

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36397

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

COMMENTS OF BNSF RAILWAY COMPANY

While BNSF takes no position on the merits of the dispute between CP and CN giving rise to this proceeding, BNSF appreciates the opportunity to provide comments on the proper interpretation 49 U.S.C. § 10742. BNSF interchanges traffic with dozens of railroads at hundreds of locations across the BNSF service territory, pursuant to negotiated agreements with its partners. The designation of facilities to accomplish interchange has long been an operational and commercial matter to be negotiated among railroads, and BNSF believes that should continue to be the case.

There is a well-established history of law and industry custom regarding interchange. As a result, carriers come to negotiated solutions in almost all situations and disputes brought to the agency have been rare. The fact that railroads typically negotiate numerous agreements with their interchange partners reduces the chance of disputes. Carriers recognize that unreasonable positions taken in one instance will make it difficult to reach acceptable arrangements elsewhere. BNSF believes that the Board should not disturb this state of affairs by

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using a private dispute between two railroads in very specific and unique factual circumstances to make broad public policy through the announcement of new legal standards or processes.

It is well settled that the location of the interchange point between rail carriers is “a matter to be arranged by the parties . . . by consultation, exploration of mutual benefits, and negotiation of differences.” *New York, Chi. & St. L. R. Co. v. New York Central R. Co.*, 314 I.C.C. 344, 345 (1961) (“*New York, Chicago*”). In the event that no agreement is reached, a receiving carrier has a right to designate the facilities used for interchange, so long as the designation is not unreasonable. *Norfolk S. Ry. Co.—Pet. for Dec. Order—Interchange with Reading Blue Mountain & N. R.R. Co.*, NOR 42078 (STB served Apr. 29, 2003). The fact that interchange can be accomplished at one interchange point does not mean that the receiving carrier cannot select another reasonable interchange point. *Id.* at 6 (citing *Burlington N. R.R. v. United States*, 731 F.2d 33, 40 (D.C. Cir. 1984)). In making the designation, the receiving carrier must “not impose unusual, unreasonable, or impossible operating hazards or require the delivering carrier to do work which properly belongs to the receiving carrier.” *New York, Chicago*, 314 I.C.C. at 345.

The Seventh Circuit did not disturb this framework, but instead ruled on a narrow issue: that a rail carrier may have the “power to provide” interchange facilities under 49 U.S.C. § 10742 even if it does not own those facilities. As a result, the court held that there may be circumstances when a receiving carrier can

designate facilities for interchange located on a willing third party. *Wis. Cent. Ltd. v. STB*, 20 F.4th 292 (7th Cir. 2021).

Recognizing the Seventh Circuit’s conclusion that the “power to provide” can mean something other than direct ownership of facilities, the Board can resolve the dispute at issue here by exercising its statutory responsibility to judge the reasonableness of facilities for interchange under section 10742. As with other sections of the Board’s organic statute that call on the Board to exercise its expertise in the railroad industry and determine “reasonableness,” section 10742 requires the Board to balance all of the facts and circumstances related to the dispute in determining whether the designation of interchange facilities is reasonable. *See, e.g., Sherwin Alumina Co. v. Union Pacific R.R. Co.*, NOR 42143 (STB served Sept. 29, 2015).

The specific factors weighed by the Board in determining the reasonableness of a designation of interchange facilities by the receiving carrier will necessarily depend on the facts of the case. In many situations, the cost to the delivering carrier of making the interchange at the point designated by the receiving carrier will be a relevant consideration. BNSF believes that as a general matter it would not be reasonable for a receiving carrier to unilaterally designate an interchange location that would require the delivering carrier to incur costs associated with using or accessing any third-party facilities absent agreement from the receiving carrier to reimburse the delivering carrier for such costs.

In assessing the reasonableness factors at issue in the current dispute, there is no need for the Board to address any other aspect of settled law regarding Section 10742 or other parts of its organic statute. For example, it would be unnecessary for the Board to revisit and opine on section 10705 in resolving this dispute. The Board has previously correctly explained in the *Canexus* case that, while sections 10705 (through routes) and 10742 (interchange facilitates) are related, the sections cover distinct subjects. Section 10705 relates to the origin to destination routing of traffic, whereas section 10742 relates to the facilities necessary to carry out the operations necessary to interchange cars at specific locations. To the extent a receiving carrier seeks to change the route of traffic through a different geographic location, that is a 10705 question, not a 10742 question. *Canexus Chemicals Canada L.P. v. BNSF Rwy. Co.*, NOR 42131, slip op. at 9 & n. 48 (STB served Feb. 8, 2012).

Conclusion

Because there is a well-defined history of law and custom regarding interchange, railroads are usually able to avoid disputes regarding the designation of interchange facilitates. The Board should be mindful that any broad changes to the law or policy in this proceeding could lead to an increase in disputes and litigation by upending established arrangements and giving parties an incentive to test out new legal standards through litigation. That would not be a desirable outcome, and not an outcome mandated by the Seventh Circuit's remand. As such, the Board should resolve the current dispute based on a reasonableness analysis

that considers the facts of this dispute without making any significant legal or policy changes.

Respectfully submitted,

/s/ Timothy J. Strafford

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CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing *Comments of BNSF Railway Company* to be served electronically or by first-class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Sally Mordi

Sally Mordi
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