forth in the schedule attached hereto as Exhibit B. Notwithstanding the foregoing, SOO hereby acknowledges that NSR makes no guarantee as to the actual transit time for any SOO train, and there shall be no penalty imposed on NSR for failure to meet the anticipated transit time set forth in this Section 4(a) over any period of time, nor shall SOO have any right to seek damages from NSR on account of such failure. The Parties agree that this Section 4(a) addresses expected average transit time and Section 9(a) addresses dispatching, which matters are separate and distinct.

(b) SOO shall provide the Service Standards Committee notice of the schedules for regularly scheduled SOO trains operating over the Subject Trackage, as well as any proposed modifications. SOO shall provide the Service Standards Committee at least seven (7) days prior written notice of such changes in SOO train schedules or frequencies, and notice as reasonably practicable in the case of train annulments and, subject to the Maximum Volume Restrictions set forth in Section 3(m), extra trains necessitated by sudden or seasonal surges in traffic volumes.

(c) NSR and SOO shall establish a Service Standards Committee consisting of appropriate operating personnel of each Party, which shall: (i) monitor, and periodically review, the performance of the Parties under this Michigan Trackage Rights Agreement, (ii) carry out such duties as may be assigned to it in this Agreement, including without limitation the prescription of protocols specifying (A) the method and length of advance notice by SOO to NSR of the End Point in Chicago, IL at which SOO wishes to enter or exit the Subject Trackage; and (B) the method and length of advance notice by SOO to NSR of train annulments and extra trains resulting from sudden or seasonal surges in traffic volumes, (iii) review, and adjust as required from time to time, schedules for trains operating on the Subject Trackage, and (iv) address any other operating issues that may arise in connection with SOO's operations hereunder. Meetings of the Service Standards Committee may be convened by either Party as required to fulfill its duties under this Agreement. The Service Standards Committee may meet by telephone or at such location as the Parties may agree.

SECTION 5. COMPENSATION

(a) Generally.

(i) SOO shall compensate NSR for the use of the Subject Trackage by paying to NSR a sum computed by multiplying (a) the Michigan Trackage Rights Charge (as defined in Section 5(b) of this Agreement) by (b) the number of cars (loaded or empty) and locomotives moved over the Subject Trackage by (c) the actual miles of the Subject Trackage over which the cars and/or locomotives are moved (which are agreed to be 253.9 miles for the Subject Trackage between Delray Tower and CP-502, and 260.8 miles for the Subject Trackage between Delray Tower and CP-509). In computing the compensation payable by SOO pursuant to this Section 5,

[]

(b) The Michigan Trackage Rights Charge.

The Michigan Trackage Rights Charge shall initially be []. Should there be a change of control of D&H involving CN, the Michigan Trackage Rights Charge will immediately, and without further action of the parties (including CN), convert to an amount equal to [].

(c) Customs Charges

(i) SOO shall pay to NSR [], as compensation for the transfer of Customs Cars between Oakwood Yard and Delray Intermodal Terminal (payment applicable in each direction) pursuant to section 2(k) (the "Customs Transfer Charge").

(ii) SOO shall pay to NSR [], as compensation for each lift of an intermodal unit on to or off of a Customs Car, or on to or off of a truck for transfer to an offsite location, pursuant to section 2(k) (the "Customs Lift Charge"); provided that if SOO enters into an arrangement with the terminal operator lifting Intermodal Units pursuant to section 2(k) under which SOO pays directly, or makes arrangements for payment directly to, such terminal operator and as a result NSR does not incur any costs for the lifting of such Intermodal Units, SOO shall not be required to pay the Customs Lift Charge to NSR.

(The Customs Transfer Charge and the Customs Lift Charge are collectively referred to as the "Customs Charges".)

(d) Adjustment of Charges

(i) The Michigan Trackage Rights Charge and the Customs Charges shall be adjusted upward or downward effective July 1 each year, beginning July 1, 2005, to compensate NSR for one hundred percent (100%) of any increase or decrease in the cost of labor and material, excluding fuel, as reflected in the Annual Indices of Charge-out Prices and Wage Rates (1977=100), Series RCR, included in "the AAR Railroad Cost Index" issued by the Association of American Railroads ("AAR"); provided, however, that the Michigan Trackage Rights Charge shall in no event be decreased to a level below [], as the case may be subject to Section 5(b), the Customs Transfer Charge shall in no event be decreased to a level below [], and the Customs Lift Charge shall in no event be decreased to a level below []. In determining the amount (if any) of the annual adjustment, the final "Material prices, wage rates and supplements combined (excluding fuel)" index for the Eastern District shall be used, and the calendar year ending December 31, 2003 shall be deemed the "Base Calendar Year."

(ii) The first annual adjustment to the Michigan Trackage Rights Charge and the Customs Charges shall be computed by calculating the percentage of increase or decrease in the final index for the calendar year ending December 31, 2004, as related to the final index for

the Base Calendar Year, and applying that percentage to the initial Michigan Trackage Rights Charge set forth in Section 5(b), the initial Customs Transfer Charge set forth in section 5(c)(i), or the initial Customs Lift Charge set forth in section 5(c)(ii), as the case may be. Subsequent annual adjustments will be computed by calculating the percentage of increase or decrease in the final index published for the calendar year immediately preceding the year in which the adjustment is to be applied, as related to the final index published for the Base Calendar Year, and applying that percentage to the initial Michigan Trackage Rights Charge set forth in Section 5(b), the initial the Customs Transfer Charge set forth in section 5(c)(i), or the initial Customs Lift Charge set forth in section 5(c)(ii), as the case may be.

By way of example with respect to the Michigan Trackage Rights Charge, assuming "A" to be the "Material prices, wage rates and supplements combined (excluding fuel)" final index for the Base Calendar Year; "B" to be the "Material prices, wage rates and supplements combined (excluding fuel)" final index for the calendar year 2004; "C" to be the initial Michigan Trackage Rights Charge; and "D" to be the percentage of increase or decrease, the adjusted Michigan Trackage Rights Charge to be applied on and after July 1, 2005 would be determined by the following formula:

$$(1) \quad (B - A) / A = D$$

$$(2) \quad (C \times D) + C = \text{adjusted Michigan Trackage Rights Charge, effective July 1, 2005.}$$

(iii) If the base for the "Annual Indices of Charge-out Prices and Wage Rates" issued by the AAR is changed from the year 1977, an appropriate revision shall be made in the base (established as herein provided) for the calendar year 1977. If the AAR or any successor organization discontinues publication of the "Annual Indices of Charge-out Prices and Wage Rates," an equitable substitute for determining the annual percentage of increase or decrease shall be negotiated by the Parties. In the absence of agreement, the Parties shall submit the issue to binding arbitration in the manner prescribed in Section 14.

(iv) On or before the 15th day of each calendar month during the term of this Michigan Trackage Rights Agreement, SOO shall prepare and deliver to NSR a statement setting forth the number of cars and miles operated on the Subject Trackage pursuant to this Michigan Trackage Rights Agreement during the immediately preceding month (the "Monthly Statement"). The Monthly Statement shall be delivered to NSR's Manager Miscellaneous Billing in electronic format, and shall contain a detailed list of the cars that moved during the subject month, which list shall include, for each car, the following information: (1) car initial and number, (2) the respective End Points that the car moved between, (3) whether the car exceeded ninety-six (96) feet in length (including, without limitation, articulated cars), (4) for each car exceeding ninety-six (96) feet in length, the number of axles on such car, and (5) any other information relating to such cars that NSR may reasonably request in connection with accounting for the use of the Subject Trackage Rights. NSR shall develop and present to SOO an invoice (the "Use Invoice") computed in accordance with Section 5(a) for use of the Subject Trackage Rights covered by that Monthly Statement. SOO shall make payment to NSR within sixty (60) days after the date of such Use Invoice.

(v) On or before the 15th day of each calendar month during the term of this Michigan Trackage Rights Agreement, NSR shall develop and present to SOO an invoice (the "Customs Charge Invoice") computed in accordance with Section 5(c)(i) and (ii) for the transfer of Customs Cars between Oakwood Yard and Delray Yard and the lifting of intermodal containers during the immediately preceding calendar month. SOO shall make payment to NSR within sixty (60) days after the date of such Customs Charge Invoice.

(vi) Any dispute regarding the amount of a Monthly Statement, Use Invoice or Customs Charge Invoice shall be reconciled between the Parties, and any adjustment resulting from such reconciliation shall be reflected in a subsequent Use Invoice or Customs Charge Invoice, as the case may be. If SOO disputes any portion of an Use Invoice or a Customs Charge Invoice, it shall nevertheless pay such invoice in full (unless such dispute involves a material amount in relation to the total amount of such invoice), subject to adjustment upon resolution of the dispute; provided, however, that (i) no exception to any charge in a Use Invoice or a Customs Charge Invoice shall be honored, recognized or considered if filed after the expiration of three (3) years from the date of the Use Invoice or Customs Charge Invoice, and (ii) no invoice shall be rendered more than three (3) years (a) after the last day of the calendar month in which the expense covered thereby is incurred, or (b) in the case of charges disputed as to amount or liability, after the amount owed or liability therefor is established. Any claim for the adjustment of a Monthly Statement, Use Invoice or Customs Charge Invoice shall be deemed to be waived if not made in writing within three (3) years after the date of the relevant Monthly Statement for statement adjustments and the date of the relevant Use Invoice or Customs Charge Invoice for invoice adjustments.

(vii) SOO and NSR shall each have the right, at its own expense, to initiate an audit of the records of the other Party pertaining to the use of the Subject Trackage Rights under this Agreement, and any Monthly Statement, Use Invoice, Customs Charge Invoice or other invoice issued by SOO or NSR, respectively, pursuant to this Michigan Trackage Rights Agreement, at any time within three (3) years of the date of the relevant Use Invoice, Customs Charge Invoice or other invoice (as applicable) relating to use of the Subject Trackage Rights. All such audits shall be conducted at reasonable intervals, locations and times, and completed within a reasonable period of time. Each Party agrees that, except as permitted by Section 19 of this Agreement, all information disclosed to it or its representatives in connection with such an audit will be held in strictest confidence and will not be disclosed to any third party (other than to the arbitrators in connection with an arbitration conducted pursuant to Section 14 of this Michigan Trackage Rights Agreement or as required by applicable law). Any adjustment resulting from an audit conducted pursuant to this Section 5(d)(vii) with respect to which the Parties are in concurrence shall be reflected in a subsequent Use Invoice or Customs Charge Invoice, as the case may be.

(viii) Invoices rendered pursuant to the provisions of this Michigan Trackage Rights Agreement, other than Use Invoices, Customs Charge Invoices and charges under Section 9(i), shall include direct labor and material costs, together with the surcharges, overhead percentages and equipment rentals as specified by NSR at the time any work is performed by NSR for SOO, or, upon the mutual agreement of the Parties, shall include actual costs and expenses.

SECTION 6. MAINTENANCE OF SUBJECT TRACKAGE

(a) NSR shall be solely responsible for the maintenance, repair and renewal of the Subject Trackage. NSR shall keep and maintain the Subject Trackage in reasonably good condition for the use herein contemplated, such condition not to be less than Federal Railroad Administration Class 3 (or any replacement of it), subject to normal slow orders and the like, but NSR does not guarantee the condition of the Subject Trackage or that operations thereover will not be interrupted. NSR shall take reasonable steps to ensure that any interruptions will be kept to a minimum and shall use its best efforts to avoid such interruptions.

(b) NSR shall, in planning program maintenance of the Subject Trackage, take into account the schedule of SOO trains on the Subject Trackage as well as NSR trains. NSR shall from time to time throughout the term of this Michigan Trackage Rights Agreement, through the Service Standards Committee, advise SOO of its schedule for planned maintenance, and any revisions to such schedule, as soon as practicable after such maintenance plan is determined or revised. NSR shall further provide the designated officer of SOO with seven (7) days prior notice (or such lesser notice period as is reasonable in the circumstances) of substantial delays or line outages on the Subject Trackage due to planned maintenance.

SECTION 7. CONSTRUCTION AND MAINTENANCE OF CONNECTIONS

(a) Existing connections or facilities, which are jointly used by the Parties hereto under existing agreements, shall continue to be maintained, repaired and renewed by and at the expense of the party or parties responsible for such maintenance, repair and renewal under such agreements.

SECTION 8. ADDITIONS, RETIREMENTS AND ALTERATIONS

(a) NSR, from time to time and at its sole cost and expense, may make changes in, additions and betterments to, or retirements from, the Subject Trackage as shall, in its judgment, be necessary or desirable for the economical or safe operation of the Subject Trackage or as shall be required by any law, rule, regulation, or ordinance promulgated by any governmental entity having jurisdiction. Such additions and betterments shall become a part of the Subject Trackage and such retirements shall be excluded from the Subject Trackage.

(b) NSR shall, promptly after the Effective Date (as defined in Section 13(a) of this Agreement) construct, diligently and with all deliberate speed, the Butler Segment.

(c) SOO may request facility changes, additions and betterments to the Subject Trackage. NSR and SOO in good faith shall determine the proportion of benefit to each of them of facility changes, additions and betterments proposed by SOO and if such determination can be agreed to by NSR and SOO, each of them shall bear their proportionate cost of such facility changes, additions and betterments. If NSR, in the exercise of its best business judgment, determines that its proportionate benefit from any such facility change, addition or betterment is less than the amount of the cost thereof which SOO believes should be borne by NSR, NSR shall

nonetheless make such facility change, addition or betterment at SOO's cost and expense if requested in writing by SOO, subject to NSR approval, not to be unreasonable withheld.

SECTION 9. MANAGEMENT AND OPERATIONS

(a) NSR shall have exclusive control of the management and operation (including dispatching) of the Subject Trackage. Operation and control, including dispatching, of the Subject Trackage shall be conducted, except as provided for in separately applicable multi-railroad dispatch protocols such as those currently in place for the Chicago area, in a manner as to afford each of the Parties, and any other present or future user of the Subject Trackage (or any portion thereof) economical and efficient movement of its traffic over the line. For the purposes of dispatching, NSR's and SOO's trains of the same class shall be treated with equal priority, with the five (5) classes of trains being:

- (1) Passenger;
- (2) Priority intermodal;
- (3) Other intermodal and automotive;
- (4) Regular (unit and freight trains not scheduled to set off/pick up en route); and
- (5) Other (includes trains and equipment that must operate at restricted speeds, i.e., local, work, or other such equipment movements);

provided, that in the event of a conflict, the NSR dispatcher shall be empowered to deviate from the priorities set forth herein in order to employ best practices to efficiently move all trains.

(b) NSR shall provide SOO with read-only access to NSR's Central Traffic Control screens covering the Subject Trackage in the offices of SOO designated by SOO. NSR shall be responsible for the cost of modifying its system to the extent necessary to provide SOO access to its Central Traffic Control screens, and SOO shall be responsible for the cost of the communications link with SOO and the costs to use such link incurred in SOO's offices. Such access, and the information derived therefrom, shall be restricted to CPR operating personnel designated by the Services Standards Committee, who shall only use said access, and the information derived therefrom, to monitor SOO train movements and for no other purpose, and shall further protect the confidentiality of the information derived therefrom.

