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December 19, 2022

VIA E-FILING

Cynthia T. Brown
Chief of the Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: **Wisconsin Central, Ltd. – Petition for Declaratory Order – Interchange with
Soo Line Railroad Company, FD 36397**

Dear Ms. Brown:

Please find attached Norfolk Southern Railway Company's ("NSR") Opening Statement in the above-captioned proceeding. If there are any questions concerning this e-filing, please contact me by telephone at (202) 663-7823 or by e-mail at wmullins@bakerandmiller.com. If I am unavailable, you may contact Erin Glavich, by telephone at (202) 663-7830 or by e-mail at eglavich@bakerandmiller.com.

Sincerely,

/s/ **William A. Mullins**

William A. Mullins

Enclosure

cc: Thomas E. Zoeller

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36397

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

NORFOLK SOUTHERN RAILWAY COMPANY – OPENING STATEMENT

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December 19, 2022

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36397

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

NORFOLK SOUTHERN RAILWAY COMPANY – OPENING STATEMENT

BACKGROUND

In response to the order from the Court of Appeals for the Seventh Circuit in Wis. Cent. Ltd. v. Surface Transportation Board, 20 F.4th 292 (7th Cir. 2021) (“Wis. Cent.” or “Decision”), the Surface Transportation Board (“STB” or “Board”), via a decision issued on October 19, 2022, has solicited input from stakeholders and other interested persons. While the Board has requested input on eight specific questions, Norfolk Southern Railway Company (NSR) is limiting its comments to the broader policy implications of the court’s Decision and future implementation of that Decision.

SUMMARY

While this dispute arose between two carriers, Wisconsin Central, Ltd. (CN) and Soo Line Railroad Company (CP), the potential implications of the questions posed in this proceeding by the Board could, if the court’s Decision is applied too broadly, have significant impacts across the entire US rail industry.¹ Accordingly, NSR is commenting in this proceeding

¹ NSR takes no position on the immediate dispute between CN and CP. Because the Board requested comment on certain broad policies within this dispute proceeding, NSR offers these comments on those policy questions.

to ensure that the Board appreciates the potential effect the future application of the Decision could have on the industry. NSR submits that the Board should avoid the temptation of interpreting the Seventh Circuit's Decision as "significantly" altering long-standing precedent. The court's Decision was narrowly tailored. Read correctly, it merely provides that the Board, in applying 49 U.S.C. §10742, must also consider whether a receiving carrier's choice to use a terminal railroad or a third-party for interchange and to impose any costs on the delivering carrier is "reasonable, proper, and equal."

The Decision did not say the Board could not consider alternative interchange methods, cost considerations, long-standing practice, or operational concerns in applying Section 10742. Indeed, all those factors remain solely within the discretion of the Board to review on a case-by-case basis. Any attempt to provide a broad reading of the Decision and to adopt an approach other than a case-by-case approach could indeed have profound consequences to the industry. As such, the Board should avoid adopting hard and fast bright line rules and continue to apply a case-by-case approach to determining whether a receiving carrier's proposed interchange is consistent with the statute.

ARGUMENT

I. THE SEVENTH CIRCUIT'S DECISION SHOULD NOT BE USED TO REVERSE LONG STANDING BOARD PRECEDENT AND SHOULD BE NARROWLY INTERPRETED

By using phrasing such as the Decision could have "significant impact on the rail industry;" could "significantly alter" long-standing precedent and practices, and could "have wide-reaching consequences," the Board appears to believe that the court's Decision is broad-reaching and precedent-setting. NSR suggests otherwise. Rather, NSR understands the Seventh Circuit's Decision was intended to be limited. It was not intended to remove the Board's

discretion in determining whether an interchange was “reasonable, proper, and equal.” Instead, the core holding of the court was narrow: the Board was wrong to conclude that the phrase “power to provide” was the equivalent of saying that interchange can happen only where both parties have connecting tracks.

The court’s holding was simply that a receiving carrier may in fact designate a terminal railroad or a third party as the means to accomplish interchange if the receiving carrier had the “power to provide” the use of such a terminal railroad or third party. BUT—and this is an important “but”—such interchange must still be “reasonable, proper, and equal.” Whether such a designated interchange using a third party or terminal railroad is “reasonable, proper, and equal” is a case-by-case evaluation using long-standing precedent. As such, the court’s decision does not change the fundamental approach of any interchange dispute before the Board: the parties should negotiate first. Failure to agree could then be submitted to the Board for a determination under Section 10742, using existing Board precedent, as to whether the other statutory factors are met.

