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

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

Dear Ms. Brown:

Please find enclosed for filing Soo Line Railroad Company d/b/a Canadian Pacific ("CP")'s Reply to Wisconsin Central, Ltd. ("CN")'s Motion for Leave to File Reply to Reply.

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

**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 MOTION FOR LEAVE TO FILE REPLY TO REPLY

Soo Line Railroad Company d/b/a Canadian Pacific (“CP”) respectfully submits this Reply to the Motion for Leave to File Reply to Reply filed by Wisconsin Central Ltd. d/b/a Canadian National (“CN”) (the “Motion”).

In its June 18, 2020 Motion, CN asserts that there is “good cause” to permit CN to submit a 25-page reply to reply (“CN’s Reply”) to CP’s May 29, 2020 Reply (“CP’s Reply”) to CN’s Petition for Declaratory Order (“Petition”), alleging that CN must “complete and correct the record.” Motion at 0.¹ In reality, and as explained in more detail below, CN’s Reply neither completes nor corrects the record but instead continues to ignore settled precedent, distort the facts, and largely repeat its prior arguments. Accordingly, CN’s Reply should be rejected as an improper reply to reply.²

¹ The Motion begins with an unnumbered page, followed by pages numbered 1 to 4. For purposes of this Reply, the first page of the Motion will be referred to as page “0.”

² See, e.g., 49 C.F.R. § 1104.13(c) (prohibiting a reply to a reply); *Petition of the Western Coal Traffic League to Institute a Rulemaking Proceeding to Abolish the Use of the Multi-stage Discounted Cash Flow Model in Determining the Railroad Industry’s Cost of Equity Capital*, Docket No. EP 664, slip. op. at 1-2, n. 2 (STB served Aug. 14, 2017) (rejecting reply to reply that repeated the party’s prior arguments and did not provide information necessary to develop a more complete record).

I. The Board’s pronouncement on what Section 10742 requires is not “dicta” and “stray language.”

The bulk of CN’s Reply is a simply a rehashing of its incorrect view of the law, while mischaracterizing and improperly seeking to marginalize the controlling and long-standing precedent governing the obligations of physically contiguous carriers to provide interchange facilities on their own line. In its Reply, CN avers that the law set out in CP’s Reply is derived “entirely from dicta” and “stray language.” Motion at 1, CN’s Reply at 1. But the law that a receiving carrier in a direct physical interchange is required “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” has been expressed quite clearly by the Board, including in *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*”) (emphasis added), a case which CN simply ignored in its Petition.³ *Toledo* is in line with the D.C. Circuit case of *Burlington N. R.R. Co. v. United States*, 731 F.2d 33 (D.C. Cir. 1984) (“*Burlington Northern*”) and

³ It is worth noting that at the August 6, 2019 oral argument in FD 36299, Board Member Fuchs discussed *Toledo*, directed CN’s counsel to page 10 of that decision, and then explained:

Because you kind of mentioned that the power to provide is key I think to the receiving carrier’s right, or a key part of the statute generally, and the Board has a little discussion on, you know, what’s within the power to provide.

...

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. And, you know, I think during that time there was also a connection over a third-party carrier. *Does that to you show that the Board viewed at the time, and has viewed, that if there is a direct connection between the carriers that that basically gets primacy? And that’s the obligation that a carrier would have?*

Aug. 6, 2019 Oral Arg. Tr. at 119:17-121:1 (emphasis added). CN’s complete failure to address that case in its Petition and its one-paragraph response to it in its 25-page Reply is telling.

the Board’s decision in *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*”) (citing *Burlington Northern*, 731 F.2d at 38) (“Custom requires the 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 carrier.”).⁴ The language that CN casually and erroneously dismisses as stray or dicta in fact defines the bedrock principles underpinning the Board’s and the Court’s decisions. Those principles are rooted in 49 U.S.C. § 10742 and informed by long-standing custom.

