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May 29, 2020

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

ENTERED
Office of Proceedings
May 29, 2020
Part of
Public Record

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 Petition for Declaratory Order.

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

Please do not hesitate to contact me with any questions.

Sincerely,

/s/ David F. Rifkind

Counsel for Soo Line Railroad Company

Enclosures

cc: Parties of Record; Service list from Docket FD No. 36299

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 36397

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

REPLY TO PETITION FOR DECLARATORY ORDER

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Dated: May 29, 2020

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Soo Line Railroad Company d/b/a Canadian Pacific (“CP”) respectfully submits this Reply to the Petition for Declaratory Order submitted by Wisconsin Central Ltd. d/b/a Canadian National (“CN”).¹

I. INTRODUCTION

CN asks the Board to issue a declaratory order under the false premise that the Board must enable “a permanent solution to the long-running dispute” regarding the locations that CN can designate to receive interchange traffic in the Chicago area. But there really is no dispute under the law—CN must designate a reasonable location on its own line where it will receive interchange traffic and must provide CP a free route over its line to the location. The Belt Railway Company of Chicago’s (“BRC”) Clearing Yard (“Clearing”), which CN seeks to designate, does not meet that standard.

What was “long-running,” however, was the parties’ agreement for nearly a decade to interchange traffic at Spaulding where CN’s and CP’s lines physically meet. Only last year did CN unilaterally decide to cancel the parties’ agreement and designate Kirk Yard (“Kirk”) as the

¹ This Reply is supported by the Verified Statements of Nicholas C. Walker (“Walker V.S.”), Daniel Sabatka, P.E. (“Sabatka V.S.”), and Charles Hubbard (“Hubbard V.S.”).

new interchange location, a location not only outside Chicago, but outside Illinois altogether. To avoid disruption to rail operations that would have resulted from CN's plainly unreasonable designation of Kirk as the new interchange location, CP filed a Petition for a Declaratory Order, which resulted in the Board declaring Kirk an unreasonable interchange location.

In this proceeding, CN asks the Board to declare both that it can designate Clearing Yard as an interchange location and that CP should pay the BRC's fees. Of course, as the Board is aware, the parties have already voluntarily reached an Interim Agreement to interchange at Clearing. Pursuant to that agreement {{ [REDACTED] [REDACTED] }}. That agreement properly reflects the interests of each party. Namely, CN's interest in increasing capacity over its main line through Spaulding and CP's interest in ensuring that CP to CN interchange traffic is reliably cleared from its Bensenville Yard daily regardless of the state of the Chicago Terminal. And it properly reflects CN's legal obligations. In the hopes of getting a better deal, however, CN now asks the Board to eviscerate the statutory obligations of physically contiguous carriers to provide reasonable interchange facilities on their lines to receive traffic.

CN's Petition asks the Board to weigh-in on what is essentially a private commercial dispute between carriers. This dispute does not jeopardize rail operations. In such situations, the Board's practice has been to let the parties resolve such disputes through private negotiation. Accordingly, the Board should decline to initiate a declaratory proceeding,² or should it initiate a proceeding, the Board should issue an order denying CN's Petition for Declaratory Order.

² Alternatively, should the Board institute a proceeding, the Board should set a procedural schedule as outlined below.

II. BACKGROUND

For nearly a decade, pursuant to agreement, CP and CN interchanged freight rail cars in Chicago at Spaulding, one of two locations in the Chicago area where CN's and CP's lines intersect. Walker V.S. at ¶ 4. Prior to the Spaulding Interchange Agreement that the parties executed in 2010, CN and CP interchanged cars at several locations in the Chicago Terminal Area, which was inefficient for both railroads. *Id.* The new arrangement contributed to greater fluidity and efficiencies in Chicago. *Id.* at ¶¶ 4-5. Nevertheless, in March 2019, CN gave CP formal notice that it was terminating the Spaulding Interchange Agreement effective May 10, 2019, and designated Kirk as the place where CN would accept cars in interchange. *Id.* at ¶ 11. Kirk was not a reasonable interchange location for CP to deliver cars; it is located in Gary, Indiana on the opposite side of the Chicago Terminal from CP's Bensenville Yard ("Bensenville"). *Id.* To reach Kirk and return to Bensenville, CP would have had to incur substantial costs, including requiring CP to operate more than 200 miles—including 168 miles on CN's rail line. *Id.*

CN's insistence that it would not accept interchange at Spaulding after May 10, 2019, posed a threat to rail operations in the Chicago Terminal Area. Accordingly, on April 30, 2019, CP filed a petition for declaratory order and preliminary injunction, seeking a declaratory order that Kirk is an unreasonable interchange location. *See Soo Line R.R. Co. – Petition for Declaratory Order and Preliminary Injunction – Interchange with Canadian National*, Finance Docket No. 36299 ("Prior Proceeding").³ On November 27, 2019, the Board granted CP's petition and declared that Kirk is not a reasonable interchange location and that CN could not unilaterally designate Kirk to receive cars in interchange from CP. *Soo Line R.R. Co.–Petition for Declaratory*

³ CP incorporates by reference the pleadings and evidence submitted to the Board in the Prior Proceeding.

Order and Preliminary Injunction – Interchange with Canadian National, STB Fin. Docket No. 36299 (STB served Nov. 29, 2019) (“*FD 36299 Final Decision*”).

During the pendency of the Prior Proceeding, CP and CN entered into an agreement to interchange CN-bound traffic at BRC's Clearing Yard (the "Interim Agreement").⁴ On August 21, 2019, the parties notified that Board "CP and CN have agreed to an interim arrangement for interchanging traffic in Chicago while this proceeding is pending before the Board," pursuant to which "CN will deliver CP-bound interchange traffic to CP at Bensenville, and CP will deliver CN-bound interchange traffic to CN via the Belt Railway Company's Clearing Yard." Joint Notice of Interim Agreement, STB Fin. Docket No. 36299 (filed Aug. 21, 2019); *see also* Interim Agreement at 1 ({{ [REDACTED] }}

The Interim Agreement further provided that { }

⁴ Interim Agreement, STB Fin. Docket No. 36299 (filed Sept. 5, 2019) (enclosing Interim Agreement filed under seal), Exhibit 8 to CN's Petition for Declaratory Order, STB Fin. Docket No. 36397.

[REDACTED]
 [REDACTED] }
 Despite the Board's *FD 36299 Final Decision* and the parties' Interim Agreement in which CN agreed { [REDACTED]
 [REDACTED] }—which decision plainly did not force CP to interchange/deliver to Clearing absent CP's consent—CN continues to assert that it need not provide CP an interchange on its line, but rather that it may force CP to interchange at the BRC's Clearing Yard *and* that CP must bear the associated BRC fees. CN's position is neither supported by the parties' agreements, statute, or Board precedent.

III. THE BOARD SHOULD NOT INITIATE A DECLARATORY ORDER PROCEEDING

The Board “*may* issue a declaratory order to terminate a controversy or remove uncertainty.” 5 U.S.C. § 554(e) (emphasis added); *see also* 49 U.S.C. § 721. Thus, as noted by CN in its Petition, the Board has the discretion to decide whether it should even begin a declaratory order proceeding. *See CSX Transp. Inc. – Petition for Declaratory Order*, STB Fin. Docket No. 34662, slip. op. at 5 (STB served Mar. 14, 2005) (“The Board has broad discretion to determine whether to issue a declaratory order.”) (citing *Intercity Transp. Co. v. United States*, 737 F.2d 103 (D.C. Cir. 1984); *Delegation of Authority – Declaratory Order Proceedings*, 5 I.C.C.2d 675 (1989)). In this situation, it should not.

Where carriers interchange and the allocation of costs should be negotiated between the parties. As noted by the Board in its *FD 36299 Final Decision*, “[c]arriers routinely reach such agreements, with few interchange disputes coming before the Board.” *FD 36299 Final Decision* at 7-8. *See also Norfolk S. Ry. Co.—Petition for Declaratory Order—Interchange with Reading Blue Mtn. & N. R.R. Co.*, NOR 42078, slip op. at 4 (STB served Apr. 29, 2003) (“*Reading Blue*

Mountain”) (“Under 49 U.S.C. 10742, connecting carriers are required to interchange traffic with each other. Usually they do so on the basis of mutual agreement. This is an operational matter that carriers should be able to settle themselves.”). The location of interchange is “a matter to be arranged between the parties . . . by consultation, exploration of mutual benefits, and negotiation of differences.” *New York, Chi. & St. Louis. R. Co. v. New York Central R. Co.*, 314 I.C.C. 344, 345 (1961) (“*New York*”). Indeed, “[a] carrier cannot arbitrarily provide points of interchange which ignore the basic rights of others.” *Id.*

CP and CN interchanged at Spaulding at CN’s urging for nine years. Walker V.S. at ¶ 4. But now CN wants to unilaterally interchange at Clearing for its own benefit—not the Village of Bartlett’s and certainly not CP’s. Implicit in the Interim Agreement between CP and CN in which {{ [REDACTED] [REDACTED] }}.

From CP’s perspective, however, Spaulding is preferable. Interchanging at Spaulding using its own forces, helps ensure that CN interchange traffic is reliably cleared from Bensenville daily, regardless of conditions in the Chicago Terminal. Thus, Spaulding provides operational certitude, reduces risks to CP’s fluidity, and allows CP to control its own destiny. Further, as discussed in VI. below, CP believes that it is ultimately more economical for CP to take the traffic to Spaulding rather than to Clearing and pay a third party. Notwithstanding these considerations, CP has been willing to compromise, and has compromised by voluntarily agreeing to interchange at Clearing subject to two caveats: {{ [REDACTED] [REDACTED] }}

CP’s Petition for a Declaratory Order in the Prior Proceeding asked the Board to issue a declaration to avoid disruption to rail operations that would have resulted from CN’s unilateral

and plainly unreasonable designation of Kirk as the new interchange location. Here, however, there is no threatened disruption. The parties have voluntarily agreed to interchange at Clearing and have agreed, at least temporarily, on the terms and conditions. And the parties' Interim Agreement {{ [REDACTED] [REDACTED] }}. But instead of negotiating a long-term agreement based on the commercial realities and the respective interests of the parties, CN attempts to drag the Board into the parties' commercial dispute by filing this proceeding, in hopes that the proceeding will give it leverage to negotiate a more favorable longer-term arrangement or that the Board will impose such an outcome.

At its core, this matter is simply a business dispute between two carriers, and the Board should decline to become entangled in such disputes. For these reasons and those below, the Board should decline to open a declaratory order proceeding.

