

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

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REPLY TO CP’S MAY 29, 2020 REPLY

This case boils down to an assertion by CP that CN is legally barred from designating a place to receive interchange traffic in the Chicago area that is not on CN’s “own lines” at Spaulding, even when CN has designated an interchange point on the Belt Railway—a terminal railroad co-owned by CN, CP, and other Class I railroads whose entire purpose is to facilitate interchange between its owning carriers.¹ CP’s argument ignores both the statute and the Board’s rulings permitting carriers to choose where they wish to receive interchange traffic. Under governing precedent and industry practice, a carrier may freely designate a point where it will receive interchange traffic, so long as it does not impose unusual, unreasonable, or impossible operating hazards on the interchange partner. CP instead posits a new rule that carriers with “direct physical interchanges” may only designate interchange points on lines that they “own”—a rule that CP conjures by attributing outsized meaning to stray language from cases that never considered a carrier’s right to designate a co-owned terminal railroad as an interchange point.

¹ All terms have the same meaning set forth in CN’s Petition for Declaratory Order.

Moreover, even if CP's proposed new rule were adopted, it would not allow CP to prevail under the facts here. CP reaches Spaulding via trackage rights over Metra's West Line, not over lines that CP owns. Thus, the mystical significance that CP attributes to a "direct physical connection" between carriers' "own lines" thus does not even apply to Spaulding. And since CP and CN are co-owners of the BRC, it is hard to understand why CN's designated interchange point at Clearing Yard would not fall within CP's proposed "own lines" rule, or why CP should not be expected to pay the ordinary fees that BRC charges owners for the switching services that BRC crews are providing for CP's interchange traffic at Clearing.

Indeed, if CP's new rule were accepted, none of the BRC's Class I co-owners would have the right to designate the BRC to receive interchange traffic from another co-owner, since in almost every instance the railroads have a "direct connection" elsewhere in the Chicago region. The confusion that CP's formalistic rule could cause in Chicago could be immense and could upset settled expectations as to railroads' right to interchange via other terminal railroads. The Board should grant CN's Petition and affirm CN's statutory right to designate an interchange receipt point on a co-owned terminal railroad.

Section I of this Reply to Reply responds to CP's claim that the Board should not open a proceeding and to CP's mischaracterization of the Interim Agreement, in which CP and CN explicitly agreed to base the ultimate payment of BRC switching fees on the results of a Board decision on which party was responsible for those fees. Section II responds to CP's claim that its "own lines" rule is "clearly" required by

the law—despite it having no connection to the statutory language—and to CP’s even more questionable claim that a rule requiring a carrier to select an interchange point on its “own lines” would prohibit CN from designating a point on a co-owned terminal railroad. Section III responds to CP’s new arguments about the supposed virtues of Spaulding, including the new claim that the Board is required to ignore grade crossing blockages caused by the former interchange operations at Spaulding. Section IV rejects CP’s unfounded call for unnecessary discovery, and Section V proposes that the Board hold an oral argument in the event that it believes that additional information would be helpful to it.

I. THE BOARD’S DECISION ABOUT WHETHER CN MAY DESIGNATE CLEARING TO RECEIVE INTERCHANGE TRAFFIC AND WHETHER CP IS RESPONSIBLE FOR SWITCHING FEES IS PLAINLY NEEDED.

CP begins its Reply by arguing that the Board should decline to open a proceeding at all—a somewhat remarkable assertion from the party that brought this dispute to the Board in the first place in Finance Docket No. 36299. CP’s suggestion that the Board should not consider CN’s Petition is based on a willful blindness to the history of this proceeding and a flat mischaracterization of the parties’ August 16, 2019 Interim Agreement.

First, CP claims that the Board should not open a proceeding because the Interim Agreement remains in place. But as CP well knows, the Interim Agreement was never meant to be a permanent solution. The Interim Agreement is just that—a temporary agreement in place only until the Board determines {{

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That final decision was plainly not reached by the Board in FD 36299.³

CP's suggestion that the Interim Agreement was intended to be a permanent solution, and that CN is trying to "get[] a better deal" by filing this Petition, is therefore nonsense. CP Reply at 2. {{

}}⁴ The only party trying to "get a better deal" is CP, which is inexplicably backing away from its agreement {{
}} and is instead asking the Board to leave the parties in indefinite limbo.⁵

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³ *Soo Line Railroad Company—Pet. for Declaratory Order and Preliminary Injunction—Interchange With Canadian National*, FD 36299, slip op. at 4 (STB served Nov. 29, 2019) ("the Board will not address th[e] issue [of whether] CN can legally designate the Belt Railway Company's Clearing Yard ... as an interchange point").

⁴ See Interim Agreement at 2 ({{“

”}}).

