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304156

March 21, 2022

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The Honorable Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
U.S. Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: STB Finance Docket No. 36397: *Wisconsin Central, Ltd. — Petition for Declaratory Order — Interchange with Soo Line Railroad Company*

Dear Ms. Brown:

Please find enclosed for filing Soo Line Railroad Company d/b/a Canadian Pacific (“CP”)’s Reply to Wisconsin Central, Ltd. (“CN”)’s Post-Remand Brief.

CP’s filing includes both a Public Version and a Highly Confidential Version.

Please do not hesitate to contact me with any questions.

Sincerely,

Stinson LLP

/s/ David F. Rifkind

David F. Rifkind

Counsel for Soo Line Railroad Company

Enclosures

cc: Parties of Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

STB Finance Docket No. 36397

CP'S REPLY TO CN'S POST-REMAND BRIEF

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Dated: March 21, 2022

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Soo Line Railroad Company d/b/a Canadian Pacific (“CP”) respectfully submits this Reply to the Post-Remand Brief filed by Wisconsin Central Ltd. d/b/a Canadian National (“CN”) (“CN’s Brief”).

I. INTRODUCTION

CN’s Post-Remand Brief vastly overstates the breadth and import of the Seventh Circuit’s opinion (the “Opinion”), asserting that but a “sole question remain[s] in this case: Whether CP must pay the [Belt Railway of Chicago (“BRC”)]’s switching fees for the CN-bound interchange traffic that CP delivers to the BRC’s Clearing Yard” CN’s Brief at 1. This assertion ignores the Court’s stated framework for analysis for interchange disputes. According to the Court, “three distinct questions could require resolution: (1) may the receiving carrier ever designate a willing third party to receive the 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?” *Wisc. Cent. Ltd. v. STB*, 20 F.4th 292, 294-95 (7th Cir. 2021).

The Seventh Circuit addressed only the first question and only generally, *i.e.*, that CN theoretically could contract with the BRC to act on its behalf—not that CN had contracted with BRC to act on its behalf. Holding that the Board is entitled to deference with respect to reasonableness, it left to the Board to resolve the next threshold question: Whether Clearing—CN’s unilaterally-chosen location for its benefit—is reasonable relative to Spaulding—where CN and CP’s lines intersect and

the parties interchanged traffic for nearly a decade? Only if the Board answers that question affirmatively, does it consider the issue of who pays for interchange at Clearing.

Here, the question of reasonableness of Clearing relative to Spaulding must take into account the fact that interchange at Spaulding ensures CP is able to keep its Bensenville Yard clear of CN interchange traffic when Clearing is struggling. Keeping cars out of Clearing and Chicago helps protect CP's and the terminal's fluidity. As CN itself represented to the Board as a prime public interest justifying its acquisition of the EJ&E, the acquisition would allow CN to keep traffic out of the Chicago terminal area—and Clearing in particular—to the benefit all stakeholders.

Further, the Board should take into account third party costs in its reasonableness determination. Spaulding is free to CP to interchange whereas, according to CN, CP must pay to deliver cars to interchange at Clearing even though the switch to Clearing is entirely for CN's benefit. So, if CP must pay BRC fees as CN contends, this would be an additional basis for determining that Clearing is not reasonable for traffic that could be interchanged at Spaulding for free.

As to the question of who pays the BRC fees for the traffic at issue, the statute unequivocally requires CN to “provide” the interchange facilities to receive traffic. 49 U.S.C. § 10742. As the Board already observed, if CP pays, CN would be “providing” nothing.” *Wisc. Cent., Ltd.—Pet. for Decl. Order—Interchange with Soo Line R.R. Co.*, FD 36397, 2020 WL 6380328, slip op. at 7 (STB served Oct. 30, 2020) (the “2020

Board Decision”). Thus Section 10742 plainly requires that CN pay for Clearing as to the traffic that it seeks to compel CP to interchange at Clearing.

This is consistent with the Court’s holding that the statute allows CN to contract with a third party to receive traffic on CN’s “behalf,” *Wisc. Cent. Ltd.*, 20 F.4th at 294, *i.e.*, CN can contract with the BRC to step into its shoes of CN for purposes of receiving the issue traffic. Since CN cannot charge CP for the use of CN’s own interchange facilities, it inexorably follows that the BRC, when it is acting on CN’s “behalf,” cannot charge CP for use of its interchange facilities.

CN’s argument that the BRC Operating Agreement overrides CN’s statutory obligation “to provide” is fundamentally flawed. The BRC Operating Agreement, which was intended to address interchange traffic that the carriers voluntarily interchanged at Clearing, does not prohibit carriers from entering into separate reimbursement as carriers have done for more than a century. Nor does the BRC Operating Agreement itself directly address who pays in the first place.

Lastly, CN’s argument that fairness requires that CP pays its share ignores the fact that the move to Clearing for traffic interchanged in both directions is entirely for CN’s benefit.