IV. CN CANNOT DESIGNATE BRC'S CLEARING YARD TO RECEIVE INTERCHANGE TRAFFIC FROM CP.

A. Standard for Contiguous Carriers.

Carriers are required by statute to establish joint routes. 49 U.S.C. § 10703 ("Rail carriers providing transportation subject to the jurisdiction of the Board under this part shall establish through routes (including physical connections) with each other . . ."). In furtherance of that requirement, Section 10742 requires carriers to "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 delivery of passengers and property to and from, its respective line and a connecting line of another rail carrier." 49 U.S.C. § 10742. The application of this statutory requirement to provide interchange facilities is well settled and depends on whether the connecting

carriers have a direct physical connection, *i.e.*, are “contiguous,” or must utilize a bridge carrier to interchange traffic.

Where two carriers are “in a direct physical interchange,” the receiving carrier must “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 carrier.” *Burlington N. R.R. Co. v. United States*, 731 F.2d 33, 38 (D.C. Cir. 1984) (“*Burlington Northern*”) (emphasis added). *See also Reading Blue Mountain*, slip. op. at 4 (citing *Burlington Northern*, 731 F.2d at 38) (same); *BNSF Railway Company — Discontinuance of Trackage Rights Exemption — In Peoria and Tazewell Counties, Ill.*, Docket No. AB 6 (Sub-No. 470X), *Toledo, Peoria & Western Railway Corp. — Petition for Declaratory Order*, Docket No. FD 35404, slip. op. at 10 (STB served April 26, 2011) (“*Toledo*”) (citing *Reading Blue Mountain*, slip. op. at 4) (same). The chosen interchange location must also be reasonable and not impose undue operating hazards or require the delivering carrier to do work that is properly the work of the receiving carrier. *See* 49 U.S.C. § 10742; *New York* at 345; *Toledo*, slip. op. at 10; *Reading Blue Mountain*, slip. op. at 4-5.

Burlington Northern involved two railroads that were non-contiguous in Chicago. Because they were non-contiguous, BN delivered cars to B&O via an intermediate terminal switch carrier (Baltimore and Ohio Chicago Terminal Railroad (B&OCT)) and paid the B&OCT a per car fee. 731 F.2d at 35-40. In an effort to avoid the per car fee, BN sought to establish that a direct physical connection existed between it and B&O. *Id.* According to BN, because B&O wholly owned B&OCT, BN’s direct connection to the B&OCT constituted a direct physical connection between BN and B&O. *Id.* BN contended alternatively that B&O’s trackage rights over B&OCT constituted a de facto direct physical connection to BN. *Id.* at 38-40. The D.C. Circuit disagreed, affirming the

ICC's holding that neither B&O's ownership of B&OCT nor its trackage rights over B&OCT established a direct physical connection between BN and B&O. *Id.*

However, had there been a direct physical connection, then B&O would have been required to designate an interchange location on its own line and provide a free route to get there; in other words, if there were a direct connection, B&O could not have required that BN interchange via the intermediate switch carrier and pay the fee. Thus, the holding in *Burlington Northern* that a receiving carrier may satisfy its obligation by requiring the delivering carrier to interchange via a terminal switch carrier applies only to “*noncontiguous railroads*” (emphasis added), *i.e.*, railroads that do not have a direct physical connection.⁵ *Id.* at 39 (explaining that utilizing a terminal switching carrier is “one permissible way for two noncontiguous railroads to interchange traffic, even though one of them has sole ownership of the intervening switching carrier”).

Toledo, which examined how the interchange obligations of a receiving carrier changed after the direct physical connection to the delivering carrier was severed, reaffirmed the significance of a direct physical connection. In *Toledo*, BNSF and TP&W directly interchanged traffic in East Peoria, Illinois via TP&W's bridge over the Illinois River. *Toledo*, slip. op. at 2. However, after TP&W's bridge was destroyed, the carriers no longer had a direct physical connection. *Id.* at 2, 10. As a result, the carriers interchanged via an intermediate switch carrier, the TZPR. *Id.* at 2-3, 10. TP&W argued to the Board that BNSF as receiving carrier was obligated to pay for the intermediate carrier's fees as part of its obligation to provide a free route to the

⁵ In its Petition, CN argues that the non-contiguous nature of the railroads in *Burlington Northern* is immaterial. Pet. at 21. But CN's argument ignores a central premise of the case. Namely, that the existence of a direct physical connection between BN & B&O would have relieved BN of the obligation to pay the intermediate switch railroad's fees. Indeed, if CN were correct that whether the parties are contiguous or not is immaterial, there would have been no case or controversy for the D.C. Circuit to resolve.

physical interchange location. *Id.* at 10. But the Board rejected this argument on the grounds that BNSF's obligation to provide "free, direct interchange" on its line ceased after the TP&W bridge was destroyed:

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. Here, however, there is no direct physical connection between BNSF and TP&W, as the lines of BNSF and TP&W are physically separated by tracks owned by P&PU and leased to TPZR. When the TP&W bridge was intact, ***there was such a direct physical connection, and BN was obligated to provide TP&W with free, direct interchange via that route***, which BN did until the TP&W bridge was destroyed. Once TP&W opted not to repair its bridge, however, its only remaining connection with BNSF was via trackage rights arrangements over a different railroad's line.

Id. (internal citations omitted; emphasis added). The inescapable conclusion from *Toledo* is that had there still been a direct physical connection between BNSF and TP&W, BNSF could not have met its obligation to provide free interchange facilities by requiring the delivering carrier to utilize an intermediate switch carrier at the delivering carrier's expense. Likewise, here, where there is a direct physical connection, CN's designation of Clearing at CP's expense clearly fails to satisfy CN's obligation to provide CP with free, direct interchange on its line.

The distinction between contiguous and non-contiguous carriers for purposes of interchange make practical sense and is sound policy. It is the delivering carrier's responsibility is to bring the interchange traffic to the receiving carrier's line, *i.e.*, "to make delivery on the rails of their connections." *Kansas City S. Ry. Co. v. La. & Ark. Ry. Co.*, 213 I.C.C. 351, 359 (1935) (quoting *Chicago, R.I. & P. Ry. Co. v. Baltimore & O. R. Co.*, 113 I.C.C. 681 (1926)). But if the carriers are not physically connected, then an intermediate carrier must be utilized in order to bridge the gap between the delivering carrier's line and the receiving carrier's line. Because the intermediate carrier is fulfilling the delivering carrier's responsibility, it is reasonable that the delivering carrier

should bear the intermediate carrier's fees. However, if the delivering and receiving carriers have a direct physical connection, then the delivering carrier can and should fulfill its obligation itself. In that situation, the receiving carrier should not be able to force the delivering carrier to incur additional third party costs for the receiving carrier's convenience.

B. CP and CN are Contiguous in Chicago.

That CN and CP are contiguous railroads in Chicago, with a direct physical interchange at Spaulding cannot be in serious dispute.⁶ The CP line in question is a critical part of CP's network and has been for decades: CP operates multiple freight trains daily over the line, CP is the exclusive holder of the freight common carrier obligation on the line, controls and dispatches the line, and the line appears in CP's timetables and maps as part of CP's system. Hubbard V.S. at ¶¶ 5, 11. CN's main line physically crosses the line at Spaulding with lead tracks (the East Wye and the West Wye) and interchange tracks maintained for the very purpose of facilitating the interchange of traffic. Sabatka V.S. at ¶ 4. And for nearly a decade, the parties conducted direct physical interchange at Spaulding. *FD 36299 Final Decision* at 1-2, 5.

Nevertheless, CN erroneously contends that because the Northeast Illinois Regional Commuter Railroad Corporation d/b/a Metra ("Metra") owns the underlying property rights for CP's main line at Spaulding,⁷ CN and CP are somehow not physically contiguous. According to CN, CP merely holds "trackage rights" over Metra's line and therefore "CN-owned lines and CP-owned lines do not connect at Spaulding or at Clearing." Pet. at 21. But the mere fact that Metra owns the underlying property is irrelevant as to whether there is a direct physical connection, and

⁶ Spaulding is one of two locations where CP and CN's trackage physically meet and connect with one another at Chicago. The other location is Rondout. Walker V.S. at ¶ 4.

⁷ As explained in more detail in the accompanying Verified Statement of Charles Hubbard, the relationship of CP and Metra in the Chicago Terminal arises from the bankruptcy of the Chicago, Milwaukee, St. Paul and Pacific Railroad. Hubbard V.S. at ¶¶ 4-8.

it does not change the reality that the rail line is part of CP's system, and an important one at that.⁸ In fact, in approving Soo Line's acquisition plan for the bankrupt Chicago, Milwaukee, St. Paul and Pacific Railroad (the "Milwaukee") the ICC observed that the Milwaukee's lines would become part of CP's mainline system between St. Paul and Chicago. *Chicago, Milwaukee, St. Paul and Pacific Railroad Co.—Reorganization—Acquisition By Grand Trunk Corp.*, 2 I.C.C.2d 161, 384 (1984) ("Between Minneapolis/St. Paul and Chicago, the mainline of the combined system will be the double track mainline route of the MILW.")

Moreover, CP's rights and interests in its main lines in the Chicago Terminal Area are more akin to ownership than typical trackage rights arrangements. Typical trackage rights arrangements, like those at issue in *Burlington Northern*, limit traffic to overhead traffic and may also include other limits such as commodities and volumes; are over a host freight railroad that has sole control over the line and is responsible for capital projects, maintenance, and dispatching; are subject to a per car fee that typically includes a return on investment for the host⁹; and are permissive in nature. *Hubbard V.S.* at ¶¶ 11-12.

CP's rights in its main lines in Chicago bear almost none of these features. CP as the

⁸ Railroads hold varying degrees of property rights underlying lines that comprise their systems. Those property rights range from none in the case of a contract operator for a state owned line, to easements, lease interests, and ownership in fee simple, among others. A railroad's property interests in the right of way is generally not determinative of whether or not two railways are contiguous.