(c) SOO shall comply with the provisions of the Federal Locomotive Inspection Act and the Federal Safety Appliance Act, as amended, and any other federal and state and local laws, regulations and rules respecting the operation, condition, inspection and safety of its trains, locomotives, cars and equipment while such trains, locomotives, cars, and equipment are being operated over the Subject Trackage. SOO shall indemnify, protect, defend, and save harmless NSR and its parent corporation, subsidiaries and affiliates, and all of their respective directors, officers, agents and employees from and against all fines, penalties and liabilities imposed upon NSR or its parent corporation, subsidiaries or affiliates, or their respective directors, officers,

agents and employees under such laws, rules, and regulations by any public authority or court having jurisdiction, when attributable solely to the failure of SOO to comply with its obligations in this regard.

(d) SOO in its use of the Subject Trackage shall comply in all respects with the safety rules, operating rules and other regulations of NSR, and the movement of SOO's trains, locomotives, cars, and equipment over the Subject Trackage shall at all times be subject to the orders of the transportation officers of NSR; provided, however, that such safety rules, operating rules, other regulations and orders of the transportation officers of NSR shall not unjustly discriminate between the Parties. NSR will not make any rule or restriction applying to SOO's trains that does not apply equally to NSR's trains. SOO's trains shall not include locomotives, cars or equipment which exceed the width, height, weight or other restrictions or capacities of the Subject Trackage as published in Railway Line Clearances, and no train shall contain locomotives, cars or equipment which require speed restrictions or other movement restrictions below the maximum authorized freight speeds as provided by NSR's operating rules and regulations, without the prior consent of NSR. The Service Standards Committee shall make proper accommodation for exceptions, should that be reasonable, necessary and practicable. All SOO trains shall be powered to permit operation at posted speeds.

(e) SOO shall make such arrangements with NSR as may be required to have all of its employees who shall operate its trains, locomotives, cars and equipment over the Subject Trackage qualified for operation thereover. NSR shall provide reasonable cooperation and assistance in the qualification of SOO operating (train and engine) crews for service over the Subject Trackage as soon as the date such crews and NSR personnel are available and the notice of exemption relating to the trackage rights granted herein has been filed with the STB. SOO shall pay to NSR, upon receipt of bills therefor, any cost incurred by NSR in connection with the qualification of such employees of SOO, as well as the cost of pilots furnished by NSR, until such time as such SOO employees are deemed by the appropriate examining officer of NSR to be properly qualified for operation as herein contemplated. SOO supervisory personnel who have been qualified to operate over the Subject Trackage by an appropriate examining officer of NSR may qualify other SOO employees for operation of trains over the Subject Trackage.

(f) If any employee of SOO shall neglect, refuse or fail to abide by NSR's rules, the instructions and restrictions governing the operation on or along the Subject Trackage or the associated NSR property, such employee shall, upon written request of NSR, be promptly withheld by SOO from working on NSR's property pending the results of a formal investigation of the alleged neglect, refusal or failure. After the foregoing request is given to SOO, SOO shall promptly hold an investigation, in which all parties concerned shall participate and bear the expense for its officers, counsel, employees and witnesses. Notice of such investigation to SOO employees shall be given by SOO officers. The investigation shall be conducted in accordance with any applicable terms and conditions of schedule agreements between SOO and its employees. If the result of such investigation warrants, such employee shall, upon written request by NSR, be restricted by SOO from service on the Subject Trackage, and SOO shall release and indemnify NSR from and against any and all claims and expenses because of such withdrawal.

(g) In the event that a SOO train shall be forced to stop on the Subject Trackage, due to mechanical failure of SOO's equipment or any other cause (mechanical or otherwise) not resulting from an accident or derailment, and such train is unable to proceed, or if a SOO train fails to maintain the speed required by NSR on the Subject Trackage, or if in emergencies, bad ordered or otherwise defective cars are set out of a SOO train on the Subject Trackage, NSR shall have the option to furnish motive power or such other assistance (mechanical or otherwise) as may be necessary to haul, help or push such trains, locomotives or cars, or to properly move the disabled equipment off the Subject Trackage. SOO shall reimburse NSR for the cost of rendering any such assistance. If it becomes necessary to make repairs to or adjust or transfer the lading of such disabled or defective cars in order to move them off the Subject Trackage, NSR shall arrange for such work to be done, and SOO shall reimburse NSR for the cost thereof.

(h) Whenever SOO's use of the Subject Trackage requires rerailling, wrecking service or wrecking train service, NSR shall arrange for the provision of such service, including the repair and restoration of roadbed, the Subject Trackage and structures. The cost, liability and expense of the foregoing, including without limitation loss of, damage to, or destruction of any property whatsoever and injury to and death of any person or persons whomsoever or any damage to or destruction of the environment whatsoever, including without limitation land, air, water, wildlife, and vegetation, resulting therefrom shall be apportioned in accordance with the provisions of Section 11 hereof. All locomotives, cars, equipment and salvage from the same so picked up and removed which is owned by or under the management and control of or used by SOO at the time of such wreck, shall be promptly delivered to it.

(i) If any cars, cabooses, or locomotives of SOO are bad ordered en route on the Subject Trackage and it is necessary that they be set out, those cars, cabooses or locomotives shall, after being repaired, be picked up by SOO. NSR may, upon request of SOO and at the expense of SOO, unless otherwise provided for in the Field and Office Manuals of the Interchange Rules of the AAR, furnish required labor and material to perform light repairs required to make such bad ordered equipment safe and lawful for movement, and billing for this work shall be at rates prescribed in, and submitted pursuant to, the Field and Office Manuals of the Interchange Rules of the AAR.

(j) SOO shall not have any claim against NSR for liability on account of loss or damage of any kind in the event the use of the Subject Trackage by SOO is interrupted or delayed at any time from any cause.

(k) NSR shall make best efforts to provide the designated officer of SOO with prompt notice of any unplanned substantial delays or line outages on the Subject Trackage, and shall promptly advise the designated officer of SOO of the resumption of normal service on the Subject Trackage.

SECTION 10. MILEAGE AND CAR HIRE

All mileage and car hire charges accruing on cars in SOO's trains on the Subject Trackage shall be assumed by SOO and reported and paid by it directly.

SECTION 11. LIABILITY

The responsibility between the Parties hereto for loss of, damage to, and destruction of any property whatsoever and injury to and death of any person or persons whomsoever, arising out of, incidental to or occurring in connection with this Michigan Trackage Rights Agreement, also expressly including, without limitation, all liabilities arising after the Commencement Date hereof under FELA and environmental laws but excluding consequential damages of any Party hereto (which are always borne by the Party which sustained them) and excluding claims for exemplary and punitive damages, hereinafter referred to as "Damage," shall be apportioned as follows without regard to fault or negligence:

(a) If Damage occurs involving solely the trains, locomotives, equipment or employees of one of the Parties, then that Party shall be solely responsible for such Damage, even if caused partially or completely by another Party.

(b) If Damage occurs involving the trains, locomotives, equipment and/or employees of both NSR and SOO, then (i) NSR and SOO each shall be solely responsible for any Damage to its own employees, locomotives and equipment and those cars in its own revenue account (including lading) ("NSR Equipment" and "SOO Equipment," respectively, and collectively, the "Equipment"), and (ii) the Parties shall each be responsible for 50 percent of the Damage to the Subject Trackage and associated facilities and any Damage sustained by third parties, regardless of the proportionate responsibility between them as to the cause of the Damage.

(c) For the purposes of assigning responsibility for Damage under this Section 11 as between the Parties hereto, the employees, locomotive and equipment and those cars in the revenue account (including lading) of CPRC or its subsidiaries shall be considered to be the employees, locomotives and equipment and cars of SOO. Except for the foregoing, for the purposes of assigning responsibility for Damage under this Section 11 as between the Parties hereto, the trains of a third party or parties shall be considered to be the trains of NSR.

(d) Notwithstanding anything to the contrary in Sections 11(a), (b) and (c), above, when any damage to or destruction of the environment, including without limitation land, air, water, wildlife, and vegetation, occurs with one or more trains of the Parties involved, then, as between themselves, the Parties agree that (i) NSR shall be solely responsible for any damage or destruction to the environment and to third parties which results solely from a substance transported in NSR Equipment from which there was a release, (ii) SOO shall be solely responsible for any damage or destruction to the environment and to third parties which results solely from a substance transported in SOO Equipment from which there was a release, and (iii) NSR and SOO shall be responsible, in proportion to the total number of pieces of Equipment of each Party from which there was a release, for any damage or destruction to the environment and to third parties which results solely from one or more substances transported in both NSR Equipment and SOO Equipment from which there was a release.

(e) SOO and NSR each shall be responsible for the payment, handling, administration and disposition of all Damage for which it bears exclusive responsibility under this Section 11, and SOO and NSR shall have joint responsibility for the payment, handling, administration and

disposition of all Damage for which they are jointly responsible under this Section 11. In assigning joint responsibility to both NSR and SOO, it is not intended that NSR and SOO will, in all instances, actually act jointly, but rather that they will agree between themselves on the most practical and efficient arrangement for handling, administering, and disposing of Damage for which they bear joint responsibility, with the objective of eliminating unnecessary duplication of effort and minimizing overall costs.

(f) Each Party covenants and agrees (i) to indemnify and save harmless the other Party from and against any payments which are the responsibility of such Party under this Michigan Trackage Rights Agreement, and all expenses, including attorney's fees and expenses, and any other expenses of any court or regulatory proceeding, incurred by the indemnified Party in defending any claim for which the responsible Party is liable, and (ii) to defend such indemnified Party against such claims with counsel selected by the responsible Party and reasonably acceptable to the indemnified Party.

(g) Notwithstanding anything to the contrary in this Section 11, whenever Damage occurs with one or more trains being involved, and one or more of the involved trains is a SOO train, and such Damage is attributable solely to the gross negligence or willful or wanton misconduct of only one of the Parties to this Agreement, and such gross negligence or willful or wanton misconduct is the direct or proximate cause of such Damage, then the Party to which such gross negligence or willful or wanton misconduct is attributable shall assume all liability, cost and expense in connection with such Damage. The Parties agree that, for purposes of this Section 11(g), "gross negligence or willful or wanton misconduct" shall be defined as "the intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another; such a gross want of care and regard for the rights of others as to justify the presumption of willfulness and wantonness."

(h) Notwithstanding any provision of this Section 11 to the contrary, each Party shall assume and bear all responsibility for any Damage caused by acts or omissions of any of its employees while under the influence of drugs or alcohol.

(i) If any suit or action shall be brought against either Party for Damage which under the provisions of this Michigan Trackage Rights Agreement is in whole or in part the responsibility of the other Party, said other Party shall be notified in writing by the Party sued, and the Party so notified shall have the right and be obligated to take part in the defense of such suit and shall pay a proportionate part of the judgment and costs, expense and attorneys' fees incurred in such suit according to its liability assumed hereunder.

(j) For purposes of determining liability under this Section 11, pilots furnished by NSR to SOO pursuant to this Michigan Trackage Rights Agreement shall be considered to be the employees of SOO while such pilots are on board or getting on or off SOO trains.

(k) Notwithstanding any provision of this Michigan Trackage Rights Agreement to the contrary, for the purpose of this Section 11, the word "Equipment" shall mean and be confined to (i) cabooses, (ii) vehicles and machinery which are capable of being operated on railroad tracks that, at the time of an occurrence, are being operated on the Subject Trackage, and

(iii) vehicles and machinery that, at the time of an occurrence, are on the Subject Trackage or its right of way for the purpose of maintenance or repair thereof or the clearing of wrecks thereon.

SECTION 12. CLAIMS

(a) The Parties shall agree between themselves on the most fair, practical and efficient arrangements for handling and administering freight loss and damage claims with the intent that (i) each Party shall be responsible for losses occurring to lading in its possession for the account of such Party and (ii) the Parties shall follow applicable AAR rules and formulas in providing for the allocation of losses which are either of undetermined origin or in cars handled in interline service by or for the account of the Parties.

(b) Each of SOO and NSR shall indemnify and hold harmless the other Party against any and all costs and payments, including benefits, allowances, and arbitration, administrative and litigation expenses, arising out of lawsuits, claims or grievances brought by or on behalf of its own employees or their collective bargaining representatives (or, as to SOO, the employees or the collective bargaining representatives of CPRC or its subsidiaries), either pursuant to employee protective conditions imposed by a governmental agency upon the agency's approval or exemption of this Agreement and operations hereunder or pursuant to a collective bargaining agreement. It is the Parties' intention that SOO and NSR each shall bear the full costs of protection of its own employees under employee protective conditions that may be imposed, and of grievances filed by its own employees (or, as to SOO, the employees of CPRC or its subsidiaries) arising under its collective bargaining agreements with its employees (or, as to SOO, the employees of CPRC or its subsidiaries).

SECTION 13. TERM, DEFAULT AND TERMINATION

(a) This Michigan Trackage Rights Agreement shall become effective (the "Effective Date") as of the first date executed by all of the Parties. However, SOO operations over the Subject Trackage shall not commence until a date (the "Commencement Date") mutually agreed in writing between SOO and NSR, which date shall not occur until the later of the following three dates: (i) the date upon which construction of the Butler Segment is completed; (ii) the effective date of any required U.S. Surface Transportation Board ("STB") authorization or exemption of the trackage rights granted to SOO herein (including compliance with any condition(s) imposed by the STB in connection with such approval or exemption) and (iii) the expiration of any required labor notices.

(b) This Michigan Trackage Rights Agreement shall remain in full force and effect until mutually terminated by the Parties. The Initial Term of this Agreement shall be twenty-five (25) years from the Commencement Date, and shall be renewable continuously thereafter for additional periods of ten (10) years ("Additional Term(s)"). At the end of the Initial Term, SOO may, at its option, (i) extend this Agreement under the same terms and conditions for one Additional Term, or (ii) require renegotiation of the Agreement. At the end of the first (and any subsequent) Additional Term, either NSR or SOO may extend the Agreement under the then-current terms and conditions, or require renegotiation of the Agreement. In either case, the notice to continue the then-current terms and conditions or to require renegotiation shall be given by

SOO or NSR, as the case may be, by giving the other Party advance written notice at least six (6) months prior to the expiration of the then-current term. If the Parties cannot agree upon the terms and conditions upon which the trackage rights granted herein may be exercised by SOO during such Additional Term, either Party may submit any open provisions to binding arbitration pursuant to Section 14. The arbitrators shall be instructed to take into consideration the relative economic positions of the Parties under this Agreement, and the intent of the Parties, in each case at the time this Agreement was executed, as well as any significant operating, economic and/or technological changes that have occurred in the interim. The effective date for the new terms and conditions, whether reached by negotiation or arbitration, shall be the initiation of said Additional Term. In the event that railroad operations, technology or other events create, in the view of one Party to this Agreement, a disparity such that the terms and conditions of this Agreement over time no longer reflect the intention of the Parties in a substantial and material way, and such disparity has a material and substantial adverse effect on said Party, that Party may give notice of such to the other Party, who shall negotiate in good faith modification of this Agreement in order to address and possibly remove said perceived disparity. Should the Parties fail to reach agreement with regard to such perceived disparity, the concerned Party may invoke mediation or other methods of non-binding alternative dispute resolution, in which the other Party agrees to participate in good faith.

(c) SOO shall have the right to terminate this Michigan Trackage Rights Agreement upon giving NSR at least thirty (30) days prior written notice of such termination. Such termination shall be considered to be a termination of both this Michigan Trackage Rights Agreement and the underlying right of movement.

(d) Termination of this Michigan Trackage Rights Agreement shall not relieve or release either Party hereto from any obligations assumed or from any liability which may have arisen or been incurred by such Party under the terms of this Michigan Trackage Rights Agreement prior to termination thereof.