II. BACKGROUND

For nearly a decade, CP and CN interchanged freight rail cars at Spaulding, one of two locations in the Chicago area where CN’s and CP’s lines intersect. *Soo Line R.R. Co.—Pet. for Decl. Order and Prelim. Inj.—Interchange with Canadian Nat’l*, FD 36299, 2019 WL 7484084, slip op. at 1 (STB served Nov. 29, 2019) (“2019 Board

Decision”). The interchange at Spaulding not only worked well, but also kept traffic out of the often congested Chicago Terminal area. CP’s Reply to Petition for Declaratory Order, FD No. 36397 at 3 (May 29, 2020) (“CP’s Reply”), Walker Verified Statement (“Walker V.S.”) at ¶¶ 4-5, 16. It also promoted fluid and efficient yard operations by ensuring that CN’s cars would be cleared from CP’s Bensenville Yard daily, kept CP’s mainline (which it shares with Metra) fluid during the day and was more economical than paying a third party terminal switch carrier. Walker V.S. at ¶¶ 16, 17.

When CN’s forecast of traffic volumes over the mainline through Spaulding grew, CN sought to eliminate interchange at Spaulding as a way to free up capacity on its mainline.¹ *Id.* at ¶ 15. In March 2019, CN first unilaterally designated its Kirk Yard (“Kirk”) in Gary, Indiana as the new interchange location for CP to deliver CN. *Id.* at ¶¶ 10-11. Kirk is located on the other side of the Chicago Terminal from CP’s

¹ CN continues to claim that moving interchange from Spaulding to Clearing Yard also benefits Bartlett by reducing blocked crossings frequency. CN’s Brief at 5. The Board and the Seventh Circuit have already found these allegations of no, or little, moment to the statutory interpretation at issue. In addition, as a factual matter, the reduction in blocked crossings at Bartlett is explained by many factors other than the shift in interchange location, including reductions in train volumes and changes in CN’s operational practices. Notably, CN continues to hide the data that would shed insight on this issue. Further, although the outcome of this proceeding is unlikely to change where the parties interchange traffic in light of the terms of the parties’ Interim Agreement, even if interchange did revert to Spaulding, reasonable actions could again be undertaken to minimize any alleged impact on the community, including by CN itself whose increased mainline traffic appears to be a primary source of the alleged impact. For example, CP previously shifted interchange operations to the middle of the night and will act to clear grade crossings for emergency vehicles. Walker V.S. at ¶ 9. CN could easily choose to do the same.

Bensenville Yard and to reach Kirk and then return to Bensenville Yard, CP would have had to operate from Bensenville Yard to the connection to CN's rail line at Spaulding, and then operate around Chicago to Kirk and back again—a distance of more than 200 miles, including 168 miles on CN's rail line. *Id.* at ¶ 11; 2019 Board Decision at 5-6. On that roundabout journey, CP would have incurred substantial crew, crew transport, fuel and equipment costs as compared to interchange at Spaulding, which is immediately adjacent to CP's main line and is only 17 miles from Bensenville Yard. *Id.* Therefore, on April 30, 2019, CP asked the Board to declare that Kirk is not a reasonable interchange location, which would potentially include the exercise of trackage rights over Norfolk Southern. *Id.* at 1-6.

Following briefing and oral argument, by Decision served November 29, 2019, the Board declared that Kirk is not a reasonable interchange location and that CN could not unilaterally designate Kirk to receive cars in interchange from CP. *Id.* at 1, 8.² In so ruling, the Board made clear that “CP cannot be forced by CN to exercise its trackage rights in order to reach Kirk Yard” as “trackage rights are permissive with their holder.” *Id.* at 6-7. CN did not appeal that decision.

Undeterred—and seeking to foist the cost of its preferred interchange location onto CP—CN instead petitioned the Board on April 14, 2020 to declare that (1) CN

² During the pendency of FD 36299, CN and CP entered into an agreement to interchange CN-bound traffic at Clearing (the “Interim Agreement”). *See* Ex. 8 to CN's Petition. Under the Interim Agreement, CN pays 100% of the BRC's fees for cars that would otherwise have been interchanged at Spaulding pending a “final Board decision.” *Id.* at 1. The Interim Agreement specifies that “[t]he parties will conclude a permanent agreement regarding interchange at Chicago upon the final Board decision (or appeal), informed by the decision.” *Id.* at 2.

had the right to designate the BRC's Clearing Yard as the interchange location in Chicago for receiving cars from CP and (2) that CN may require that CP bear the associated BRC fees. CN's Petition for Declaratory Order, FD No. 36397 (April 14, 2020) ("CN's Petition") at 1. The BRC is a terminal switching carrier in the Chicago Terminal owned by six Class I railroads that operate in Chicago. 2020 Board Decision at 1 n. 2. Although CP holds an 8.33% interest and CN a 16.66% interest in the BRC, the BRC is a separate and distinct legal entity that is controlled by neither CP nor CN. CP's Reply, Hubbard Verified Statement ("Hubbard V.S.") at ¶ 13; 2020 Board Decision at 1 n.2. To avoid the BRC becoming entangled in payment disputes between carriers, the BRC Operating Agreement provides an administratively workable rule which contemplates that the delivering carrier pay BRC's fees for cars interchanged using Clearing. Hubbard V.S. at ¶ 15. Nothing in the carriers' agreements with BRC prohibits CN and CP from entering into a separate agreement that requires CN to reimburse CP for some or all of such fees. *Id.*