⁹ The Board's methodology for prescribing trackage rights compensation sets compensation based on "the sum of three elements: (1) the variable cost that is incurred by the owning carrier but attributable to the tenant carrier's operations over the owning carrier's track; (2) the tenant carrier's usage-proportionate share of track maintenance and operating expenses; and (3) an interest or rental component to compensate the owning carrier for the tenant carrier's use of the capital dedicated to the track by the owning carrier." *North Carolina RR Co.—Petition to Set Trackage Compensation and Other Terms and Conditions—Norfolk Southern Ry Co., Norfolk & Western Ry Co., and Atlantic and East Carolina Ry Co.*, FD No. 33134, slip op. at 3 n.13 (STB served May 29, 1997).

exclusive freight common carrier, is not limited by commodity, type or volume of traffic that CP can handle on the line. *Id.* at ¶¶ 11-12. Nor does CP pay a per car trackage rights fee for use of the line; rather CP pays its share of {{ [REDACTED] }}

{{ [REDACTED] }} And, of course, CP is not a mere tenant on the main line but rather {{ [REDACTED] }}

{{ [REDACTED] }} {{ [REDACTED] }}

{{ [REDACTED] }}

{{ [REDACTED] }}

{{ [REDACTED] }}

Furthermore, *Burlington Northern*'s holding that the carriers were not contiguous was based on the fact that "the exercise of trackage rights remains permissive with their holder." 731 F.2d at 39 (citing *Chicago, Rock Island & Pacific Railway v. Denver & Rio Grande Railroad*, 143 U.S. 596, 609 (1892)). Here, CP's rights to operate on the Joint Line are not "permissive" in nature. CP, as the exclusive freight common carrier, has a common carrier obligation to serve traffic on the Joint Line. In any event, *Burlington Northern*, held that a carrier could not be compelled to exercise permissive trackage rights to establish a physical interchange but acknowledged that a carrier could voluntarily do so. *Id.*

¹⁰ The so called “North Line” runs from Madison Street in downtown Chicago to Fox Lake, Illinois and Rondout, and the so called “West Line” runs from Tower A5 in Chicago to Almora, Illinois (west of Elgin). The West Line includes the track segment from Bensenville Yard west to Spaulding and the track segment from Bensenville Yard east to Cragin in Chicago. The trackage east to Cragin is the route CP trains would take CN interchange traffic to BRC’s Clearing Yard. Cragin connects to BRC’s line which then proceeds south to Clearing. *See* Hubbard V.S. at ¶¶ 6-7.

Accordingly, CN and CP are in fact contiguous railroads in Chicago, requiring CN to designate an interchange location on CN's line and to provide free, direct interchange. *See, e.g., Burlington Northern*, 731 F.2d at 38; *Toledo*, slip. op. at 10; *Reading Blue Mountain*, slip. op. at 4. Clearing—which is neither on CN's line nor on CP's line and requires CP to pay fees—in no way meets CN's obligations.

C. CP and CN's Minority Ownership Interests in BRC are Immaterial.

CN argues that it may designate Clearing for interchange because CN is a “co-owner” of the BRC and therefore has “the power to provide” Clearing as an interchange facility. Pet. at 17-22. This argument is fundamentally flawed in several respects.

To begin, the law is clear that CN's obligation is to provide interchange facilities on its "own line." CN and CP are not physically connected at Clearing. And Clearing is not on CN's *own line*. Regardless of either CN or CP's ownership interests in BRC, each is a separate corporate entity.¹¹ As such, the BRC does not constitute either CN's or CP's line. Indeed, the D.C. Circuit rejected similar arguments in *Burlington Northern* where it found that B&O and its wholly owned subsidiary, the B&OCT, were separate and distinct railroads and therefore B&OCT's lines did not create a direct physical connection between the receiving and delivering carrier. *Burlington*

¹¹ The corporate separateness between BRC and its owners is reflected in the BRC Operating Agreement which makes clear that BRC is a distinct railroad with its own operations. See, e.g., BRC Operating Agreement (attached to CN's Petition as Exhibit 9), at 8 (Article Three, Section 7) ({[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]}). BRC is in fact operated as a stand-alone business with its own management, work force, property and equipment.

Moreover, CP and CN are not sole co-owners of the BRC as suggested in CN's petition. Rather, CP and five other Class I railroads that interchange in Chicago own the BRC in varying shares. CP is a minority shareholder and holds a smaller ownership interest than does CN. Hubbard V.S. at ¶ 13.

Northern, 731 F.2d at 38-40; see also *Burlington Northern Inc. v. Baltimore and Ohio RR Co.*, I.C.C. Docket No. 37515, slip op. at 5 (served July 12, 1982) (finding that despite “substantial intermingling of the affairs and operations of B&O and B&OCT . . . B&OCT is a common carrier, separate from B&O”).

CN’s argument also ignores the fact that the statutory obligation of Section 10742 is to “provide reasonable, proper, and equal” interchange facilities, and focuses instead on the limiting clause of that obligation, *i.e.*, “facilities that are within its power to provide.” See 49 U.S.C. § 10742. A plain reading of the statute makes clear that while that interchange facility must be within CN’s “power to provide,” CN in the first instance must in fact provide that interchange facility. By designating Clearing, a facility owned and operated by BRC, and insisting that CP pay BRC’s fees to utilize Clearing, CN is not “providing” an interchange facility; rather, it is demanding that CP exercise its contractual right to operate over BRC¹² and utilize BRC’s switching service. Like the trackage rights in *Burlington Northern*, CP’s rights to operate on the BRC are permissive with the holder. *Burlington Northern*, 731 F.2d at 39 (“Absent contrary stipulation in the lease or in the required ICC authorization, the exercise of trackage rights remains permissive with their holder.”). Demanding that CP exercise permissive rights over BRC’s line at

¹² CP must operate 14 miles on the BRC’s rail line between Cragin Junction and the western entrance to Clearing (Walker V.S. at ¶ 13) and, CP must pay the BRC a fee to use BRC’s facilities and services. Hubbard V.S. at ¶ 14. Although CN characterizes that fee as a switch fee rather than a trackage rights fee it undoubtedly encompasses the cost of CP operating on BRC tracks to get to Clearing, as well as the cost to BRC of CN operating to Clearing. See BRC Operating Agreement, at 5-6 (Article Three, Section 1(a) and (b)) ({ [REDACTED] [REDACTED] }). In this respect, there is no relevant difference between the BRC switch fee and a trackage rights fee. See *Belt Railway Company of Chicago—Operation*, 324 I.C.C. 597, 600 (1965) (explaining that owner-to-owner movements either direct or via Clearing “derive from trackage rights over the [BRC]”).

CP's expense is a far cry from CN providing free interchange facilities on CN's lines as the law requires. *See, e.g., Toledo*, slip. op. at 10.

D. Nothing Prohibits CN from Reimbursing CP for Payment of BRC Fees.

In an effort to get around the law's clear requirement that CN provide free interchange, CN argues that the BRC Operating Agreement requires that the delivering carrier pay BRC's fees, and therefore, CP must bear that expense. CN misapprehends the situation, perhaps as a distraction. The agreement with BRC controls how BRC bills the carriers utilizing its services. *Hubbard V.S.* at ¶ 15. It provides an administratively workable rule and avoids BRC becoming entangled in payment disputes between carriers. *Id.* 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.* Such agreements have long been the practice in the industry. *See e.g., Kansas 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"). {{ [REDACTED] }}. The BRC Operating Agreement does not affect CN's statutory obligation to provide free interchange facilities and to do so on its own line.

V. CN REMAINS FULLY CAPABLE OF MEETING ITS OBLIGATION TO PROVIDE INTERCHANGE ON ITS LINE, FOR EXAMPLE, AT SPAULDING.

As noted by the Board in its Decision in the Prior Proceeding, "CN and CP interchanged [at Spaulding] pursuant to the Spaulding Interchange Agreement from 2010 to 2019, with neither carrier raising before the Board a claim that the interchange was unreasonable." *FD 36299 Final Decision* at 5. Even now in its Petition, CN suggests that BRC's Clearing Yard is a better option than Spaulding but neither asserts, nor asks the Board to determine, that Spaulding has somehow

become an unreasonable interchange location. *See* Pet. at 1 (setting forth CN’s two “questions” for the Board). Nor could it.

Spaulding continues to meet CN and CP’s respective obligations to provide reasonable interchange facilities. CN has identified no recent changes that would render Spaulding unreasonable.¹³ Rather, CN’s chief complaint with Spaulding appears to be the interchange’s impact on its main line operations as CN seeks to route more traffic over the EJ&E. But that alone would not be a valid argument for eliminating Spaulding as a reasonable interchange location or for absolving CN of its obligation to provide interchange facilities on its rail line, whether at Spaulding or some other reasonable location.¹⁴

Moreover, CN has other options for achieving its goals. As explained at oral argument in the Prior Proceeding and in Daniel Sabatka’s and Nick Walker’s respective Verified Statements, reconfiguring CN’s interchange tracks would reduce any interference with main line operations and also help address community concerns.^{15, 16} Walker V.S. at ¶ 20; Sabatka V.S. at ¶¶ 5-7. Of course, CN would rather avoid the expense altogether by forcing CP to Clearing on CP’s nickel.

¹³ Prior to moving the interchange to Clearing, interchange volumes remained relatively consistent with some softening in the last several years. Since moving to Clearing volumes have softened further. *See* Walker V.S. at ¶ 8.

¹⁴ Even where interchange at the actual point of physical intersection of the two carriers’ lines may not be the most practicable—which is certainly not the case here—the receiving carrier still must designate a reasonable interchange point *on its own line*. *See New York*, 314 I.C.C. at 344 (noting that although the current “Kingsbury and Clogville interchanges are located at points of intersection of the two railroads,” the proposed alternative interchange of “Collinwood Yard *is on the line* of the defendant”) (emphasis added). And, of course, even then the designation cannot require the delivering carrier to do work which properly belongs to the receiving carrier.” *Id.* at 345. *See also FD 36299 Final Decision* at 5 (quoting *New York*, 314 I.C.C. at 345) (“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.’”) (emphasis added).

¹⁵ CP estimates that the reconfiguration could be accomplished for approximately \$7 to \$10 million depending on the option selected. Sabatka V.S. at ¶ 6.

¹⁶ CN could also continue to deliver CN to CP cars via the Indiana Harbor Belt Railroad as it does now and receive cars from CP at Spaulding. In that case, CN could simply use any passing

A. Any Reductions in Extended Blocked Crossings at Spaulding May be Attributable to Factors Other than Suspension of Interchange Operations, And Likely Are Temporary.

CN continues to lean on the alleged community impacts of interchanging at Spaulding in an effort to sway the Board. In the Prior Proceeding, CN alleged that the interchange operations were to blame for blocked crossings that were causing community concerns and drummed up community support for moving the interchange. And in this proceeding, CN alleges that moving the interchange from Spaulding to Clearing under the Interim Agreement has significantly reduced blocked crossings in Bartlett. But the data provided by CN in its Petition is at too general a level to demonstrate a cause and effect between the change to Clearing and the decreased blocked crossings or to support any conclusions.¹⁷ There are several factors that affect the length and frequency of blocked crossings as well as the degree of disruption to the community caused by such blockages. These factors include both the number of trains and the length of trains. Fewer and shorter trains are likely to result in both fewer blocked crossings as well as a reduction in the duration of blockages.