Such an approach is fundamentally in sync with the court’s language suggesting that CN could in fact designate the Belt Railway (assuming agreement or a contractual right to do so) as the means to receive traffic; but whether CP had to accept that designation “depends on the language of the statute.” Wis. Cent., 20 F.4th at *295. In other words, the Board still has the discretion to determine whether such a requested interchange was “reasonable, proper, and equal.” Any such subsequent Board decision would then of course be subject to the Chevron² standard. This gives substantial deference to the Board’s application of the statute and words “reasonable, proper, and equal.” The Decision simply did not give the receiving carrier carte

² See Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 844 (1984) (“Chevron”).

blanche in selecting interchange points, or that in every circumstance, the delivering carrier must foot the bill.³

In posing the three narrowly tailored questions:

If the parties cannot agree where to exchange traffic, three distinct questions could require resolution: (1) may the receiving carrier ever designate a willing third party to receive traffic on its behalf?, (2) if yes, is the proposed location for interchange ‘reasonable’ (another important word in §10742) compared with the place where switching otherwise would occur?, (3) if yes to both of these questions, who pays the third party?

Wis. Cent. at *294-95, the court was essentially mirroring the process the Board follows in deciding STB interchange disputes. First, whether the authority under which the receiving carrier designates track (or a third party or a terminal railroad) as the means to receive interchange is appropriate in the situation; second, whether it is reasonable to do so compared to where interchange would otherwise occur; and third, who should pay for it? The only difference between the Board’s long-standing approach and the court’s view is that the court clarifies that interchange may in fact occur via a third party or terminal railroad IF it is within the power of the receiving carrier to provide AND such a decision is “reasonable, proper, and equal.”

The Wis. Cent. Decision does not compel a finding that use of a third party or terminal railroad to accomplish interchange is always reasonable, but rather, the decision to use such a third party or terminal railroad must be one of the many factors the Board would adjudicate under Section 10742. The Decision clearly supports continued individual case adjudication based on the Board’s evaluation of individual factors under the long-standing Board precedent.

³ Indeed, requiring the delivery carrier to foot an expensive bill for the use of the terminal railroad or third party could well be “unreasonable” and should be a factor in any Board decision on the reasonableness of whether the proposed use of a third party or terminal railroad to accomplish interchange is consistent with Section 10742.

It appears that the Seventh Circuit was careful to avoid overstepping its authority by telling the Board how it should interpret its own implementing regulations but left that to the discretion of the Board. The Decision was not intended to “significantly alter” long-standing precedent and practices or to “have wide-reaching consequences,” nor should it be read to be so.

II. READING THE DECISION TOO BROADLY WOULD LEAD TO HAVOC

As noted, there is nothing in the Wis. Cent. Decision that indicates the Seventh Circuit intended to nullify the Board’s ability to determine whether an individual interchange dispute is “reasonable, proper, and equal” nor does the Decision provide a receiving carrier free reign to move interchange points at the delivering carrier’s expense. Indeed, such a broad interpretation would wreak havoc and upend railroad operations and economics. Moreover, there is nothing in the Decision (or long-standing Board precedent) that indicates the Board cannot consider “costs” being imposed on the delivering carrier as one of the factors to consider in determining whether the interchange via a third party or terminal railroad is reasonable.

The Board has asked several questions about how and when cost may be considered in its October 19 2022 decision. This appears to be in response to the Seventh Circuit’s assertion that the Board conflated (1) who pays the charges with (2) may a receiving carrier designate a willing third party to accept the traffic on its behalf? The court answered the second question but left the question of cost to the STB.

