

SERVICE DATE – NOVEMBER 29, 2019

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36299

SOO LINE RAILROAD COMPANY—PETITION FOR DECLARATORY ORDER AND
PRELIMINARY INJUNCTION—INTERCHANGE WITH CANADIAN NATIONAL

Digest:¹ In this decision, the Board grants Soo Line Railroad Company's petition for declaratory order and finds that Wisconsin Central Ltd.'s designated interchange point of Kirk Yard is unreasonable. The request for a preliminary injunction is denied as moot.

Decided: November 27, 2019

On April 30, 2019, Soo Line Railroad Company d/b/a Canadian Pacific (CP) filed a petition for declaratory order and preliminary injunction arising from the termination of an interchange agreement with Wisconsin Central Ltd. d/b/a Canadian National (CN) in the Chicago terminal area. The Board will grant CP's petition for declaratory order but deny the request for a preliminary injunction as moot.

BACKGROUND

In 2010, following CN's acquisition of the EJ&E West Company, CN and CP executed an agreement that provided for the interchange of most freight cars at Spaulding (Spaulding Interchange Agreement), one of two locations in the Chicago area where CN's and CP's lines intersect.² (CP Pet., V.S. Walker 2.) The Spaulding interchange is located near Bartlett, Ill. (See CP Pet., V.S. Walker, Ex. C.) CP delivers an average of approximately 36 cars each day to CN (typically mixed manifest) and pulls an average of 47 cars from CN (typically mixed manifest and auto racks) at Spaulding. (CP Pet., V.S. Walker 2.) CN blocks and switches all Spaulding interchange traffic at CN's Kirk Yard in Gary, Ind.³ (CN Reply, V.S. Albritton 16,

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² The Spaulding Interchange Agreement does not apply to freight cars carrying toxic-by-inhalation hazardous or poison-by-inhalation hazardous materials. (See CP Pet., V.S. Walker, Ex. E, at 1; CN Reply, V.S. Albritton 1-2, May 20, 2019.)

³ This includes CP-bound traffic, the interchange of which is not before the Board.

May 20, 2019.) CN's Kirk Yard is 84 route-miles from the Spaulding interchange. (CP Pet., V.S. Walker 4; CN Reply, V.S. Albritton 21, May 20, 2019.)

By letter dated March 11, 2019, CN provided CP 60-days' notice that CN would terminate the Spaulding Interchange Agreement and designated CN's Kirk Yard in Gary as the location to receive all interchange traffic destined to CN from CP in Chicago. (CP Pet., V.S. Walker, Ex. D.)

On April 30, 2019, CP filed a petition for declaratory order and preliminary injunction. CP seeks a declaratory order that Kirk Yard is an unreasonable interchange location, asserting that it would have to operate "168 miles on CN's rail line, use multiple crews, and dedicate a CP locomotive for the assignment." (CP Pet. 2.) CP also sought a preliminary injunction ordering CN to continue to receive CP cars at Spaulding "unless and until the parties agree upon a replacement location, CN designates a reasonable replacement location, or the Board prescribes a replacement location." (*Id.*)

CN replied to the request for preliminary injunction on May 3, 2019, stating that CP has expressed willingness to deliver CN-bound cars to the Belt Railway Company of Chicago's Clearing Yard, although CP and CN disagree on who should bear the expenses arising from that option. (CN Reply 1-2, May 3, 2019 (citing CP Pet., V.S. Walker, Exs. E & G).) CN and CP subsequently filed letters regarding Clearing Yard on May 6, 2019, and the Board ordered CN and CP to participate in Board-sponsored mediation on May 9, 2019.