Indeed, there is good reason to believe that CN's volumes are simply down overall and have been for several months. CN's traffic on this line was likely impacted by the First Nation protesters blockading CN (as well as CP) main lines in Canada.¹⁸ And volumes are likely also

eastbound train with time to stop and pick up the cars. Walker V.S. at ¶ 14. This would also minimize interchange operations at Spaulding.

¹⁷ Thus, as noted below, should the Board initiate a declaratory order proceeding, CP submits that discovery be allowed to confirm data actually shows that change in interchange had any effect.

¹⁸ See, e.g., <https://www.cn.ca/en/news/2020/02/cn-forced-to-shut-down-parts-of-network-due-to-blockades>

down due to the global economic impacts of Covid-19. None of this information is included in the data that CN provides.¹⁹

Nor does the data reflect other relevant changes to CN's operations. For example, according to CN's historic data that CN previously filed in the EJ&E oversight proceeding, most blockages were due to CN main line operations unrelated to interchange operations, *e.g.*, trains waiting for a window to cross the CP/Metra main line at Spaulding. Thus, if CN avoids the Metra rush hour, it would reduce the amount of time a train is held short blocking roads while it waits for a window to cross the CP/Metra main line. Likewise, CN could reduce blocked crossings in Bartlett by holding its trains outside of Bartlett. CN could also run its longer trains during non-peak travel periods. CN may well have pursued one or more of these strategies since the parties stopped interchanging at Spaulding. CN's data also fails to reflect the likelihood that avoided CP interchange operations, which CP performed in the middle of the night to avoid inconveniencing the community, likely accounts for much of the reduction in blockages.²⁰ However, the data submitted in CN's Petition are too bare bones to show the actual reason(s) for the alleged reduction in grade crossing blockages.

In any event, any current relief that Bartlett is enjoying is likely to be short lived.²¹ As explained in the Prior Proceeding, CN's proposed movement of the interchange is not calculated

¹⁹ See, *e.g.*, <https://www.cn.ca/en/investors/key-weekly-metrics/> This CN website includes charts showing weekly volumes over the last year, a copy of which is attached hereto as Exhibit A.

²⁰ CN likewise could have reduced the impact of its interchange activity simply by not conducting interchange during rush hour, typically around 5 PM. See CP's June 18, 2019 Letter, STB Fin. Docket No. 36299.

²¹ On May 6, 2020, the Village of Bartlett filed a letter in this proceeding noting that the system Bartlett created for residents to log at-grade train stoppages in real time had not received a complaint since November, although it had received nine between August and October of last year. The letter leaps to the conclusion that the "only thing" to which the Village can attribute that decrease is that the interchange operations between CN and CP being temporarily moved from Spaulding to Clearing. But, of course, there can be many reasons why the system Bartlett set up

to reduce train traffic or the frequency of blocked crossings in Bartlett; rather, it is calculated to increase CN's main line capacity to increase the number of trains it can route over this corridor. In June 2019, CN was averaging more than 23 trains through Bartlett daily²² prior to the voluntary agreement to move interchange to Spaulding and forecasted an increase of four to five additional daily trains by the fourth quarter 2020 (previously, in December 2018, CN forecast nine additional trains in a U.S. Army Corps of Engineers permit application).²³ CP believes that this forecasted increase in daily train volumes is the real reason that CN seeks to move the interchange location from Spaulding permanently. While this forecast did not take into account the blockades and Covid-19 among other factors, those impacts are temporary. Eventually, when CN volumes rebound, there likely will be more and longer CN trains moving through Bartlett, resulting in more and longer blocked crossings, not fewer.

B. Blocked Crossings Are Not an Appropriate Basis for Decision in a Section 10742 Dispute.

CN's invocation of the community concerns as a basis for the Board's decision in a 49 U.S.C. § 10742 proceeding is inconsistent with the statute and without precedent. Moreover, it raises troubling policy implications. Rail lines transect tens of thousands of communities across the country. As population densities grow, rail-community issues such as blocked grade crossings become more prevalent. Historically, such issues have been handled by local and federal

has not recently received complaints, including, for example, a decrease in overall train volume (or, at minimum, a decrease in the length of trains being run during the day), the current Covid-19 pandemic in which many residents are (as even the letter notes) under a "stay-at-home" order and are therefore not driving, and a lack of recent publicizing to the public of the system Bartlett created.

²² CP's July 3, 2019 Letter and Appendix A thereto.

²³ See CN's Reply to Petition to Reopen, *Canadian National Railway Company and Grand Trunk Corporation – Control – EJ&E West Company*, STB Finance Docket No. 35087 (Sub-No. 8), at 7 (filed April 29, 2019).

investment in permanent solutions, for example, grade separation projects such as underpasses or overpasses.²⁴ Railroads have typically worked with communities to implement such solutions and would no doubt do so here if asked. But if the Board were to accede to CN's request to consider the impact on Bartlett as a factor in its decision here, it would be opening the door to efforts by localities nationwide to challenge the presence of rail operations in their communities rather than investing in infrastructure necessary to better coexist.

Moreover, in enacting ICCTA, Congress specifically sought to protect the rail industry from such efforts by local and state governments to prioritize local interest over interstate rail operations. In fact, the Board and the Courts are often confronted with issues arising from efforts by state and local governments to infringe on regulated rail operations for public health and welfare reasons communities. These actions might include, for example, taking property to build a bike trail, a park, or road, or requiring rerouting of hazmat traffic around population centers. They are often well-intentioned, but to the extent they interfere with rail operations, they are categorically preempted. *See, e.g., City of Lincoln v. Surface Transp. Bd.*, 414 F.3d 858 (8th Cir. 2005) (condemnation of a 20-foot strip along railroad's 100-foot right-of-way for use as a pedestrian and bicycle trail categorically preempted); *CSX Transp., Inc.—Petition for Declaratory Order*, STB FD No. 34662 (STB served May 3, 2005) (District of Columbia law banning transportation of certain hazardous commodities within 2.2-mile radius of U.S. Capitol categorically preempted). Indeed, it is clear that an effort by Bartlett to prevent CP and CN from interchanging in Spaulding would unreasonably interfere with rail operations. As such, it would be subject to federal

²⁴ CP estimates that a Bartlett Road grade separation structure could be constructed for between \$5 and \$10 million. *See Sabatka V.S.* at ¶ 7.

preemption and therefore prohibited. The Board should not allow such prohibited regulation of rail operations to sneak in the back door in this proceeding.

VI. UNDER THE GUISE OF FAIRNESS, CN SEEKS TO FORCE CP TO PAY FOR THE BENEFITS OF CLEARING FOR CN TO THE DETRIMENT OF CP

In its Petition, CN suggests an “unfair imbalance” in requiring CN to provide a free route to BRC’s Clearing Yard, suggesting that CP would in fact be saving money by interchanging at Clearing and therefore should be forced to pay for Clearing. There are four flaws with this argument.

First, CN’s fairness argument ignores the fact that CN seeks to move the interchange to Clearing for its benefit and that benefit is likely substantial as demonstrated by CN’s current {{ [REDACTED] [REDACTED] }}. But CN has kept the magnitude of their benefit they expect to realize a secret.

Second, CN’s argument, at a minimum, overstates any potential costs savings to CP and makes the unwarranted assumption that any such savings would endure long term.²⁵ In fact, CP believes that in the long term the economics favor Spaulding. As an initial matter, the suspension of the daily G35 assignment between Bensenville and Spaulding has not directly translated to a cost savings as CN suggests. Suspension of the assignment resulted neither in a reduction of train and engine employees or the amount of locomotives in the pool.²⁶ See Walker V.S. at ¶ 17.

²⁵ At oral argument in FD No. 36299, in response to a Board question, Mr. Walker gave a rough estimate of the cost of G35 at \$4,800 per day, but, as explained in his accompanying Verified Statement to this Reply, Mr. Walker inadvertently stated the cost in Canadian dollars. The internal management cost in U.S. dollars is approximately \$3,600 per day. See Walker V.S. at ¶ 7.

²⁶ Elimination of one assignment generally would not affect the total number of train employees CP must maintain in order to respond to surges in volume. In fact, the suspension of G35 did not result in a conductor or engineer losing an assignment. Had it, however, the affected employee would have been paid—if a conductor, via the extra board weekly guarantee, or if an engineer, via existing agreement. See Walker V.S. at ¶ 17.

Moreover, CP must maintain a sufficient crew base to handle fluctuating volumes in the Chicago Terminal as well as the potential of CN traffic to Clearing if the traffic cannot be handled on the two daily trains CP operates to Clearing. Those trains are subject to an 8,000-foot limit in length. If volumes exceed existing train capacity, CP may need to operate a third train to Clearing to handle CP to CN traffic. *See Walker V.S.* at ¶¶ 17-18. Laying on a third train would fully absorb any potential savings from suspending G35, and, if CN has its way, would be in addition to BRC's fees. Because BRC fees are on a per car basis and fluctuate based on total daily volumes, the supposed savings to CP would also depend on the volume of cars CP must move to Clearing. Thus, the supposed economics are not a sound basis for changing settled law. A ruling that CP must bear BRC's fees based on the supposed economic benefits of eliminating G35, at best would be on unsteady ground indeed, enduring only if, and so long as, such benefits in fact accrue.

Third, forcing CP to spend money for work that it is entirely capable of, and prefers to handle itself is fundamentally unfair. It is also heavy handed in that it seeks to substitute CN's judgment for CP's own judgment on how CP should run its railroad and asks the Board to insert itself into an operational decision that is best left to the railroad.

Lastly, CN's argument ignores the substantial risks to CP specifically, and to the Chicago Terminal generally, of forcing more cars into the Terminal. CN's alleged benefits to CP are premised on Clearing remaining fluid. But that will not always be the case as volumes vary and, notwithstanding the current effects of the pandemic, are expected to grow substantially overtime. Unexpected surges in volumes, long term growth, and bad weather can cause, and have caused, congestion at Clearing. And on those days when the Terminal is experiencing congestion, forcing even a relatively modest amount of cars into the Terminal will add to the congestion and could

have catastrophic consequences for the rail system.²⁷ If Clearing becomes short on capacity as has been the case at times, and were to refuse or delay CP interchange traffic, cars that otherwise could have been interchanged with CN will instead congest CP yards and sidings. At thirty cars a day piling up in Bensenville the yard will quickly run out of track space. Thus, even a short disruption could prove very costly to CP. Accordingly, CP has a strong preference for direct interchange with CN at Spaulding via CP's line. With direct interchange, CP controls its own destiny. Regardless of events at Clearing and in the Chicago Terminal, CP can be assured that CN's interchange cars will be cleared daily from Bensenville. CP also retains control over scheduling interchange trains and can do so at night which also works to keep CP's main line with Metra fluid during the day. CP believes that these risks and operational efficiency outweigh the supposed benefits of utilizing Clearing Yard as the interchange location. *See Walker V.S.* at ¶¶ 16-18.

