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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

STB Finance Docket No. 36397

**CANADIAN PACIFIC'S COMMENTS IN RESPONSE TO
DECISION SERVED OCTOBER 19, 2022**

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Soo Line Railroad Company d/b/a Canadian Pacific (“CP”) respectfully submits these Comments in response to the Board’s decision served October 19, 2022 (the “October 19 Decision”). As requested, CP will limit its Comments to the broader legal issues set forth in the Board’s decision and will not address the specific facts of this case. CP’s Comments below respond to the specific questions identified in the October 19 Decision. At the outset, CP offers the following general observations on the topics raised in the Board’s decision.

Rail carriers have statutory obligations to establish interline routes that entail the handoff (or interchange) of traffic from one carrier to another at a junction point where the two railroads connect. The specific locations of these interchanges, and the specific tracks and other facilities used to effectuate interchange, are in the vast majority of cases established by the two carriers and not a matter of regulatory concern.

The Board has a role, of course, in those unusual cases where rail carriers are not able to agree on the establishment of appropriate joint-line routes or on the specific interchange arrangements at established junction points. CP’s responses to the Board’s specific questions will address in more detail CP’s views concerning the legal principles governing the Board’s role in this area. That role is of course governed by statute, most pertinently 49 U.S.C. §§ 10703, 10705, and 10742. Where the statutory language leaves the Board with interpretive discretion – as it does with respect to such matters as whether particular interchange facilities proposed by a rail

carrier (or by two connecting rail carriers) are “reasonable, proper and equal” – CP urges the Board to exercise that discretion in a manner calculated to (a) establish decisional principles that continue to encourage carriers to make arrangements for interchange without the involvement of the Board; (b) preserve existing incentives for carriers to reach agreement on their interchange arrangements and avoid creating new incentives for opportunistic disruption of existing interchange arrangements; and (c) preserve the flexibility necessary to consider all facts potentially relevant to the reasonableness of proposed interchange arrangements in a particular case.

As CP explains below, Board precedent and sound regulatory principles support the notion that, in cases where two connecting carriers cannot agree on the specifics relating to interchange at a particular junction, the receiving carrier should be given the initiative in designating “reasonable, proper, and equal” facilities for the delivery of railcars to it, and that carrier must “provide” those facilities by giving the delivering carrier access for free over its trackage and, where necessary, funding any costs associated with access via trackage owned by a third party.

Issue 1: *“How a carrier’s obligations under 49 U.S.C. § 10742 to ‘provide reasonable, proper, and equal facilities that are within its power to provide’ should be understood in light of the decision by the United States Court of Appeals for the Seventh Circuit, as well as the impact of that decision on existing ICC and Board precedent and current carrier practices.”*

In CP’s view, the Seventh Circuit’s decision does not significantly affect the obligations of carriers under 49 U.S.C. § 10742, and should not disrupt carrier practices thereunder.

First, the decision did not alter the core statutory framework: as the Board has long held, receiving carriers are obligated under Section 10742 to “provide” interchange facilities that are “reasonable, proper, and equal,” and those facilities must be “within [that carrier’s] power to provide.” Thus, the facilities that receiving carriers provide must still be – as they were always required to be – “reasonable, proper, and equal” under the circumstances.

Second, as the Board has frequently noted, the vast majority of all arrangements for the interchange of traffic take place pursuant to agreements between the delivering and receiving carriers as to the location of the exchange of railcars and whatever implications those arrangements might have for the allocation of costs between the two carriers. The Seventh Circuit’s decision does not alter this basic framework, and thus it should not disrupt any existing interchange arrangements.

Third, to the extent the Seventh Circuit’s decision might be read to alter Board precedent and practice, it does so only in the limited context where a receiving carrier with a direct physical connection to the delivering carrier at a particular junction or gateway might seek to designate as the place of interchange a set of facilities that must be reached via trackage owned by a third party, when that third party is “willing to provide” access to those facilities for deliveries to the receiving carrier.

The broader framework of Section 10742, however, continues to apply even in this context: the interchange option that the receiving carrier seeks to designate at a particular interline junction must be “independently reasonable, proper, and equal.”