On May 20, 2019, CN filed its reply to CP's petition for declaratory order. CN argues that as long as it does not choose an interchange point that imposes "unusual, unreasonable, or impossible operating hazards,"⁴ the receiving carrier may choose among possible options and "offer only that option which best serves its own business interests,"⁵ and that CP bears the burden of demonstrating that Kirk Yard is "unusual, unreasonable, or impossible."⁶ In support of its argument that Kirk Yard is reasonable, CN argues that Spaulding is an unreasonable interchange point because interchanging there blocks CN's main line; blocks between one and three at-grade rail crossings, often for 10 minutes or more; and imposes an unequal burden on CN because CN transports all traffic back to Kirk Yard for blocking and classification. (CN Reply 13-16, May 20, 2019; *see also id.*, V.S. Albritton 9-11.) CN also argues that CP trains run

⁴ (CN Reply 10-11, May 20, 2019 (quoting *N.Y., Chi. & St. Louis R.R. v. N.Y. Cent. R.R.*, 314 I.C.C. 344, 345 (1961))).

⁵ (*Id.* at 11-12 (quoting *Burlington N. R.R. v. United States*, 731 F.2d 33, 40 (D.C. Cir. 1984))).

⁶ (*Id.* at 12 (quoting *Norfolk S. Ry.—Pet. for Declaratory Order—Interchange with Reading Blue Mountain & N. R.R. (Reading Blue Mountain)*, NOR 42078, slip op. at 5 (STB served Apr. 29, 2003))).

within 100 yards of Kirk Yard on a near-daily basis via trackage rights granted by Norfolk Southern Railway Company (NSR), and that CN would offer CP rights to reach Kirk Yard from NSR's line. (CN Reply 17, May 20, 2019).

CN and CP subsequently filed several letters addressing various interchange location issues, and the Board received comments from individuals and local entities who support moving the interchange away from Spaulding. After mediation concluded without a settlement, the Board held an oral argument on August 6, 2019, where CP and CN each presented arguments. The Village of Bartlett, Ill., also participated.

PRELIMINARY MATTERS

Preliminary Injunction Request. In a joint notice filed on August 21, 2019, CN and CP state that they reached an interim interchange agreement, under which CP will deliver CN-bound traffic to Clearing Yard while this proceeding is pending before the Board. (Jt. Notice of Interim Agreement 1.)⁷ CN and CP state that “[a]s a result of this interim agreement, CP’s April 30, 2019 petition for a preliminary injunction is moot.” (*Id.*) Accordingly, the request for a preliminary injunction will be denied as moot.

Reasonableness of Clearing Yard. Although CP did not request in its petition that the Board resolve the issue, during the course of the proceeding CN and CP have raised arguments about the reasonableness of Clearing Yard as the interchange point for CN-bound traffic.⁸ Regardless of how the Board might rule on such a designation, it is unclear whether CN has actually designated Clearing Yard as the interchange point, or whether it remains an alternative proposal.⁹ During the oral argument, it appeared that CN and CP were not in agreement about

⁷ CN and CP filed public and highly confidential versions of the agreement on September 5, 2019.

⁸ (*See, e.g.*, CN Reply 2, May 3, 2019 (“CN is willing to receive interchange cars at [Clearing Yard] and is planning to implement that alternative on May 10.”); CP Letter 1, May 6, 2019 (“Now, after acknowledging that Kirk is unreasonable in correspondence with CP and after CP filed the instant petition, CN seeks to change its designation to Clearing.”).)

⁹ (*Compare* CN Reply 3, May 20, 2019 (“CN will deliver CP-bound traffic directly to CP’s Bensenville classification yard, and CP would be required in turn to deliver CN-bound traffic directly to CN’s Kirk classification yard.”), *with id.* at 21-22 (“The Board should make clear in its order denying the [p]etition that CP is obligated to either deliver CN-bound interchange traffic to Kirk Yard or to deliver that traffic to the existing CN-CP interchange at Clearing Yard”) and CN Reply 2 n.4, Nov. 12, 2019 (“As CN indicated at the hearing and in its July 12, 2019 filing, it has formally designated Clearing Yard to receive interchange traffic, *as an alternative to CN’s previous designation of its Kirk Yard.*” (emphasis added)).)

whether Clearing Yard had been designated as the interchange point,¹⁰ and CP's counsel stated that the reasonableness of Clearing Yard had not been fully briefed.¹¹