In railroading, cost is a major consideration. As the Board has previously recognized, costs are usually the reason carriers seek to change an interchange point. It is also a prime factor in the negotiation of interchange agreements, where parties look to strike an agreement that recognizes their mutual benefit and is “equal” to both parties. In future Board cases applying the Decision, costs should indeed be a central consideration to the ultimate determination of whether

the interchange is “reasonable, proper, and equal.” Indeed, costs have always been part of the considerations.⁴ Nothing in the Seventh Circuit’s opinion should be read to eliminate or reduce the weight of cost in determining the appropriateness of a chosen interchange point.⁵

Any interpretation of the Decision which would prevent the Board from considering the costs that would be imposed on the delivering carrier if a receiving carrier proposes to use a third party’s tracks or a terminal railroad in any subsequent Board dispute over the reasonableness of that proposed interchange could indeed have widespread industry consequences. Such an approach would create incentives for a receiving carrier to use a third party or terminal railroad while imposing operational costs and changes on the delivering carrier. For example, from an operational standpoint, designating a terminal carrier for the interchange could shift the costs of building infrastructure and densities to the delivering carrier. This obviates the need for receiving carriers to own and maintain infrastructure because they can push those costs and operations onto the delivering carrier. Intermediate carriers could also become overwhelmed with operational complexities.⁶

⁴ See, e.g., N.Y., Chi. & St. Louis R.R. v. N.Y. Cent. R.R., 314 I.C.C. 344, 345 (1961)(“However, in the naming of new points of delivery or interchange between the two carriers, there are matters of cost, mutual convenience, unusual hazard, and efficient of service which must be considered.”); Burlington N. R. Co. v. U.S., 731 F.2d 33, 40 (D.C. Cir. 1984)(finding that where multiple locations are reasonable, proper, and equal, a railroad may offer the choice that best serves its business interest); Norfolk S. Ry. – Pet. For Declaratory Order – Interchange with Reading Blue Mountain & N. R.R., NOR 42078, slip op. at 5-6 (“Reading Blue Mountain”) (no showing of the need for or the absence of revenue concessions).

⁵ For example, a receiving carrier may have the contractual right to use a terminal railroad and designates the terminal railroad as the interchange point. It may be a completely reasonable choice in that operationally the location is better for all parties involved but using a terminal railroad or third-party may impose such significant costs on the delivering carrier that such costs are not “reasonable, proper, or equal.”

⁶ Terminal railroads are usually owned collectively by the connecting Class I railroads. In most cases, such terminal railroads must accept the traffic of their owning carriers and could not likely refuse to be designated by the receiving carrier as the interchange location.

One only needs to look at Chicago to understand how such a broad interpretation of the Decision would create chaos and immediate change. In Chicago (as well as other major multi-carrier connections), much of the interchange between carriers is handled through direct yard-to-yard interchanges. Under a reading of the Decision that a receiving carrier could designate interchange at an intermediate carrier at the delivering carrier's cost, receiving railroads would be incentivized to designate terminal companies like the Belt Railway of Chicago ("BRC") or Indiana Harbor Belt ("IHB") (all major Chicago carriers connect to BRC and IHB and thus would have the "power to provide" IHB or BRC to facilitate interchange) as the means by which the receiving carrier desires to facilitate interchange and have those costs imposed on the delivering carrier. If costs and other operational concerns could not be considered in any subsequent Section 10742 determination, this would push the costs to the delivering carriers; push the volume to the intermediate carrier; and allow the receiving carrier the benefit of having work done by the intermediate carrier at the cost of someone else. BRC or IHB would quickly become overwhelmed. Any increase in costs for switching fees to handle the increased volume would impact the delivering carrier and shippers but would not alter the incentives for the receiving carrier, who would retain the lower costs and better service markers in its books. Such an uneven playing field could make existing rail service challenges more profound. Such an approach would not be "reasonable, proper, or equal."⁷ This scenario would play out across the nation in every major city with terminal switching services provided by intermediate carriers.

⁷ These consequences do not happen today because all carriers have an incentive to reduce costs and to avoid the cost of intermediate switching. Furthermore, the carriers often have their own infrastructure in the area to switch and classify cars to move into their networks. As a result, interchange agreements are often negotiated between delivering and receiving carriers based on their mutual desire to avoid costs and the existence of available infrastructure to do the work of interchange. The Board should avoid changing these long-standing incentives.