Burlington N. R.R. Co. v. United States, 731 F.2d 33, 40 (D.C. Cir. 1984) (“*Burlington Northern*”). And the receiving carrier must actually “provide” the delivering carrier with the facilities and access to them so as to enable the delivering carrier to effect interchange. *Id.* at 38. *See also Norfolk S. Ry. Co.—Pet. for Declaratory Order—Interchange with Reading Blue Mountain & N. R.R. Co.*, Docket No. NOR 42078, slip op. at 4 (STB served Apr. 29, 2003) (“*Reading Blue Mountain*”); *Toledo, Peoria & W. Ry. Corp. — Pet. for Declaratory Order*, Docket No. FD 35404, slip. op. at 10 (STB served April 26, 2011) (“*Toledo*”).

Accordingly, the Seventh Circuit’s decision does not alter the well-established statutory framework even in the narrow context it was addressing: if a receiving carrier with a direct physical connection to the delivering carrier wishes to designate interchange facilities that *can only be reached* via the delivering carrier’s use of a third party’s track or facilities, (1) the choice must still be a “reasonable, proper, and equal one;” and (2) the receiving carrier must “provide” those facilities, which means that it must bear any charges associated with the delivering carrier’s use of the third party’s track and facilities, just as a receiving carrier must provide a free route over its own line enabling the delivering carrier to reach facilities it might designate that are any distance from a direct physical connection between the two carriers.

Were there any ambiguity in the statute about the meaning of “provide” in this context, the Board would be well within its discretion to interpret Section 10742 to require the receiving carrier to bear the costs associated with interchange using third-party facilities. Such an interpretation would ensure that — if the receiving carrier is

to be given the initiative in proposing a reasonable set of interchange arrangements for deliveries to it – the receiving carrier does not seek opportunistically to foist cost burdens upon the delivering carrier. Such an interpretation would avoid this opportunistic behavior by requiring the receiving carrier to internalize the costs associated with its selection of a third party’s facilities in lieu of other available options. Although a receiving carrier’s effort to do so might well be deemed “unreasonable,” a rule giving the receiving carrier the obligation to bear the costs associated with its selection would provide salutary incentives for it to propose reasonable solutions in the first instance.¹

Issue 2: *“Whether the Board can consider the costs to each railroad of using a particular interchange location designated by one carrier when determining whether interchange facilities are ‘reasonable’ under § 10742 and, if so, whether the Board can allocate such costs between delivering and receiving railroads when resolving § 10742 disputes. If commenters believe that the Board may consider costs as part of a reasonableness determination under § 10742, commenters should address how the Board should consider costs and/or the allocation of costs in making such a determination.”*

There is no question that the costs associated with effecting interchange at a particular location, using particular facilities, should have a bearing on whether the designation of those facilities is “reasonable” under Section 10742 in situations when

¹ There are many situations where the interchange of railcars necessarily involves only a single set of facilities at which railcars are both delivered and received (e.g., a siding at the point where two railroads connect). In these situations, neither carrier likely would have any initiative in the designation of a particular set of facilities, but at the same time there likely would be little occasion for disputes about which facilities need to be provided to support interchange.

the delivering and receiving carriers do not reach agreement regarding the use of those facilities.

If a particular interchange location is unreasonable in light of available alternatives because of the extra costs associated with that location, the receiving carrier will have failed to discharge its obligation under Section 10742 to provide “reasonable” facilities for interchange. In this setting, there would be no occasion for the Board to “allocate” any costs between the two carriers.

If a particular interchange location designated by the receiving carrier is reasonable, the statute directs that (absent agreement otherwise) the party “providing” those facilities bear the costs thereof, including any charges associated with accessing the facilities over trackage of the receiving carrier or any third party over which the delivering carrier must operate. Just as a receiving carrier cannot charge a delivering carrier for use of interchange facilities that the receiving carrier owns, it cannot force the delivering carrier to pay to use another carrier’s interchange facilities that the receiving carrier procures by contract to fulfill its Section 10742 obligation.

Of course, in the vast majority of cases, the parties exchanging interchange traffic will negotiate over the location and manner in which traffic will be exchanged between them, and those negotiations would typically encompass some allocation of the burdens of picking up and delivering traffic at the chosen location(s).