At the very least, if the Board views this dispute as requiring a determination of "fairness," based on economics, then the Board should establish a procedural schedule that allows for discovery on such issues as the magnitude of the economic benefit to CN of moving the interchange to Clearing.

VII. IF THE BOARD INITIATES A PROCEEDING, THE BOARD SHOULD SET A PROCEDURAL SCHEDULE THAT ALLOWS ADEQUATE TIME FOR DISCOVERY.

For the reasons discussed above, CP believes that the Board should summarily deny CN's request for a declaratory order. However, if the Board does not, then CP requests that it establish a procedural schedule that allows sufficient time for discovery. CN has made several factual

²⁷ In fact, the Board approved CN's acquisition of the EJ&E based in part on CN's representation 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 Railway Company and Grand Trunk Corporation – Control – EJ&E West Company*, STB Finance Docket No. 35087, slip op. at 5, 10 (STB served Dec. 24, 2008).

allegations and drawn conclusions that CP believes are not well founded. These include claims regarding the impact on Bartlett of moving the interchange from Spaulding to Clearing based on blocked crossings data that is aggregated at such a high level as to obscure the actual cause of the blockages that are of concern to the Bartlett community; namely blockages caused by CN's main line traffic and operational decisions. A full record would include more meaningful data. Likewise, a full record would include information regarding the economic benefits to CN of moving the interchange to Clearing. Accordingly, the Board should establish a procedural schedule allowing discovery on that issue. To accommodate the discovery, CP proposes the following procedural schedule:

- 0 days – Board issues procedural schedule
- +120 days -- Discovery closes
- +160 days -- Supplemental opening briefing
- +190 days -- Supplemental reply briefing

VIII. CONCLUSION

For the reasons stated above, the Board should issue an order denying CN's Petition for Declaratory Order. Alternatively, should the Board institute a proceeding, the Board should set a procedural schedule as outlined above.

Respectfully submitted,

/s/ David F. Rifkind

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Dated: May 29, 2020

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of May, 2020, copies of the foregoing REPLY TO PETITION FOR DECLARATORY ORDER were served by mail or email on the following:

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As a courtesy, the Reply has also been mailed to the following additional parties listed on the service list for Finance Docket No. 36299:

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/s/ David F. Rifkind
David F. Rifkind

EXHIBIT A

CN Website Charts

CN > Investors > Key Weekly Metrics

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Key Weekly Metrics

Key Weekly Metrics

The railroad performance measures are reported weekly. These measures represent only some of the indicators of railroad performance. Please be advised that you should not rely solely on this information as an indication of CN's overall performance, financial or otherwise, as it may be misleading when viewed in isolation.

Effective January 1, 2019, CN has introduced new definitions for Cars on-Line, Train Speed and Terminal Dwell.

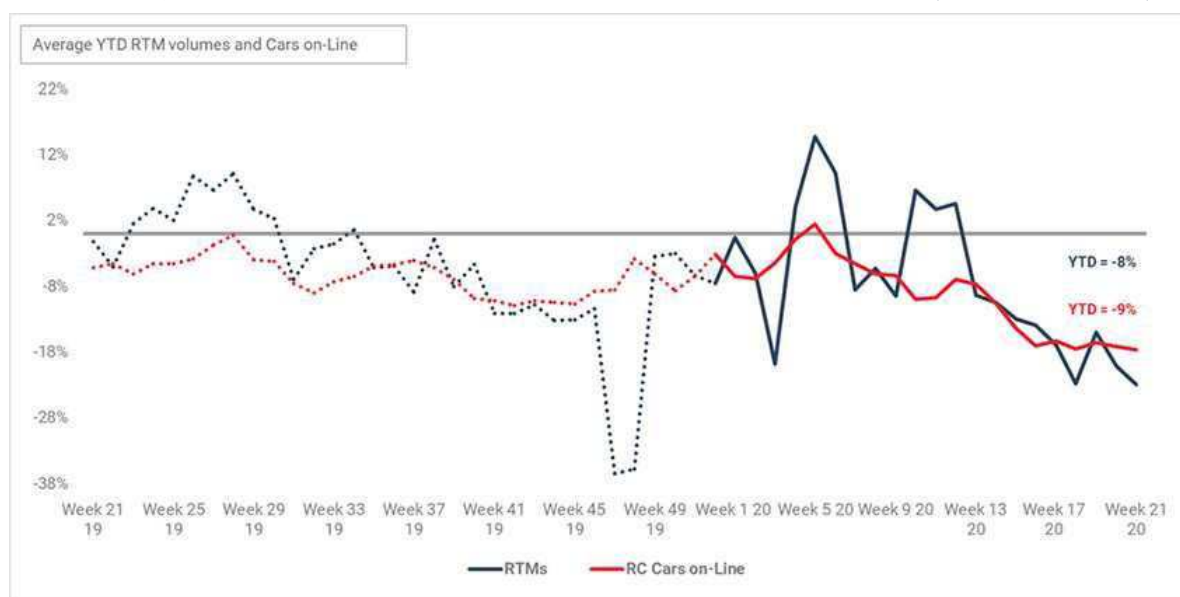
Weekly Volumes

CN reports weekly volumes by AAR grouping (carloads) and by CN reported Business Units (RTMs and carloads). Revenue ton-miles (RTMs) represent a better proxy of workload than carloads as this metric takes into account the length of haul of the movement.

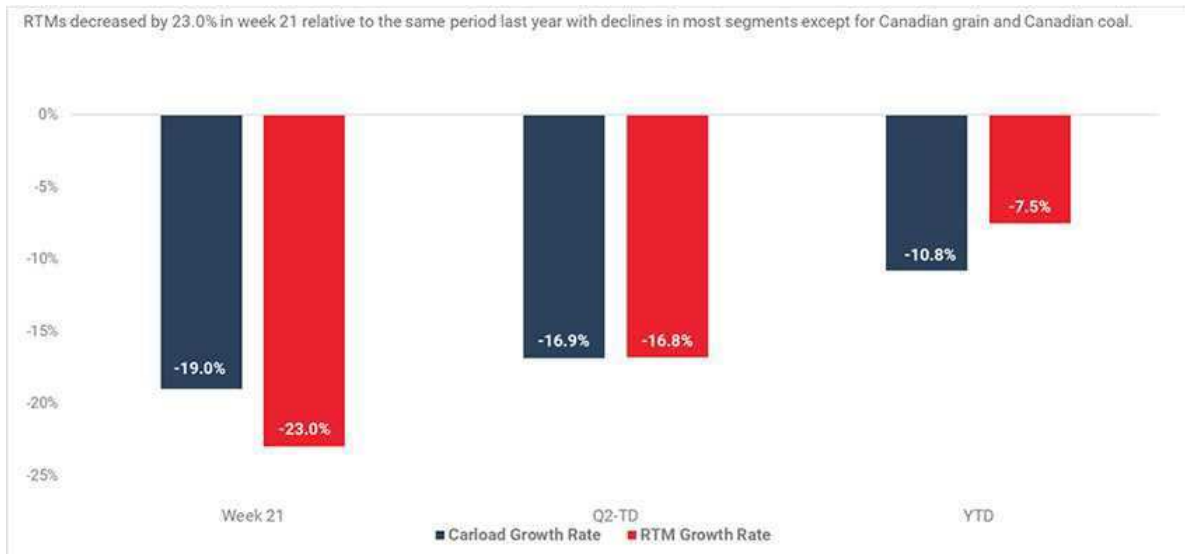
The chart below highlights the year-over-year (YoY) growth rate in total system RTMs for the past 52 weeks in relation to the YoY growth rate in railway-controlled cars on-line. As to be expected, CN's strategy of growing volumes faster than the economy requires additional railcars (railway-owned or private) on the system.

Weekly RTMs data is reported from Sunday to Saturday. Weekly railroad controlled cars on-line data is reported from Saturday to Friday.

% Change YoY – RTMs and Railroad-Controlled Cars on-Line (Last 52 weeks)



RTMs & Carloads



📎 [CN – RTMs Summary by Business Unit](#) (XLSX)

📎 [CN – Cars summary by AAR Grouping](#) (XLSX)

2020



Week 21 (xlsx 20.81 KB)



VIEW

The weekly volumes use the following definitions:

RTM

RTM is calculated by multiplying the weight in tons of the shipment lading being transported (or “tons of lading carried in the Carload”) by the number of miles that the shipment (or Carload) is transported on company lines. The tare weight of the car is excluded.

Key Weekly Operating Metrics

Car Velocity (how many miles a car moves per day) represents an all-encompassing operating metric that takes into account the train speed from origination yard to destination yard as well as the time (in hours) that the railcar spends in a yard.

Car Velocity (Car Miles per Day)



[Key Operating Metrics – Current Week](#) (XLSX)

The weekly operating metrics use the following definitions:

Car Velocity

Car Velocity is defined as the average miles per day traveled by loaded and empty, active system, foreign and private cars on company lines.

Through Network Train Speed

Through network train speed measures the line-haul movement from origin to destination, including time at terminals. The average speed is calculated by dividing train-miles by total hours operated, excluding yard and local trains, passenger trains, maintenance of way trains, and foreign trains.

Through Dwell (Hours)

Through dwell is the average time a car resides within terminal boundaries expressed in hours. The measurement begins with a customer release, received interchange, or train arrival event and ends with a customer placement (actual or constructive), delivered or offered in interchange, or train departure event. This excludes stored, bad ordered, maintenance of way cars, or cars with dwell greater than 10 days.

Railroad-Controlled Cars on-Line

Railroad-Controlled Cars on-Line is defined as the average of the daily on-line inventory of freight cars under railroad control and exclude: private cars once placed at customer location, foreign or system empty cars placed at a customer location for greater than 24 hours, and foreign or system loaded cars placed at a customer location for greater than 48 hours. Articulated cars are counted as a single unit. Maintenance of way cars are excluded.



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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 NICHOLAS C. WALKER

1. My name is Nicholas Walker. I am employed by Soo Line Railroad Company d/b/a Canadian Pacific (CP) in the capacity of Assistant Vice President of Operations, US East, officed in Chicago at Bensenville Yard. I was promoted to this position from General Manager Operations in 2019, having served as General Manger from 2017. Prior to that, I served as Operations Superintendent at Bensenville and as Assistant Superintendent at CP's Winnipeg, Manitoba Yard, and at St. Paul, Minnesota. I began my railroad career in 2005 as a conductor with CP at Chicago. Of my 15 years of railroad service, 10 years have been in the Chicago Terminal.