To utilize the BRC's services and facilities to deliver cars to CN, CP must pay a per car fee. Hubbard V.S. at ¶ 14; *see also* BRC Operating Agreement (attached as Ex. A to CN's Brief).³ Thus, the route to Clearing Yard is not freely-available to CP simply because CP holds a minority interest in the BRC. Not only is the route not free, CP must also exercise permissive trackage rights over the BRC lines to reach CN's proffered chosen interchange point of Clearing Yard. Hubbard V.S. at ¶ 14. As

³ CP would also have to operate east on its mainline from its Bensenville Yard to reach the BRC's rail lines and then operate south on the BRC's line to Clearing to make interchange deliveries for CN. Walker V.S. at ¶ 13.

an owner, under the BRC Operating Agreement, CP has the right but not the obligation to interchange traffic utilizing the BRC. *Id.*

By Decision served October 30, 2020, the Board, applying the plain language of 49 U.S.C. § 10742 and longstanding precedent, declared that CN cannot unilaterally designate the BRC's Clearing Yard as the location where it will receive traffic in interchange from CP. 2020 Board Decision at 1. And it made clear that by forcing CP to pay a fee to reach CN's chosen interchange location of the BRC's Clearing Yard, "CN would itself be 'providing' nothing." *Id.* at 7.

Following an appeal by CN of the Board's Decision, the U.S. Court of Appeals for the Seventh Circuit issued a decision on December 8, 2021 which remanded this matter to the Board "for further proceedings consistent with [the Court's] [O]pinion." *Wisc. Cent. Ltd.*, 20 F.4th at 295. As explained in more detail below, while the Seventh Circuit's Opinion held that the statutory language "power to provide" allows CN to enter into a contract with a willing third party to receive its traffic "on its behalf," *id.* at 294-95, the Opinion did not address whether the BRC Operating Agreement was a sufficient contractual basis for CN to designate Clearing, nor did it reach the issues of (1) the reasonableness of CN's unilaterally-chosen interchange location, or (2) who pays if Clearing is determined to be reasonable relative to Spaulding.

On February 2, 2022, without any Board directive concerning post-remand briefing and unaccompanied by any request for leave to file, or for the Board to reopen the record on remand, CN unilaterally filed its "Post-Remand Brief." On February

14, 2022, CP filed a letter motion requesting that the Board strike CN’s unauthorized and improper filing; determine whether and, if so, on what issues, further briefing should address in this matter; or, in the alternative, if the Board determines to accept CN’s brief, that CP be granted until March 21, 2022 to file its Reply to CN’s Post-Remand Brief. On February 22, 2022, CN filed a letter opposing CP’s February 14, 2022 letter motion (“CN’s February 22, 2022 Letter Reply”).

III. REMAND STANDARDS

The Seventh Circuit’s Opinion made no specific command to the Board on remand, simply stating that it was remanding this matter to the Board “for further proceedings consistent with [the Court’s] opinion.” *Wisc. Cent. Ltd.*, 20 F.4th at 295. And while it is true that “[w]hen the [agency] addresses a case on remand, the ‘law of the case’ generally requires it to confine its discussion to the issues remanded[,] [t]he law of the case doctrine, however, applies only to issues that have been resolved, *generally leaving [the Board] free to address issues that the appellate court left undecided.*” *United States v. Morris*, 259 F.3d 894, 898 (7th Cir. 2001) (emphasis added) (internal citations omitted). Thus, the law of the case doctrine has no application at all to issues left unaddressed by the Seventh Circuit.

Likewise, CN’s assertion that the law of the case doctrine somehow could preclude the Board from addressing issues which, while not actually decided were, according to CN, “impliedly” decided,⁴ puts the cart before the horse. If the issue were

⁴ CN’s February 22, 2022 Letter Reply at 5 (citing *Delgado v. U.S. Dep’t of Justice*, 979 F.3d 550, 557 (“[T]he law of the case [doctrine], . . . ‘prohibits a lower court from

left undecided—and many were—then the law of the case doctrine has no application in the first place. Moreover, “[t]he law of the case doctrine applies only to issues actually decided, and not to dicta.” *Abbott Labs. v. Torpharm, Inc.*, No. 97 C 7515, 2003 U.S. Dist. LEXIS 19294, at *8 (N.D. Ill. Oct. 28, 2003) (citing *Geldermann, Inc. v. Fin. Mgmt. Consultants, Inc.*, 27 F.3d 307, 312 (7th Cir. 1994)).

Therefore, on remand, in addition to “the issues remanded” and “issues arising for the first time on remand,” the Board may also address issues timely raised “*but which remain undecided.*” *Morris*, 259 F.3d at 898 (emphasis added). As explained herein, the Court’s short Opinion left unaddressed several issues which precede any determination of who must pay for access to Clearing Yard.⁵

IV. ARGUMENT

Under the Court’s decisional framework, there are three questions that could require answering. The Court answered only the first question: whether CN may “ever” designate a willing third party to act on its “behalf” to receive traffic from CP. *Wisc. Cent. Ltd.*, 20 F.4th at 294. The Court ruled that CN could contract with BRC as a willing third party to act on its behalf. But in doing so, the Court did not address whether the BRC Operating Agreement standing alone provided for BRC to receive traffic on CN’s behalf. It does not.

reconsidering on remand an issue expressly or impliedly decided by a higher court absent certain circumstances.”) (emphasis added).