CP's petition did not seek a determination as to whether CN can legally designate the Belt Railway Company's Clearing Yard—a yard jointly owned by a number of Class I carriers¹²—as an interchange point. Indeed, it remains unclear whether CN has designated Clearing Yard as an interchange point, and at least one party believes that the issue has not been fully briefed. Other interested parties may not have had notice that the Board might determine whether Clearing Yard is a reasonable interchange point. Accordingly, the Board will not address this issue.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 10742, a rail carrier must “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.” Further, “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

¹⁰ (See Oral Arg. Tr. 70 (CN's counsel stating “[w]hile the designation had been for Kirk, it was very clear in the letters . . . that at the time that CP filed its case Clearing was . . . where they were negotiating a solution”); *id.* (CN's counsel stating that “both Kirk and Clearing are well within [CN's] broad discretion to designate an interchange facility”); *id.* at 101 (CN's counsel stating “[w]e have designated Kirk and we've designated Clearing”); *id.* at 179 (CP's counsel confirming his understanding that CN's current designation is Kirk Yard).)

¹¹ In response to a question at oral argument regarding whether the Board has the power to address anything beyond whether Kirk Yard is unreasonable and the request to enjoin CN from ceasing the interchange at Spaulding, CP's counsel responded: “I think the Board has broad powers to fashion a remedy, but I would say that we haven't fully briefed the other issues.” (Oral Arg. Tr. 7.) CN's counsel later stated that the record had “not been assembled in an ideal way” because the case had developed since the petition was filed, that there had been “letters going back and forth,” and that “[t]here are complicated issues that . . . got treated very quickly and probably didn't get briefed in full.” (*Id.* at 133.) The post-hearing replies filed by CN and CP do not provide a more complete record on Clearing Yard issues. CP only responded to specific questions raised at oral argument, (see CP Reply, Oct. 21, 2019), and CN's filing is premised on the incorrect assertion that “[t]he one question remaining for the Board's resolution is which party is legally responsible for the switching fees paid to the Belt for interchange cars that CP delivers to CN at Clearing Yard,” (CN Reply 2, Nov. 12, 2019).

¹² CN, CP, and several other Class I carriers are co-owners of the Belt Railway Company. (CN Letter 2, July 12, 2019 (responding to June 18 and July 3 CP letters).)

impossible operating hazards or require the delivering carrier to do work which properly belongs to the receiving carrier.” N.Y., Chi. & St. Louis, 314 I.C.C. at 345 (quoting Kan. City S. Ry. v. La. & Ark. Ry., 213 I.C.C. 351, 359 (1935)). “While the preferred point of interchange normally is the intersection of the two carriers’ lines, practical considerations may dictate otherwise.” Black v. ICC, 837 F.2d 1175, 1178 (D.C. Cir. 1988) (citing N.Y., Chi. & St. Louis, 314 I.C.C. at 346).

In its March 11, 2019 letter notifying CP that it was terminating the Spaulding Interchange Agreement, CN designated Kirk Yard as the interchange point where it will receive traffic from CP. (See CP Pet., V.S. Walker, Ex. D.) Kirk Yard is located on CN’s system, and CN has stated that CP would be given a free route over CN’s tracks to Kirk Yard. (See CN Reply 9, May 3, 2019.)

However, as noted above, Kirk Yard is 84 route-miles from Spaulding, the nearest physical connection point between CP and CN, which means that CP would be required to travel 84 miles on CN’s system to Kirk Yard, deliver the rail cars, and then make the 84-mile return trip back to its own line. Given the long distance, traveling to and from Kirk Yard would likely cause CP’s crews to exceed the maximum hours they are allowed to work under the federal hours of service statute, requiring crews to be taxied back to Bensenville, and CP would also be required to dedicate a locomotive for the movement. (CP Pet., V.S. Walker 4; see also Oral Arg. Tr. 46 (CP’s counsel stating that interchanging at Kirk Yard would require at least two crews and possibly three in winter).) 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.” See N.Y., Chi. & St. Louis, 314 I.C.C. at 345 (quoting Kan. City S. Ry. v. La. & Ark. Ry., 213 I.C.C. at 359). 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. Indeed, CP and CN have both confirmed that neither is engaged in any agreement that requires a carrier to travel more than 50 miles on another carrier’s lines to interchange, let alone 84 miles. (See CP Reply 2, Oct. 21, 2019; CN Reply 15, Nov. 12, 2019.)