Notwithstanding these clear statements of the duties of contiguous railroads to provide interchange facilities, CN claims that the industry has a different understanding. CN offers no evidentiary support for this erroneous lawyer’s argument. The Board need look no further than CN-CP’s course of conduct and CN’s own statements for evidence that the principles clearly articulated by the Board and the DC Circuit continue to guide how railroads conduct business.⁵ CN and CP have long conducted interchange where their respective systems meet, including for nearly a decade, at Spaulding following CN’s acquisition of the EJ&E. Further and quite notably, when CN sought to unilaterally designate a new interchange location last year, it designated Kirk Yard and not Clearing, a location on neither CN’s line nor CP’s line. And in designating Kirk, CN asserted “its legal right to designate a reasonable interchange point *on its lines* to receive traffic

⁴ CN’s attempt to downplay the significance of the D.C. Circuit’s statement in *Burlington Northern*, see CN’s Reply at 10 n. 15, is undercut by the fact that the Board has expressed that same statement in *Reading Blue Mountain*, while itself citing *Burlington Northern*.

⁵ Nor can CN’s position regarding industry custom be squared with the fact that a central premise of *Burlington Northern* was that if a direct physical connection existed between BN and B&O, BN could not be required to utilize a terminal carrier at BN’s expense to deliver cars in interchange to B&O. *Burlington Northern*, 731 F.2d at 38-40.

from CP” and its obligation to provide “a *free route over its tracks* to that interchange point.”⁶ Moreover, while CN urged CP to *voluntarily agree* to Clearing, only once the interchange dispute was before the Board did CN belatedly adopt its current position that it has an *absolute right* to designate Clearing.⁷ Thus, CN’s own course of conduct and statements are consistent with the settled law applicable to the duty to provide interchange facilities that applies to contiguous carriers such as CN and CP.

CN also uses its proffered reply to reply to repeat the canard that CP merely holds trackage rights over the line through Spaulding and therefore the railroads are not physically contiguous. In doing so, CN disregards the facts, the parties’ course of conduct, and the law discussed in CP’s Reply. CN ignores the fact that the ICC, in approving the proposed transaction by which CP acquired the freight assets of the Milwaukee, specifically acknowledged that the line would become CP’s main line.⁸ CN likewise ignores the facts that the line is CP’s main line, and that CP

⁶ See April 16, 2019 letter from Michael A. Cory, EVP and COO for CN, to Robert A. Johnson, EVP Operations for CP at 2 (included as Exhibit F to CP’s Petition in FD 36299) (emphasis added):

In accordance with the terms of that [2010 Interchange] agreement and its legal right to designate a reasonable interchange point on its lines to receive traffic from CP, we view Kirk Yard as a reasonable interchange point in the Chicago Terminal.

...

CN’s only legal responsibility is to provide reasonable facilities for interchange and a free route over its tracks to that interchange point. CN[] is fulfilling this responsibility through this exercise of its rights as a receiving carrier to specify an interchange point on CN’s lines.

⁷ See CN’s March 11, 2019 letter terminating the Spaulding Interchange Agreement and designating Kirk Yard (attached as Ex. 5 to CN’s Petition); CN’s Petition at 3 (“In July 2019, CN officially designated Clearing as an alternative interchange [] location to receive cars from CP.”) (citing July 12, 2019 Letter from CN to A. Davis, STB Fin. Docket No. 36299 and exhibit 1 thereto).

⁸ *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.”).

operates freight trains over the line daily, holds the freight common carrier obligation on the line, {{ [REDACTED] }}, among other facts.⁹ CN ignores the parties' course of conduct in interchanging at Spaulding precisely because that is where the party's lines physically meet. And CN ignores the law that states that even if CP merely held trackage rights, CP could voluntarily opt to exercise such rights to establish a direct physical connection with CN.¹⁰ Thus, CN does not so much as reply to CP's Reply as seek to distract the Board from it by doubling down on the toothless argument with which it opened.

CN also uses its Reply to rehash its baseless argument that the BRC Agreement between the terminal carrier's owners somehow mandates use of the BRC at the delivering carrier's expense. As CP explained, however, the BRC agreement is a voluntary agreement that contains no such mandate.¹¹ Nor is there any evidence that any carrier understood that the BRC Agreement conferred an absolute right on a receiving carrier to designate Clearing for interchange. CP also explained that the requirement that {{ [REDACTED] }} is for BRC's administrative convenience; nothing in the BRC Agreement prohibits carriers from reimbursing such fees and, as the Board has acknowledged, carriers can and do have side reimbursement agreements.¹² CN's Reply again disregards CP's evidence, argument, and case

⁹ See, e.g., CP's Reply at 11-13, Hubbard V.S. at ¶¶ 11-12.