⁵ Furthermore, the “usual rule [is] that a reviewing court should leave the agency free on remand to determine whether supplemental fact-gathering is necessary.” *See, e.g., Sierra Club v. EPA*, 325 F.3d 374, 382 (D.C. Cir. 2003) (citing *Nat’l Grain & Feed Ass’n v. OSHA*, 903 F.2d 308, 310-11 (5th Cir. 1990)).

Additionally, the Court left for the Board to address the questions of whether Clearing is reasonable relative to Spaulding, and if, yes, who must pay for the interchange. The Board is afforded deference with respect to issues of reasonableness. *Wisc. Cent. Ltd.*, 20 F.4th at 295. Because Clearing increases risks to CP, the terminal, and the rail network if CP must pay to use Clearing when Spaulding is free to it, then Clearing is not reasonable. And, as to who must pay, the statute speaks directly to that issue and clearly requires that CN, as part and parcel of its obligation to provide interchange facilities, pay the BRC's fees. Otherwise, CN would be providing nothing.

A. The BRC Operating Agreement does not provide for BRC to receive cars on CN's behalf at Clearing.

The only issue addressed by the Seventh Circuit was whether a receiving carrier may “ever” designate interchange facilities on a third party's line. The Seventh Circuit ruled that a carrier can have the “power to provide” interchange facilities “as a result of a contract, just as it can have that power by ownership.” *Wisc. Cent. Ltd.*, 20 F.4th at 294. Thus, a receiving carrier may contract with a willing third party to receive cars on its behalf.

CN contends, however, that the Court went a step further and held that the BRC Operating Agreement gives CN the power to provide Clearing, *i.e.*, it is a contract for BRC to receive cars on its behalf. CN is incorrect for several reasons.

First, the Opinion never even mentions the BRC Operating Agreement, let alone decided that it has any effect on the parties' obligations. It refers only to the fact that BRC is “willing” to receive cars on CN's behalf. But that reference merely

accepts as true CN's representation that BRC is willing to accept cars on its behalf. It says nothing about the rights and obligations under the BRC Operating Agreement, an agreement that the Seventh Circuit declined to discuss and is therefore left for the Board to address. *See Morris*, 259 F.3d at 898 (explaining that on remand an agency is "free to address issues that the appellate court left undecided").

Second, the Opinion effectively concludes that a third party may by contract act on the receiving carrier's "behalf", that is, as the receiving carrier's agent for purposes of receiving cars. The BRC Operating Agreement, however, does not establish such an agency relationship. In fact, the ICC, in approving the 1965 BRC Operating Agreement expressly rejected an agency relationship between BRC and its owners as incompatible with the agreement and the BRC's role as a neutral switch carrier. *See Belt Ry. Co. of Chi., et al.—Operation*, 324 I.C.C. 597, 605, 610-11 (1965). Thus, the BRC Operating Agreement by itself is insufficient to satisfy CN's obligations to contract with BRC to act on its behalf.

Third, CN's reliance on the BRC Operating Agreement and its interpretation of that agreement as requiring CP to exercise its rights under that agreement to deliver CN-bound cars to Clearing for CN's benefit cannot be reconciled with the Supreme Court-based holding that "the exercise of trackage rights remains permissive with their holder," *Burlington N. R.R. v. United States*, 731 F.2d 33, 39 (D.C. Cir. 1984) (citing *Chi., Rock Island & Pac. Ry. v. Denver & Rio Grande R.R.*, 143 U.S. 596, 609 (1892)), or the related rule that a carrier allow a delivering carrier

free interchange. *See Toledo, Peoria & W. Ry. Corp.—Pet. for Declaratory Order*, FD 35404 et al., 2011 WL 1564711, slip op. at 10 (STB served April 26, 2011) (“Section 10742 requires a receiving railroad in a direct physical interchange to designate a point on its own line where it will receive traffic and to provide a free route over its tracks to that point for the delivering railroad.”). These precedents require that CN’s contract with BRC allow CP to reach Clearing without charge.

CN wrongly contends that the Seventh Circuit overruled both the rule that a carrier cannot be compelled to exercise permissive trackage rights for another carrier’s benefit and the “free-transit” rule. Neither contention is correct. The Opinion does not discuss the permissive trackage rights rule. The Seventh Circuit cannot reverse a rule rooted in Supreme Court precedent and certainly cannot do so *sub silentio* without so much as a reference to the rule or its underlying decision. In fact, this same principle was espoused in the 2019 Board Decision in FD 36299—a decision which CN did not appeal—wherein CN asserted that “that it would be willing to grant CP trackage rights from the NSR line to Kirk Yard,” CN’s attempted chosen interchange location. 2019 Board Decision at 6. But the Board made clear that “CP cannot be forced by CN to exercise its trackage rights in order to reach Kirk Yard” as “in general, trackage rights are permissive with their holder.” *Id.* at 6-7 (citing *Burlington Northern*, 731 F.2d at 39). Thus, the Board has already twice determined that CN cannot force CP to exercise trackage rights to reach CN’s chosen interchange location. And to the extent that CN is now suggesting that the 2020 Board Decision’s on that point was somehow “impliedly” reversed by the Seventh Circuit—which it

clearly was not since it was not even mentioned by the Court—CN conveniently ignores the fact that the issue was already decided by the Board in its 2019 Board Decision, a decision which CN failed to appeal.