Despite the 84-mile distance, CN makes four principal arguments—none of which is persuasive—for why the designation of Kirk Yard is not unreasonable. First, CN argues that Kirk Yard is reasonable because Spaulding is not reasonable. (CN Reply 13-16, May 20, 2019.) But CN and CP interchanged there pursuant to the Spaulding Interchange Agreement from 2010 to 2019, (see id. at 5), with neither carrier raising before the Board a claim that the interchange was unreasonable. Indeed, CP’s petition does not seek a declaration on the reasonableness of Spaulding, CN has not sought such a declaration itself, and, accordingly, the Board does not make any determination on that issue. Moreover, in general, the reasonableness of a given interchange point is determined by its own characteristics. A railroad may, therefore, have more than one reasonable interchange point. See Reading Blue Mountain, NOR 42078, slip op. at 6

(noting that where a railroad has more than one reasonable interchange point to offer, “it need not provide all such options to connecting lines but may instead offer only that option which best serves its own business interests” (quoting Burlington N., 731 F.2d at 40)). Similarly, a finding that one possible interchange point is *unreasonable*—a finding that the Board does not make here—does not establish that an alternative interchange point is necessarily *reasonable*.

Second, CN argues that using Kirk Yard would result in a more equal distribution of work between CN and CP. According to CN, when interchanging at Spaulding, CN crews transport cars “84 miles one-way from Kirk to Spaulding; in contrast, CP crews only must travel 17 miles from Bensenville to Spaulding.” (CN Reply 17, May 20, 2019.) CN maintains that its proposal, under which CN will deliver cars from Kirk Yard to CP’s Bensenville Yard, and CP will deliver cars from Bensenville to Kirk, represents “an equitable 50-50 split of interchange work.” (*Id.* at 18.) However, the requirement that a receiving carrier perform the work that “properly belongs” to it, N.Y., Chi. & St. Louis, 314 I.C.C. at 345, does not translate into a requirement that two carriers that deliver cars to and receive cars from each other must perform the same amount of work or that interchange operations performed at one location must precisely balance those that occur at another. In any case, CN’s proposed arrangement would hardly be “equal.” CN ignores that CP would be required to travel nearly five times farther each way on CN’s tracks than CN does on CP’s tracks (84 miles as opposed to 17 miles).¹³

Third, CN asserts that CP trains run within 100 yards of Kirk Yard using trackage rights granted by NSR. (CN Reply 17, May 20, 2019.) CN states that it would be willing to grant CP trackage rights from the NSR line to Kirk Yard. (*Id.*) CP points out, however, that its trackage rights on the NSR line are limited and do not allow CP to enter and exit the line to deliver cars in interchange at Kirk Yard.¹⁴ (*See* Oral Arg. Tr. 26, 27, 30.) Furthermore, in general, trackage

¹³ CN may be attempting to suggest that an “equal” division of labor would satisfy the obligation under 49 U.S.C. § 10742 to provide “reasonable, proper, and equal facilities.” But “equal facilities” refers to a non-discrimination requirement, not to an “equal” sharing of costs between two carriers that both deliver and receive cars in interchange with each other. *See, e.g., Cent. Power & Light Co. v. S. Pac. Trans. Co.*, 2 S.T.B. 235, 243 n.10 (1997) (“Historically, interchange cases under section 10742 (and former section 3(4), its statutory predecessor) have mainly concerned discrimination issues between carriers; *i.e.*, whether, under section 10742, a rail carrier has failed to provide a complaining rail carrier with interchange facilities ‘equal’ to those offered to other railroads.”), *aff’d sub nom. MidAmerican Energy Co. v. STB*, 169 F.3d 1099 (8th Cir. 1999); Burlington N., 731 F.2d at 40 (“[O]ur earlier resolution of the discrimination issue under section 10741(a) makes clear that existing interchange facilities are not discriminatory with respect to petitioner; no basis therefore exists for asserting their inequality.”).