A similar result could occur if a receiving carrier were to obtain rights—such as trackage rights—for a delivering carrier to operate over a third party to a connection between the third party and the receiving carrier but impose those costs on the delivering carrier. If the Board interprets the Wis. Cent. Decision to mean that a receiving carrier need only obtain contractual or ownership rights in an intermediate carrier and then force a delivering carrier to operate over rights purchased by third parties, a carrier may be made to go anywhere. This not only would require nullification of interchange precedent, but also the Board’s long-standing precedent on a carrier’s right to use (or not use) trackage rights.⁸

As a practical matter, the premise that a receiving carrier may pick any interchange point if it has the “power to provide” that interchange and then to prevent the Board from considering the costs or operational difficulties associated with that choice in the context of a Section 10742 proceeding could indeed upend railroading. A receiving carrier could arrange for interchange via a third party by agreeing to a disadvantageous switching fee and then force the delivering carrier to pay it. A receiving carrier could secure rights to cross third party tracks for miles beyond a closer point, to a better yard for the receiving carrier at a prohibitive cost in power, labor, and time for the delivering carrier. This carte blanche for a receiving carrier to be allowed to select any interchange point, so long as it could buy the route, would hand receiving carriers, especially larger carriers, all the negotiation power and no incentive to agree to more reasonable, balanced interchanges for the parties’ mutual benefit.

What these hypotheticals make clear is, that taken to the extreme, the Seventh Circuit Decision would fundamentally upend this balance and hand each receiving carrier unprecedented power while denying delivering carriers of much of their negotiating power. This would be

⁸ See Burlington N., 731 F.2d at 38-39.

particularly acute for smaller railroads, short-lines, and terminal facilities. A receiving carrier would be uninhibited to make decisions based solely on its own needs, to increase its revenues, or solely to harm a competing carrier. To hand a single party that power is contrary to the statute, the authority of the STB, contrary to rail policy, and clearly not the intention of the Seventh Circuit to change rail operations so fundamentally across the country.

III. THE BOARD SHOULD CONTINUE TO REVIEW INTERCHANGE DISPUTES ON A CASE-BY-CASE BASIS CONSISTENT WITH BOARD PRECEDENT AND THE PRINCIPLES UNDERPINNING INTERCHANGES

The Board has a solution to avoid those problems, which is fully consistent with the Wis. Cent. Decision and Board precedent: the receiving carrier does indeed have the right to designate the place it receives traffic, even if it does so via a terminal railroad or third-party, but that right is not absolute. Interchange decisions must be governed by the principles of balance and negotiation between carriers.⁹ If a dispute does end up at the Board, the Board should only uphold a receiving carrier's designation using a third-party or terminal carrier if doing so is "reasonable, proper, and equal" consistent with the long-standing principles governing interchange. And the Board has the latitude to determine the reasonableness based upon the

⁹ See, e.g., Rates, Regulations and Practices of Peoria & Pekin Union Railway Co. at Peoria, Ill., and Near-by Points, 93 I.C.C. 3, 16 (1924) ("In accordance with usual railroad practice, the matter of making and receiving deliveries of cars is the subject of mutual agreement, each line having the right within reasonable limits to designate the point where cars will be received."); Kansas City S. Ry Co. v. Louisiana & A. Ry. Co., 213 I.C.C. 351, 358-59 (1935) ("[I]t follows that the receiving carrier necessarily has the right to designate where it will accept cars in interchange from its connections, provided, in making such designation, the receiving carrier does not impose unusual, unreasonable, or impossible operating hazards or require the delivering carrier to do work which properly belongs to the receiving carrier."); N.Y., Chi. & St. Louis, at 345 ("Thus, the right of the receiving carrier to designate the point where it will receive cars in interchange is not an absolute right, but by its limitations becomes a matter of proposal, subject to discussion and negotiation. A carrier cannot arbitrarily provide points of interchange which ignore the basic rights of others. This is a matter to be arranged between the parties. Interchange agreements should be reached by consultation, exploration of mutual benefits, and negotiation of differences.")

particular facts of that proceeding. That is baked into the long history of STB and ICC precedent and into the statutes that support this precedent.¹⁰ The Board should continue to follow those precedents.

In contrast, the Board's October 19, 2022 decision implies that the Board desires to establish hard and fast rules for which the parties could look at in determining interchange disputes. The Board should avoid such a result or desire. The Board may be concerned that, if it continues to follow a case-by-case approach, it will be left with a vague and flexible standard and that without more concrete terms, the Board would be inundated with fights over the "reasonable, proper, and equal"-ness of unilaterally designated interchange points. Or the Board may be concerned that a flexible standard leaves parties, which are highly sophisticated, uncertain what interchange regulations will apply in the future. However, more concrete standards may have the opposite effect. Concrete terms could promote gamesmanship between railroads in which they meet technical requirements while skirting the spirit of the standard. A set list of factors may not capture all factors specific to an interchange negotiation and instead become a roadblock to a party raising the issue with the Board. Similarly, concrete factors cannot be as inclusive of all issues that may arise, and it would instead raise barriers for smaller parties. Concrete procedural terms may also unintentionally tip the scales in favor of one party or the other in carrier-to-carrier negotiations.