2. My current responsibilities include overall supervision of rail transportation operations of CP in the greater Chicago Terminal, and specifically the trackage to and from Bensenville Yard and the other major rail yards within the Terminal, as well interchange with other Class I railroads including Canadian National (CN).

3. I previously submitted a verified statement in the declaratory judgment proceeding involving the reasonableness of CN's designation of its Kirk Yard for interchange (STB Docket FD No. 36299). In that statement I provided history and supplied context regarding our interchange operations with CN at Chicago as they related primarily to CN's designation of Kirk Yard. The purpose of this statement is to update that history and provide context of our interchange operations

with CN in view of CN's attempt to designate BRC's Clearing Yard as the interchange location to receive CP cars at CP's expense but for CN's benefit, and to explain why CP prefers to continue to interchange at Spaulding.

History and Practice of CP/CN Interchange at Chicago

4. As I previously explained, as recently as 2009, CN and CP interchange at Chicago was made pursuant to seven (7) separate interchange agreements and took place at multiple locations. We eliminated these inefficient arrangements and consolidated interchange at one location, Spaulding Yard, in 2010, at CN's suggestion as I understand it, following CN's acquisition of the Elgin, Joliet and Eastern Railway Company (EJ&E). Spaulding is one of two locations (the other is Rondout) where CP and CN's trackage physically meet and connect with one another at Chicago. CP and CN each maintains side trackage at Spaulding sufficient for interchange.

5. Spaulding worked well for 8+ years until, at CN's request, the parties entered into an "Interim Agreement" which provides for interchange via the Indiana Harbor Belt Railroad (IHB) for CN to CP traffic and the Belt Railway Company of Chicago (BRC) for CP to CN traffic.

6. When CP and CN interchanged at Spaulding, we interchanged with one another every day (7 days a week, 52 weeks a year). CP operated a daily train assignment, G35, which worked from Bensenville Yard and delivered CP to CN traffic at Spaulding, and pulled CN to CP traffic back to Bensenville. Similarly, CN had a work assignment that delivered and pulled CN to CP/CP to CN traffic at Spaulding. Our traffic to CN is typically mixed manifest. CN's traffic to us is mixed manifest and auto racks.

7. At oral argument in FD No. 36299, in response to a question, I ball-parked the cost of G35 at \$4,800 per day. In preparing my verified statement, I realized that I had miscalculated,

I was thinking in Canadian dollars, and have confirmed that the actual cost is approximately \$3,600 USD per day.

8. Our interchange traffic volumes with CN had been remarkably consistent prior to the pandemic and First Nations rail blockades in Canada. From January of 2014 and through April 2019, daily CN to CP traffic at Spaulding averaged 47 cars and CP to CN traffic averaged 35.9 cars. In 2020, volumes are down. For the first four months of 2020, daily CN to CP traffic averaged 33.5 cars and CP to CN averaged 28 cars (excluding TIH). The data also shows our interchange traffic in both directions has been softening since January 2014, pandemic notwithstanding.

9. Operationally, Spaulding works, but like all locations in Chicago it has its idiosyncrasies. CP needs authority from the CN dispatcher to cross CN's mainline both at arrival and departure. As we ready for departure, we may have to double to put our train together. There are two ways to do this. The way that blocks the CN main line the least amount of time potentially blocks the Bartlett Road crossing, located to the south of CN's yard tracks at Spaulding. The CN dispatcher gives our crew the amount of time to do our work. If there is sufficient time we double with the least impact to Bartlett Road. When the window we have been given by the CN dispatcher results in blocking of the road crossing, we have broken our train in the past to minimize impact to the road. Additionally, CP performs interchange operations in the middle of the night when there is little road traffic in order to minimize potential inconvenience to the surrounding community.

Discussions to Move the Interchange Point

10. Since the summer of 2018, my counterpart at CN in Chicago, William Albritton, Jr., and I have occasionally had conversations where CN has expressed an interest in possibly moving our interchange point from Spaulding. At first, CN proposed that CP both deliver and pull

from CN's Glenn Yard in Chicago. That would impose all the costs for the interchange on CP and require CP to pay trackage rights fees to operate over the Indiana Harbor Belt (IHB) between CP's Bensenville Yard and CN's Glenn Yard. The other burdens spring from Glenn Yard's location and the traffic density of other railroads between Bensenville and Glenn. We would run the risk of our CP crews expiring on Hours of Service, especially in the winter, if they had to go to Glenn, which would impose an approximate cost of \$135 per day to taxi back and forth to Bensenville Yard. It would also erode our crew base. And CP has no assignments going to Glenn today and we have no reason to do so.

11. In its March 11, 2019 Notice to Terminate the existing interchange agreement, CN designated CN's Kirk Yard as the location for CP to deliver interchange traffic to CN. Kirk Yard is located in Gary, Indiana, on the opposite side of the Chicago Terminal from Bensenville Yard, our principal classification yard in Chicago. To get to CN's Kirk, CP would have to traverse 17.2 railroad miles west from Bensenville to Spaulding, and then 84 railroad route miles southeast from Spaulding to Kirk for a total of 101.2 miles, one way. Given the distance, CP would likely have needed to utilize multiple crews and incur significant taxi costs and equipment costs. The Board properly ruled that Kirk Yard was an unreasonable interchange location.

12. In the course of additional conversation with Mr. Albritton, in March 2019 I believe, he suggested that CN could deliver CP traffic at Bensenville via the IHB and that CN would absorb the cost of IHB trackage rights fees. We also discussed under that scenario CP taking CN's traffic to the BRC's Clearing Yard. {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }}

13. In my prior statement, I referred to the BRC fee as a trackage rights fee. I understand that CN disputes this characterization. However, in order to get to Clearing Yard, CP must operate east from Bensenville on CP's main line to Cragin Junction and from there south on BRC's line approximately 14 miles to Clearing Yard to access Clearing from the west. It is my understanding that the per car fee that CP pays the BRC is based in part on CP's operations on BRC's track between Cragin Junction and Clearing Yard, as well as on BRC's switching of CN interchange traffic at Clearing Yard from the tracks on which CP delivers interchange traffic to the tracks on which CN pulls interchange traffic.

14. CP remains willing to continue to deliver to Spaulding, and any eastbound train on CN's mainline at Spaulding with time could add the CP to CN interchange cars to their train and go to Kirk Yard. CN has many trains passing Spaulding every day on the way to Kirk. CN has shown no interest in this.

15. CN has stated to me that the reason they terminated the 2010 Interchange Agreement and seek to change the interchange location from Spaulding is due to a desire to make their main line more efficient. I believe that is accurate. I also believe that if CN were successful in moving interchange from Spaulding permanently, CN will close its facility at Spaulding to eliminate the maintenance expense, remove mainline turnouts, and thus eliminate Spaulding as an interchange location option. {{ [REDACTED] }}
[REDACTED]}}

CP Prefers Spaulding as an Interchange Location

16. CP prefers conducting interchange at Spaulding for several reasons. First, interchange at Spaulding keeps cars out of the often congested Chicago Terminal Area. This is particularly important if Clearing Yard is short on capacity as has been the case at times. Even a

small amount of cars can make a large difference when Chicago is seizing up. Interchange at Spaulding also ensures that the cars do not congest CP's Bensenville Yard waiting for conditions at Clearing Yard to ease. We prefer direct interchange because we control our own destiny that way. With direct interchange we are not constrained by the situation at Clearing or by the actions of others which may cause congestion to and from Clearing. Direct interchange to Spaulding via our own railroad and setting the time for the interchange assignment at night also works to keep our mainline with Metra fluid during the day. If Clearing were to refuse or delay our interchange traffic, at approximately 30 cars-a-day, we would quickly run out of track space if Clearing is unable to accept the traffic and Spaulding is not an option. CP believes that these risks and operational efficiency outweigh the supposed benefits of utilizing Clearing Yard as the interchange location.

17. Further, CP believes that in the long term the economics favor Spaulding. While I understand that CN contends CP will save money by annulling the G35 assignment to Spaulding, CN's claims are based on the assumption that current conditions in the larger Chicago Terminal will continue indefinitely. Moreover, CP did not permanently save money in the manner CN suggests when G35 was suspended due to the Interim Agreement. The two train crew members for G35 exercised their seniority and took other assignments. The locomotives were returned to the pool. When the crew marked to other assignments, no one fell out at the bottom of the roster because business was strong when G35 was suspended. Had business conditions been otherwise and a conductor at the bottom of the roster was unable to hold a job through the exercise of seniority as a result of the bumping, he or she would have gone to the extra board. Our extra board carries a weekly guarantee so in that case the individual would still be paid. (Our engineers are guaranteed in cases such as this.) To put this in perspective, we currently have 1,183 train and engine

employees on the roster in the United States. Railroading is a dynamic business. Volumes and train counts fluctuate and change with market dynamics and the larger economy. To say we are heavy one conductor permanently if an assignment in a terminal as active as Chicago were annulled, given all the other variables, is a reach. We prefer Spaulding and are comfortable with the cost of G35 because, in our judgment, control of our operations and fluidity are the higher value.

18. CN's claims also assume that CP will handle the CN interchange cars on the two trains daily that CP operates from Bensenville to Clearing Yard indefinitely. Currently, while rail volumes are soft due to the effect of the global pandemic among other factors, CP has been able to accommodate the CN interchange traffic on the existing train service. However, those trains have limited capacity as they are subject to an 8,000-foot BRC train length limit. As the economy recovers, CP expects volume growth could potentially require that CP operate a third train to Clearing Yard in order to accommodate the CN interchange traffic. If that happens, any supposed cost savings from annulling G35 to Spaulding would be offset entirely. Further, if CP must pay BRC charges, this would further offset any supposed cost savings from annulling G35. If volumes grow, the third party fees could quickly exceed such savings.

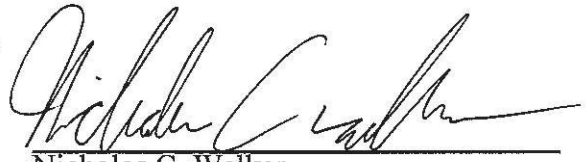
19. Notwithstanding CP's preference to utilize Spaulding or some other reasonable interchange location, CP has voluntarily agreed to deliver CN interchange cars via the BRC {{ [REDACTED] }} CN requested the move to Clearing Yard for CN's benefit, a benefit CN refuses to quantify. CP does not believe that it is fair and reasonable for CN to force CP to incur third party fees, forgo operational control and risk congestion when the purpose of moving interchange location is for CN's benefit.