⁵ To the extent that CP is suggesting that the final decision in FD 36299 represented a “decision in its favor,” that suggestion cannot be reconciled with the text of the Interim Agreement, which {{
}}. See *supra* at note 2.

Likewise, CP's suggestion that it is inappropriate for the Board "to weigh-in on what is essentially a private commercial dispute between carriers" is baffling. CP Reply at 2. Every contested case before the Board involves a private commercial dispute between carriers or between a carrier and its customers. While it is true that carriers often agree with regard to interchange locations, and that the Board is rarely called upon to resolve these questions,⁶ that is not a basis for the Board to refuse to decide cases in which the carriers do not agree. This is particularly so in cases like this one, where the disagreement springs from a fundamental dispute about what the law requires. To say that the Board should not decide disputes like this one is to say that the Board should have no role at all.

In short, there is no valid basis for the Board to decline to resolve CN's Petition. The Board "may issue a declaratory order to terminate a controversy or remove uncertainty." 5 U.S.C. § 554(e). Here, CN's Petition sets forth a controversy between the parties that requires the Board's guidance, and that guidance would both "terminate a controversy" and "remove uncertainty." Specifically, CP and CN cannot agree on a permanent solution for interchanging CN traffic in the Chicago area. None of the grounds that the Board has cited as rationales to decline to issue a declaratory order apply here. For example, this is not a situation where the controversy is not ripe or where the Board's decision would fail to terminate an

⁶ CN Reply to Petition for Declaratory Order ("CN Reply"), FD 36397, at 5-6 (filed May 29, 2020).

active controversy.⁷ Indeed, the Board acknowledged that the issue of whether CN can designate Clearing Yard for interchange with CP paying its own switching fees was something the Board might have resolved in FD 36299, but the Board decided it was best not to address those issues because they were not fully briefed or presented by CP's Petition.⁸

In contrast, CN's Petition squarely presents the question of whether CN can designate Clearing to receive interchange traffic with CP paying its own switching fees, and the Board has the benefit of full briefing. It is now time for the Board to resolve the important questions that it left unresolved in FD 36299.

II. AS CO-OWNERS OF THE BELT, CN CAN DESIGNATE CLEARING YARD AS ITS INTERCHANGE LOCATION, AND CP MUST PAY ITS OWN SWITCH FEES.

A. CP's "Own Line" Rule Has No Basis in the Law.

The twin legal questions in this case are whether CN—as a co-owner of the BRC—can lawfully designate Clearing as its point of interchange with CP, and whether CP—as a co-owner of the BRC—should pay the BRC for the switching services it provides CP. Pet. at 14-29.

In its Petition, CN has argued that the answer to each question is yes, based on the language of 49 U.S.C. § 10742, which allows railroads to designate interchange facilities that they “have the power to provide,” and on the long-settled

⁷ See, e.g., *Union Pac. R.R. Co.—Pet. for Decl. Order—Imposed Interchange Charges*, Docket No. 42052, slip op. at 3-4 (STB served June 13, 2000).

⁸ *Soo Line Railroad Company—Pet. for Declaratory Order and Preliminary Injunction—Interchange With Canadian National*, FD 36299, slip op. at 4 (STB served Nov. 29, 2019).

principle that a “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 impossible operating hazards or require the delivering carrier to do work which properly belongs to the receiving carrier.”⁹ Here, designating the parties’ existing interchange point at Clearing Yard is not unusual, unreasonable, or impossible, and asking CP to deliver to that point is not asking for work that properly belongs to CN.¹⁰ CN further argued that under industry custom, the BRC Operating Agreement, and simple fairness, CP is responsible to pay its own switch fees, which pay the BRC for the services its crews perform to switch CP’s interchange traffic (services that CP would otherwise have to do with its own crews, at its own expense).¹¹

⁹ See Pet. at 17-24; *Soo Line Railroad Company—Pet. for Declaratory Order and Preliminary Injunction—Interchange With Canadian National*, FD 36299, slip op. at 4-5 (STB served Nov. 29, 2019); see also *New York, C. & St. L. R. Co. v. New York Central R. Co.*, 314 I.C.C. 344, 345 (1961) (“*New York*”) (a “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 impossible operating hazards or require the delivering carrier to do work which properly belongs to the receiving carrier” (quoting *Kansas City S. Ry. Co. v. Louisiana & A. Ry. Co.*, 213 I.C.C. 351, 359 (1935)); *Kansas City S.*, 213 I.C.C. at 356 (if interchanging carriers cannot agree, “the receiving carrier is entitled as of right to establish a reasonably located place where cars may be delivered to it”); *Rates, Regulations, and Practices of Peoria & Pekin Union Ry. Co. at Peoria, Illinois, and Near-By Points*, 93 I.C.C. 3, 9 (1924).

¹⁰ See Pet. at 22-24.