(e) In the event of any substantial failure on the part of any Party to perform its obligations provided under the terms of this Michigan Trackage Rights Agreement and its continuance in such default for a period of sixty (60) days after written notice thereof by certified mail from the other Party, the non-defaulting Party shall have the right at its option, after first giving thirty (30) days written notice thereof by certified mail, and notwithstanding any waiver by such Party of any prior breach thereof, to refer such matter to arbitration pursuant to Section 14 and seek damages and/or specific performance of the terms of this Agreement from the defaulting Party. In the case of a substantial default by SOO which continues after adjudication of such default through arbitration, NSR may terminate this Michigan Trackage Rights Agreement and the underlying right of movement if SOO fails to cure such substantial default within: (i) thirty (30) days of the receipt of notice of continued default in the case of such a default in an obligation to pay NSR of SOO, (ii) fourteen (14) days of the receipt of notice of continued default in the case of such a default under Section 3(b), (c), (d), (g) or (h); and (iii) ninety (90) days of the receipt notice of continued default in the case of any other such default under this Michigan Trackage Rights Agreement. For clarity, the Parties agree that where SOO is moving Automotive Traffic where the rights granted herein were modified without the consent of NSR, the provisions of Section 3(i) shall apply.

SECTION 14. ARBITRATION

(a) Any dispute arising between the Parties with respect to this Michigan Trackage Rights Agreement shall be referred to their respective senior operating officers for resolution. In the event such officers are unable to resolve the dispute, either Party may submit the dispute for binding arbitration by three independent arbitrators before the American Arbitration Association under the Commercial Arbitration Rules. The decision of the arbitrators shall be final and conclusive upon the Parties. Each Party to the arbitration shall pay the compensation, costs, fees and expenses of its own witnesses, experts and counsel. The compensation, costs and expenses of the arbitrators, if any, shall be borne by the Parties, with SOO paying fifty (50) percent and NSR paying fifty (50) percent. The arbitrators shall not have the power to award consequential or punitive damages or to determine violations of criminal or antitrust laws. Pending the award of the arbitrators, there shall be no interruption in the transaction of business under this Michigan Trackage Rights Agreement, and all payments in respect thereto shall be made in the same manner as prior to the arising of the dispute until the matter in dispute shall have been fully determined by arbitration, and thereupon such payment or restitution shall be made as required by the decision of the arbitrators.

SECTION 15. ABANDONMENT

(a) NSR shall have the right, subject to securing any necessary regulatory approval or exemption, to abandon the Subject Trackage or any portion thereof (the "Abandonment Segment") during the Initial Term, or any Additional Term, of this Michigan Trackage Rights Agreement. NSR shall provide SOO no less than ninety (90) days prior notice of its intention to seek to abandon any Abandonment Segment.

(b) If NSR elects to abandon the Subject Trackage (or any portion thereof) pursuant to Section 15(a), this Michigan Trackage Rights Agreement shall continue to apply in all respects to any remaining portion of the Subject Trackage not abandoned by NSR. Upon request, SOO shall promptly prepare and, on or after the date that NSR has filed its own application or petition with respect to said abandonment, file any required application or petition to obtain regulatory authorization or exemption for the discontinuance of SOO's trackage rights over the relevant Abandonment Segment.

(c) NSR shall, not less than 90 days prior to any submission to the Surface Transportation Board (or successor agency having jurisdiction over said abandonment) of an application or exemption for authority to abandon an Abandonment Segment(s), offer SOO the first right to purchase such Abandonment Segment(s) for the fair market value of such Abandonment Segment(s) at the time of purchase, and on such other terms and conditions as are customary with respect to line sales by NSR at the time. SOO shall have sixty (60) days ("Abandonment Notice Period") within which to advise NSR that it will exercise its right to purchase ("Exercise Notice"). If the Parties are unable to agree upon the fair market value of the Abandonment Segment(s) that SOO wishes to purchase, either Party may refer the issue to arbitration pursuant to Section 14, which arbitration shall determine all other issues relating to terms and conditions for the sale not then (at the time of the initiation of the arbitration) agreed to by the Parties. Such arbitration shall be conducted on an expedited basis, with selection of the

arbitrators within forty-five (45) days of the initiation of arbitration, all submissions to be made by the Parties within ninety (90) days of the initiation of arbitration, and a decision to be rendered within thirty (30) days following the final submissions of the Parties.

(d) The Parties shall consummate the sale contemplated by this Section 15 within forty-five (45) days of the latest of: (a) the rendering of an arbitration decision, should issues related to the sale proceed to arbitration; (b) the execution of a purchase and sale agreement, should the Parties execute the same; and (c) the grant of authority, or exemption from the need to obtain a grant of authority, from any regulatory body having jurisdiction over the same.

(e) If SOO elects not to purchase the Abandonment Segment, it shall so advise NSR within the same sixty (60) day Abandonment Notice Period by delivering to NSR a notice of waiver of right to purchase said segment ("Waiver Notice"). Failure of SOO to provide NSR with either an Exercise Notice or a Waiver Notice within the aforesaid sixty (60) day period shall constitute a Waiver Notice.

(i) In the event of a Waiver Notice, SOO shall promptly file such application, petition or exemption notice as may then be required to obtain regulatory authority or exemption for the discontinuance of its trackage rights over the Abandonment Segment.

(ii) A Waiver Notice shall constitute a waiver by SOO of its statutory rights, if any at the time of the abandonment, to purchase or otherwise subsidize operations over the Abandonment Segment pursuant to an offer of financial assistance or other applicable method.

SECTION 16. SUCCESSORS AND ASSIGNS

(a) This Michigan Trackage Rights Agreement shall inure to the benefit of and be binding upon each of the Parties and their respective successors and permitted assigns.

(b) Except as provided in Section 16(c), SOO may not assign this Agreement, or any of its rights, interests or obligations hereunder, including by operation of law, without the prior consent in writing of NSR, which consent NSR may withhold at its discretion. In the event of such an assignment appropriate amendments shall be made to section 11(c).

(c) In the event of a sale or lease of substantially all of the assets or business of SOO, or the merger or consolidation of SOO into a firm or corporation not controlled by CPRC, SOO may: (i) assign this Agreement to CPRC or a US-based subsidiary of CPRC, in which case the party acquiring control over the assets or business of SOO may not move traffic pursuant to this Agreement, or (ii) if SOO remains a subsidiary of CPRC after the sale of substantially all of its assets or business, SOO may continue to enjoy the benefit of this Agreement, but the party acquiring control over the assets or business of SOO may no longer move traffic pursuant to this Agreement. On the happening of either of the foregoing events appropriate amendments shall be made to section 11(c).

SECTION 17. NOTICE

Any notice required or permitted to be given by one Party to another under this Michigan Trackage Rights Agreement shall be deemed given on the date sent by certified mail, or by such other means as the Parties may agree, and shall be addressed as follows:

If to SOO: General Manager – Interline Management
Canadian Pacific Railway Company
Gulf Canada Square
401 9th Avenue SW
Calgary, Alberta, Canada T2P 4Z4

with a copy to:

Manager Interline Agreement Management
Canadian Pacific Railway Company
Gulf Canada Square
401 9th Avenue SW
Calgary, Alberta, Canada T2P 4Z4

If to Norfolk Southern: Executive Vice President Operations
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510-2191

with a copy to:

Senior Director – Joint Facilities
Norfolk Southern Corporation
185 Spring Street, SW, Box 158
Atlanta, Georgia 30303

Either Party may provide changes in the above addresses to the other Parties by personal service or certified mail.

SECTION 18. FORCE MAJEURE

The obligations, other than payment obligations, of the Parties to this Agreement shall be subject to force majeure (including strikes, riots, floods, accidents, Acts of God, acts of terrorism, and other causes or circumstances beyond the control of the Party invoking such force majeure as an excuse for nonperformance), but only as long as, and to the extent that, such force majeure shall reasonably prevent performance of such obligations by the affected Party. In the event that an event of force majeure impairs either Party's ability to fulfill its obligations to the other Party under this Michigan Trackage Rights Agreement, said Party shall take all reasonable measures,

including providing routing over alternate rail lines to the extent practicable (subject to reimbursement for incremental costs), and granting the right to enter and exit the Subject Trackage at locations other than the End Points in case of a necessary detour, to restore performance of its obligations in a timely manner.

SECTION 19. CONFIDENTIALITY

Except as provided by law or by rule, order, or regulation of any court or regulatory agency with jurisdiction over the subject matter of this Michigan Trackage Rights Agreement, or as may be necessary or appropriate for a Party hereto to enforce its rights under this Michigan Trackage Rights Agreement, during the Initial Term and any Additional Terms, the terms and provisions of this Michigan Trackage Rights Agreement and all information to which access is provided or which is obtained hereunder will be kept confidential, and will not be disclosed by any Party to any person other than such Party's officers, employees, and attorneys without the prior written approval of the other Party.

SECTION 20. INDEMNITY COVERAGE

(a) As part of the consideration hereof, each Party hereby agrees that each and all of its indemnity commitments in this Michigan Trackage Rights Agreement in favor of the other Party shall also extend to and indemnify the parent corporation, subsidiaries and affiliates of such other Party, and all of its directors, officers, agents and employees.

SECTION 21. REGULATORY APPROVAL

(a) Upon execution of this Michigan Trackage Rights Agreement by each of the Parties hereto, SOO shall promptly file with the STB, and diligently prosecute, an appropriate notice of exemption with respect to the trackage rights granted to it herein.

SECTION 22. GENERAL PROVISIONS

(a) This Michigan Trackage Rights Agreement and each and every provision hereof are for the exclusive benefit of the Parties hereto and not for the benefit of any other person. Nothing herein contained shall be taken as creating or increasing any right of any other person to recover by way of damages or otherwise against any of the Parties hereto.

(b) This Michigan Trackage Rights Agreement contains the entire understanding of the Parties hereto with respect to its subject matter and supersedes any and all other agreements and understandings between the Parties.

(c) No term or provision of this Michigan Trackage Rights Agreement may be changed, waived, discharged or terminated except by an instrument in writing and signed by both of the Parties.

(d) Each definition in this Michigan Trackage Rights Agreement includes the singular and the plural, and references in this Michigan Trackage Rights Agreement to the neuter gender include the masculine and feminine where appropriate. References herein to any agreement or

contract mean such agreement or contract as amended. As used in this Michigan Trackage Rights Agreement, the word "including" means "without limitation", and the words "herein", "hereof" and "hereunder" refer to this Michigan Trackage Rights Agreement as a whole. All dollar amounts stated herein are in United States currency.

(e) All words, terms and phrases used in this Michigan Trackage Rights Agreement shall be construed in accordance with the generally applicable definition or meaning of such words terms and phrases in the railroad industry.

(f) The division of this Michigan Trackage Rights Agreement into sections and subsections, and the insertion of headings and references, are for convenience of reference only, and shall not affect the construction or interpretation of this Michigan Trackage Rights Agreement. Unless the context otherwise requires, all references herein to sections are to sections in this Michigan Trackage Rights Agreement.

(g) As used in this Michigan Trackage Rights Agreement, whenever reference is made to the trains, locomotives, cars or equipment of, or in the account of, one of the Parties hereto, such expression means the trains, locomotives, cars and equipment in the possession of or operated by one of the Parties and includes such trains, locomotives, cars and equipment which are owned by, leased to, or moving in the trains of such Party. Whenever such locomotives, cars or equipment are owned or leased by one Party, but are in the possession of, or are being operated in a train of the other Party, such locomotives, cars and equipment shall be considered those of that other Party in whose possession or train such locomotives, cars and equipment are located.

(h) This Michigan Trackage Rights Agreement is the product of mutual negotiations of the Parties hereto, none of whom shall be considered the drafter for purposes of contract construction.

(i) No consent or waiver, expressed or implied, by a Party of any breach or default by the other Party in the performance by such other Party of its obligations hereunder shall be deemed or construed to be a consent to or waiver of any other breach or default in the performance hereunder by such other Party. Failure on the part of a Party to complain of any act or failure of the other Party or to declare the other Party in default, irrespective of how long such failure continues, shall not constitute a waiver by such first mentioned Party of its rights hereunder.

(j) If any provision of this Michigan Trackage Rights Agreement or the application thereof to any Party hereto or to any circumstance shall be determined by a court of competent jurisdiction to be invalid or unenforceable to any extent or for any reason, the remainder of this Michigan Trackage Rights Agreement or the application of the provisions thereof to such Party or circumstance, other than those determined to be invalid or unenforceable, shall not be affected thereby and shall be enforced to the fullest extent permitted by law, and the Parties shall promptly enter into such other agreement(s) as their respective legal counsel may deem appropriate in order to replace such invalid or unenforceable provisions in a manner which

(m) This Michigan Trackage Rights Agreement may be executed in several counterparts, each of which will be deemed an original, and such counterparts shall constitute one and the same instrument.

(n) If the STB, in approving or exempting (if so required) the transaction contemplated by this Agreement, imposes any condition (other than standard labor protective conditions) which would in the sole judgment of NSR or SOO, materially reduce the benefits to that Party from the same, then the materially affected Party may, in its sole discretion: (a) accept the condition and proceed with the transaction contemplated by this Agreement; (b) terminate this Agreement, or (c) appeal such condition judicially and postpone the Commencement Date for up to thirty (30) months until final action on its appeal; and if such appeal is unsuccessful, either (i) reject the condition and terminate this Agreement, or (ii) accept the condition and proceed with the transaction contemplated by this Agreement.

IN WITNESS WHEREOF, the Parties hereto have caused this Michigan Trackage Rights Agreement to be duly executed as of the date first above written.

WITNESS:

SOO LINE RAILROAD
COMPANY

D. Welsh
Title *Ex. Dir. Network Development*

By: *[Signature]*

WITNESS:

NORFOLK SOUTHERN RAILWAY
COMPANY

Title

By: _____

produces a result which is substantially equivalent to the terms of this Michigan Trackage Rights Agreement in all material respects.

(k) Nothing herein shall be interpreted as creating an association, partnership, joint venture or other joint undertaking between NSR and SOO.

(l) This Michigan Trackage Rights Agreement shall be governed and interpreted in accordance with the laws of the State of New York, without regard to application of the choice of law principles thereof.

(m) This Michigan Trackage Rights Agreement may be executed in several counterparts, each of which will be deemed an original, and such counterparts shall constitute one and the same instrument.

(n) If the STB, in approving or exempting (if so required) the transaction contemplated by this Agreement, imposes any condition (other than standard labor protective conditions) which would in the sole judgment of NSR or SOO, materially reduce the benefits to that Party from the same, then the materially affected Party may, in its sole discretion: (a) accept the condition and proceed with the transaction contemplated by this Agreement; (b) terminate this Agreement, or (c) appeal such condition judicially and postpone the Commencement Date for up to thirty (30) months until final action on its appeal; and if such appeal is unsuccessful, either (i) reject the condition and terminate this Agreement, or (ii) accept the condition and proceed with the transaction contemplated by this Agreement.

IN WITNESS WHEREOF, the Parties hereto have caused this Michigan Trackage Rights Agreement to be duly executed as of the date first above written.

