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Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

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

Dear Ms. Brown:

Wisconsin Central, Ltd. (“CN”) and Soo Line Railroad Company d/b/a Canadian Pacific (“CP”) notify the Board that they are withdrawing the confidentiality designations for certain materials that CN and CP designated Confidential or Highly Confidential in their prior filings in this docket. These materials are being included in the joint appendix for the petition for review of the Board’s October 30, 2020 decision in this proceeding, which is pending before the United States Court of Appeals for the Seventh Circuit docketed as *Wisconsin Central Ltd v. Surface Transportation Board* (No. 20-3507).

Specifically, CN is withdrawing confidentiality designations for (1) its April 14, 2020 Petition for Declaratory Order, except for Exhibit 11, which remains Highly Confidential; (2) its June 18, 2020 Motion for Leave to File Reply to Reply; and (3) its June 18, 2020 Reply to Reply.

CP is withdrawing confidentiality designations for (1) its May 29, 2020 Reply to Petition for Declaratory Order and (2) its July 8, 2020 Reply to Motion for Leave to File Reply to Reply.

With the exception of Exhibit 11 to the Petition for Declaratory Order, the Highly Confidential versions of the above-referenced filings may be entered on the Board’s public docket. To simplify the process of replacing the

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Cynthia T. Brown

March 15, 2021

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filings in the docket, versions of each of the above-referenced filings are attached to this letter.

Respectfully submitted,

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Attachment 1

April 14, 2020 CN Petition for Declaratory Order

(Confidentiality Designations Removed, Except Exhibit 11)

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

STB FINANCE DOCKET NO. 36397

PETITION FOR DECLARATORY ORDER

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Dated: April 14, 2020

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Wisconsin Central, Ltd. (“CN”) respectfully submits this Petition for a Declaratory Order that would enable a permanent solution to the long-running dispute over CN’s right to designate a point to receive interchange traffic in Chicago from Soo Line Railroad Company d/b/a Canadian Pacific (“CP”). In this Petition, CN asks the Board to address the critical questions that it left unanswered in Finance Docket No. 36299¹:

(1) Whether CN has the right to designate the Belt Railway of Chicago’s (“BRC’s”) Clearing Yard as CN’s point to receive interchange traffic from CP; and

(2) Whether each railroad is required to bear its own costs for those interchanges, including fees for the BRC’s switching services.

CN believes that each of the answers is “yes.”

CN notes at the outset that this is not an emergency filing and that it does not plan to seek a preliminary injunction. CN is committing that it will continue operating under the Interim Agreement put in place in August 2019,² under which CP delivers its interchange traffic to CN at Clearing {{(with CN reimbursing CP on an interim basis for 100% of the switching fees CP pays to the BRC for Clearing interchange traffic that was formerly interchanged at Spaulding, pending a final Board decision as to who was responsible for those costs}}).³ The Interim

¹ *Soo Line R.R. Co. – Pet. for Declaratory Order and Preliminary Injunction – Interchange with Canadian National*, STB Fin. Docket No. 36299 (served Nov. 29, 2019) (“*November 29 Decision*”).

² See Joint Notice of Interim Agreement, STB Fin. Docket No. 36299 (filed Aug. 21, 2019); Interim Agreement Submission, STB Fin. Docket No. 36299 (filed Sept. 5, 2019) (enclosing Interim Agreement filed under seal).

³ Portions of this Petition that are marked in single braces (e.g., “{ }”) are designated Confidential and portions that are marked in double braces (e.g., “{ { } }”) are

Agreement was not terminated by the Board's *November 29 Decision*, because by its terms it is to remain in effect until {{the Board issues a decision regarding which railroad is responsible for the switching fees CP pays to the BRC for Clearing interchange traffic that was formerly interchanged at Spaulding}}.

The genesis of this dispute in 2019 was the pressing need for CN to move its Chicago-area interchanges with CP from Spaulding to a more workable location. As CN and multiple community interests showed in Finance Docket No. 36299, Spaulding interchanges caused increasing problems for CN mainline operations and created regular grade crossing blockages that impacted the surrounding communities.⁴ After months of unsuccessful discussions with CP, in early 2019 CN notified CP that it would cancel the Spaulding interchange agreement and designated CN's nearest classification yard (Kirk Yard) to receive interchange traffic from CP. CP objected to Kirk, arguing that it was unreasonably far from CP's lines. After further negotiations, CN and CP agreed that consolidating interchange operations at Clearing Yard would be an acceptable alternative from an operational perspective. While the parties were negotiating over who would pay the BRC's switching costs at Clearing, CP filed a petition with the Board seeking a

designated Highly Confidential under the proposed Protective Order CN is submitting today.