¹¹ See *id.* at 24-29.

CP does not dispute that carriers generally have the right to designate where they will receive interchange traffic. Nor does CP claim that interchanging at Clearing Yard imposes any unusual, unreasonable, or impossible operating hazards, or forces CP to do work that is properly CN's work. And CP does not dispute that the long-standing industry practice is for the forwarding carrier to pay its own switching costs associated with delivery, or that BRC crews are now performing switching work that formerly had to be performed by CP crews.

Nevertheless, CP claims that a receiving carrier's right to designate its preferred interchange point is limited by a separate rule that requires the interchange point to be on the receiving carrier's "own line" if it has a "direct physical connection" with the delivering railroad. CP Reply at 7-11. CP does not attempt to ground this new rule in the language of § 10742, which requires a railroad to provide interchange facilities that are merely "within its power to provide"—not facilities that it owns. Indeed, CP's only statutory discussion is a paragraph at the end of its argument, where it asserts that the Board should ignore the statute's "power to provide" language because it supposedly is a "limiting clause."¹² CP Reply at 15-16. CP thus would have the Board ignore the "power to provide" language of § 10742 on the grounds that it is a "limiting clause" and

¹² CN is not aware of any principle of statutory interpretation that would allow an agency to set aside statutory language by classifying it as a "limiting clause," and CP cites no case to that effect.

instead tack on a new limiting clause requiring interchange facilities to be on tracks that a railroad owns. But statutory language cannot be so easily set aside.¹³

Nor can the Board reasonably assume that an “own tracks” limitation is implicit in § 10742. Congress knows when to specify that provisions of the Interstate Commerce Act apply to lines owned by a carrier; for example, 49 U.S.C. § 11102(a) explicitly applies to terminal facilities “owned by a rail carrier.” Congress’s decision not to put a similar ownership limitation in § 10742 must be assumed to be an intentional legislative choice.¹⁴ Moreover, it is a choice that makes an enormous amount of sense. As Congress well knows, railroads often have rights to operate over and use property that they do not own, whether through trackage rights agreements, joint use agreements, or other arrangements. A requirement that interchange facilities only be provided on tracks that a railroad owns makes no sense, and would discourage efficient arrangements where a railroad chooses to provide interchange facilities through a terminal railroad, a contract with a short line, or via leased track.

¹³ See *Bostock v. Clayton Cty.*, No. 17-1618, slip op. at 2 (U.S. June 15, 2020) (“When the express terms of a statute give us one answer and extratextual considerations suggest another, it’s no contest. Only the written word is the law[.]”). Here, CP does not even identify “extratextual considerations” that it believes contradict the statutory language. It simply asks the Board to ignore the statute’s language.

¹⁴ See, e.g., *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 485 (1996) (“Congress ... demonstrated in CERCLA that it knew how to provide for the recovery of cleanup costs, and ... the language used to define the remedies under RCRA does not provide that remedy.”); *Franklin Nat’l Bank v. New York*, 347 U.S. 373, 378 (1954) (finding “no indication that Congress intended to make this phase of national banking subject to local restrictions, as it has done by express language in several other instances”).

Lacking any statutory support, CP points to dicta from prior cases stating that a receiving carrier in a direct physical interchange should “designate a point on its own line where it will receive traffic and ... provide a free route over its tracks to that point for the delivering carrier.” CP Reply at 8 (emphasis omitted).¹⁵ According to CP, this language means that the only way a carrier can satisfy its § 10742 obligation is to provide a facility “on its own line,” and therefore that designating a co-owned terminal facility is unlawful. CP Reply at 8-9. But the language CP cites cannot support that extreme proposition. Not one of the cases CP cites actually considered whether a carrier could adequately satisfy its § 10742 obligations by designating a terminal railroad, and certainly not a terminal railroad that is co-owned by the railroad and its interchange partner. And neither the Board, the ICC, nor any court has ever held that a railroad’s designation is insufficient because it was not on tracks that it “owned.”

For example, CP relies on *Burlington Northern Railroad Co. v. United States*, 731 F.2d 33 (D.C. Cir. 1984), but CP has that case exactly backwards.¹⁶ In *Burlington Northern*, the delivering carrier (Burlington Northern) challenged a decision by the receiving carrier (the B&O) to designate an interchange receipt location on an intermediate switching carrier (the B&OCT). Burlington Northern argued, as CP does now, that B&O should be forced to instead establish “a direct

¹⁵ It is worth noting that CP’s quotation from *Burlington Northern* is not a holding of the court, but rather a description of one of BN’s arguments. *Burlington N.*, 731 F.2d at 38 (acknowledging that the ICC “implicitly accepted” BN’s argument).