A flexible standard of reasonableness, driven by Board precedent, incentivizes parties to negotiate their interchange agreements, rather than use gamesmanship of a Board-imposed

¹⁰ See, e.g., Burlington N., 731 F.2d 33; Black v. ICC, 837 F.2d 1175, 1177 (D.C. Cir. 1988)(affirming the Commission's determination that an interchange point was reasonable based on the particular circumstances such as lack of facilities, necessity to block crossings, and other operational difficulties); Reading Blue Mountain, at 5 (finding the petitioner did not support its claims that the interchange point was operationally and commercially unreasonable.).

standard. It also forces the parties to find a commercially suitable solution and minimizes the need for the Board to dedicate its precious resources deciding disputes. Most importantly, a flexible standard keeps negotiating power in the hands of parties, rather than the unbalanced power an extreme interpretation of Wis. Cent. would impose.

Nor does the Seventh Circuit's opinion seem to require a concrete standard. Instead, the court indicated "reasonable" is a keyword in deciding whether a particular interchange decision is appropriate. Id. at 294-95. And this is consistent with Board precedent. As set forth in N.Y., Chi. & St. Louis:

We agree that the Central has a right to terminate the contracts as provided therein. However, in the naming of new points of delivery or interchange between the two carriers, there are matters of cost, mutual convenience, unusual hazard, and efficiency of service which must be considered. ... Thus, the right of the receiving carrier to designate the point where it will receive cars in interchange is not an absolute right, but its limitation becomes a matter of proposal, subject to discussion and negotiation. A carrier cannot arbitrarily provide points of interchange which ignore the basic rights of others. This is a matter to be arranged between the parties. Interchange agreements should be reached by consultation, exploration of mutual benefit, and negotiation of differences.

Id. at 345.

Inherent in the concept of reasonableness is the mutual consideration and wider impact of the receiving carrier's right to choose the interchange point. While a receiving carrier has the right to choose its interchange location, it is not unfettered. Reasonableness is a fact-intensive inquiry, and under Board precedent, it may reach into several areas that any party must be prepared to defend before the Board, including the business justification for deviating from industry custom, for negotiating contractual access under punitive terms, the extent to which the delivering carrier considered the impact on railroad operations, the costs imposed on the delivering carrier, and so on. In fact, the Board's decision in Reading Blue Mountain provides the template both for how the Board can consider reasonableness and what evidence the

objecting party must provide.¹¹ While the objecting party retains the burden of demonstrating the choice is unreasonable, the extent of a receiving carrier's failure to consider the mutual and larger impact are factors to weigh and should be weighed.

CONCLUSION

The court's Decision did not remove the Board's discretion to determine whether a particular interchange is consistent with 49 U.S.C. §10742. Such a decision remains solely within the Board's purview. The court merely stated that a receiving carrier may choose to use a terminal carrier or a third-party (assuming it has the power to provide that service) as the means to achieve interchange with the delivering carrier, even if the two carriers otherwise have connecting tracks and have previously used that connecting interchange location. Such a decision by the receiving carrier, however, must continue to be "reasonable, proper, and equal." In making that determination, which should be done on a case-by-case basis, the Board continues to remain free to consider alternative interchange methods, cost considerations, long-standing practice, and operational concerns and to reject the use of the third-party or terminal railroad if the proposed use is not consistent with Section 10742. The Board should avoid adopting hard and fast bright line rules and continue to apply a case-by-case approach to determining whether a receiving carrier's proposed interchange is consistent with the statute.

Respectfully Submitted,

/s/ William A. Mullins

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Attorneys for Norfolk Southern Railway
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December 19, 2022

CERTIFICATE OF SERVICE

I hereby certify that a true copy of Norfolk Southern Railway Company's ("NSR") Opening Statement in the above-captioned proceeding was served by first-class mail, postage prepaid, or by a more expeditious manner, this 19th Day of December, on all Parties of Record.

/s/ **William A. Mullins**

William A. Mullins

Attorney for Norfolk Southern Railway Company