Issue 3: *“Whether the Board has authority under any other statutory provision(s) to resolve a dispute regarding the costs associated with an interchange location and how the Board should apply any such statutory authority.”*

In general, the Board’s authority is to decide, in those unusual instances where railroads have not been able to agree on an interchange arrangement, whether an arrangement proposed by the receiving railroad is “reasonable.” As noted above, it would be the designating carrier’s obligation to bear any costs associated with the facilities themselves and the delivering carrier’s access to them. Other costs, such as the carriers’ respective operating costs, may also bear on the reasonableness determination. *See N.Y., Chi., & St. Louis R.R. v. N.Y. Cent. R.R.*, 314 I.C.C. 344, 345-46 (1961).

Carriers generally have discretion to address costs associated with interline traffic through their own rate-setting, as well as divisions negotiations with connecting carriers. Accordingly, as a general matter, where proposed interchange arrangements are reasonable and the designating carrier has borne the costs of providing access to interchange facilities, the allocation of costs between them is a matter of agreement (including with respect of divisions of through revenue) and is not a matter for Board involvement. In extreme cases, a costly interchange arrangement could have a bearing on whether a particular through route is efficient and on the carriers’ respective divisions in cases where a route is prescribed by the Board.

Issue 4: “*How the statutory term ‘reasonable’ should be interpreted.*”

Board precedent appropriately focuses reasonableness in the first instance on whether there has been a concerted effort by the parties to reach an agreement as to the interchange location. *See e.g., id.* at 345 (holding that the location of interchange is “a matter to be arranged between the parties . . . by consultation, exploration of mutual benefits, and negotiation of differences”). Efforts to unilaterally dictate a new interchange location are unreasonable. *Id.* at 346.

Board precedent next appropriately focuses the reasonableness inquiry on the question of whether the facilities designated for interchange enable the interline carriers to discharge their common carrier obligations to complete transportation between origin and destination via the chosen routing. Facilities are reasonable as long as that location or operation “does not impose unusual, unreasonable, or impossible operating hazards or require the delivering carrier to do work which properly belongs to the receiving carrier.” *Id.* (citing *Kansas City S. Ry. Co. v. La. & Ark. Ry. Co.*, 213 I.C.C. 351, 359 (1935)). *See also Soo Line R.R. Co.—Pet. for Declaratory Order and Prelim. Inj.—Interchange with Canadian National*, Docket No. FD 36299, slip op. at 5 (STB served Nov. 29, 2019) (“*Soo Line I*”).

How the Board further interprets “reasonable” is subject to the Board’s discretion. *Wisc. Cent. Ltd. v. STB*, 20 F.4th 292, 295 (7th Cir. 2021) (“The statutory word ‘reasonable’ gives the Board interpretive leeway...”). That discretion is best exercised within the bounds of the specific facts and circumstances of the proceeding before it. The Board’s approach in *Reading Blue Mountain* is illustrative. In that proceeding, the Board considered reasonableness in light of the facts that Norfolk

Southern (“NS”), which opposed the new interchange designated by the receiving short line carrier, had previously proposed the new interchange location, NS trains ran past it daily, and the short line had “completed all significant infrastructure improvements at [the new location] necessary for interchange.” *Reading Blue Mountain*, slip op. at 4.

As discussed below, in those instances where there is an established interchange, the reasonableness of a new interchange should be determined relative to the existing location. In such instances, the Board may also consider other pertinent factors including the reasons for the proposed change; whether the benefits that the receiving carrier seeks to realize from changing locations could be realized by other means, *e.g.*, by making improvements to the existing interchange facility; the impact on the delivering carrier’s investments in interchange facilities at the existing location; whether the change shifts costs on to the delivering carrier for the receivers benefit; and the potential impact on both the delivering carrier’s and the rail network’s operations.

Similarly, the existence of a direct physical interchange may bear on the reasonableness of proposed arrangements at locations where the carriers do not connect directly. Board precedent recognizes that “[n]ormally, the most practicable and efficient interchange between carriers is at points of intersection of the carriers’ tracks.” *N.Y., Chi.*, 314 I.C.C. at 346. It follows that the further from such an intersection, the less practicable and efficient a proposed interchange is likely to be for the delivering carrier. *See e.g., Soo Line I*, slip op. at 5 (“Although an interchange

point is not required to be located at the point of actual, physical connection, requiring the delivering carrier to operate on the receiving carrier's line for extended distances can become 'work which properly belongs to the receiving carrier.'").