20. The improvements to the track configuration at Spaulding that Mr. Sabatka outlines in his Verified Statement would mitigate the potential for blocked crossings and improve operational efficiency for interchange there. In a nutshell, the improvements would minimize the time either CP or CN occupied CN's mainline. Specifically, CN would likely deliver CP's cars to Track 4 from the south, cut its locomotive, take the East Wye and shove light across and into our side of the Yard. CN would then run around the North Siding and pull the CP to CN cars from that track without doubling, as CP would typically leave the CN cars intact on North Siding. For delivery, CP would enter from the east, cross the interlocker and proceed past the western entry point of our yard tracks, shove into the yard and down the West Wye leaving the cars intact on the North Siding. To pull, CP would work its way light back up the West Wye and onto CP Main #2 and over the interlocker, and down the East Wye where we would tie onto the cars left by CN without doubling. As an added benefit, CP's moves under this arrangement would be via the CP dispatcher not the CN dispatcher.

VERIFICATION

I, Nicholas C. Walker, 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.

Executed on this 29 day of May, 2020.



Nicholas C. Walker

**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 DANIEL SABATKA

1. My name is Daniel Sabatka. I have been employed by Soo Line Railroad Company doing business as Canadian Pacific (“CP”) in various engineering roles for approximately 9 years and currently am the Director Project and Public Work - US. I submit this Verified Statement in support of CP’s Reply to Wisconsin Central, Ltd.’s (“CN”) Petition for a Declaratory Order to the Surface Transportation Board (“STB”).

2. As Director, Projects and Public Works – US, I am responsible for design, planning, and overseeing construction of rail infrastructure projects.

3. The purpose of my statement is to describe and provide a rough cost estimate of [1] two engineering options for reconfiguring the CN interchange tracks at Spaulding to improve interchange operations; and [2] an option for grade separation at Bartlett Road. I understand that the operational impacts of such changes are addressed separately by Nick Walker.

4. CP’s east/west main line and CN’s north/south main line intersect at Spaulding Junction. As illustrated in Exhibit A to this Verified Statement, CP’s interchange tracks are located on the south side of the CP main and the west side of the CN main. With the exception of Track #4 which is located east of CN main, CN’s interchange tracks are located on the west side of CN main and south of CP’s interchange tracks. The West Wye connects CP’s interchange

tracks to the CN interchange tracks via the CN main and EJE siding. CN's interchange tracks connect to the East Wye, which is used for trains accessing the CP main to return to Bensenville, via the CN main.

5. Working with Nick Walker, we redesigned CN's existing track structure at Spaulding in order to improve interchange operations and lessen the impact on CN's main line and the surrounding community. These options for reconfiguring Spaulding are illustrated in schematics attached hereto as Exhibit B and described below:

- i. Connect the West Wye directly to CN's interchange track bypassing the CN main line. This will allow for CP and CN to move between the respective interchange tracks within the Yard without touching the CN main.
- ii. Lengthen the interchange track (Track #4) east of CN's main line. This can be accomplished by shifting to the west the current CN main between Stearns Road and south of Bartlett Road and straightening out the connection between what was CN's main and existing Track #4.
- iii. Remove the north turnout from Track #4 and connect Track #4 directly to the East Wye so that a train on Track # 4 can access the CP main line via the East Wye without touching CN main.
- iv. At CN's option, crossovers could be added to connect the west side interchange tracks (Track #s 1, 2 and 3) to Track #4. This would require shortening slightly Track #'s 1, 2 and 3.

6. Based on my knowledge and experience, I have estimated the cost of reconfiguring the CN interchange tracks as described above. In my opinion, if CN makes all of the changes described above (Option 1) the cost of construction would be approximately \$10.2

million. If CN omits the crossovers described in item 5(iv) above, the cost would be approximately \$7.2 million. A more detailed budget estimate is attached to this Verified Statement as Exhibit C.

7. Grade separation at Bartlett Road would be the best solution to the potential blocked grade crossing issue as it greatly improves safety as well as efficient rail operations. In my experience, a grade-separated structure could be constructed for between \$5 to \$10 million.

VERIFICATION

I, Daniel Sabatka, verify under the penalty of perjury that I am authorized to make this verified statement 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.

Daniel Sabatka

Daniel Sabatka, P.E.
Director Projects and Public Works - US
Soo Line Railroad Company

Dated: May 28, 2020

EXHIBIT A
to Verified Statement of Daniel Sabatka

SPALDING MAP

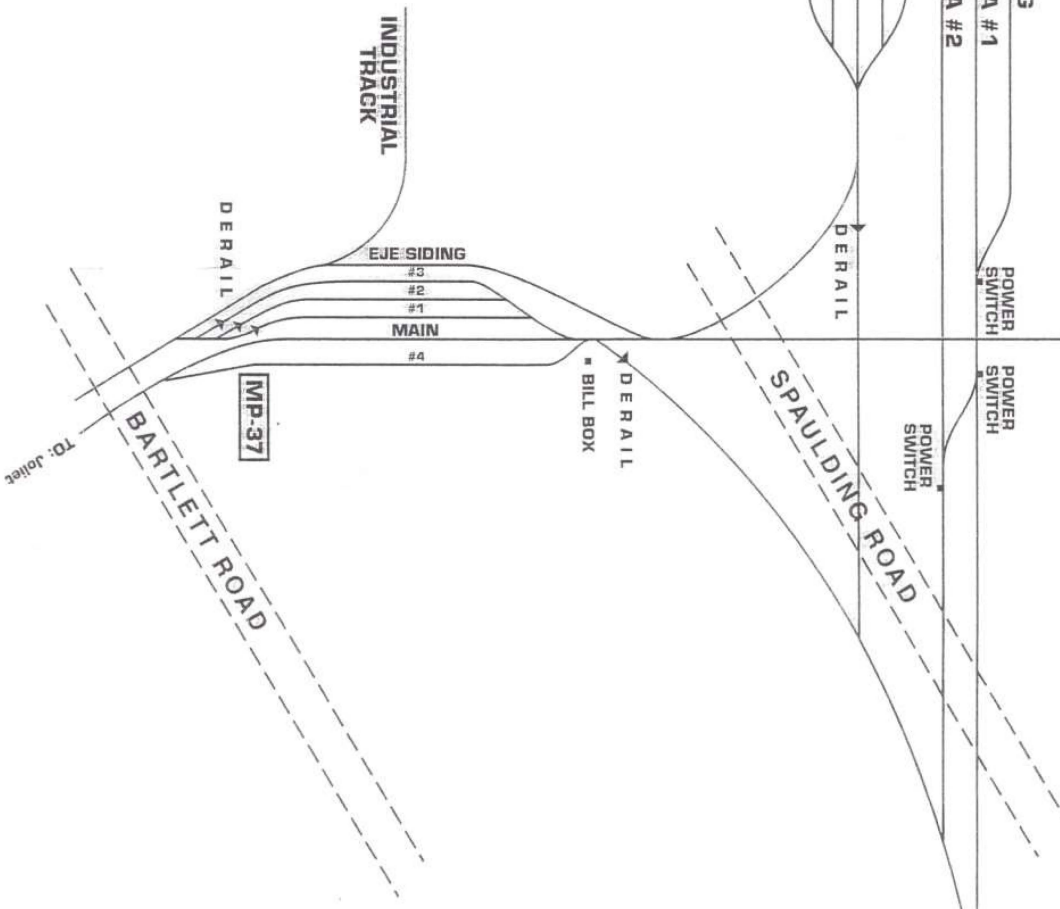
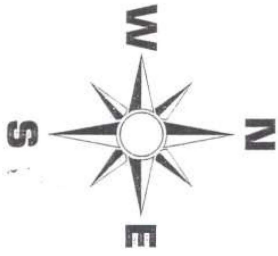
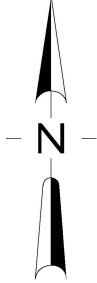


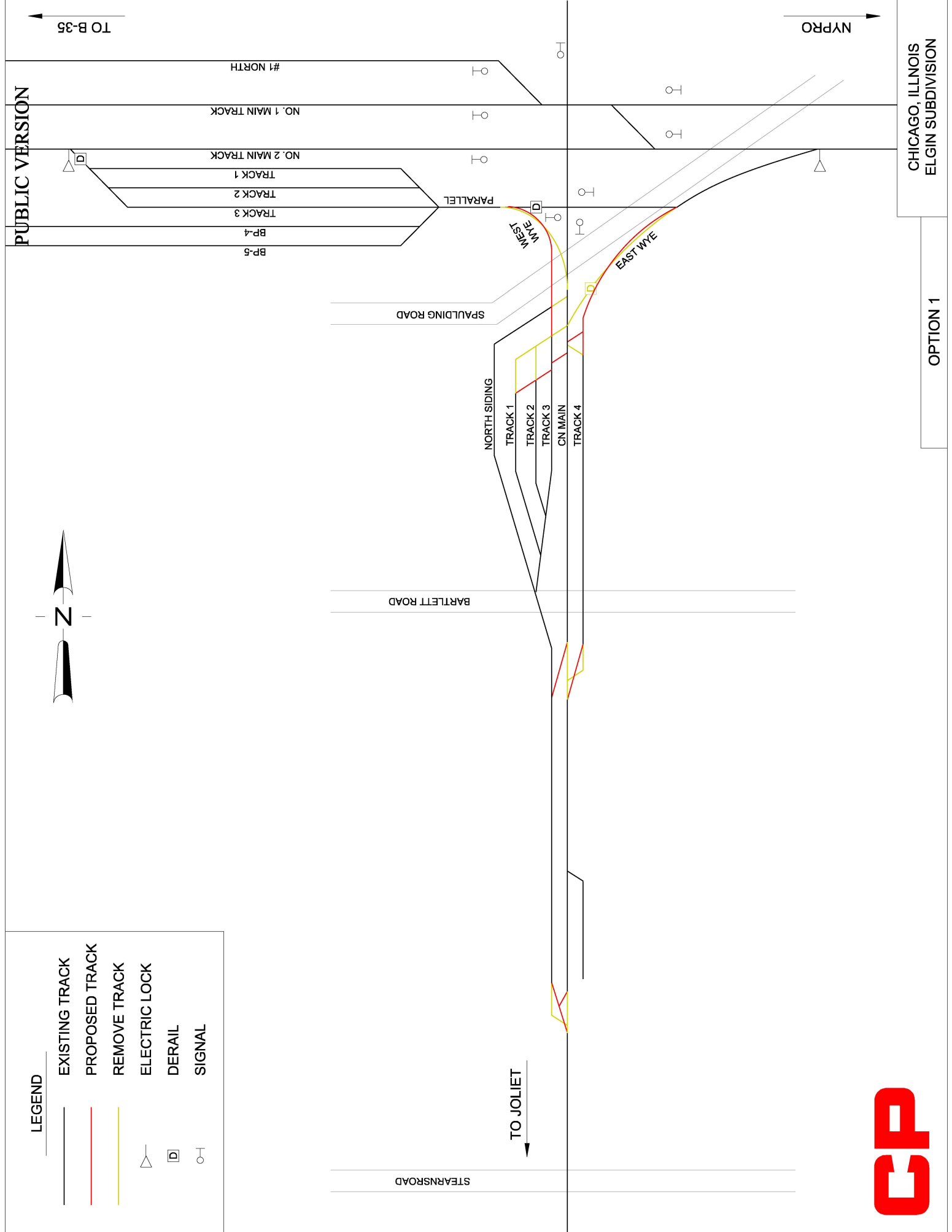
EXHIBIT B
to Verified Statement of Daniel Sabatka