¹⁶ See CP Reply at 8-9.

physical interchange” with Burlington Northern via trackage rights.¹⁷ But the D.C. Circuit disagreed and held that the receiving carrier had the right to choose how it would provide interchange facilities. Indeed, the holding of *Burlington Northern* (which CP tellingly does not cite) is that “when a carrier has the power to provide two or more options for interchanging traffic, each of which is independently reasonable, proper, and equal, it need not provide all such options to connecting lines but may instead offer only that option which best serves its own business interests.”¹⁸ CP hypothesizes that the case would have come out differently if Burlington Northern and B&O had had a direct physical connection and that, if that were the case, the court would have held that B&O would be required to interchange on its own tracks. CP Reply at 9. But the *Burlington Northern* court did not say that—to the contrary, it explicitly affirmed that “the B & O has quite properly elected to utilize only one of the options available to it (intermediate switching via the B & OCT) and to forego exercising another (direct interchange under a trackage rights agreement).”¹⁹ Far from supporting CP’s position, *Burlington Northern* actually affirms CN’s right as a receiving carrier to designate “intermediate switching via the [BRC]” at Clearing as its interchange point, regardless of what CP may “prefer” to the contrary.

¹⁷ *Id.* at 39.

¹⁸ *Id.* at 40.

¹⁹ *Burlington N.*, 731 F.2d at 40.

CP's reliance on *Toledo, Peoria & Western*²⁰ is similarly unavailing. See CP Reply at 9-10. There, the Board held that a receiving carrier was not obligated to pay trackage rights fees for a delivering carrier with which it did not directly connect.²¹ While the Board indicated that the lack of a "direct physical connection" was important to its analysis,²² it was not addressing facts remotely similar to the ones here, where the challenged interchange designation is on a co-owned terminal railroad and where CP does not in fact have a "direct physical connection" with CN at Spaulding, but rather connects to Spaulding via trackage rights over Metra-owned track.²³

B. Even If the Board Were to Adopt an "Own Line" Rule, CN Would Still Plainly Have the Right to Designate Clearing.

Even if CP were right that interchange designations are subject to a rule requiring carriers in "direct physical connections" to choose interchange points on tracks that they own (a rule about which Congress was silent), that rule would not change the outcome here, for two reasons.

²⁰ *Toledo, Peoria & W. Ry. Corp.—Pet. for Declaratory Order*, FD 35404 (STB served Apr. 26, 2011).

²¹ *Toledo, Peoria & Western*, FD 35404, slip op. at 10.

²² *Id.*

²³ In the same vein, *RBMN's* quotation of *Burlington Northern* was plainly not a holding that a railroad was not allowed to designate interchange locations on a co-owned terminal railroad. See *Norfolk So. Ry. Co.—Pet. for Declaratory Order—Interchange With Reading Blue Mountain & No. R.R. Co.*, FD 42078 (served Apr. 29, 2003) ("*RBMN*"). That issue was not presented in *RBMN*, which affirmed a receiving carrier's right to designate a new interchange point that required the delivering carrier to make new 30-mile hauls over *RBMN's* lines, even though no evidence was presented as to the unsuitability of the former interchange point. See *id.* at 5-7.

First, as CN explained in its Petition, CP does not have a “direct connection” to Spaulding—it rather connects to Spaulding via trackage rights over Metra’s West Line. Pet. at 20-21. CP asserts that this does not matter, because its trackage rights are allegedly “more akin to ownership than typical trackage rights arrangements.” CP Reply at 12. But in *Burlington Northern*, trackage rights over a wholly owned subsidiary were not deemed to be sufficient to create a direct physical connection.²⁴ If B&O’s trackage rights over its wholly-owned subsidiary were not sufficient to create a “direct physical connection,” then one cannot reasonably say that CP’s trackage rights over a Metra line are sufficient just because they are allegedly “akin to ownership.”²⁵

Moreover, nearly every assertion that CP makes about its Metra operating rights are equally true about its operating rights on the BRC. CP’s rights to operate on the BRC are “not limited by commodity, type, or volume of traffic”; CP does not pay “a per car trackage rights fee to the BRC” (but rather only pays a switching fee for work performed by BRC crews that CP would otherwise have to do on its own); and CP is not a “mere tenant,” but rather a co-owner of the BRC.²⁶ CP suggests that its 8.66% ownership of the BRC is not significant, but that share far outweighs its 0% ownership of the Metra West Line. While CP has doggedly attempted to

²⁴ *Burlington N.*, 731 F.2d at 35, 40.

²⁵ CP does not produce any evidence suggesting that Metra would agree that CP’s rights on the West Line are “akin to ownership.”

²⁶ *Compare* CP Reply at 13 (listing attributes of Metra trackage rights agreement) with CN Petition at 20 & Ex. 9 (describing and appending provisions of Belt Railway Operating Agreement).

maintain the fiction that it has a “direct physical connection” with CN at Spaulding that merits special legal priority over the parties’ established interchange point at Clearing Yard, the facts do not support it.