A proposed interchange location that would force a delivering carrier to pay a third party to do work that the delivering carrier is otherwise able to do itself likely would not be reasonable. Fundamentally, a rail carrier has the right to operate its own railroad using its own labor and equipment. A regime that entitled rail carriers to force interchange arrangements that impose unnecessary third-party or other costs on connecting lines would be neither reasonable nor proper.² In this vein, the Supreme Court long ago held that a rail carrier cannot be compelled to exercise its own contractual rights to use a third party's facilities for the benefit of another carrier. *Chi., R.I. & P. Ry. Co. v. Denver & R.G.R. Co.*, 143 U.S. 596, 609 (1892).

In sum, the factors that should be considered may vary depending on the specific facts and circumstances. Among the relevant factors are the following:

- The existence (or not) of a viable direct physical connection;
- Distance from the direct physical connection to the designated facility;
- Safety and operating hazards;
- Relative costs and efficiencies;

² The ability to impose third-party costs on another carrier is of particularly concern if the interchange involves a Class I and either a Class II or III carrier. In those situations, the interchange traffic is likely to account for a material amount of the smaller carrier's overall traffic and therefore the operational and economic impact on the smaller railroad is likely to be significant, and the business relationship between it and the Class I is likely to be asymmetric.

- Historical practice, *e.g.*, whether the interchange is an established and long-standing interchange and, if so, the reasons for departure from existing interchange arrangement and the impact on the delivering carrier's investment in facilities at the established interchange;
- If a receiving carrier designates a third party's facilities, whether the receiving carrier has contracted with the third party to provide the facilities on the receiving carrier's behalf;
- Whether the delivering carrier is providing the delivering carrier a free route to access the interchange facilities;
- If a change of locations is proposed, whether the change shifts costs onto the delivering carrier for the receiving carrier's benefit; and
- Whether the benefits that the receiving carrier seeks to realize in changing interchange locations could be realized by some other means, *e.g.*, investment by the receiving carrier in its existing interchange facilities.

Issue 5: *"How the interests of delivering and receiving carriers should be balanced in the selection of an interchange location, particularly where the existing interchange location is well established or long-standing."*

As discussed above, the Board has interpreted the statute to give the initiative in selecting an interchange location to the receiving carrier, which must provide reasonable and proper interchange facilities sufficient to complete interline movements via a particular junction. If, however, the receiving carrier's designation

places disproportionate burdens on the delivering carrier, or imposes inefficiencies on the movement of freight via the junction, that designation may not be reasonable.

In addition, if the receiving carrier's designation alters a well-established or long-standing arrangement for the interchange of railcars, Board precedent correctly establishes that reasonableness shall be considered *in comparison with* the existing interchange location. *See N.Y., Chi.*, 314 I.C.C. at 345. The Seventh Circuit decision is consistent with this precedent. *See Wisc Cent.*, 20 F.4th at 294. The Board should consider whether the proposed designation imposes operational and economic burdens on the delivering carrier's operations relative to the existing interchange and balance such factors in favor of the delivering carrier, particularly if there is no evidence that the previous location had become costlier or more difficult operationally.

If the delivering carrier has made investments or altered its network operations to accommodate interchange at a particular location, a proposed change initiated by the receiving carrier might be unreasonable for that reason. Likewise, if the proposed change materially affects the economics of existing traffic, this could render the proposed change unreasonable. Such a change could harm shippers if the change makes the interchange costlier either overall or to the delivering carrier, potentially resulting in increased rates.