As to the free-transit rule, the Opinion did not question the validity of the rule itself, but merely faults the Board for not explaining why designation of Clearing would “frustrate” the rule. *Wisc. Cent. Ltd.*, 20 F.4th at 294. This criticism merely goes back to the Seventh Circuit’s criticism of the Board for assuming the answer to question 3 (who must pay) in determining the answer to question 1 (whether CN may “ever” designate a third party to receive cars on its behalf). *Id.* at 294-95. The free-transit rule thus remains very much a valid and vital part of STB jurisprudence and simply reflects the statutory requirement that a receiving carrier “provide” interchange facilities to receive traffic.

B. Clearing is not a reasonable interchange location for the issue traffic relative to Spaulding.

Under Section 10742, CN’s statutory obligation is to “*provide* reasonable, proper, and equal facilities” for the interchange of traffic. 49 U.S.C. § 10742 (emphasis added). Section 10742 is clear on the parties’ respective interchange obligations. It states:

A rail carrier providing transportation subject to the jurisdiction of the Board under this part *shall provide* reasonable, proper, and equal facilities that are within its power to provide for the interchange of traffic between, and for the receiving, forwarding, and delivering of passengers and property to and from, its respective line and a connecting line of another rail carrier or of a water carrier providing transportation subject to chapter 137.

49 U.S.C. § 10742 (emphasis added). In determining reasonableness of interchange locations, the location must not impose undue operating hazards “or require the delivering carrier to do work which properly belongs to the receiving carrier.” *N.Y., Chi. & St. Louis R.R. Co. v. N.Y. Cent. R.R. Co.*, 314 I.C.C. 344, 345 (1961) (quoting *Kan. City S. Ry. Co. v. La. & Ark. Ry. Co.*, 213 I.C.C. 351, 359 (1935)). *See also Toledo*, slip op. at 10 (interpreting 49 U.S.C. § 10742); *Norfolk S. Ry.—Pet. for Declaratory Order—Interchange with Reading Blue Mountain & N. R.R.*, NOR 42078, 2003 WL 1963547, slip op. at 4-5 (same) (STB served April 29, 2003); 2019 Board Decision at 5 (“Here, requiring CP to travel 84 miles one way on CN’s system solely to effectuate interchange—a distance that would likely cause CP crews’ permissible hours of service to expire and would require a dedicated locomotive—would be unreasonable and is ‘work which properly belongs’ to CN.”).

Importantly, the question as formulated by the Seventh Circuit is not whether Clearing is a “reasonable” interchange point generally as CN appears to contend, but whether Clearing is reasonable “relative” to Spaulding. *Wisc. Cent. Ltd.*, 20 F.4th at 294 (“[I]s the proposed location for interchange ‘reasonable’ (another important word in § 10742) *compared with* the place where switching otherwise would occur?”) (emphasis added). The answer for the traffic at issue, is no.

In addition to third party costs, there are operational costs to CP associated with Clearing.⁶ *Walker V.S.* at ¶ 16. If Clearing is encountering fluidity issues as

⁶ CN has previously tried to argue that CP saves crew and equipment costs in not having to service Spaulding. However, as CP previously explained elimination of the assignment to Spaulding has not resulted in the reduction of its crew base or

has happened in the past, CN cars may congest CP's Bensenville Yard until Clearing can accept them. *Id.* Congestion at Bensenville could have serious consequences for the CP system. *Id.* Interchange at Spaulding ensures that CP can clear its Bensenville of CN interchange traffic daily, regardless of conditions elsewhere in the Chicago Terminal, helping to ensure that CP is master of its own destiny. *Id.*

Keeping cars out of Clearing and the Chicago terminal also benefits Chicago area stakeholders (including customers and other railroads) and the North American network. Indeed, in the EJ&E control proceeding, CN represented to the Board that the transaction would help to relieve congestion in the Chicago Terminal by enabling CN traffic to bypass Clearing Yard and the Chicago Terminal area. *See Canadian National Ry. Co. and Grand Trunk Corp.—Control—EJ&E West Co.*, FD No. 35087, 2008 WL 8139694, slip op. at 5 (“According to the applicants, acquiring the Kirk Yard and other yards on the EJ&E line . . . *would permit CN to use those yards instead of the congested BRC Clearing Yard* to classify and switch trains passing through the Chicago metropolitan area. Applicants expect this access to reduce the number of trains that, though bound for other destinations, would otherwise need to travel into Chicago.”), 10 (“Applicants maintain that this rerouting *would benefit CN-served customers in the Chicago area and customers served by other Class I railroads by reducing the demand on the capacity of BRC*, Indiana Harbor Belt Railroad (IHB),

equipment pool in Chicago. Walker V.S. at ¶ 17. Further, CP's ability to move CN bound cars on existing trains to Clearing is dependent on capacity and is likely temporary. *Id.* at ¶¶ 16-18. In the future, CP may need to add an additional train to Clearing in order to handle CN bound traffic from Bensenville. *Id.* at ¶ 18.

and other CN lines through the central Chicago terminal area.”) (STB served Dec. 24, 2008) (emphasis added). CN should be held to its prior representations to the Board on its intention of moving traffic away from the congested BRC, particularly where CN’s about face on this issue is based on its own self-interest and is in neither the public’s interest nor CP’s.