WITNESS:

SOO LINE RAILROAD
COMPANY

Title

By: _____

WITNESS:

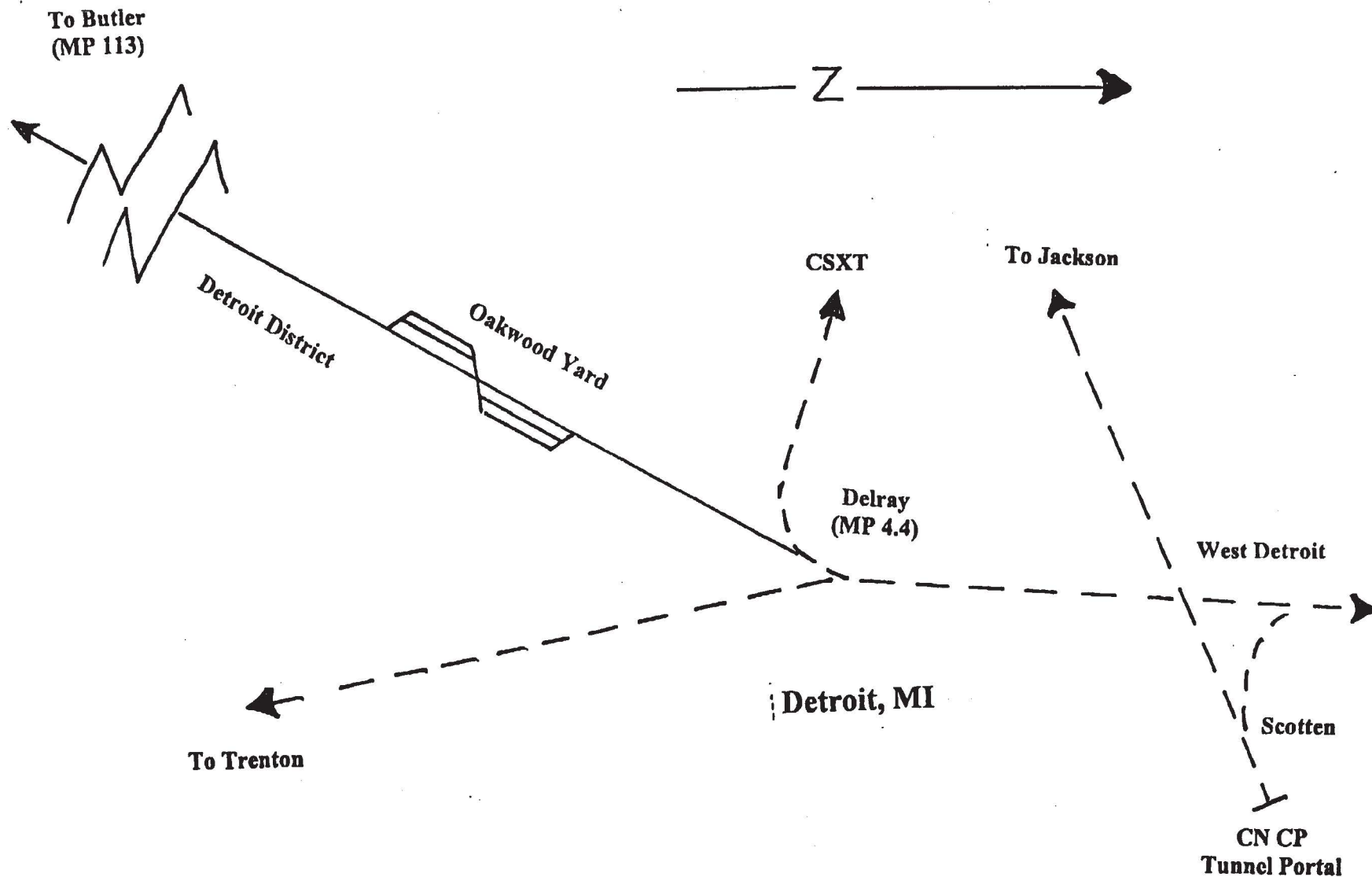
NORFOLK SOUTHERN RAILWAY
COMPANY

Title

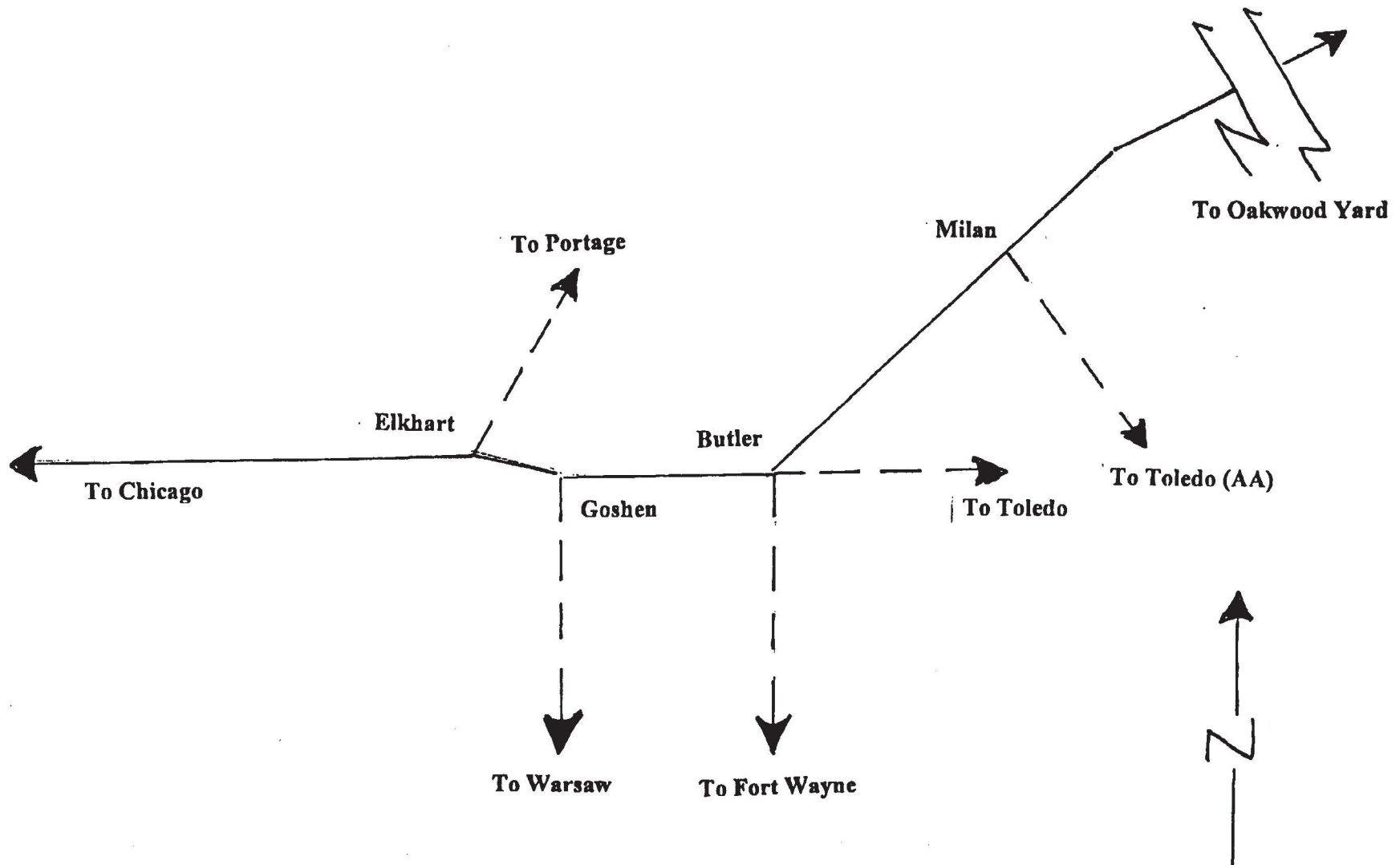
By: C. W. Moore

EXHIBIT A
ROUTE OF SUBJECT TRACKAGE

CPRS Trackage Rights over NSR Detroit, Michigan – Chicago, Illinois



**CPRS Trackage Rights over NSR
Detroit, Michigan – Chicago, Illinois**



**CPRS Trackage Rights over NSR
Detroit, Michigan – Chicago, Illinois**

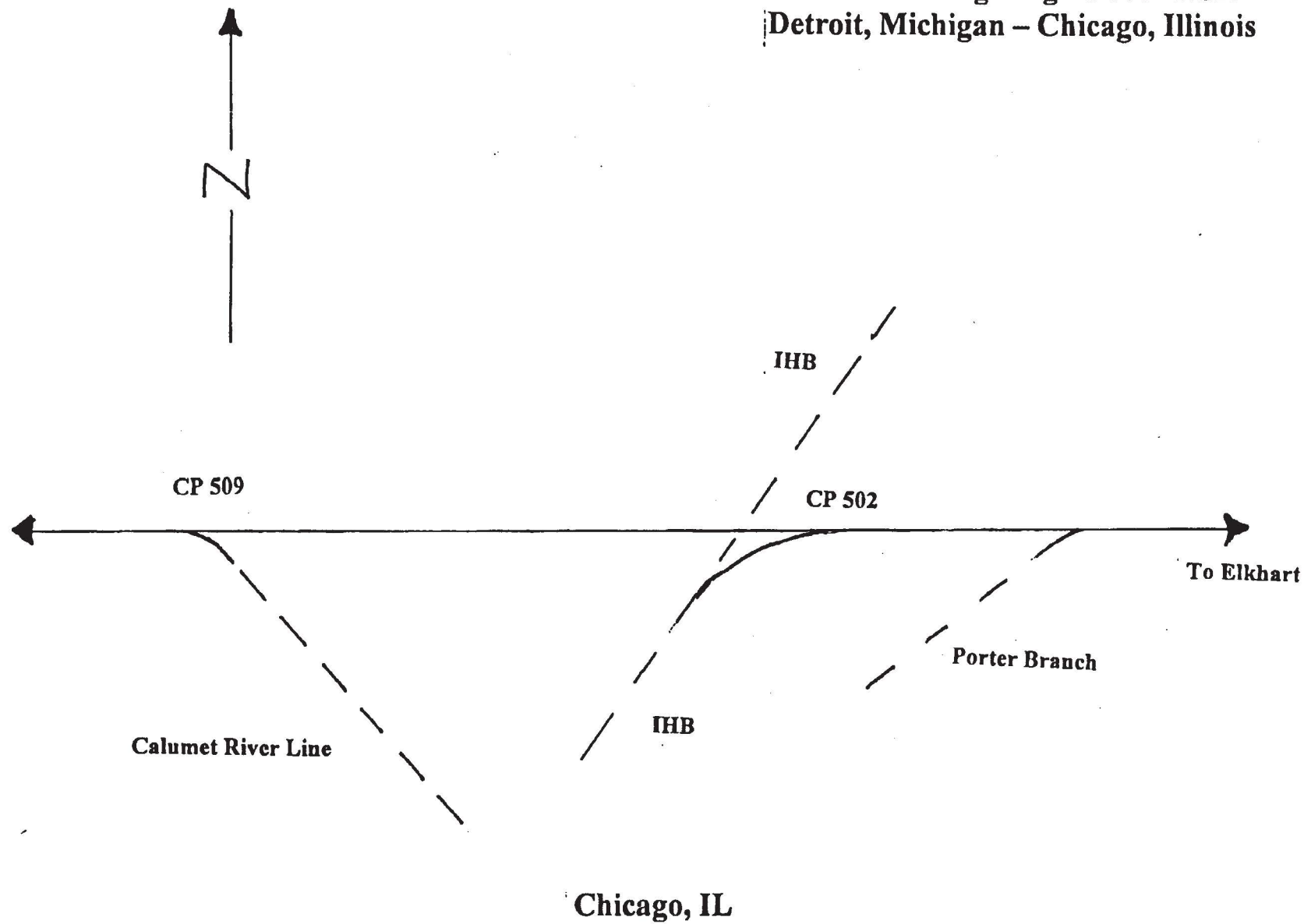


EXHIBIT B
ANTICIPATED TRANSIT TIMES

Addendum A

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Exhibit 2
Indiana Harbor Belt Interchange Agreement

INTERCHANGE AGREEMENT

Dated this 15 day of July 2005

Among the

Indiana Harbor Belt Railroad Company

and the

Norfolk Southern Railway Company

and the

Consolidated Rail Corporation

and the

**Soo Line Railroad Company, d/b/a
Canadian Pacific Railway**

regarding the interchange of freight cars
at IHB Gibson Yard

INTERCHANGE AGREEMENT

This Agreement made this 15th day of July, 2005 between the **Indiana Harbor Belt Railroad Company** (herein after referred to as "**IHB**"), **Norfolk Southern Railway Company** (herein after referred to as "**NSR**"), **Consolidated Rail Corporation** (hereinafter referred to as "**CRC**") and the **Soo Line Railroad Company, d/b/a Canadian Pacific Railway**, hereinafter referred to as "**CPR**"; sometimes collectively referred to as the "**Parties**" and sometimes individually referred to as a "**Party**".

RECITAL

WHEREAS, CPR has received trackage rights between Eastern Canada and CP 502 for interchange with IHB, and

WHEREAS, for operating convenience IHB and CPR desire said interchange to take place at Gibson Yard, and

WHEREAS, NSR controls third party rail access between CP 502 and Gibson Crossing, and

WHEREAS, CRC CONTROLS THIRD PARTY RAIL ACCESS BETWEEN Gibson Crossing and Gibson Yard, and

WHEREAS, the parties hereto desire to enter into a written agreement to provide for the method for said interchange, of rail traffic at Gibson Yard routed via CP 502.

NOW, THEREFORE, it is understood and agreed between the parties hereto as follows:

SECTION 1 GRANT OF OPERATING RIGHTS

The CPR shall have the right, and agrees to deliver, with its own power, crew, and marker trains to the IHB via CP 502 in East Chicago, Indiana. Said grant shall be considered a grant of operating rights and not trackage rights. Each of CPR and IHB will deliver cars to the other on such tracks in Gibson Yard as IHB from time to time designates.

SECTION 2 POINTS AND TIME OF INTERCHANGE

Unless otherwise modified herein, the rules of the Association of Railroads governing interchange of cars between railroads shall govern the interchange of cars hereunder. For the purpose of determining the application of the provision of this Interchange Agreement, the time of interchange of cars from the CPR to the IHB will be deemed to be when the cars to be interchanged are set out on the designated interchange track(s) at Gibson Yard and the motive power is detached from said cars. For purposes of the application of Section 7 of this Agreement, trains will be considered to be in the account of CPR until interchanged as defined herein.

SECTION 3 INTERCHANGE MECHANICAL INSPECTION

IHB and CPR shall comply with the provisions of the Federal Locomotive Safety Act and Safety Appliance Act when conducting interchange operations contemplated herein.

SECTION 4 CLASSIFICATIONS

CPR will perform two freight classifications for IHB:

- 1) All GM Automobile traffic, setup autos and auto parts.
- 2) All other traffic.

SECTION 5 CONDITIONS OF TRACKS

IHB shall be bound only to use reasonable and customary care, skill and diligence in the operation, maintenance, repair and renewal of tracks. CPR shall not, by reason of any defect therein or by reason of the failure or neglect on the part of any other party to repair any such defect or by reason of the failure or the neglect of the other to properly operate same, have or make against any other party any claim or demand for any loss, damage or injury whatsoever, resulting from such defect, neglect or failure.

SECTION 6 CLEARING OF WRECKS

Whenever CPR's use of the IHB tracks requires rerailing, wrecking service, or wreck train service, IHB shall perform such service, including the repair and restoration of roadbed, track and structures, and the cost and expense thereof, including without limitation; loss of, damage to, or destruction of any property whatsoever and injury to or death of any person or persons whomsoever resulting therefrom, shall be apportioned in accordance with the provisions of Section 7 hereof. All locomotives, cars and equipment and salvage from the same so picked up and removed which are owned by or under the management and control of or used by CPR at the time of such wreck shall be promptly delivered to it.