⁴ See CN Reply to Petition for Declaratory Order, STB Fin. Docket No. 36299, at 13-16 (filed May 20, 2019).

declaration that Kirk Yard was an unreasonable interchange location.⁵ CN responded by asking the Board to consider Clearing as a reasonable interchange location.⁶ In July 2019, CN officially designated Clearing as an alternative interchange received location to receive cars from CP.⁷

After multiple filings and an oral argument, the Board issued a decision declaring Kirk was an unreasonable interchange location for CP to deliver CN's cars in light of the circumstances. The Board then closed the FD 36299 proceeding without addressing CN's designation of Clearing or which party should be responsible for paying the switching fees for interchange traffic CP delivers to Clearing that was formerly interchanged at Spaulding. *November 29 Decision* at 4.

In the months since the *November 29 Decision*, CN and CP have been unable to resolve which party should be responsible for paying the switching fees for traffic CP delivers to Clearing that was formerly interchanged at Spaulding. CP's position is that interchange should revert to Spaulding unless CN pays both its own costs to interchange traffic with CP and CP's costs for BRC switching fees. CN's position is that it has the right under 49 U.S.C. § 10742 to designate reasonable alternatives to Spaulding that are within CN's "power to provide," and that, as a co-owner of the

⁵ *Soo Line R.R. Co. – Pet. for Declaratory Order and Preliminary Injunction – Interchange with Canadian National*, STB Fin. Docket No. 36299 (filed Apr. 30, 2019).

⁶ CN Reply to Petition for Declaratory Order, STB Fin. Docket No. 36299, at 21-22 (filed May 20, 2019).

⁷ Letter from CN to A. Davis, STB Fin. Docket No. 36299, at 2 (filed July 12, 2019) ("Exhibit 1 is a letter from CN to CP ... designating Clearing as an interchange location....").

BRC along with CP, CN plainly has the “power to provide” Clearing as an location to receive interchange traffic from CP. And it is equally plain that CP as a delivering carrier is responsible for paying the BRC for the switching services it is performing for CP’s interchange traffic, just as CN is responsible for switching fees for interchange traffic it delivers to CP at Clearing. A Board decision on the merits is required to resolve this fundamental difference between the parties. Accordingly, CN respectfully asks the Board to order that Clearing is a reasonable interchange location and that each carrier is required to pay its respective BRC switch fees.

Section I recounts the factual background and procedural history. Section II identifies the legal standard at issue in this proceeding. Section III explains why CN is entitled to a declaratory order confirming its right to designate Clearing as a point to receive interchange traffic from CP. Section IV details the reasons why CP is required to pay the BRC for its switching services.

I. FACTUAL BACKGROUND

While the Board is familiar with the facts and procedural history from the record in Finance Docket No. 36299, the most relevant facts are summarized below to ensure a complete record in this docket.⁸

⁸ CN also incorporates by reference the pleadings and evidence submitted to the Board in *Soo Line Railroad Company – Petition for Declaratory Order and Preliminary Injunction – Interchange with Canadian National*, STB Fin. Docket No. 36299.

A. Interchange Operations Between CN and CP in the Chicago Region Since 2010

In 2010, CP and CN entered into an interchange agreement under which traffic interchanged between the two carriers in the Chicago region would be interchanged at Spaulding. This agreement consolidated interchange operations that had previously occurred at numerous locations across the Chicago region. Spaulding was not the only Chicago-area interchange point between CN and CP; CP also delivered TIH and some non-TIH traffic to CN via the BRC's Clearing Yard, with CP paying the typical BRC switching fees for such deliveries. The 2010 Interchange Agreement provided that it could be terminated by either party upon 60 days written notice.