Spaulding is free to CP to deliver cars to CN. If CN is correct that CP must bear the BRC fees, Clearing obviously would not be free to CP. Instead, CP would be forced to pay a third party to use the interchange facilities at Clearing. This additional third party cost weighs heavily against the reasonableness of Clearing relative to Spaulding. Of course, if CN were to undertake to pay BRC’s fees, as it is currently doing under the Interim Agreement, or the Board were to hold that § 10742 requires CN to bear the cost to provide the interchange facilities, then this aspect of the cost factor would be neutral in the reasonableness determination.

C. The obligation “to provide” requires that CN pay fees associated with use of its designated interchange facilities.

1. Section 10742 requires CN to pay BRC fees as part of its obligation “to provide.”

The answer to the question of who pays the third party costs to provide the interchange facilities at Clearing “depends on the language of the statute.” *Wisc. Cent. Ltd.*, 20 F.4th at 295. And on this issue the statute is unambiguous. Section 10742 plainly states that a carrier “*shall provide* reasonable, proper, and equal facilities that are within its power to provide for the interchange of traffic.” 49 U.S.C. § 10742 (emphasis added). “Shall provide” cannot reasonably be treated as “shall provide for a fee.” Thus the Board has consistently construed Section 10742 to require

a receiving carrier to provide access to interchange facilities for “free.” *See* 2020 Board Decision at 6. Even CN has acknowledged its “legal responsibility” to provide CP interchange facilities at no cost to CP. *See id.* at 8 (citing to CN’s COO’s own letter⁷ which stated that “CN’s only legal responsibility is to provide reasonable facilities for interchange and a *free* route over its tracks to that interchange point”) (emphasis added). And in this proceeding, the Board properly held that if CP must pay BRC fees, then “CN would itself be ‘providing’ nothing.” *Id.* at 7.⁸

Likewise, courts have consistently held that an obligation to provide requires the obligator to bear the economic cost. *St. Louis Police Officers’ Ass’n v. Bd. of Police Comm’rs of City of St. Louis*, 259 S.W.3d 526, 529 n.4 (Mo. 2008) (“The phrase ‘shall provide’ is substantially different from the phrase ‘shall be made available for purchase’ and implies that the Board must provide to its retirees insurance coverage without the necessity of paying a premium.”). To “provide” means something more than simply allowing. *See Cent. Midwest Interstate Low-Level Radioactive Waste Comm’n v. Pena*, 113 F.3d 1468, 1473 (7th Cir. 1997) (“[T]he Commission must ‘provide for’ the disposal of the region’s waste before it is rewarded with an incentive payment. The Commission asserts . . . that it could ‘provide for’ disposal *by allowing* a third party to act The Secretary, on the other hand, interprets ‘provide for’ to

⁷ *See* FD 36299, CP’s Apr. 30, 2019 Petition for Declaratory Order. Ex. F, at 2 (Letter from CN Executive VP and COO Mike Cory).

⁸ Contrary to CN’s argument, the Court took no issue with the Board’s holding that CN would be providing nothing if CP must pay the BRC fees. Rather, the Court took issue with the Board’s reliance on an assumption that CP must pay the BRC fees in deciding whether CN could “ever” satisfy its obligation to “provide” by designating Clearing. The Court left it to the Board to decide who must pay.

mean *something more than simply allowing* waste to make its way out of the region. We believe the Secretary’s position is correct.”) (emphasis added). To “provide” does not necessarily involve a payment in return. *See, e.g., Gideon v. Wainwright*, 372 U.S. 335, 339-340 (1963) (requiring states to provide at no charge trial counsel for indigent defendant charged with felony).

2. Requiring CN to pay BRC fees is consistent with industry practice.

According to CN, industry custom and practice requires the delivering carrier to pay the intermediate switch fees. But this custom applies only where there is no direct physical connection. It reflects the fact that the delivering carrier bears the burden of delivering on the rails of the receiving carrier. So where there is no direct physical connection, the burden falls on the delivering carrier to employ an intermediary to bridge the gap. In those circumstances, because the intermediate carrier is acting on “behalf” of the delivering carrier, the delivering carrier typically pays the intermediate carrier’s fees. Here, however, the intermediate carrier would be acting on the receiving carrier’s “behalf,” and therefore CN must be responsible for the fee.

Where there is a direct connection, industry custom and practice generally, and CP and CN’s course of conduct here, properly reflect an understanding that the obligation to provide interchange facilities means for “free.” Receiving railroads do not charge delivering railroads for use of the receiving railroads’ interchange facilities in direct interchange.

This obligation to provide has the same meaning whether CN is providing the interchange facilities directly or has contracted with a third party to receive traffic “on its behalf.” Indeed, the Seventh Circuit’s choice of language here specifying that the third party would be acting “on [CN’s] behalf,” *Wisc. Cent. Ltd.*, 20 F.4th at 294, makes clear that the third party would be stepping into the shoes of CN in assuming CN’s obligations to provide interchange facilities to receive traffic. If CN is barred from charging CP directly for the use of its interchange facilities, *e.g.*, at Spaulding, it follows that BRC cannot charge CP when BRC acts on CN’s “behalf.”