Further, the record does not support CP’s insistence that the BRC switching fees that it wants CN to permanently subsidize are really “trackage rights fees.” See CP Reply at 15-16 & n.12. {{

^{27}}} Exhibit 11 to CN’s Petition is the BRC rate sheet, which {{

}} Those fees are the mechanism for BRC co-owners to reimburse the BRC for the switching services performed at Clearing Yard **that would otherwise be performed by the co-owners**.²⁸ Federal law does not require the receiving carrier to pay those switch fees; rather, the custom is for the delivering carrier to incur those costs. See *Burlington Northern*, 731 F.2d at 35; *Baltimore & Ohio R. Co. v. United States*, 277 U.S. 291, 301 (1928); *Chicago, Rhode Island and Pacific Ry. Co. v. Baltimore & Ohio R.R. Co.*, 113 I.C.C. 681, 690 (1926).

Second, even if carriers are required to designate interchange receipt locations on tracks they “own,” the BRC plainly is co-owned by both CN and CP, and CN’s designation of the BRC is thus on tracks that CN partially owns.

CP fails to grasp the full consequences of its being a co-owner of the Belt. The Class I co-owners of the Belt have multiple “direct connections” with other co-

²⁷ See Pet. at 19-20 (describing co-owner rights to operate over BRC).

²⁸ See Pet. at 24-25 (describing work performed by BRC crews in exchange for switch fees).

owners somewhere in the complex Chicago gateway. For decades, the Belt Railway has operated as a terminal switching carrier that each of its railroad co-owners could use to interchange traffic with each other, with the common understanding that each would bear its own costs for the switching services provided by the Belt.²⁹ The Belt serves these co-owners, the shipping public, and the Chicago communities by switching and interchanging traffic at a highly efficient, central location. While the co-owners were never required to designate the Belt as the point of interchange between them for any or all traffic, they are plainly entitled to do so pursuant to the operating agreement signed by all six co-owners.

Yet under CP's view of the law, Congress has forbidden these co-owners from designating the Belt as the point of interchange if there is a direct connection anywhere else in the Chicago gateway. Co-owners instead would be forced to receive interchange traffic on tracks they "own" at the "direct connection" – and a delivering railroad could extract any financial ransom it wished as the price of using the terminal facility as an alternative. Adopting such a momentous change in the law would severely upset expectations, discourage the use of terminal railroads as an efficient interchange solution, and eviscerate a receiving railroads' right to designate where it wishes to receive interchange traffic. The consequences could lead to a widespread reshuffling of interchange locations in the Chicago region (and other localities with co-owned terminal railroads), and a permanent decrease in the

²⁹ In fact, CP has historically paid its own switching fees to the BRC for TIH and some non-TIH traffic delivered to CN at Clearing. Pet. at 5, 25-26.

use of terminal railroads to consolidate interchange at central locations. This result cannot possibly be what Congress contemplated with Section 10742.

Moreover, the Board holds railroads to the terms of voluntary agreements, unless the agreement violates a specific provision of the Interstate Commerce Act.³⁰ The BRC Operating Agreement should be treated no differently. The Board should not permit CP to turn its back on a joint facility agreement that has benefited the Chicago community for decades by claiming now that no co-owner of the BRC who has another “direct connection” with another co-owner is allowed to designate Clearing as the point of interchange between them.

III. CP’S NEW CLAIMS ABOUT THE FORMER INTERCHANGE AT SPAULDING SHOULD BE REJECTED.

In its quest to convince the Board that Spaulding is the only possible reasonable interchange point that CN could designate, CP asserts a series of new arguments and factual claims, none of which have merit.

First, CN’s evidence shows a dramatic drop in grade crossing blockages over 10 minutes at the grade crossings in the Spaulding area, beginning in September 2019—the first month after interchange was moved to Clearing Yard pursuant to the Interim Agreement.³¹ The Village of Bartlett has confirmed that the situation

³⁰ *Toledo, Peoria & W. Ry.*, FD 35404, slip op. at 11 (STB served Apr. 26, 2011) (“The Board will not upset [an] arms-length, negotiated arrangement....”); *Township of Woodbridge. v. Consol. Rail Corp.*, NOR 42053, at 4-5 (STB served Dec. 1, 2000) (voluntary agreement in which rail carrier agreed to limit operations in community during certain hours was not preempted).