SECTION 7 LIABILITY

The responsibility of the parties hereto as between themselves for loss of, damage to, or destruction of any property whatsoever or injury to or death of any person or persons whomsoever, resulting from, arising out of, incidental to, or occurring in connection with the exercise of this agreement shall be determined as follows:

A. Whenever any loss of, damage to, or destruction of any property whatsoever, or injury to or death of any person or persons whomsoever, occurs with the trains, locomotives, cars or equipment of, or in the account of, only IHB or CPR hereto being involved, that party so involved shall assume all liability therefor, and bear all cost in connection therewith, including, without limitation all cost and expense referred to in Section 6 hereof; and shall forever protect, defend, indemnify and hold harmless the other parties and its officers, agents and employees from any and all claims, costs (including but not limited to attorney's fees) expenses, suits or judgments arising from such damage, injury or death.

B. Whenever any loss of, damage to, or destruction of any property whatsoever, or injury to or death of any person or persons whomsoever, occurs with the trains, locomotives, cars or equipment of or in the account of, both IHB and CPR being involved, the IHB and CPR shall each separately assume all liability for loss of or damage to its trains, locomotives, cars (including lading) or equipment, and for injury to or death of each of its employees or persons under its control. Any injury or death of any other person or persons whomsoever, and loss of or damage or destruction of all property (including the trackage) so occurring shall be borne equally by IHB and CPR, including the cost and expense referred to in Section 6 hereof.

C. Whenever any loss of, damage to, or destruction of any property whatsoever, or injury to or death of any person or persons whomsoever, occurs with the trains, locomotives, cars or equipment of or in the account of, CPR and any railroad other than IHB while CPR is operating under this agreement, CPR shall forever protect, defend, indemnify, and hold harmless IHB and its officers, agents and employees from any and all claims, costs (including but not limited to attorney's fees), expenses, suits, or judgments arising from such damage, injury or death.

For the purposes of clarification only, it is intended that CPR and said other user(s) shall each separately assume and bear all liability, cost and expense for loss of and damage to trains, locomotives cars (including without limitation lading) and equipment operated by each of them and for injury to and death of each of their directors, officers, agents and employees and persons in each of their care and custody. All liability, cost and expense for injury to, or death of, any other person or persons whomsoever, for loss of, damage to, or destruction of all other property (including without limitation the Trackage) and for any damage to or destruction of the environment whatsoever, including without limitation land, air, water, wildlife, and vegetation, so occurring shall be borne equally by CPR and such other user(s).

D. The foregoing provisions of Paragraphs A and B shall apply regardless of consideration of fault or negligence of the parties hereto or third persons. Indemnification provisions of Paragraphs A and B shall extend to third party actions for indemnification or contribution arising from the causes enumerated in Paragraphs A and B.

E. For the purpose of clarifying the application of the provisions of 7A and 7B herein, whenever any injury to or death of any CPR employee occurs while said employee is not physically located on a train, locomotive, cars or equipment (e.g. lining a switch, inspecting equipment, walking on the right of way, etc.) and the injury or death does not occur as a result of the movement of any other trains, locomotives, cars or equipment, then said incident shall be deemed to have occurred with the trains, locomotives cars and equipment of only the CPR and CPR shall assume all liability for said injury or death of its employee.

F. In every case of death or injury suffered by an employee of either the Parties or of a Third Party Railroad, when compensation to such employee or employee's dependents is required to be paid under any workmen's compensation, occupational, disease employers liability or other law, and either of said parties, under the provisions of this agreement, is required to pay said compensation, if such compensation is required to be paid in installments over a period of time, such party shall not be released from paying any such future installments by reason of the expiration or other termination of this agreement prior to any of the respective dates upon which any such future installments are to be paid.

G. IHB employees performing Pilot Service for CPR under the terms and conditions of this Agreement shall be deemed to be CPR employees. IHB employees whose sole responsibility is to provide CPR Pilot Service during their respective tour of duty will be considered CPR employees during their entire tour of duty. IHB employees who perform service

other than CPR Pilot service during their tour of duty will be considered employees of CPR only during the specific period of time they are employed in CPR Pilot Service.

SECTION 8 ENGINE SERVICING

The IHB agrees to service and fuel CPR locomotives at IHB's engine facilities as per IHB Local Freight Tariff 9347-C dated January 1, 2004 and hereafter as amended.

SECTION 9 COMPENSATION

Intermediate, Division and Terminal Switching charges for traffic handled pursuant to this agreement by the IHB for CPR will be governed by separate agreements and tariffs.

No separate trackage fees will be required to be paid by the CPR to the IHB for permission granted herein for the CPR to operate CPR trains on the IHB/Conrail joint facility trackage between CP 502 and Gibson Yard.

The expense of pilot service for qualifying CPR crews will be the responsibility of CPR who shall reimburse the IHB for actual cost of labor plus additives and miscellaneous expenses including, but not limited to, transportation fares, meals and lodging.

SECTION 10 MISCELLANEOUS

CPR agrees at CPR's own expense, to provide its train crews with radios fitted with IHB frequencies. CPR will arrange to contact IHB's Communication Department, and IHB will furnish to CPR the proper information enabling CPR crews to communicate with IHB operating officials via radio. CPR's use and operations shall at all times be subject to the direction and control of IHB's officer in control of the subject tracks and to applicable provisions of IHB's safety and operating rules.

Rights granted to CPR by this Interchange Agreement are for the sole purpose of interchanging traffic between CPR and IHB at Gibson Yard. CPR shall not perform any local freight service whatsoever at any point located on IHB property at Gibson Yard or IHB/Conrail joint facility property. CPR is prohibited from interchanging freight trains, locomotives, cars and equipment with any third party at any point on IHB property or IHB/Conrail joint facility property.

Procedures for qualification of CPR crews shall be arranged by the local supervision of each carrier. CPR shall be responsible to ensure its employees maintain their qualification to operate its trains on IHB property. IHB reserves the right to disqualify CPR employees from operating on IHB property for violation of, or alleged violation of, IHB Operating Rules, Practices, Procedures or failing to follow instructions from the proper authority.

The terms and conditions of this agreement apply to CPR trains operating between Eastern Canada and IHB via CP 502 and have no effect on any other agreements. CPR shall not have the right to permit or admit any Third Party to the use of the IHB tracks by reason of this Agreement.

This Agreement contains the entire understanding of the Parties with respect to the subject matter here of and supersedes any and all understandings of the Parties. No term or provision of this Agreement may be waived, modified or eliminated except by an instrument in writing signed by all parties.

SECTION 11 TERM

This Agreement becomes effective at 0001, Friday July 15, 2005 and shall continue in full force and effect until terminated as provided herein, provided, however; that either IHB or CPR shall have the right to terminate this agreement upon giving ninety (90) days advanced written notice to the other parties.

Termination of this agreement shall not relieve or release either IHB or CPR from any obligations assumed or from any liability which may have arisen or been incurred by said parties under the terms of this agreement prior to the termination thereof.

SECTION 12 NOTICE

Any notice required or permitted to be given by one party to the other under this Agreement shall be deemed given on the date sent by certified mail, or by such other means as the parties may agree, and shall be addressed as follows:

If to IHB:

General Manager
Indiana Harbor Belt Railroad Company
2721-161st Street
Hammond, Indiana 46323 - 1099

If to CPR:

Director Interline Management
Canadian Pacific Railway
1200 Jorie Blvd
Oak Brook, IL 60523

Manager Interline Agreements
Canadian Pacific Railway
401 – 9th Avenue SW, Suite 500
Calgary, AB Canada T2P 4Z4

If to NSR:

Senior Director – Joint Facilities
Norfolk Southern Corporation
1200 Peachtree Street, NE
Box 158
Atlanta, GA 30309

If to CRC

President
Consolidated Rail Corporation
1000 Howard Blvd.
Mount Laurel, NJ 08054

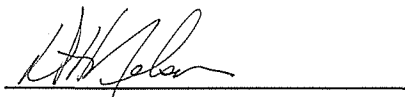
Either party may provide changes in the above addresses to the other party by personal service or U.S. Mail.

SECTION 13. GOVERNING LAW

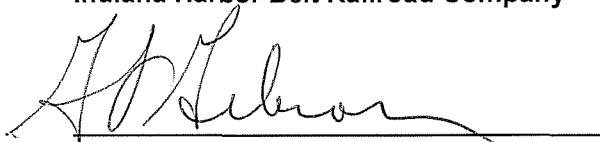
The terms of this Agreement shall be governed by and construed in accordance with the laws of the State of Indiana.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the date first above written.

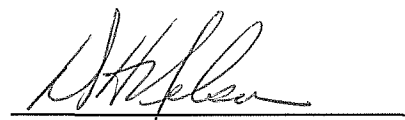
WITNESS:



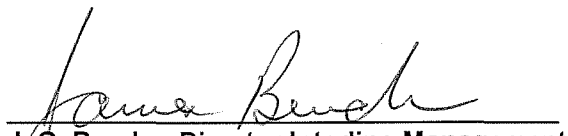
Indiana Harbor Belt Railroad Company


G. L. Gibson, General Manager

WITNESS:



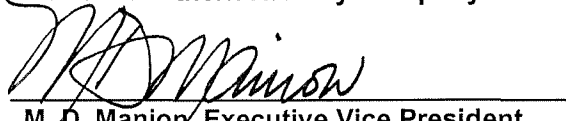
**Soo Line Railroad Company, d/b/a
Canadian Pacific Railway Company**


J. G. Bender, Director Interline Management

WITNESS:



Norfolk Southern Railway Company


M. D. Manion, Executive Vice President
Operations

WITNESS:



Consolidated Rail Corporation

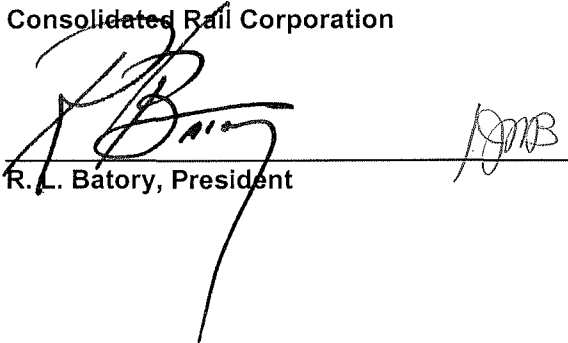
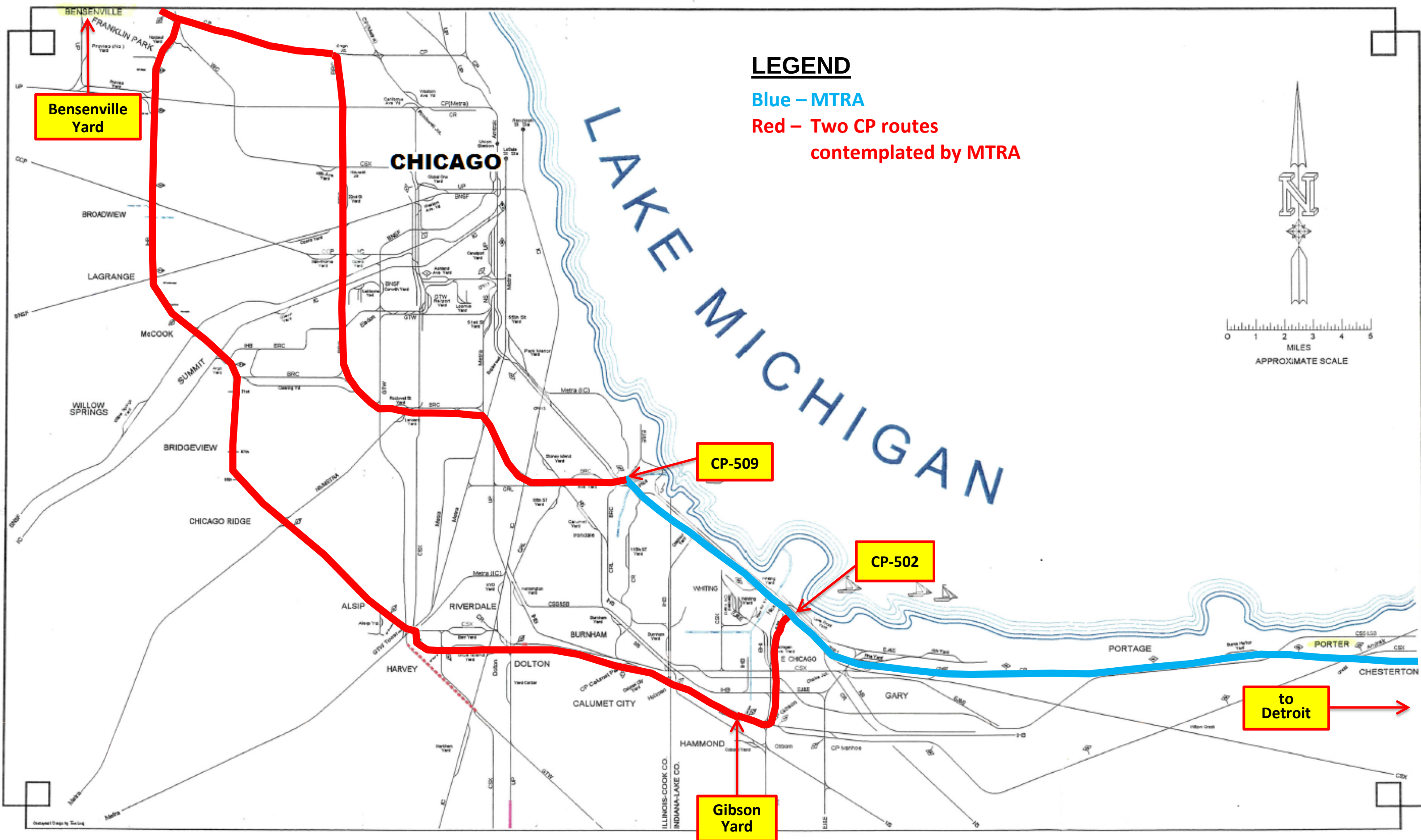

R. L. Batory, President

Exhibit 3
Map



LEGEND

- Blue – MTRA
- Red – Two CP routes contemplated by MTRA

Bensenville Yard

CP-509

CP-502

Gibson Yard

to Detroit

Exhibit 4
Arbitration Award

**CANADIAN PACIFIC RAILWAY COMPANY,
SOO LINE RAILROAD COMPANY
D/B/A CANADIAN PACIFIC,
Claimant / Counter – Respondent,**

v.

In Re: MTRA/IHBLA

**NORFOLK SOUTHERN RAILWAY COMPANY,
Respondent / Counter-Claimant**

ARBITRATORS' FINDINGS OF FACT

1. The parties to this dispute are the Soo Line Railroad Company, d/b/a Canadian Pacific (hereinafter with its railroad affiliates collectively referred to as "CPR") and Norfolk Southern Railway Company ("hereinafter referred to as "NS"). Both are large, sophisticated, Class I railroads.

2. CPR does not own a line of railroad track between Detroit and Chicago, which presents a significant gap in its rail system between the Eastern U.S. /Canada and the Midwestern U.S.