3. Allowing a receiving carrier to evade its statutory burden to provide interchange facilities would be highly disruptive to interchange arrangements.

CN’s position—that CP can be compelled to pay for the interchange facilities that the statute requires CN to provide—would turn the statute on its head and upset the status quo in the industry by obliterating the shared understanding of interchange rights, obligations and customs. It would create an economic incentive for carriers to force interchange traffic over third parties by enabling receiving carriers that currently incur costs to provide and maintain interchange facilities to unburden themselves of those costs by designating a third party to receive the traffic at the delivering carrier’s expense.

D. The BRC Operating Agreement does not control who pays.

The BRC Operating Agreement governs cars that carriers have agreed to interchange via Clearing. It has no application to the cars at issue here, which are cars which CN seeks to compel CP to deliver via Clearing. As discussed in section (1) below, even for cars that the parties agree to interchange at Clearing, the BRC

Operating Agreement does not mandate that the delivering carrier bear the burden of the BRC fees. Rail carriers are free to enter into reimbursement agreements. As discussed in section (2) below, even if the BRC Operating Agreement purported to require CP to bear the BRC fees—it does not—that agreement would not help CN as the statute mandates that CN bear that burden.

1. Railroads can and do enter into separate reimbursement agreements.

According to CN, CP's operating agreement with the BRC, and not the statute, dictates who must pay the BRC's fees. But as the Board has long recognized, the agreements with intermediate switch carriers to bill the delivering carriers do not control who ultimately must bear the fees. *See, e.g., Kan. City S. Ry. Co.*, 213 I.C.C. at 355-56 (explaining that the practice of an intermediate carrier billing the delivering carrier for its services "is independent of any agreement between the delivering and receiving carriers for the absorption of certain intermediate switching charges").

The payment provisions in the BRC Operating Agreement are simply for administrative convenience to govern how the BRC bills the carriers utilizing its services without becoming entangled in payment disputes between carriers. *See, e.g.,* CP's Reply at 16; *Hubbard V.S.* at ¶ 15. However, nothing in the carriers' agreements with BRC prohibits CN and CP from entering into a separate agreement that requires CN to reimburse CP for some or all of such fees. *Id.* Separate reimbursement agreements have long been the practice in the industry. *See, e.g., Kan. City S. Ry. Co.*, 213 I.C.C. at 355-56. As Will Wangerin explains in the accompanying Verified

Statement, in addition to the Interim Agreement with CN, {{ [REDACTED]

[REDACTED] }} Wangerin V.S. at ¶¶ 2-3. Thus the BRC Operating Agreement has never been viewed as an agreement that the delivering carrier will always bear the BRC fees.

Notably, the BRC Operating Agreement itself is completely silent on the issue of who pays as between the delivering carrier and the receiving carrier. It only states that a charge shall be paid for the transfer of cars. {{ [REDACTED]

[REDACTED] }} This is hardly a sufficient basis on which to conclude that the parties to the BRC Operating Agreement intended to, and did in fact, bargain away substantive statutory rights and obligations, and certainly not with respect to traffic that was or could be interchanged elsewhere at a direct physical interchange for free.

At best, the BRC Operating Agreement addresses to whom the invoice for BRC's fees is sent—not who is ultimately responsible for paying the fees. But even on the question of who is billed, CN appears to acknowledge that the BRC Operating Agreement does not establish an absolute rule that BRC bills the delivering carrier. *See* CN's Petition at 26 (stating that it is only “ordinarily” the case that switch charges are billed to the delivering carrier).

Nothing in the carriers' agreements with BRC supersedes the Section 10742 obligation “to provide” interchange facilities. Certainly, the BRC Operating

Agreement cannot be used to unilaterally force one of the railroads to accept a new interchange location and to force the delivering railroad to provide, *i.e.*, pay, for the interchange facilities contrary to the statutory obligation.

Nor does the BRC Operating Agreement prohibit CN and CP from entering into a separate agreement that requires CN to be the ultimate payor of the BRC interchange fees, as is currently the case under the Interim Agreement.

2. CN’s argument misconstrues the Court’s Opinion which focused on statutory rights and obligations and makes no mention of the BRC Operating Agreement.

CN also argues that the Seventh Circuit Opinion’s focus on “contractual right[s]” compels the Board to defer to the terms of the BRC Operating Agreement’s payment provisions over the “‘norm[s]’ on which the Board mistakenly relied before.” CN’s Brief at 15. There are three problems with CN’s argument.

First, the choice is not between the terms of the BRC Operating Agreement and industry norms. Rather, the question that CN put to the Board is, what does Section 10742 require? If anything, the Court’s Opinion stands for the proposition that the Board is bound by the unambiguous language of the statute. On the issue of who pays, the statute is unambiguous—CN must “provide” the interchange facilities.