³¹ *See* Pet. at 7-9; CN Reply to Soo Line Railroad Company’s October 21 Letter, FD 36299 (filed Nov. 12, 2019), at 4-7.

on the ground has dramatically improved.³² CP nonetheless claims that the Board should pay no attention to the dramatic drop in grade crossing blockages because CN has not provided enough “data” to prove that the decrease was not a result of generalized volume decreases due to protests in Canada or COVID-19.³³ But the only “data” needed to support this proposition is a calendar. CN’s evidence showed that grade crossing blockages dropped precipitously in September 2019, long before the Canadian First Nations protest blocked rail lines in Canada in February 2020 or COVID-19 impacts beginning in March 2020.³⁴

Perhaps recognizing that there can be no serious factual question that moving the interchange point in August reduced grade crossing blockages at Spaulding, CP claims that considering community impacts in the context of determining the legality of an interchange point is somehow inconsistent with federal ICCTA preemption of local and state regulation of rail operations. CP Reply at 21. But the premise of ICCTA preemption is that local and state regulation of rail transportation is preempted because the Board’s jurisdiction is exclusive, not because local impacts are inconsequential. Indeed, the Board has considered the impact of railroad operations on grade crossings in other proceedings.³⁵ It is true

³² Village of Bartlett Letter at 1 (filed May 7, 2020) (noting that at-grade crossings of over 10 minutes are “down over 75% since the interim agreement was put in place”).

³³ CP Reply at 18-19.

³⁴ See Pet. at 7-8.

³⁵ See, e.g., *CSX Transp., Inc.—Acquisition of Operating Easement—Grand Trunk W. R.R. Co.*, FD 35522 (Board issued multiple orders requiring regular reports on

that sometimes grade crossing blockages are unavoidable, and that the broader interests of the interstate rail transportation system often override parochial interests. But that does not make community impacts irrelevant to the Board's consideration of whether an interchange designation is reasonable.

Second, CP proposes that Spaulding could be improved as an interchange location through engineering work.³⁶ But all it provides are the same engineering proposals that it presented in FD 36299, with an additional cost estimate suggesting that the rebuild would cost up to \$10 million.³⁷ As CN explained in FD 36299, these expensive and difficult rebuilds would not resolve the fundamental fluidity issues caused by interchanging traffic at Spaulding.³⁸ CN would still have to block its single-track main line to cut trains to place cars on sidings, and interchange operations would still require blockages of at-grade crossings of local roads, which would still be traversed for every interchange. Indeed, the construction phase for this project would almost certainly worsen fluidity issues and increase local grade crossing blockages. Such a multi-year, multi-million dollar project is plainly not a reasonable investment when an efficient and workable

grade crossing blockages and steps taken by railroad to alleviate community concerns).

³⁶ See CN Reply at 17 & Sabatka V.S.

³⁷ CP marked its estimates as Highly Confidential, and thus CN's internal engineering experts have been unable to review them or opine on how realistic the cost estimates are. But it is clear that either option would require many millions of dollars and cause substantial construction disruptions to the community.

³⁸ CN Reply to Soo Line Railroad Company's October 21 Letter, FD 36299 (filed Nov. 12, 2019), at 14-15.

alternative exists at Clearing Yard. And, as the D.C. Circuit explained in *Burlington Northern*, CN is not obligated to spend millions of dollars to provide CP with its preferred interchange point; rather, as the receiving carrier, CN “may instead offer only that option which best serves its own business interests.”³⁹

Finally, CN’s Petition showed that CP is saving substantial monies from interchanging at Clearing, because it has been able to cancel the regular train start for the G35 interchange train to Spaulding, and instead can include CN-bound interchange traffic on the trains that CP is already running to Clearing.⁴⁰ CP has no response to this evidence, except to implausibly suggest that it has not financially benefited because the employees assigned to the G35 train have taken other assignments and the locomotives have been returned to the pool.⁴¹ But reassigning assets from a job that is no longer needed is an obvious efficiency gain that reduces CP’s system-wide asset needs. CP does not otherwise contest that it is reaping a considerable financial windfall from the move of interchange operations to Clearing Yard, both because it has now canceled a regular train and because, under the Interim Agreement, CP temporarily is having CN pay the BRC to perform the switching work that CP crews used to perform.⁴² The Board should not allow CP to

³⁹ *Burlington N.*, 731 F.2d at 40.

⁴⁰ Pet. at 28.

⁴¹ CP Reply at 22-23.

⁴² CP’s vague claim that it thinks Spaulding is a better “long-term solution” for interchange because of possible “congestion” at Clearing is unsupported by any historical examples of problematic congestion at Clearing. CP Reply at 22-24. It is also at odds with CP’s own pre-litigation statements that interchange at Clearing

continue using the threat of returning to inefficient and problematic interchange operations at Spaulding as leverage to avoid paying the switching fees that are customarily borne by delivering carriers.