In most circumstances, the balancing of the "interests of delivering and receiving carriers" should not be necessary. Because interline traffic exchanged between two carriers at any given junction tends to move in both directions, both will

be “receiving carriers” able to designate the reasonable interchange location and facilities of their choosing. Railcars moving in different directions between two carriers are often interchanged at the same location. However, in some instances traffic may be interchanged at different locations depending on the direction of movement, with one carrier delivering to the other at one facility and the other carrier delivering to the first at a different facility. *See, e.g., Kansas City S. Ry. Co. v. Louisiana & Ark. Ry. Co.*, 213 I.C.C. 351, 357 (1935)). This landscape tends to encourage the carriers to “balance” the benefits and burdens by selecting interchange locations that suit their business interests without imposing undue burdens on the delivering carrier, and in the process encourages the establishment of a “compromise” arrangements that work well for both carriers and the efficiency of interchange for the benefit of shippers and the rail network.

Issue 6: *“How a carrier’s ‘power to provide’ facilities relates to the other carrier’s ability or rights to reach those facilities.”*

As discussed above, the application of this provision is straightforward. If the receiving carrier lacks the “power to provide” the proposed facilities to the delivering carrier, the proposed arrangements would not comport with Section 10742.

If the delivering carrier’s own line of railroad does not reach the facilities, the receiving carrier must provide the running rights to reach them, consistent with long-established precedent and the text of Section 10742. *Burlington Northern*, 731 F.2d at 38. *See also Reading Blue Mountain*, slip. op. at 4; *Toledo*, slip. op. at 10. Logically, a receiving carrier that cannot provide the running rights necessary for the delivering carrier to reach the designated facilities lacks the “power to provide” those facilities.

Furthermore, the phrase “power to provide” must be read in conjunction with Section 10742’s requirement that the receiving carrier actually “provide” the facilities. Accordingly, the receiving carrier cannot force the delivering carrier to exercise its trackage rights to reach the designated facilities. Rather, the receiving carrier must provide the running rights to reach the facility.

Issue 7: *“Generally what procedures and factors should apply when railroads cannot agree on an interchange location or one carrier unilaterally seeks to move an existing interchange location.”*

If an agreement cannot be reached as to interchange location, the statutory framework entitles receiving carriers unilaterally to designate the interchange facilities to be used, and to propose “mov[ing]” interchange to a different location, subject to the requirements discussed above.

Because interchange is generally reciprocal, the discretion afforded the other carrier to designate the facilities (potentially different ones) where it will receive cars in interchange will tend to stimulate accommodation and agreement among the parties. In CP’s experience, Board-sponsored mediation can be useful in helping to facilitate agreement, and is an appropriate first step in advance of the submission of evidence and argument in a Board proceeding.

In cases where agreement cannot be reached, and a delivering carrier believes that the new designation by the receiving carrier would be unreasonable or otherwise not comport with its statutory obligation, the delivering carrier may petition the Board to determine whether the receiving carrier has complied with its obligation. In

appropriate circumstances, the delivering carrier ought to be entitled to equitable relief preserving the status quo pending a Board determination.

Issue 8: *“Whether and how any changes a party recommends regarding the Board’s interpretation of § 10742 should affect the Board’s interpretation of other statutory provisions and related precedent (e.g., 49 U.S.C. § 10705(a)(2) and related precedent).”*

CP is not proposing any changes to the Board’s interpretation of Section 10742, and the framework discussed above is entirely consistent with other statutory provisions.

Regarding Section 10705(a)(2) in particular, that provision relates to the selection of a route (and thus the gateway/junction for interline routes), and the law appropriately gives the initiative to the originating carrier. *See Canexus Chems. Can. L.P. v. BNSF Ry Co.*, Docket No. NOR 42131, slip op. at 10 (STB served Feb. 8, 2012). Once the parties in an interline movement have agreed on the junction where interchange will occur, Section 10742 provides the receiving carrier with the obligation to designate and provide “reasonable, proper, and equal” facilities sufficient to carry out the interchange of that traffic. *See id.* at 9 ¶ n.48.

The absence of feasible or efficient interchange facilities at a particular gateway/junction may have a bearing on the lawfulness of the proposed route, but the receiving carrier has an obligation under Section 10742 to provide facilities in order to complete any lawful interline route.

Respectfully submitted,

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Dated: December 19, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December, 2022, I caused a copy of the foregoing CANADIAN PACIFIC'S COMMENTS IN RESPONSE TO OCTOBER 19, 2022 DECISION to be served by email or first-class mail upon all parties of record in this proceeding.

/s/ David F. Rifkind
David F. Rifkind