Second, CN’s argument is based on the unsupported and wrong assumption that the Seventh Circuit vacated the Board’s prior decision in part because the Board failed to give effect to the BRC Operating Agreement. The Seventh Circuit, however, merely held that CN could contract with a willing third party to receive traffic on CN’s behalf and that the BRC is a willing third party. But the Court neither explicitly

nor implicitly found that the BRC Operating Agreement was such a contract and the Opinion includes no mention of the BRC Operating Agreement. Indeed, if the BRC Operating Agreement requires, as CN asserts, that CP pay for the privilege of delivering cars to CN via the BRC, then the BRC Operating Agreement fails to satisfy the Seventh Circuit's most basic requirement as the BRC would be acting on CP's behalf, and not on CN's.

Third, CN is trying to recast this as a contractual dispute. But if this were merely a contractual dispute it would seem to be better addressed in a court. *See* 2020 Board Decision at 11 n.11 (“If there is disagreement about what the BRC Operating Agreement requires, such a dispute would be properly resolved by a court, not the Board.”). There would be no need for the Board to weigh in on a mere contractual dispute. Of course, this is not a contract dispute. It is a dispute about the respective substantive rights and obligations of receiving and delivering carriers in interchange as established by Congress.

E. CN's purported “fairness” argument ignores that the move to Clearing is at CN's insistence for CN's benefit.

Finally, CN attempts to pivot the issue of who pays away from the statutory obligation to one of fairness. According to CN, it is only fair that each carrier pay its own BRC switching fees, *i.e.*, CN pays for the CP-bound traffic it delivers via Clearing and CP pays for the CN-bound traffic it delivers via Clearing. CN's Brief at 18-19. The statute, however, is unambiguous and unqualified as to the obligation to provide interchange facilities. There is no “fairness” exception to that obligation.

Further, CN's argument conveniently ignores the fact that it voluntarily assumed the obligation to pay the BRC fees for CP-bound cars when CN asked CP to accept cars via the BRC rather than at CP's preferred interchange location of Spaulding. CP continues to make its facilities at Spaulding available to receive cars from CN for free as the statute requires. Also CN's argument ignores the fact that it is CN that is demanding that CP deliver cars to CN via BRC rather than delivering to CN's interchange facilities at Spaulding which are free to CP. And the change to Clearing in both directions is for CN's benefit.⁹

Not only is it CN's choice to utilize the BRC for CN's benefit, from an operations perspective the change to the Clearing Yard potentially adversely affects CP and the greater rail network. As noted above, the interchange at Spaulding not only worked well, but also kept traffic out of the often congested Chicago Terminal area. It also promoted fluid and efficient yard operations by ensuring that CN's cars would be cleared from CP's Bensenville Yard daily, kept CP's mainline fluid during the day and was more economical than paying a third party terminal switch carrier. Walker V.S. at ¶¶ 16-17. In effect, CN's demand that CP pay any BRC fees equates to a demand that CP subsidize CN's operational improvements to CP's detriment. Where's the fairness in that?

⁹ According to CN the Board should also consider the fact that CN incurs trackage rights to reach Clearing while CP does not have to pay trackage rights to operate west from Bensenville on the shared Metra main line. But this ignores the fact that it is entirely CN's choice to go to Clearing. CN would incur no fees, trackage or otherwise, to interchange at CP's preferred location of Spaulding.

CN also argues that BRC is performing work at Clearing that would otherwise be work that CP would need to perform, *i.e.*, blocking and classification of cars for CN. There are two problems with this argument. First, CP still has to classify the cars and build a train at Bensenville for interchange regardless of where the CN-bound cars are interchanged. Second, to the extent that the BRC is doing work that CP would otherwise have performed, CP can and prefers to do the work itself with its own crews and own equipment for free. It would clearly be unfair to compel CP to incur an unnecessary third party expense for CN's benefit.

V. CONCLUSION

For the foregoing reasons, the Board should deny the relief that CN has demanded and should confirm that Clearing is not reasonable relative to Spaulding for the traffic at issue, and that, if it is reasonable, CN must pay all associated BRC fees for CP's access to that interchange point.

Respectfully submitted,

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Dated: March 21, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March 2022, I caused a copy of the foregoing REPLY TO CN'S POST-REMAND BRIEF to be served by email and first-class mail upon the following parties of record:

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 36397

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

VERIFIED STATEMENT OF WILL WANGERIN

1. My name is Will Wangerin. Since December 1, 2021, I have been employed as Director Interline and Passenger – South by Soo Line Railroad Company, which, together with affiliated operating rail companies in the United States and Canada, does business as Canadian Pacific (“CP”). I have been employed in other capacities with CP since 1998.

2. In my positions at CP, I have become familiar with CP’s rail networks, facilities and operations throughout North America. I am also familiar with various interchange agreements between CP and other rail carriers that are utilized to move traffic on CP’s network.

3. {{ [REDACTED]

[REDACTED]

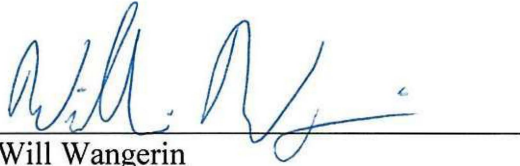
[REDACTED]

[REDACTED]

[REDACTED] }}

VERIFICATION

I, Will Wangerin, 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 blue ink, appearing to read 'Will Wangerin', is written over a horizontal line.

Will Wangerin
Director Interline and Passenger - South
Soo Line Railroad Company

Dated: March 21, 2022