3. In 1985, CPR addressed this gap by entering into a Joint Use Agreement with C&O Railway (later to become part of CSX Transportation Co., hereinafter referred to as "CSXT"). The Joint Use Agreement provided that C&O would haul CPR trains (including CPR locomotives and cabooses) between yards in Chicago and Detroit using C&O crews. The Joint Use Agreement provided for a limited number of CPR trains but did not limit the commodities that C&O would haul. For the next 20 years, C&O (or CSXT) hauled CPR trains between Chicago and Detroit pursuant to this agreement.¹ Although the majority of traffic that moved under the Joint Use

¹ Although the parties here have referred to the Joint Use Agreement as a "haulage agreement," regulatory authority was obtained as "trackage rights." The ICC authorized (through exemption)

Agreement was westbound automobiles and related auto parts (and empty returns), other non-automotive traffic was moved as well.

4. On June 2, 2005, CPR and NS entered into the Michigan Trackage Rights Agreement (“MTRA”). CPR intended to replace the C&O Joint Use Agreement with the MTRA in providing CPR a connection for traffic between Detroit and Chicago.² The MTRA grants to CPR a right to operate a limited number of its trains, with its own crews, over NS trackage between points in and around Detroit and two points near Chicago referred to as Control Points 502 and 509. The trackage rights are “bridge rights” only, meaning that CPR is not permitted to use the trackage to serve customers on the line or to interchange with other carriers from that trackage. The number of trains CPR may operate is limited to a weekly average of 10 per day (total in both directions), and each train is limited to 8500 feet. The MTRA protects specified NS intermodal traffic interlined with other railroads by prohibiting CPR from using the trackage rights to compete for that business. The MTRA also protects certain NS automobile traffic by prohibiting CPR from using the trackage rights to haul automobiles from specified NS-served facilities. Both the intermodal and automotive restrictions are detailed and comprehensive. The MTRA does not contain any other restrictions on the commodities that CPR is permitted to carry, nor the origin or destination of the cars beyond the trackage rights line, nor whether it is a unit or manifest train.

the grant of the rights at their inception, ICC Finance Docket No. 30703, *Soo Line R. Co. – Joint use of Lines – Chesapeake & O. R. Co.* (served September 10, 1986), and the STB authorized (through exemption) the later discontinuance of the rights, STB Finance Docket AB-57 (Sub-No, 59X), *Soo Line R. Co. – Discontinuance of Trackage Rights Exemption* (served June 30, 2010).

² The MTRA has subsequently been amended in several respects not material to this dispute.

5. Section 2(e)(i)³ of the MTRA provides in pertinent part:

[CPR] may use the trackage rights granted herein solely for the purposes of:

(i) ... the overhead movement of any commodity in the revenue waybill account of [CPR]; provided that such traffic has both a prior and subsequent movement on [CPR] lines (including trackage rights held by [CPR] over other carriers): (A) east of, but not including, Detroit, MI; and (B) west of, but not including, CP-502 or CP-509

6. The MTRA was intended to provide CPR with two routes in and out of Chicago on the east, one over Control Point 509 and the other over Control Point 502. However, when the MTRA was signed by the parties in June 2005, while CPR held other trackage rights that permitted it to reach Control Point 509, it did not have any means of connecting with Control Point 502.

7. In the weeks following execution of the MTRA, CPR was not successful in obtaining ownership of or formal trackage rights over trackage connecting with Control Point 502. Recognizing that Indiana Harbor Belt Railroad Company (“IHB”) has trackage rights to reach Control Point 502, CPR and IHB entered into an Interchange Agreement, dated July 15, 2005 (“IHBIA”), along with NS and Consolidated Rail Corporation (“Conrail”). Section 1 of the IHBIA provides as follows:

The CPR shall have the right, and agrees to deliver, with its own power, crew, and marker trains to the IHB via CP 502 in East Chicago, Indiana. Said grant shall be considered a grant of operating rights and not trackage rights. Each of CPR and IHB will deliver cars to the other on such tracks in Gibson Yard as IHB from time to time designates.

The IHBIA is terminable by IHB or CPR (not Conrail or NS) on 90 days’ written notice.⁴

³ Specific portions of the MTRA are quoted or referenced below and to that extent constitute further findings of the panel.

⁴ Additional portions of the IHBIA are quoted or referenced below and to that extent constitute further Findings of the panel.

8. Section 2(c) of the MTRA provides that CPR must determine on a train by train basis whether to enter or exit the subject trackage via CP-502 or CP-509, and advise NS's designated operating officer of the intended routing.

9. Section 2(c) of the MTRA states that NS must use its best efforts to accommodate the routing specified by CPR.

10. Section 2(d) of the MTRA provides that NS's designated operating officer will instruct CPR on a train by train basis whether to enter or exit the trackage via CP-502 or CP-509, provided such instructions are consistent with operating protocols prescribed by a Services Standard Committee, comprised of representatives of both NS and CPR.

11. Section 2(d) of the MTRA states that CPR shall have no claim against NS for failing to accommodate Soo's requested routing.

12. Despite the requirements of the MTRA, CPR and NS both failed to designate representatives to serve on the Services Standard Committee, and both failed to propose or adopt any operating protocols.

13. Utilizing the IHBIA, CPR has delivered westbound trains, via CP 502, to IHB in and around IHB's Gibson Yard for interchange to IHB; and IHB has delivered eastbound trains to CPR in and around Gibson Yard for interchange to CPR for eastbound movement via CP 502. The large majority of traffic interchanged between CPR and IHB at Gibson Yard has consisted of westbound automobiles and related auto parts, and eastbound empty returns. However, there have been other commodities and car-types interchanged at Gibson in both directions.

14. Beginning in 2013, IHB delivered to CPR at Gibson Yard a number of unit trains of tank cars loaded with crude oil that originated on the BNSF Railway. These trains were interchanged to IHB in Chicago, and were moved by IHB to Gibson Yard. Those trains were then interchanged at Gibson Yard to CPR, which hauled the trains eastbound via Control Point 502 over the MTRA to Detroit and points beyond. Prior to May 9, 2014, no less than 6,380 crude oil cars moved over Control Point 502.

15. By letter dated March 31, 2014 NS questioned CPR concerning whether operating the crude oil trains over Control Point 502 complied with the MTRA. CPR did not respond to that letter. NS subsequently notified CPR that the MTRA did not permit CPR to move eastbound unit trains of crude oil originating on BNSF and interchanged to CPR by IHB at Gibson Yard, and blocked the movement of such a train by holding it at a location on the track subject to the MTRA. CPR disputes this limitation of its operating rights.

16. In order to permit continued rail service of the disputed move, CPR and NS entered into an agreement effective May 9, 2014 pursuant to which CPR agreed without prejudice to pay an access fee (in addition to the fee specified in the MTRA) per car for any further such movements pending resolution of this dispute.

17. On October 24, 2014, CPR invoked the arbitration provisions of the MTRA by filing a Demand for Arbitration with the American Arbitration Association, docketed as Case No. 01-14-0001-7938, and NS filed an Answer and Counterclaims.

18. In July 2014 the parties entered into an Agreement to Arbitrate Pending Disputes in which CPR appointed Ronald Lane and NS appointed Paul Keenan to serve as arbitrators and to choose a third neutral arbitrator. Pursuant to the agreement Mr. Robert Opal was selected as the third

neutral arbitrator. Also pursuant to the agreement, the arbitration is to be conducted in accordance with the commercial arbitration rules of the American Arbitration Association, but not formally administered by the American Arbitration Association.

19. On May 13, 2016 CPR requested emergency relief from this panel, alleging that NS refused to allow trains containing both mixed manifest and auto traffic from using the Michigan Trackage Rights via Control Point 502 in breach of the MTRA, and sought interim injunctive relief during the pendency of this proceeding.

20. Following expedited briefing and a telephonic hearing, the panel declined to issue preliminary relief pending a hearing on this matter. The panel concluded:

Without regard to whether irreparable harm or other legal criteria have been satisfied, the panel notes that the evidence submitted by the parties shows that CP has not used the CP-502 routing for auto-manifest trains since February of 2014 (before the arbitration was instituted), and injunctive relief is therefore unnecessary to maintain the status quo pending a final decision by the arbitrators.

21. Each party submitted a pre-hearing brief on the merits of this dispute, and an evidentiary hearing was conducted in Chicago, Illinois on July 21-23, 2016, at which the parties presented testimony and documentary evidence and opening and closing arguments. The parties submitted Post Hearing Briefs on July 25, 2016.

ARBITRATORS' CONCLUSIONS OF LAW

I. Jurisdiction

On October 24, 2014 CPR filed a "Demand for Arbitration" with the American Arbitration Association ("AAA") seeking declaratory relief akin to that afforded in a declaratory judgment action, and remedies arising from NS' alleged breach of the MTRA and IHBIA. On November

25, 2014 NS filed an Answer to the Demand for Arbitration with the AAA, and averred counterclaims which also sought declaratory relief and remedies arising from CPR's alleged breach of the MTRA and IHBIA. The MTRA includes a mandatory arbitration clause to resolve disputes arising under the agreement.

In July of 2015, CPR and NS entered into a written agreement to have the claims which had been filed with the AAA to be decided by arbitrators essentially of their choosing, and to be administered by those arbitrators --- thereby eliminating further AAA involvement or administration.

During an initial telephone conference between the arbitrators and the parties' counsel, the arbitrators pointed out that both parties had asserted a breach of contract claim under the IHBIA, but there was no arbitration clause in the IHBIA contract. At that point in time, counsel for both parties confirmed that the parties had agreed to submit any claims arising under the IHBIA to the arbitration panel.

II. MTRA Restrictions

The MTRA permits CPR to use the MTRA trackage rights for any commodity in CPR's revenue waybill account, subject to specific traffic restrictions discussed in Section A below, and a "prior/subsequent movement" requirement discussed in Section B. MTRA traffic may move in either direction and may enter or exit the trackage rights in the Chicago area either at CP-502 or CP-509, subject to the procedures set out in Section 2(c)-(d) of the MTRA. The same requirements and same conditions apply to traffic using either of these entry/exit points.

A. MTRA: Traffic Restrictions

The MTRA contains express restrictions on the handling of certain traffic. These include restrictions preventing CPR from using the MTRA trackage rights for specified movements of intermodal traffic (Section 2(e)(ii)), restrictions on performing local freight service or interchanging traffic along or at the end points of the trackage rights line (Section 3(b)), and restrictions on handling finished automobiles, trucks or vehicle parts destined to or originating in the Detroit-Warren-Livonia MI Metropolitan Statistical Area (Section 3(i)).

These restrictions are significant because they demonstrate that, when the parties intended to impose restrictions on the traffic that CPR could move under the MTRA, the parties did so by express language in the agreement and did not leave the matter to interpretation. Both parties are large, sophisticated railroads. Had they intended to impose the restrictions being asserted in this proceeding when the underlying agreements were made, those restrictions would have been clearly and explicitly stated in the agreements. The fact that no such restrictions are stated in either the MTRA or the IHBIA is a strong indication that no such restrictions were intended, and should not be read into the agreements by “interpretation”.

B. The “prior/subsequent clause” of MTRA Section 2(e)(1) and the IHBIA “operating rights”

The parties have devoted substantial effort arguing about the meaning of the “prior/subsequent clause” of MTRA Section 2(e)(i). That section establishes that the trackage rights are limited to “overhead movement,” and it does so by requiring that MTRA traffic must have “...both a prior or subsequent movement on [CPR] lines (including trackage rights held by [CPR] over other carriers): (A) east of, but not including, Detroit, Michigan; and (B) west of, but

not including, CP-502, CP-509 or such other End Point(s) in the vicinity of Chicago as may be permitted by this Michigan Trackage Rights Agreement,”

The parties agree that the trackage rights are only “overhead” or “bridge” rights, but disagree on the meaning of the phrase “including trackage rights held by CPR over other carriers”. NS’ position is that this phrase covers only formal “trackage rights” (i.e., rights approved or exempted by STB under 49 U.S.C. 11323(a)(6)) (NS Post Hearing Brief at 6). CPR’s position is that the phrase also covers rights granted by arrangements which are functionally similar to trackage rights (CPR Post Hearing Brief at 8-12). Both parties, however, agree that the IHBIA grants “operating rights”, not “trackage rights” requiring STB authorization, and that CPR has no “trackage rights” west of CP-502 (CPR Post Hearing Brief at 8-9; NS Post Hearing Brief at 3).

NS’ position cannot be lightly dismissed. After all, the MTRA prior/subsequent clause specifically states that MTRA traffic must move on “CPR lines (including **trackage rights** held by CPR over other carriers)” west of CP-502. The only rights CPR has west of CP 502 for the traffic in question are the rights granted by the IHBIA, an agreement which is obviously related to the MTRA and plainly has an impact on the rights of CPR under the MTRA. The IHBIA expressly says that the rights it grants are “operating rights and not trackage rights.” Seemingly, that should be the end of the matter: The MTRA requires “trackage rights, the IHBIA “operating rights” are expressly not “trackage rights”, therefore the “operating rights” do not satisfy the “prior/subsequent clause” of the MTRA. Further, the interplay between these provisions is obvious and should have raised a red flag for the CPR negotiators (Day 1 Hrg. Tran. at 176-177). They would, presumably, have said something about it if the language did not properly express their intent. Apparently, they raised no objection to this language. (Id.)

Yet, it is not as simple as this.

First, the structure of the MTRA leads to a contrary result. The prior and subsequent movement language is an elaboration or clarification of the term “CPR lines” in the section that limits what CPR can do between the endpoints (no local service or interchange); it is not a limitation on how CPR reaches the endpoints. Access to the endpoints is referred to expansively, clearly establishing that access need not be by ownership, and there is nothing in the language or the structure of the agreement to suggest that the parenthetical “including trackage rights” was intended to restrict the allowable access at CP-502.

This straight-forward reading of the language in Section 2(e)(1) is confirmed by the interpretive guidance provided by the parties themselves in MTRA Section 22(d) (part of the MTRA’s “General Provisions”), which provides a specific definition of the word “including”, as follows:

As used in this Michigan Trackage Rights Agreement, the word “including” means “without limitation.”

Thus, the meaning of the “prior/subsequent clause” read together with the above definition of “including” in Section 22 (d) is as follows:

provided, that such traffic has both a prior and subsequent movement on CPR lines (including, **without limitation**, trackage rights held by CPR over other carriers). [*emphasis in bold supplied*]

So read, CPR rights over another railroad which may satisfy the “prior/subsequent clause” include, but are specifically not limited to “trackage rights”.

Third, reading the “prior/subsequent clause” as requiring CPR to have STB-filed “trackage rights” west of CP-502 leads to a result which could not have been the intent of the parties. The

one thing the IHBIA was unquestionably designed to accomplish was to permit westbound automotive traffic to move via CP-502 to Gibson Yard (including traffic IHB interchanged to UP or BNSF without further handling by CPR). Since the inception of the agreements, a substantial number of cars hauling this traffic (30,000 or more per year) have moved via CP-502 (Day 2 Hrg. Tran at. 163-164). Both CPR and NS expressly agreed at the hearing that the MTRA and the IHBIA must be read in a way that permits movement of this traffic (Day 2 Hrg. Tran. at 268-70). But, if the MTRA is read to permit use of CP-502 only for traffic that moves over CPR's own lines or STB-authorized "trackage rights" west of CP-502, none of the automotive traffic would have been permitted, since this condition would not be met. This is clearly not an acceptable reading of the agreements.

Accordingly, we hold that the "prior/subsequent clause" does not categorically exclude the IHBIA "operating rights" simply because they are not technically STB-authorized "trackage rights". The IHBIA "operating rights" can properly be considered in determining whether the requirements of the "prior/subsequent clause" have been met. This reading is entirely consistent with the existing language of the MTRA, and does not require the Panel to add, excise or distort any terms of the agreement.