LEGEND

- EXISTING TRACK
- PROPOSED TRACK
- REMOVE TRACK
- ELECTRIC LOCK
- DERAIL
- SIGNAL

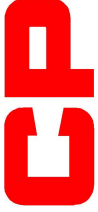


PUBLIC VERSION



CHICAGO, ILLINOIS
ELGIN SUBDIVISION

OPTION 1



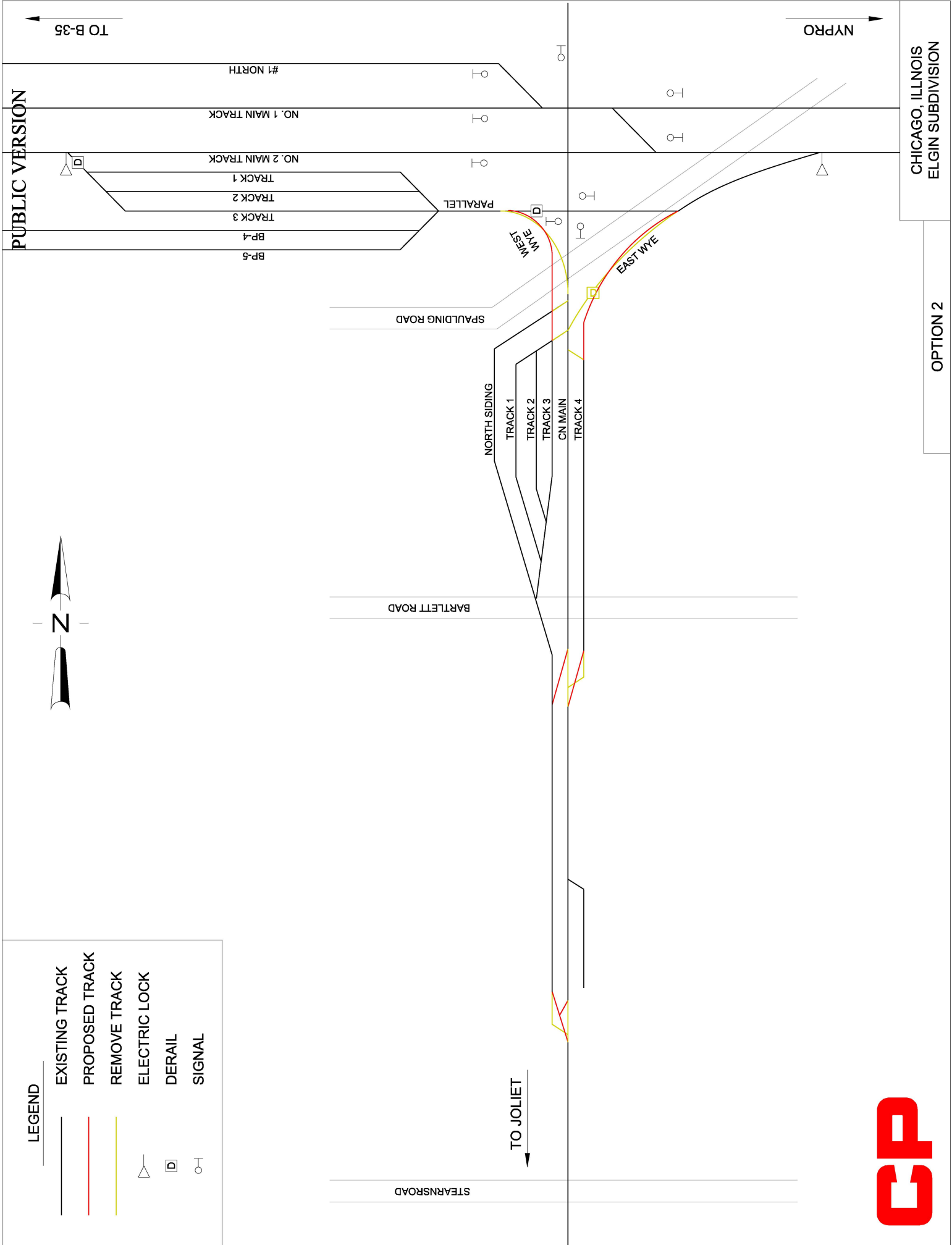


EXHIBIT C
to Verified Statement of Daniel Sabatka

REDACTED

**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 CHARLES E. HUBBARD

1. My name is Charles Hubbard. I am employed by Soo Line Railroad Company which, together with affiliated operating rail companies in the United States and Canada, does business as Canadian Pacific (“CP”), as CP’s Director; Interline and Passenger-South. I joined CP in 1986 and have served in a variety of roles including planning, accounting, operational, commercial, and management positions. Since 1992, I have been involved in various aspects of joint facilities contracts between railroads. From 2000 to 2007, I was CP’s Manager of Interline Agreements. From 2007 to 2012, I held the position of Specialist-US. In 2013, I held the position of CP’s Manager of Joint Facilities-US and in 2014, I was promoted to my current position.

2. In my positions at CP, I have become familiar with CP’s rail networks, facilities and operations throughout North America. My responsibilities include ensuring that CP’s joint facilities agreements with other railroads are properly drafted from a strategic perspective and properly administered from the operational, budgeting, and administrative perspectives.

Purpose

3. The purpose of my statement is to provide the Board with: (1) a historical background regarding CP’s main lines in the Chicago Terminal and an overview of the

relationship between Metra and CP with regard to those lines and (2) to explain the relationship between CP and the Belt Railway of Chicago (“BRC”).

CP’s Acquisition of the Milwaukee Road Assets

4. CP’s main lines and its Bensenville Yard in the Chicago Terminal were once part of the Chicago, Milwaukee, St. Paul and Pacific Railroad (the “Milwaukee”) which operated both freight and commuter traffic on the lines. In 1977, however, the Milwaukee filed for bankruptcy. During the course of the bankruptcy, the Northeast Illinois Regional Commuter Railroad Corporation d/b/a Metra (“Metra”), through the Regional Transportation Agency (“RTA”) assumed direct control of the Milwaukee’s commuter routes by entering into a Trackage Agreement with the bankruptcy trustee for the Milwaukee (the “Trustee”). The Milwaukee retained the exclusive freight rights and obligations on those routes. In 1984, the Interstate Commerce Commission approved CP’s proposal to acquire the Milwaukee and in 1985, CP purchased the Milwaukee’s freight assets for \$570 million.

5. CP acquisition of the Milwaukee included the freight rail rights and assets in the Chicago Terminal Area. The Trustee, however, retained ownership of the rail lines in the Chicago Terminal that were subject to a commuter Trackage Agreement with Metra. Instead, CP and the Trustee entered into the 1985 Trackage Agreement which gave CP {{ [REDACTED] }} The 1985 Trackage Agreement was assumed by the RTA and Metra.

6. Under the 1985 Trackage Agreement, the Milwaukee’s mainlines in the Chicago Terminal are defined as a “Joint Line” with CP. The so called “North Line” is shown as running from Madison Street in downtown Chicago to Fox Lake, Illinois and Rondout, and the so called “West Line” is shown as running from Tower A5 in Chicago to Almora, Illinois (west of Elgin).

7. The West Line includes the track segment from Bensenville Yard west to Spaulding. The West Line also includes the track segment from Bensenville Yard east to Cragin in Chicago. The trackage east to Cragin is the route CP trains would take CN interchange traffic to BRC's Clearing Yard. Cragin connects to BRC's line which then proceeds south to Clearing.

8. In 1987, Metra acquired ownership of the Joint Line from the Trustee subject to CP's rights and control under the 1985 Trackage Agreement.

9. Pursuant to the 1985 Trackage Agreement, as supplemented and amended, CP pays Metra rent for use of the West and North Lines. {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

10. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]}}

11. Today, the Joint Line tracks are operated jointly by CP and Metra. CP operates the freight, Metra operates the commuter, and CP dispatches both. The Joint Line tracks comprise CP's main lines into the Chicago Terminal and are an integral part of the CP rail network. CP holds the freight common carrier obligation on these lines. They are included in CP's timetables and maps as part of CP's system. Unlike trackage rights, CP is not restricted in the commodities, volume or type of freight traffic it handles on the Joint Line. In fact, during non-peak times Metra {{ [REDACTED]

}} And CP has the right to grant operating rights on the Joint Line to other freight railroads.

12. I understand that CN has characterized CP's rights in the Joint Line as "trackage rights." I am familiar with CP's trackage rights agreements both as host and tenant. In my experience, such trackage rights typically limit the type of traffic, the volume of traffic and sometimes the commodities that the tenant can handle on the subject trackage. Such rights are typically subject to a per car fee that includes, among other things, a return on investment for the host. Moreover, the host retains operational control of the line and is responsible for maintenance and capital projects and for admitting other railroads. CP's rights in the Joint Line do not have these characteristics and are more akin to ownership rights.

Belt Railway of Chicago

13. CP and five other Class I railroads that interchange in Chicago own the BRC in varying shares. CP, which is an 8.33% (1/13) owner of the BRC is a minority shareholder and, in fact, holds a smaller ownership interest than does CN which owns 16.66%.

14. As an owner, under the BRC Operating Agreement, CP has the right but not the obligation to interchange traffic utilizing the BRC. CP enjoys trackage rights over the BRC lines, and if CP operates over the BRC's lines it must pay a per car fee. {{ [REDACTED] }}

15. The agreement with BRC controls how BRC bills the carriers utilizing its services. { [REDACTED]

██████████ } This provides an administratively workable rule and avoids BRC becoming entangled

in payment disputes between carriers. 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.

VERIFICATION

I, Charles E. Hubbard, 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.



Charles E. Hubbard
Director, Interline and Passenger-South
Soo Line Railroad Company

Dated: May 28 2020