¹⁰ See *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. Certainly the three railroads involved here could seek to establish the functional equivalent of a direct physical interchange between the B & O and BN through appropriate negotiations among themselves. In the absence of such a consensual arrangement, however, the B & O remains free to refrain from utilizing its trackage rights and to continue conducting interchange operations through the intermediate switching services of the B & OCT.") (internal citation omitted).

¹¹ See CP's Reply at 14-16.

¹² See CP's Reply at 16.

precedent on this issue as well as the parties' course of conduct. And CN's rehashing of the Petition is not a permissible basis for filing a reply to a reply.

Further, in its Reply, CN continues to misconstrue the "power to provide" language of Section 10742 by reading it out of context of the rest of the statute. CN also mischaracterizes CP's Reply as simultaneously seeking to "tack on a new limiting clause requir[ement]" and asserting "that the Board should ignore" that same clause. CN's Reply at 8-9. CN has it backwards. It is not CP's Reply that sets forth some "new" requirement, seeks to change the law, or asks the Board to disregard statutory language. In fact, CP's argument is based on a simple and plain reading of the statute as a whole and is consistent with precedential authority. Section 10742 begins with the statement that the carrier must "*provide* reasonable, proper, and equal" interchange facilities. 49 U.S.C. § 10742 (emphasis added). Thus, while that interchange facility must be within CN's "power to provide," CN in the first instance must provide that interchange facility. By designating BRC's Clearing Yard and insisting that CP pay BRC's fees to utilize Clearing, CN is not "providing" an interchange facility. Indeed, the Board has already unequivocally stated what that exact statute means and what it requires: "*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." *Toledo, slip. op.* at 10 (citing *Reading Blue Mountain, slip. op.* at 4) (emphasis added).¹³

¹³ CN also seeks to discredit the controlling precedent by misconstruing it as requiring that the carrier designate an interchange location on lines "owned by a rail carrier." CN's Reply at 9-10. This is a strawman as the controlling precedent refers to a "point on its own line," *i.e.*, lines that comprise part of the carrier's system. It does not address the underlying ownership of the property. Clearing is not on CN's own line nor is it free to CP.

II. CN misconstrues the Interim Agreement.

In its Motion, CN further argues that it should be permitted to file a reply to reply by asserting that “CP’s Reply misstates the significance of the Interim Agreement.” Motion at 0. But it is CN’s Reply that misstates the actual language of that agreement. CN claims that the Interim Agreement {{ [REDACTED] }
[REDACTED]
[REDACTED] }}. The agreement, however, actually states: {{ [REDACTED] }
[REDACTED]
[REDACTED] }} The fact that, in order to support its preferred interpretation, CN changed the words of the Interim Agreement, is clear evidence that the Interim Agreement does not mean what CN now wishes it meant.

Likewise, CN misconstrues the “interim” nature of the agreement. CP does not assert that the Interim Agreement was a “permanent solution,” as CN suggests in its Motion. Motion at 0. But the Interim Agreement did specify that {{ [REDACTED] [REDACTED] [REDACTED] }} And in fact, in its November 2019 decision, the Board made clear that “[c]arriers routinely reach such agreements, with few interchange disputes coming before the Board.” *Soo Line Railroad Company—Pet. for Declaratory Order and Preliminary Injunction—Interchange with Canadian National*, FD 36299, slip op. at 7-8 (STB served Nov. 29, 2019). Yet CN is now seeking to drag the Board back into a dispute on the incorrect assertion that CN need not provide CP an interchange location on its line *and* that CN may force CP to bear the associated fees to reach a location which CN may not designate in the first place. Accordingly, as

suggested in CP's Reply, the Board should exercise its discretion under 5 U.S.C. § 554(e) and decline to initiate a declaratory proceeding.