Nearly a decade later, recurring operational problems at Spaulding made it clear that it was no longer a suitable interchange point. For example, interchange activities at Spaulding would block CN's single-track main line, which often slowed and sometimes stopped traffic on CN's line in the busy Chicago area.⁹ The configuration of the small yards at Spaulding¹⁰ meant that CN's main line would be blocked several times during every interchange event. The length of these blockages was unpredictable, which meant that interchange operations at Spaulding sometimes required CN to hold trains on the single-track main line while waiting for interchange operations at Spaulding to be completed. These

⁹ These operations are described in detail in Mr. William Albritton's Verified Statement ("Albritton V.S."), appended hereto. *See* Albritton V.S., at 3-9.

¹⁰ *See* Albritton V.S., at Ex. 2 (map of Spaulding track configuration).

interchange-based interruptions to main line service exacerbated other uses of CN's main line that consume capacity, such as Metra and Amtrak operations, which cross and even operate over portions of CN's single-track main line.

In addition, interchange activity regularly required CN and CP trains to occupy the three at-grade crossings at Spaulding Road, West Bartlett Road, and Stearns Road. Spaulding Road was particularly impacted because it runs directly across the track connecting CP and CN that was used to facilitate interchange at Spaulding. This meant that Spaulding Road was blocked for each CP and CN interchange event, and it was typically blocked multiple times during a single interchange. Mr. Albritton's Verified Statement gives examples of the grade crossing blockages associated with a typical Spaulding interchange. *See* Albritton V.S. at 5, 7, 9-17.

These interchange activities at Spaulding resulted in significant complaints from the community. The Village of Bartlett has attested to the disruptions the community experienced as a result of these blocked crossings. *See* Letter from K. Wallace to C. Brown, STB Fin. Docket No. 36299 (filed May 17, 2019) (detailing the challenges of blocked crossings in the Village and the history of complaints regarding blockages at West Bartlett, Stearns, and Spaulding Roads). The disruption was so significant that the community requested that the Board “**DO NOT** require the railroads to continue interchanging at Spaulding.” *Id.* at 1.

CN data shows that in 2016, Spaulding Road was blocked for 10 minutes or more 167 times as a result of interchange operations. West Bartlett Road and

Stearns Road were blocked 163 and 84 times, respectively, for more than 10 minutes, all because of interchange operations.¹¹ A comparison of blockages at these grade crossings before and after implementation of the Interim Agreement further illustrates that the blockages at these three roads were primarily attributable to interchange operations at Spaulding. Table 1 identifies the monthly total grade crossing blockages over 10 minutes at Spaulding, Stearns, and West Bartlett Roads from January through July 2019, before the Interim Agreement:

TABLE 1
Monthly Total Grade Crossing Activations Over 10 Minutes at
Spaulding Road, Stearns Road, and West Bartlett Road
January 2019 Through July 2019 (Before Interim Agreement)

Month	Spaulding Road	Stearns Road	West Bartlett Road	Total
Jan. 2019	24	19	38	81
Feb. 2019	16	18	28	62
March 2019	14	27	39	80
April 2019	20	30	42	92
May 2019	20	23	44	87
June 2019	20	18	41	79
July 2019	11	23	40	74
Average	17.9	22.6	38.9	79.2

¹¹ See *Albritton V.S.* at 9.

Table 2 shows that blockages have fallen precipitously after interchange operations were moved from Spaulding.¹² In the first seven months of operations under the Interim Agreement, blockages over 10 minutes decreased to an average of 0.7 per month at Spaulding Road, 8 per month at Stearns Road, and 9.4 per month at West Bartlett Road, a total decrease of more than three quarters from the amount when interchange was at Spaulding.

TABLE 2
Monthly Total Grade Crossing Activations Over 10 Minutes At
Spaulding Road, Stearns Road, and West Bartlett Road
September 2019 Through March 2020 (After Interim Agreement)

Month	Spaulding Road	Stearns Road	West Bartlett Road	Total
Sept. 2019	1	14	16	31
Oct. 2019	1	9	7	17
Nov. 2019	0	7	9	16
Dec. 2019	1	6	9	16
Jan. 2020	0	4	9	13
Feb. 2020	0	7	5	12
March 2020	2	9	11	22
Average	0.7	8.0	9.4	18.1

¹² August data is excluded from the averages because the Interim Agreement was implemented during the month of August 2019.