IV. THERE IS NO NEED FOR DISCOVERY.

“[T]he Board does not typically order discovery in declaratory order proceedings,” and declines to order discovery when it is not “apparent[] why discovery is needed.”⁴³ Here, CP requests discovery on the grounds that CN has made “factual allegations” that are “not well founded,” but CP fails to identify any relevant issue about which there is a legitimate dispute.⁴⁴ CP asks for discovery into two areas: (i) “the impact on [the Village of] Bartlett of moving the interchange from Spaulding to Clearing”; and (ii) “the economic benefits to CN of moving the interchange to Clearing.”⁴⁵ But no discovery is needed to illuminate either topic, the first of which is well documented by the existing record and the second of which is irrelevant. Indeed, CP’s proposal for a 120-day discovery period to explore these topic suggests that it is motivated more by a desire to delay a Board decision than a desire to explore factual issues that are genuinely in doubt.⁴⁶

was “agreeable” and that CP was “willing” to interchange there as a an operational matter.” *See* Pet. at 22 n.36 (citing CP pre-litigation statements).

⁴³ *Diana Del Grosso, et al.—Petition for Declaratory Order*, FD 35652, slip op. at 3 (STB served Jan. 24, 2013).

⁴⁴ CP Reply at 24-25.

⁴⁵ *Id.*

⁴⁶ CP’s proposed 120-day discovery period is just 30 days shorter than the discovery period for a Stand Alone Cost case. 49 C.F.R. § 1111.9(a).

On the first point, the communities near Spaulding have made clear in their own words the impacts of the former Spaulding interchange operations. A host of community interests have testified that interchanging traffic at Spaulding caused severe congestion that could be avoided by moving interchange operations to a different location within CN's power to provide (*i.e.*, Clearing Yard).⁴⁷ And the community interests were right. Tables 1 and 2 in CN's Petition present unmistakable proof that blockages longer than 10 minutes precipitously declined as soon as the Interim Agreement was entered. The reason for this causal link is not subject to serious debate. CN has presented detailed evidence about how interchange operations were conducted at Spaulding, illustrating the multiple times that grade crossings were blocked during each interchange operation and explaining how the limited track space and configuration made it impossible to avoid such

⁴⁷ Village of Bartlett Letter at 1 (filed May 7, 2020) (noting that at-grade crossings of over 10 minutes are “down over 75% since the interim agreement was put in place”); *see also* CN Reply to Petition for Declaratory Order, FD 36299 (filed May 20, 2019), at Ex. 1 (Letter from Village of Bartlett, FD 36299 (filed May 17, 2019)); Letter of Bartlett Area Chamber of Commerce Letter, FD 36299 (filed June 3, 2019); Letter of Bartlett Fire Protection District, FD 36299 (filed June 4, 2019); Comments of Susan E. Dennis-Patton, FD 36299 (filed June 7, 2019); Comments of Robert Fitzpatrick, *et al.*, FD 36299 (filed June 7, 2019); Comments of Tiffin Selz, *et al.*, FD 36299 (filed June 7, 2019); Letter from Bartlett Fire Protection District, FD 36299 (filed June 12, 2019); Letter of Hanover Township, FD 36299 (filed June 13, 2019); Letter from School District U-46, FD 36299 (filed June 13, 2019); Letter from Bartlett Area Chamber of Commerce, FD 36299 (filed June 13, 2019); Comments of Jigna Patel, *et al.*, FD 36299 (filed June 26, 2019); Village of Bartlett Notice of Intent to Participate (with Comment), FD 36299 (filed June 26, 2019); Letter of Bartlett Fire Protection District, FD 36299 (filed Aug. 2, 2019); Transcript of Oral Argument, FD 36299 (held Aug. 6, 2019), at 146-71; Letter from Village of Bartlett, FD 36299 (filed Oct. 24, 2019).

blockages.⁴⁸ CP did not object to this description of Spaulding interchange operations in FD 36299, and it does not dispute it in its Reply. There is no need for discovery into the obvious fact that moving the interchange point from Spaulding to Clearing Yard in August 2019 reduced grade crossing blockages at Spaulding.

In the same vein, CP repeating that it thinks Spaulding “works well” does not create a meaningful factual dispute necessitating discovery. CP may think that Spaulding worked well for CP, which did not have its single-track main line blocked by interchanges and which appears unconcerned by grade crossing blockages that could be avoided by moving the interchanges to Clearing Yard. But the Board does not need further discovery into whether interchange at Spaulding works well for CN or for the community, each of which has made clear why Spaulding was unworkable. Nor does the Board need discovery into whether Clearing Yard works even better for all parties. CN and the community have clearly expressed why Clearing Yard is superior, and before this litigation began, CP executives admitted that Clearing Yard interchanges were “agreeable” and that CP was “willing[]” to interchange there as an operational matter.⁴⁹

With regard to the second topic for discovery CP proposes, the issue of what “economic benefits” CN enjoys from relocating the interchange to Clearing is irrelevant. CN has been clear from the outset that it wanted to move the interchange point from Spaulding because interchange-related blockages of CN’s

⁴⁸ See, e.g., Pet. at 23-24; CN Reply, FD 36299 (filed Nov. 12, 2019), at 2-15; CN Reply to Petition for Declaratory Order, FD 36299 (filed May 20, 2019), at 5-9.