III. CN's claim of "new arguments" does not warrant a Reply to Reply.

CN also asserts that it should be permitted to file its reply to reply on the assertion that CP's Reply contains "new arguments." Motion at 1-2. For example, CN wrongly asserts that CP is raising a new argument that was not raised in FD 36299. However, this argument was expressed at the oral argument in FD 36299. *See* Aug. 6, 2019 Oral Arg. Tr. at 41:19-43:6 (responding when asked "should the Board consider broader impacts on the community in blocked crossings as they're assessing what is a reasonable interchange" that the Board should not "get involved in determining community by community" as that "would be a dangerous path for the Board to go down"). Thus, CN's justification for filing a reply to a reply is not valid.¹⁴

Furthermore, CN continues to mischaracterize CP's "willingness" to interchange at Clearing and the operational difficulties of that location, including congestion at Clearing. Again, CN ignores the actual language of the Interim Agreement. That CP was willing to interchange at Clearing was premised on, *inter alia*, {{ [REDACTED] }}

}} And CP explained in its Reply, it is not simply that CP merely believes Spaulding “works well.” Spaulding is necessary to address the risk of congestion in the Chicago Terminal. *See* CP’s Reply, Walker V.S. at ¶ 16 (explaining that interchange at Spaulding keeps cars out of the congested Chicago terminal area and the need to keep Spaulding as an option to ensure cars do not congest at CP’s Bensenville Yard while

¹⁴ Further, the idea of allowing CN a reply to reply based on “new” arguments purportedly being raised in CP’s *first* brief in this proceeding is itself curious; if that were the standard for allowing a reply to a reply, then a reply to a reply would almost always be appropriate.

waiting for Clearing congestion to ease). Indeed, although it may feign otherwise now, CN is well aware that congestion can occur. As noted in CP's Reply, 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.¹⁵ Essentially, instead of investing in its own infrastructure to achieve its goal of increasing its mainline fluidity, CN would rather be dismissive of proposed solutions to reconfigure Spaulding and indifferent to the known congestion issues in the Chicago Terminal.

IV. If the Board initiates a declaratory order proceeding, discovery is warranted.

In its Reply, CP proposed that should the Board initiate a proceeding—which it should not—then there should be discovery on the impact on the Village of Bartlett from moving the interchange from Spaulding to Clearing, and on the magnitude of the economic benefit to CN of that move in light of CN's argument in its Petition concerning CP's "crew cost savings."¹⁶ See CP's Reply at 22-24. In its Reply, CN responds that no discovery is warranted but, should discovery be permitted, 60 days is appropriate for a declaratory order proceeding, avowing that 120 days is "excessive." Both arguments lack merit.

As to the substance of the proposed discovery, it is troubling that CN refuses discovery on its allegations of significantly reduced blocked crossings in Bartlett when it so heavily relies on

¹⁵ See *Canadian National Railway Company and Grand Trunk Corporation – Control – EJ&E West Company*, STB Finance Docket No. 35087, slip op. at 5 ("Under the transaction, applicants would shift much of the rail traffic currently moving over CN's five rail lines in Chicago to the EJ&E rail line, *in order to improve the fluidity of intermodal and other CN traffic that must move into, from, or through Chicago*. As the EIS explains, *trains traveling within Chicago currently experience delays because of the congested rail lines and too much dependence on the Belt Railway Company of Chicago (BRC) Clearing Yard . . .*") (emphasis added), 10 (STB served Dec. 24, 2008).

¹⁶ Petition at 28; see also CN's Reply at 19.

those allegations. Indeed, as explained in CP's Reply, the data CN provided in its Petition is aggregated at such a high level so as to obscure the actual cause of the blockages. For example, the data provides neither the time of day/night of the crossings nor the number and length of the trains involved in the blocked crossing, as fewer and shorter trains are likely to result in both fewer blocked crossings as well as reduce the duration of the blockages. And CN provides no evidence on whether the blockages are truly caused by CN's main line traffic and operational decisions, and not the parties' interchange location. Notably, CP identified these same deficiencies in the data that CN presented in FD 36299. In that proceeding, CP utilized data reported in the EJ&E oversight proceeding to unmask the fact that many of the extended blocked crossings were due to CN operational decisions and that the extended blocked crossings attributable to CP interchange operations almost always occurred in the middle of the night.¹⁷ In this proceeding, CN once again relies on high level data that CP believes fails to present a true and accurate picture of CN's operations and Spaulding, only this time only CN has access to the relevant data. That CN again asks CP and the Board to rely on assertions while seeking to conceal the underlying data only serves to bolster CP's position that more detailed data is likely to show a much more nuanced picture than CN's sweeping allegations regarding blocked crossings.¹⁸