C. IHBIA "operating rights" satisfy the MTRA "prior/subsequent clause"

IHBIA Section 1 grants CP "operating rights but not trackage rights" over IHB west of CP-502 for interchange of traffic with IHB at IHB's Gibson Yard. It appears from the record that the purpose of the phrase "operating rights but not trackage rights" was to distinguish the rights granted CPR 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, and without approval of IHB's board of directors (Day 1 Hrg Tran. at 168; Day 2 Hrg. Tran. at 260, 262). Both parties agree that CPR does not have STB-authorized "trackage rights" west of CP-502.

We hold that the IHBIA "operating rights" fall within the scope of "CPR lines" in Section 2(e)(1) as contemplated by the parties in defining "overhead movements". Our reasons for this conclusion are as follows:

First, as shown by CPR Exhibit 114, the IHBIA "operating rights" grant essentially the same bundle of rights as a formal trackage rights agreement. In fact, the IHBIA "operating rights" actually provide broader rights than the STB-authorized "trackage rights" CPR obtained in the 1985 CSXT agreement. The IHBIA permits CPR to operate its trains with its own crews, while the CSXT trackage rights agreement required CPR trains to use CSX crews (Day 1 Hrg. Tran at 74).⁵

The "operating rights" are similar to "trackage rights" in other respects:

- A purpose of the "prior subsequent clause" was to avoid stoppages on the NS at the end points of the MTRA trackage rights (Day 1 Hrg. Tran. At 93. Like "trackage rights" the "operating rights" permit CPR trains to enter and exit the MTRA trackage without stopping on NS for crew changes or other interchange related procedures.

⁵ NS witness Hunt testified that the ability of a tenant railroad to use its own crews is an important benefit of a "trackage rights" arrangement (Day 2 Hrg. Tran. at 126-127).

- CPR does not obtain any greater rights under the “operating rights” than it would have obtained if equivalent rights had been filed with STB as “trackage rights”.⁶
- NS’ “franchise” is not affected by the “operating rights” any more than if equivalent rights had been filed with STB as “trackage rights.”
- The MTRA contemplated that CPR would obtain a much broader grant of “trackage rights” over IHB extending from CP-502 to CPR’s Bensenville Yard, which would have permitted any MTRA traffic to enter/exit NS via either CP-502 or CP-509.⁷ This would have given CPR two alternate routes through the Chicago area for all of its MTRA traffic, without regard to whether it moved over CP-502 or CP-509. NS did not object to CPR’s acquisition of these rights. Rather, it was CSX (the owner of a small section of the IHB route) which would not agree to them (Day 2 Hrg. Tran. At 104). Had CPR obtained the IHB trackage rights contemplated by the MTRA, they would have affected NS’ “franchise” at least as much as (if not more than) the “operating rights” over IHB that CPR ultimately obtained.

NS’ nevertheless argues that there is a “clear distinction” between “operating rights” (which supposedly cover only operational arrangements between railroads) and “trackage rights”

⁶ While rights such as those granted by the IHBIA are generally not required to be filed with STB, the parties to these arrangements will sometimes file them as “trackage rights”, see, for example, STB Finance Docket 34703, *Illinois Central R. Co – Trackage Rights Exemption – Union Pacific R. Co* (served June 8, 2005); STB Finance Docket No. 34688, *Carrizo Gorge R. Co., - Trackage Rights Exemption – Union Pacific R. Co.*, (served May 2, 2005)

⁷ Under this arrangement, MTRA traffic would have been routed over CP-502 or CP-509 on a “day-to-day, train-by-train, basis” under the procedures established in MTRA Section 2(c)-(d).

(which supposedly cover “commercial arrangements”) (NS Post Hearing Brief at 3-7; Day 2 Hrg. Tran. at 150-1, 172-2). That distinction is not supported by the record or by STB case law.

First, as explained by NS witness Friedman (the senior and most experienced NS official to testify on this point) the term “operating rights” does not have a generally agreed-upon definition in the railroad industry,⁸ and can cover a wide variety of railroad arrangements, sometimes including “trackage rights” (Exhibit 87, Friedman Dep at 55). While NS witness Hunt (a subordinate NS official) disagreed with Mr. Friedman, we find Mr. Friedman’s testimony on this point to be more informed and consistent with our own understanding of the term.

Second, the STB’s use of the term “operating rights” is generally consistent with Mr. Friedman’s testimony. While the STB uses the term “operating rights” to refer to interchange arrangements, it also uses the term to refer to other types of arrangements, see, for example, STB Finance Docket No. 35991, *Atlanta Development Authority –Declaratory Order* (served June 8, 2016), p. 2, n 2 (exclusive freight operating easement and “operating rights” retained by NS in sale of right-of-way to non-rail carrier); STB Finance Docket No. 35692, *Eastside Community Rail LLC – Operation and Operation Exemption*, (served November 12, 2012), p.1 (rights of a lessee railroad to operate leased rail line), STB Docket No. AB-290 (Sub-No. 311X), *Norfolk Southern R. Co. Exemption – In Baltimore Co., MD.* (served April 5, 2010, p. 1) (abandonment of “operating rights” to provide freight service over rail line owned by a transit agency). All of the cited cases involve rights to provide commercial freight service on a rail line, and are clearly “commercial” arrangements, not just “operational” arrangements between railroads. Further, apart from STB’s usage of the term “operating rights”, STB has long recognized in other contexts that interchange

⁸ MTRA §22(e) directs us to interpret words in accordance with their generally accepted meaning in the railroad industry.

arrangements have both commercial and competitive significance, see generally STB Ex Parte No. 575, *Review of Rail Access and Competition Issues* (served October 7, 2007).

Third, NS witness Harris testified that there were “absolutely” commercial reasons a railroad would want access to Gibson Yard (Day 3 Hrg. Tran. at 69). In other words, whatever “operating rights” might mean in other contexts, the IHBIA “operating rights” involved in this case are, in fact, a “commercial” arrangement.

Fourth, as previously discussed, both parties expressly agreed at the hearing that the MTRA and the IHBIA must be read to permit movement of westbound automotive traffic via CP-502, including traffic which IHB subsequently interchanges with UP or BNSF (in other words, traffic which CPR does not handle west of Gibson Yard) (Day 2 Hrg. Tran. At 268-270). This necessarily requires that the IHBIA “operating rights” be read as satisfying the MTRA “prior/subsequent” clause - at least as to the westbound automotive traffic. Otherwise, the automotive traffic would not comply with the “prior/subsequent” clause and would not be permitted by the agreements. Further, both parties have, by their conduct, treated IHBIA operating rights as sufficient for movement of westbound automotive traffic since the inception of the agreements.⁹ Indeed, it is difficult to see what business purpose the IHBIA would have served if it did not cover at least this traffic.

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

⁹ There has also been a significant movement of eastbound empty returns of automotive cars and the parties agreed at the hearing that there has been “some” movement of non-automotive traffic and that the IHBIA permits “some” such traffic, although they differ as to how much is permitted and its significance.

“trackage rights”. From an operational and commercial perspective, there is no functional difference between the IHBIA “operating rights” and formal “trackage rights”. The IHBIA “operating rights” are within the scope of access rights contemplated by the parties’ reference to “CPL lines” west of CP-502 in Section 2(e)(1). Accordingly, we hold that the IHBIA “operating rights” satisfy the MTRA “prior/subsequent” clause.

III. IHBIA Restrictions

The parties disagree as to what traffic is covered by the IHBIA. NS’ position is that the IHBIA permits only westbound movements of automotive traffic that go to Gibson Yard for classification.¹⁰ Consistent with this position, NS argues that the operating rights do not cover eastbound traffic, unit trains of oil, or westbound manifest traffic (beyond a small amount) (NS post-hearing brief at 22) CPR’s position is that the IHBIA covers all traffic (CPR Post Hearing Brief at 8-12).

We find that the IHBIA “operating rights” permit all MTRA traffic interchanged between IHB and CP at or near Gibson Yard (including, specifically the oil and manifest traffic at issue).

A. Commodity Restrictions

The IHBIA contains no express restrictions on the types of traffic that can be handled under the operating rights. The fact that the parties – large, sophisticated railroads - included no specific

¹⁰ NS’ position is actually not this clear or consistent. At various points in the record, NS witnesses opined that the IHBIA allows westbound automobile unit trains (i.e., automobile trains which are not classified at Gibson), and small (undefined) amounts of manifest traffic (Day 2 Hrg. Tran, at 194, 219-221, 244; Day 3 Hrg. Tran. at 45). NS witness Hunt also stated that eastbound empty equipment moves, while not expressly permitted by the IHBIA, were permitted by AAR Car Service Rule 6, one of the AAR rules governing interchange incorporated by the IHBIA (Day 2 Hrg. Tran. at 164).

traffic restrictions is a strong indication that no such restrictions were intended. Similarly, if NS and CPR had intended to impose restrictions on the kinds of traffic that could move under the MTRA via CP-502, they would have expressly done so -- presumably in the MTRA itself and not in an agreement involving two third parties with no stake in this issue - and not left the issue to interpretation.¹¹

Further, the record shows that IHB has not objected to handling any of the traffic CPR has interchanged under the IHBIA, regardless of type of traffic, direction of movement, or type of train (Day 2 Hrg. Tran. At 24, 102)

NS argues that the provisions dealing expressly with auto traffic imply that only auto traffic is permitted under this agreement. However, the record reflects that when CSXT hauled CPR trains between Detroit and Chicago, "CP Auto Trains" commonly referred to CP trains that terminated at Gibson Yard rather than running through to Blue Island – without regard to whether they also contained non-automotive traffic. Nelson depo. 68-69. Accordingly, the "Classification" section does not limit the traffic that can be interchanged.

NS' major argument for limiting the scope of traffic permitted by the IHBIA is that the limitation can be inferred from the scope of the interchange procedures stated in the text of the agreement (NS Post Hearing Brief at 17-19). It is true, as NS contends, that the specific interchange procedures stated in the text of the IHBIA relate primarily to westbound traffic to be classified at Gibson Yard.¹² But NS' argument fails to consider all of the interchange language in

¹¹ The restrictions claimed by NS could have easily been expressed in the MTRA.

¹² NS cites an internal CPRR E-mail in which a CPR official (Hubbard) reports a statement made by another CPR official (James Bender) that the IHBIA did not cover traffic moving in "both directions" (NS Post Hearing Brief at 11). Mr. Bender's reported view is actually contrary to the

the agreement. Section 2 of the IHBIA also broadly incorporates rules of the Association of American Railroads (AAR) governing interchange as follows:

Unless otherwise modified herein, the rules of the Association of Railroads [sic., should be “Association of American Railroads”] governing interchange of cars between railroads shall govern the interchange of cars hereunder.

The AAR rules “governing interchange of cars between railroads” include the AAR Car Service Rules (Exhibit No. 145). As NS witness Hunt admitted, the Car Service Rules are as much a part of the IHBIA as if they were written into the agreement itself (Day 2 Hrg. Tran at 272-273),

AAR Car Service Rule 7 (CSR 7) provides procedures and requirements that apply to all railroad interchanges of all rail traffic, except to the extent the parties to an interchange otherwise agree.¹³ The specific interchange procedures stated in the text of the IHBIA “modify herein” CSR 7 only as to the traffic covered by those procedures (i.e., westbound traffic to be classified at Gibson Yard).¹⁴ There is nothing in the IHBIA which limits or modifies the applicability of CSR 7 to other traffic. In other words, if the scope of the IHBIA traffic is to be inferred from its interchange language, it must be read to cover all traffic, because that is the scope of IHBIA’s

express terms of the IHBIA. The text of the IHBIA expressly covers both westbound and eastbound movements. IHBIA Section 1 provides that “Each of CPRR and IHB will deliver cars to the other” [at Gibson Yard]. Traffic delivered by CPRR to the “other” (IHB) is westbound traffic, and traffic delivered by IHB to the “other” (CPRR) is eastbound traffic.

¹³ CSR 7 is titled “Interchange-Error Movements” which suggests that the rule is only concerned with “error movements” that occur in interchange. That is not the case. As is clear from its text, the rule covers two subjects: general interchange procedures AND error movements

¹⁴ Consistent with this reading, the specific interchange procedures in the IHBIA impose requirements applicable to the traffic covered by these procedures which are different in various respects from standard CSR 7 procedures.

interchange language -- the interchange procedures stated in the agreement text together with the interchange procedures in the AAR rules which IHBIA expressly incorporates.

Finally, on this point, NS argues that reading the IHBIA to incorporate CSR 7 is impermissible because Indiana law holds that, when a reference to another writing is made in a written contract for a “limited purpose”, the other writing becomes a part of the contract only for the purpose specified, and is foreign to the contract for all purposes other than the one specified, citing *I.C.C. Protective Coating v. A.E. Staley Manufacturing Co.*, 695 N.E.2d 1030 (Ind. App., 1962). But the I.C.C. case is nothing like the instant case. In the I.C.C. case, there was no express incorporation of another document even remotely similar to the IHBIA’s broad incorporation of AAR rules governing interchange. There were simply very limited references in the underlying contract (a purchase order) to labor & materials “per specifications outlined in your quotation of June 9, 1994” and “time and material rates outlined in your letter of June 17, 1994”, 695 N.E. 2d at 1033. The seller argued that these limited references served to incorporate other terms of the seller’s offer (which differed from the final terms of the buyer’s purchase order). Unsurprisingly, the court did not agree. In contrast, the IHBIA’s incorporation of the AAR rules is a not a cryptic reference to two isolated clauses for a “limited purpose”. It is a broad and unambiguous incorporation of the entire body of AAR rules governing interchange (including the Car Service Rules), and it applies all of these rules to IHBIA traffic “except to the extent modified herein”.

B. Restriction on location of interchange

Some of the CPR traffic moving under the IHBIA is interchanged with IHB on trackage near Gibson Yard, rather than on trackage within the yard itself. While not entirely clear, NS

suggests that traffic handled in this manner is outside the scope of the IHBIA (NS Post Hearing Brief at 18).

The record shows that, when interchange occurs on a non-yard track near Gibson Yard, it is because IHB has designated the non-yard track for the interchange (Day 1 Hrg. Tran. at 113-114; Day 2 Hrg. Tran. at 25-26, 55). The question of whether the IHBIA permits IHB to designate non-yard trackage near Gibson Yard for interchange with CPR is an issue between IHB and NS. IHB is not a party to this arbitration, and we have no jurisdiction to determine IHB's rights under the IHBIA. It is not even clear there is an actual dispute between IHB and NS, as there is no evidence in the record that NS has ever raised an objection with IHB about this practice.

In sum, we cannot conclude that the IHBIA – an ordinary joint-facility agreement among parties owning or using a common stretch of track – can be read to limit the commodities, origin/destination, direction or train type of CPR trains using the MTRA trackage via CP-502.¹⁵

IV. Waiver and amendment issues

Both parties contend that the IHBIA operates as a waiver of MTRA requirements for some CP-502 traffic, but disagree on what is waived (*compare* CP Post Hearing Brief at 22-24 *with* NS Post Hearing Brief at 14-15). CPR also contends that NS, by its actions permitting some of the issue traffic to move in the past, has waived the MTRA “prior/subsequent clause” requirements for this traffic (CP Post Hearing Brief at 24).

¹⁵ We note that NS' participation in the IHBIA is as an owner of a track segment traversed by CPR for effectuating interchange. It is unclear whether NS has a protectable interest in the terms of interchange operations between CPR and IHB, but in light of our holding, we need not address this issue.