¹⁴ NSR has also filed a complaint in the U.S. District Court for the Northern District of Indiana to terminate an interchange agreement between NSR, CP, the Indiana Harbor Belt Railroad Company, and Consolidated Rail Corporation, *see generally Norfolk S. R.R. v. Soo*

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rights are permissive with their holder. See Burlington N., 731 F.2d at 39 (“Absent contrary stipulation in the lease or in the required [agency] authorization, the exercise of trackage rights remains permissive with their holder.”). CP cannot be forced by CN to exercise its trackage rights in order to reach Kirk Yard.

Fourth, CN analogizes the present case to Reading Blue Mountain to argue that CP has not shown that Kirk is unreasonable. In that case, NSR had delivered cars bound for Reading Blue Mountain & Northern Railroad Company (RBMN) to a location (Leighton) 11 miles south of the physical junction between the two railroads, on NSR’s system, and RBMN designated a new location (Penobscot) 30 miles north of the physical junction on its own system. Reading Blue Mountain, NOR 42078, slip op. at 1, 6 n.6. NSR argued that the interchange location was unreasonable, and the Board found that NSR had not “met its burden of demonstrating that Penobscot is an unreasonable choice for interchange.” Id. at 5. CN argues that the Board should reach the same result in this case. (CN Reply 20-21, May 20, 2019.) But this case is not analogous to Reading Blue Mountain, which involved several facts not present here. In that case, NSR had previously suggested interchanging at Penobscot, NSR already had trains running past Penobscot daily, and RBMN had been traveling 22 miles past its nearest customer and 11 miles beyond the nearest junction solely for the purpose of interchanging with NSR at Leighton. Reading Blue Mountain, NOR 42078, slip op. at 5, 6 n.6. Nothing in Reading Blue Mountain compels a finding that CP should be forced to interchange at a location it has not suggested is reasonable and that would require CP to travel 84 miles on CN’s line from the intersection of the carriers’ lines at Spaulding to Kirk Yard, which is almost three times as far as the 30 miles NSR was required to travel in Reading Blue Mountain.

Representatives from the Village of Bartlett spoke at the oral argument in support of moving the interchange point away from Spaulding. During their statements, they outlined the difficulties that Bartlett has had with blocked road crossings near the Spaulding interchange, amplifying the concerns expressed by various commenters.¹⁵ (See Oral Arg. Tr. 146-71.) The Board’s determination that Kirk Yard is not a reasonable interchange location does not mean that CN and CP must continue to interchange at Spaulding. Indeed, CN and CP are free to interchange at other mutually agreeable locations. For example, the parties are currently interchanging CN-bound traffic at Clearing Yard by mutual agreement.¹⁶ Carriers routinely

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Line R.R., No. 2:17-CV-00015, which CP has argued is necessary for it to use the trackage rights granted to it by NSR, see generally Soo Line R.R.—Pet. for Declaratory Order, FD 36107, slip op. at 1-3 (STB served Aug. 10, 2017).

¹⁵ Parties are reminded that the Board’s Rail Customer and Public Assistance Program (202-245-0238; rcpa@stb.gov) is available to stakeholders to facilitate informal, private-sector resolution, without litigation, wherever possible.

¹⁶ The Village of Bartlett states that, after the interchange was moved from Spaulding to Clearing Yard, its “residents and staff have seen a noticeable decrease in complaints regarding

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reach such agreements, with few interchange disputes coming before the Board. The Board finds here only that CN may not unilaterally designate Kirk Yard to receive cars in interchange from CP.

It is ordered:

1. CP's petition for declaratory order is granted as discussed above.
2. CP's request for a preliminary injunction is denied as moot.
3. This decision is effective on the date of service.

By the Board, Board Members Begeman, Fuchs, and Oberman.

(. . . continued)

stopped trains over the tracks.” (Bartlett Letter 1, Oct. 24, 2019.) CN states that blockages over 10 minutes at the three roads near Spaulding have been reduced by 70%. (CN Reply 6, Nov. 12, 2019.)