Additionally, as explained in CP's Reply, any perceived economic benefit to CP from moving the interchange to Clearing is neither certain nor likely to prevail over time. Any Board decision based on such a changing economic picture would therefore not be on a sound footing and would likely result in repeated proceedings every time there was a shift in the economics.

¹⁷ See CP's July 3, 2019 Letter and Appendix A thereto in FD 36299.

¹⁸ Interestingly, CN asks the Board to conduct oral argument so the Board can "test" the parties' positions, CN's Reply at 24, but does not believe that testing its factual assertions through discovery is warranted.

Thus, to the extent that CN is suggesting that the Board should take into account any “savings” to CP from moving the interchange to Clearing, CP then, in fairness, should be permitted discovery on CN’s economic benefit from moving the interchange. But in response, CN now asserts that discovery is not warranted because the standard does not depend upon whether CN obtains economic benefit in designating its preferred point of interchange. This new position cannot be squared with CN’s argument that CP should bear BRC’s fees based on the supposed economic benefits to CP of eliminating an assignment. *See* Petition at 28. And only once the focus is on CN’s economic benefit, does the issue suddenly become “irrelevant.” CN’s Reply at 20.

Finally, CN replies that, should discovery be permitted, 60 days is more appropriate for a declaratory order proceeding and that 120 days is “excessive.” CN’s Reply at 23, n. 51. The 120-day period proposed by CP was made with a recognition of the current environment surrounding the Covid-19 pandemic in order to allow the parties a reasonable schedule for discovery, particularly where CN itself has stated the Petition was “not an emergency filing.” *See* Petition at 1. Even under normal circumstances, the Board has approved periods of discovery larger than 60 days in declaratory order proceedings.¹⁹ Accordingly, in light of current circumstances, it would be far from “excessive” for the Board to allow 120 days for discovery in this proceeding.

V. Conclusion

For the reasons stated above, the Board should deny CN leave to file its Reply to CP’s Reply. Additionally, the Board should issue an order denying CN’s Petition for Declaratory Order; if, however, the Board institutes a proceeding, the Board should set a procedural schedule as outlined in CP’s Reply.

¹⁹ *See, e.g., Utah Central Railway Company, LLC v. Kenco Logistics Services, LLC; Kenco Group; and Specialized Rail Service, Inc.—Petition for Declaratory Order*, FD 36131, slip. op. at 1 (STB served December 14, 2017) (allowing 90 days for discovery).

Respectfully submitted,

/s/ David F. Rifkind

David F. Rifkind

Matthew Smilowitz

STINSON LLP

1775 Pennsylvania Avenue NW, Suite 800

Washington, DC 20006

(202) 785-9100

david.rifkind@stinson.com

Charles W. Webster

Senior Counsel

CANADIAN PACIFIC

11306 Franklin Ave.

Franklin Park, IL 60131

(630) 860-4161

Charles_Webster@cpr.ca

Attorneys for Soo Line Railroad Company

Dated: July 8, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of July 2020, I caused a copy of the foregoing REPLY TO MOTION FOR LEAVE TO FILE REPLY TO REPLY to be served by email and first-class mail upon the following parties of record:

Raymond A. Atkins
Matthew J. Warren
Morgan B. Lindsay
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
mjwarren@sidley.com

Kathryn J. Gainey
Counsel, U.S. Regulatory Affairs
Canadian National
601 Pennsylvania Avenue, NW
Suite 500, North Building
Washington, DC 20004
kathryn.gainey@cn.ca

Kevin Wallace
Scott Skrycki
Village of Bartlett
228 S. Main Street
Bartlett, IL 60103
sskrycki@vbartlett.org

/s/ David F. Rifkind
David F. Rifkind