The waiver claims appear moot in view of our holding that the IHBIA “operating rights” satisfy the MTRA’s “prior/subsequent clause”. We note, however, the following:

IHBIA Section 10 provides, in relevant part, as follows:

The terms and conditions of this agreement apply to CPR trains operating between Eastern Canada and IHB via CP 502 **and shall have no effect on other agreements.** (*emphasis supplied*)

The highlighted language prevents the IHBIA from being read as a waiver of any MTRA requirements.

MTRA Section 22(i) provides, in relevant part, as follows:

No consent or waiver expressed or implied, by a Party of any breach or default by the other Party in the performance of such other Party of its obligations hereunder shall be deemed or construed to be a consent to or waiver of any other breach or default in the performance hereunder by such other Party. Failure on the part of a Party to complain of any act or failure of the other Party to declare the other Party in default, irrespective of how long such failure continues, shall not constitute a waiver by the first mentioned Part of its rights hereunder”

Under this language, even if NS initially “waived” restrictions on eastbound oil traffic or westbound manifest traffic by its conduct (which we do not decide), NS had the right to revoke such waivers at any time as to future shipments. We find that NS letter of March 31, 2014 (Exhibit 42) revoked any prior waiver as to the eastbound oil traffic, and that its notification to CPR of May 12, 2016 revoked any prior waiver as to westbound manifest traffic.

Similarly, the parties have raised the possibility that the IHBIA served to “amend” the terms of the MTRA. We see no indicia that NS and CPR, by entering into an interchange agreement with Conrail and IHB intended to amend their separate MTRA agreement. Further, it appears that the MTRA itself as well as the law of New York would require a quite explicit expression of such intent. However, we have ruled that the MTRA as written places no restriction on the crude oil

trains and other manifest traffic at issue, so we do not address the question of whether the IHBIA amended the MTRA to the same effect.

V. Routing and Use of CP-502

While NS does not have the right to limit or restrict CPR traffic from entering or exiting the MTRA trackage via CP-502 based upon commodity, train type, direction, or prior or subsequent movement via IHBIA operating rights, CPR does not have the right to self-determine whether its trains can enter or exit the MTRA trackage via CP-502 or CP-509. Section 2(c) of the MTRA allows CPR to initially determine what trains will use CP-502 or CP-509, and requires NS to use its “best efforts” to accommodate the routing specified by CPR. However, section 2(d) clearly gives NS the right to accommodate, or not accommodate, CPR’s routing requests “provided, that such instructions shall generally be consistent with the operating protocols established by the Service Standards Committee.” Section 2(d) then precludes any claim by CPR against NS for failing to accommodate any requested routing.

The parties’ collective failure to form a Services Standard Committee or establish operating protocols is inconsistent with the MTRA. It will inevitably lead to future disputes over access points in the absence of any agreed standards for that determination. We strongly encourage the parties to comply with the MTRA by forming the Service Standard Committee and establishing the operating protocols required by the agreement.

CPR’s briefing on this issue asserts only that NS waived any argument seeking to enforce the access terms set out in Section 2(d), because the argument was not raised in NS’ initial briefing. However, as previously noted, Section 22(i) of the MTRA effectively precludes any such waiver.

ARBITRATORS' AWARD

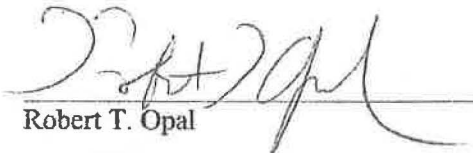
With respect to the relief and remedies requested by the parties, ¹⁶ the arbitrators rule as follows:

- 1) CPR's request for a declaration that CPR has the right to enter or exit its traffic under the MTRA at CP-502 regardless of whether that traffic has a prior or subsequent move on CPR or CPR trackage rights west of CP-502 is denied. The prior/subsequent movement requirement of the MTRA is an express term of the agreement. It has not been waived or amended and the arbitrators are not free to disregard it. In addition, under MTRA Section 2(c)-(d), CPR does not have the unilateral right to determine whether its traffic enters or exits at CP-502 or CP-509.
- 2) NS' request for a declaration that the MTRA and IHBIA prohibit CPR "from moving any traffic over CP-502 other than westbound traffic for interchange to IHB for classification in Gibson Yard, namely automotive traffic and perhaps the occasional carload of manifest traffic" is denied:
 - a. Neither the MTRA nor the IHBIA prevent CPR traffic from entering or exiting MTRA trackage at either CP 502 or CP-509 based upon the commodity being transported, direction, or the train type (including unit trains, crude oil trains or manifest).

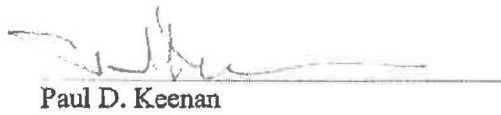
¹⁶ CPR pre-hearing brief at 23; NS pre-hearing brief at 22-23.

- b. The IHBIA “operating rights” between CP-502 and Gibson Yard are sufficient to satisfy the “prior/subsequent” movement requirements of the MTRA
 - c. The IHBIA “operating rights” include all commodities, the movement of traffic in both directions, and all train types.
 - d. There is no requirement that traffic moving under the IHBIA “operating rights” be classified at Gibson Yard
- 3) NS’ request for relief based upon CPR’s alleged breach of the MTRA and IHBIA, is denied. The record does not show any breach by CPR of these agreements.
- 4) CPR’s requests that the arbitrators (i) declare that NS is not entitled to a “premium” (i.e., access fee) for CPR traffic entering or exiting NS’ trackage at CP-502, and (ii) order NS to repay the premiums CPR paid to NS with interest. We agree that the MTRA does not provide for the assessment of an “access fee” for any traffic using CP-502; however, we deny CPR’s request for repayment of the access fee (with interest) for lack of jurisdiction. The access fee is governed by the parties’ agreement of May 9, 2014. The agreement of May 9, 2014, has no arbitration clause, and the panel has not been presented with any evidence that both parties agreed to arbitrate disputes under that agreement.

- 5) CPR's request to be awarded attorney's fees and costs is denied pursuant to Section 14(a) of the MTRA.

By: 
Robert T. Opal

By: 
Ronald A. Lane

By: 
Paul D. Keenan

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 36107

SOO LINE RAILROAD COMPANY -- PETITION FOR DECLARATORY ORDER

VERIFIED STATEMENT OF NICHOLAS WALKER

My name is Nicholas Walker. In 2005, I began working as a conductor in Bensenville, Illinois for Soo Line Railroad Company which, together with affiliated operating rail companies in the United States and Canada, does business as Canadian Pacific ("CP"). During my tenure with CP, I have served in a variety of operational roles, including Yardmaster, Supervisor Operations, Trainmaster in the Chicago and Minneapolis/St. Paul (Twin Cities) terminals, and Assistant Superintendent for the Twin Cities and Winnipeg, Manitoba terminals. Since July 2016, I have served as CP's Superintendent - US East - Bensenville Terminal.

In my career at CP, I have become familiar with all aspects of CP's day-to-day operations and have extensive knowledge of the Chicago terminal. In particular, I communicate daily with foreign carriers to ensure smooth and efficient operations. I am familiar with CP's operating rights into and out of Chicago granted by the June 2, 2005 Michigan Trackage Rights Agreement ("MTRA") and the July 15, 2005 Indiana Harbor Belt Interchange Agreement ("IHBIA").

Purpose

The purpose of my statement is to explain CP's current operations in the Chicago terminal, as well as the effect that termination of the IHBIA would have on CP's rail operations, CP's ability to use its rights granted by the MTRA, and the overall fluidity of the Chicago

terminal. Attached hereto as Exhibit 1 is a map illustrating the locations and trackage discussed in my statement.

Current Operations Via CP-502

CP currently operates between Detroit and Chicago over Norfolk Southern Railway ("NS") trackage pursuant to the MTRA and IHBIA. The MTRA provides that CP may enter and exit NS's tracks in Chicago at two points, CP-502 and CP-509. CP operates between CP-509 and its Bensenville Yard over trackage rights on the Belt Railway Company of Chicago ("BRC") from CP-509 to Cragin Junction and over Metra's commuter line from Cragin Junction to Bensenville. CP currently operates 6 to 8 manifest service trains daily between CP-509 and Bensenville Yard.

Under its rights granted by the IHBIA, CP operates on the 4-mile segment of track between CP-502 and Gibson Yard where it interchanges with the Indiana Harbor Belt Railroad Company ("IHB"). CP's primary traffic into Gibson Yard is westbound loaded automotive traffic which IHB interchanges to Union Pacific Railroad ("UP") and BNSF Railway ("BNSF"). Currently, CP operates 2 trains per day originating in Eastern Canada over CP-502 for interchange with IHB and processing at Gibson Yard -- an 8,000' solid finished automotive train ("the 147 train") and a manifest service train ("the 141 train"). Because CP's trains are limited to 8,000' between CP-502 and Gibson Yard, the 141 train sometimes includes additional automotive traffic that would otherwise cause the 147 train to exceed the 8,000' restriction. Transit time from when CP exits NS's trackage at CP-502 until arrival at Gibson Yard is between 45 minutes and 1 hour.

At Gibson Yard, IHB breaks up the 147 train and removes the automotive cars from the 141 train and processes the automotive traffic for interchange with UP and BNSF. IHB delivers

CP's automotive traffic to UP and BNSF at Gibson Yard the day after it arrives on CP's train. BNSF also receives some of the 147 train's automotive traffic for interchange at Blue Island Yard for routing to different destinations than the automotive traffic it receives at Gibson Yard. IHB delivers this automotive traffic to BNSF at Blue Island Yard on the day following its delivery at Gibson Yard. At Gibson Yard, IHB adds manifest and automotive traffic from other carriers to the 141 train, which its crews deliver with CP power to Bensenville Yard pursuant to a haulage agreement. Transit time from Gibson Yard to Bensenville Yard for CP's manifest traffic is approximately 8 hours.

Impact on CP Traffic If CP-502 is Closed

If CP could no longer access Gibson Yard via CP-502 because the IHBIA were terminated, its 141 and 147 trains would have to exit the MTRA trackage at CP-509 and travel approximately 21.4 miles north on BRC trackage to Cragin Junction. This would require operation over the 75th Street Corridor, which is widely considered to be one of the worst choke points for rail movements in Chicago. The 75th Street Corridor currently hosts 90 freight trains, 30 Metra commuter trains, and 2 Amtrak trains each day. From Cragin Junction, the trains would travel west approximately 8.8 miles over Metra's Elgin line and CP's freight mainline to Bensenville Yard, which are subject to significant capacity restrictions. Under CP's trackage rights agreement with Metra, Metra commuter trains have priority and CP's operations on the Elgin line are restricted to operating windows totaling approximately 16 hours each day. Although CP would interchange the 147 train with IHB at Norpaul Yard, approximately 1 mile south of Bensenville Yard, CP's freight main connects to IHB's mainline at B-12 in the southwest quadrant only, which does not permit a progressive westward movement to the south.

Consequently, instead of proceeding directly to Norpaul Yard with the 147 train, CP would have to continue further west to Bensenville Yard and reposition the locomotive power.

At Bensenville Yard, CP's 141 and 147 would each require different handling. As to CP's 147 trains, the current permissible train length over the MTRA trackage is 8,500'. However, the corridor between Norpaul Yard and Blue Island Yard restricts trains to 7,800' for safety reasons due to highway crossing and interlocking spacing issues. Consequently, CP would have to either reduce the capacity of the 147 train to 7,800' or remove the excess automotive cars at Bensenville Yard and combine them with the other automotive traffic from the 141 train. After inspection and any necessary remarshalling of traffic, CP crews would reposition the locomotive power to the opposite end of the train and proceed east through the southwest connection at B-12 and then south to Norpaul Yard. The above-described operation from CP-509 to Bensenville Yard for switching, inspection, re-crewing, and transit to Norpaul Yard would require approximately 18 hours.

The limited size of Norpaul Yard, however, cannot accommodate the 147 trains without breaking them up and placing them on up to 5 separate tracks. As this would severely restrict yard capacity and operations, IHB would likely require CP to leave the 147 trains with CP power attached on the mainline, adding a longer power cycle for the 147 service and consuming critical mainline capacity. IHB crews would then deliver the 147 trains to Blue Island Yard, approximately 26 miles from Norpaul Yard. There, IHB would process CP's automotive cars with other traffic for interchange with BNSF and reposition them within the yard for pick up by BNSF. From the time the CP crew arrived at Norpaul Yard to when CP's automotive traffic was interchanged with BNSF at Blue Island Yard would take 2 days, for a total of 4 days transit time from when the CP train exited the MTRA trackage at CP-509. Compared to CP's current

operations via CP-502, BNSF would receive the automotive traffic at Blue Island at least 1 day later if CP were required to operate via CP-509.

From Blue Island Yard, IHB crews would take CP's remaining automotive traffic to be interchanged with UP and BNSF at Gibson Yard, approximately 9.15 miles away. At Gibson Yard, the automotive traffic would require additional switching and repositioning before receipt by UP and BNSF, adding approximately another 2 days. As a general rule, 1 additional day of transit time is required every time a rail car requires switching and inspection within a rail yard.

In all, exiting the MTRA trackage from CP-509 instead of CP-502 would require moving the automotive traffic nearly 70 miles through the Chicago terminal and processing at 3 busy rail yards – Bensenville, Norpaul, and Blue Island – before arriving at Gibson Yard. Compared to CP's current operations via CP-502, the additional operating miles, inspection, and yard switching would add at least 4 days to the transit time for interchange with BNSF and UP at Gibson Yard.

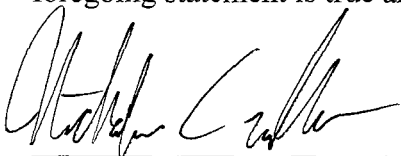
As to CP's 141 trains, after inspection at Bensenville Yard, the manifest traffic for local delivery by IHB within the Chicago terminal would be switched and combined with other IHB interchange traffic on the next scheduled train to Norpaul Yard. Due to the transit time from CP-509 and the additional inspection and switching at Bensenville Yard, it is likely the manifest traffic from the 141 train would miss the connection with the regularly scheduled train to Norpaul Yard. Consequently, the local manifest traffic would wait an extra day in Bensenville Yard before CP could deliver it to Norpaul Yard, adding approximately 30 hours transit time and consuming critical yard capacity.

If the IHBIA were terminated, CP would also lose its ability to enter the MTRA trackage at CP-502 with eastbound traffic. As CP would no longer be able to receive interchange from

IHB at Gibson Yard, the western carriers would lose the most efficient and cost effective return of empty automotive unit trains via the Chicago terminal to CP origins in Eastern Canada. After receiving the empty unit trains at Gibson Yard, IHB would deliver them to CP at Bensenville Yard for interchange. In addition to the increased handling and transit time from Gibson Yard, routing these eastbound empty automotive unit trains from Bensenville Yard over Metra and BRC trackage to enter the MTRA trackage at CP-509 would also increase congestion on Metra's commuter line and the 75th Street Corridor.

VERIFICATION

I, Nicholas Walker, declare under penalty of perjury that I am authorized to make this verification on behalf of Soo Line Railroad Company, and that the information included in the foregoing statement is true and correct to the best of my knowledge and belief.

A handwritten signature in black ink, appearing to read 'Nicholas Walker', is written over a horizontal line.

Nicholas Walker
Superintendent - US East - Bensenville Terminal
Soo Line Railroad Company

Dated: March 9, 2017

Exhibit 1
Map