⁴⁹ See Pet. at 22 n.36.

single-track mainline interfered with fluidity of that line. That benefit is apparent to anyone with a passing knowledge of the rail industry and does not need further exploration in discovery. In any event, the legal standard does not depend upon whether CN obtains economic benefits in designating its preferred point of interchange; on the contrary, the law allows the receiving carrier to choose its preferred point of interchange so long as the interchange location is within the bounds of 49 U.S.C. § 10742.⁵⁰

In short, there are no reasons here for the Board to depart from its ordinary rule that discovery is unnecessary in declaratory order proceedings. If the Board nonetheless chooses to permit CP to take some discovery, it should make clear that CN is also allowed to take discovery into CP “factual allegations” that are not “well-founded” (including CP’s attempt to minimize the cost savings that it is almost certainly realizing from interchange at Clearing, its unsupported assertions that Spaulding has better “long-term economics” to CP than Clearing, and its assertions that interchanging in Clearing creates a meaningful potential for “congestion”).⁵¹

⁵⁰ See, e.g., *Burlington N.*, at 40; *Soo Line Railroad Company—Pet. for Declaratory Order and Preliminary Injunction—Interchange With Canadian National*, FD 36299, slip op. at 4-5 (STB served Nov. 29, 2019); *New York*, 314 I.C.C. at 345.

⁵¹ Moreover, CP’s request for a 120-day discovery period is excessive. 60 days would be more appropriate for any discovery in this case. See, e.g., *Arkansas Elec. Cooperative, Inc.—Pet. for Declaratory Order*, FD 35305, slip op. at 3-5 (STB served Dec. 1, 2009) (60-day discovery period in declaratory order proceeding); *Martin Gas Sales, Inc.—Pet. for Declaratory Order—Certain Rates and Practices of Union Pacific Railroad Co.*, Docket No. 42082, at slip op. at 2 (STB served Nov. 14, 2003) (allowing 45 days for discovery).

V. IF THE BOARD BELIEVES FURTHER DEVELOPMENT OF THE ISSUES WOULD BE HELPFUL, IT SHOULD CONSIDER AN ORAL ARGUMENT.

CN believes that the Board has a sufficient record to decide this case. But in the event that the Board believes that further development of the issues would be helpful, CN believes that the Board would be best served by an oral argument that allows the Board to explore the factual and legal issues of most concern to it, rather than by further rounds of written briefs that are uninformed by the Board's questions.

In addition to being a more effective way for the Board to test the parties' positions, an oral argument would also be a mechanism for the Board to invite participation from other interested parties.⁵² If the Board wished, it could ask for post-argument briefing to answer outstanding questions or to focus on particular issues on which the Board requested comment.

In short, while CN believes that the record is complete enough for a decision now, CN believes that an oral argument would be a better next step to develop the record than another round of briefing.⁵³

⁵² *Soo Line Railroad Company—Pet. for Declaratory Order and Preliminary Injunction—Interchange With Canadian National*, FD 36299, slip op. at 4 (STB served Nov. 29, 2019) (noting that “other interested parties” may have wished to comment on CN’s right to designate Clearing).

⁵³ If the Board were to order additional briefing, it should adhere to the standard opening, reply, rebuttal format—with CN filing opening and rebuttal briefs as the Petitioner. This would conform to the typical format for declaratory order proceedings. *See, e.g., Eastern Alabama Ry. LLC—Pet. for Declaratory Order*, FD 35583, slip op. at 2 (STB served Jan. 27, 2012); *Wichita Terminal Ass’n, BNSR Ry. Co. & Union Pacific R.R. Co.—Pet. for Declaratory Order*, FD 35765, slip op. at 8 (STB served May 20, 2014); *Martin Gas Sales, Inc.—Pet. for Declaratory Order—*

VI. CONCLUSION

For the foregoing reasons, the Board should grant CN's Petition for Declaratory Order and declare that as co-owners of the Belt, CN may lawfully designate Clearing as its interchange point to receive CP traffic, with CP paying its own switching fees, consistent with long-standing industry practice.

Respectfully submitted,

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Dated: June 18, 2020

Certain Rates and Practices of Union Pacific Railroad Co., Docket No. 42082, at slip op. at 2 (STB served Nov. 14, 2003).

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of June 2020, I caused a copy of the foregoing Reply to Reply to be served by email and first-class mail upon the following parties of record.

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