The improvements in traffic flow at these crossings were confirmed by the Village of Bartlett, which informed the Board in October 2019 that it had experienced a “noticeable decrease” in blocked crossing complaints since CP and CN relocated interchange operations from Spaulding to Clearing.¹³

B. CN’s Good Faith Negotiations for An Alternative

CN raised its interchange concerns with CP in 2018 and offered a variety of reasonable solutions. But CP showed little interest in relocating the interchange point from Spaulding. Following months of discussion that failed to reach an agreement, CN provided notice to CP on March 11, 2019 that it would terminate the 2010 Interchange Agreement pursuant to the terms of the contract and would exercise its right to designate a different reasonable interchange point.

CN subsequently designated Kirk Yard as its interchange location to receive CP-to-CN interchange traffic. *See Exhibit 5, March 11, 2019 Letter from M. Matteucci to C. Hubbard.* CN offered to tender interchange cars to CP at any reasonable location it designated. (CP subsequently designated its own Bensenville Yard.) CP objected to Kirk, arguing that it was an unreasonably far distance for CP crews to travel. *See Exhibit 6, April 3, 2019 Letter from R. Johnson to M. Cory.*

In light of CP’s objections, CN worked with CP to find a mutually agreeable alternative interchange location. CP made it clear that its preference was to continue interchanging traffic at Spaulding. However, CP also indicated that it

¹³ Oct. 7, 2019 Letter from Kevin Wallace, Village of Bartlett President, STB Fin. Docket No. 36299, at 1 (filed Oct. 24, 2019).

would be “agreeable” to delivering interchange traffic to Clearing Yard as an operational matter. CP’s agreement, however, was contingent upon CN reimbursing CP for the per-car switching fees that CP would pay to the BRC. *See* Exhibit 6, April 3, 2019 Letter from R. Johnson to M. Cory; Exhibit 7, April 18, 2019 Letter from R. Johnson to M. Cory.

C. CP’s Petition for Declaratory Order and Preliminary Injunction in FD 36299

While discussions were continuing, CP filed a petition for declaratory order and preliminary injunction with the Board, arguing that Kirk was an unreasonable location for CN to receive interchange traffic and that the Board should order CN to continue to receive cars from CP at Spaulding.¹⁴ CP did not ask the Board for a ruling on the reasonableness of Clearing or the parties’ dispute over who should be responsible for paying the BRC switching fees for CP traffic at Clearing.

CN’s first pleading in response to CP’s petition explained that the core dispute between the parties was not over the reasonableness of Kirk but rather over which carrier was responsible for paying BRC switching fees for interchange traffic that CP would deliver to Clearing.¹⁵ On May 9, 2019, the Board ordered the parties to participate in Board-sponsored mediation and to “maintain the status quo and

¹⁴ *See Soo Line Railroad Company – Petition for Declaratory Order and Preliminary Injunction – Interchange with Canadian National*, STB Fin. Docket No. 36299, at 2 (filed Apr. 30, 2019).

¹⁵ CN Reply to Petition for Preliminary Injunction, STB Fin. Docket No. 36299, at 8 (filed May 3, 2019) (“the only open dispute is about money”).

continue to interchange railcars at Spaulding while they mediate this dispute.”¹⁶

The parties participated in mediation through July 2019 while continuing interchange operations at Spaulding, but mediation proved unsuccessful.¹⁷

In July 2019, CN formally designated Clearing Yard as a second location for CN to receive interchange traffic from CP. Letter from CN to A. Davis, STB Fin. Docket No. 36299, at 2 (filed July 12, 2019) (“Exhibit 1 is a letter from CN to CP ... designating Clearing as an interchange location ...”). CN also asked the Board to “consider[] which party is ultimately responsible for paying Belt switching fees.” CN Reply, STB Fin. Docket No. 36299, at 7 (filed July 12, 2019).

In August 2019, after oral argument, CN and CP entered into an Interim Agreement whereby CN-to-CP interchange cars would be delivered to CP at the BRC’s Clearing Yard, with CN bearing all the costs for such deliveries. In turn, CP-to-CN interchange traffic would be delivered to CN at the BRC’s Clearing Yard, with CP delivering the cars to Clearing and CN picking up the cars from Clearing. {{The Interim Agreement provided that CN would pay all costs for interchanging traffic at Clearing, provided that CP would reimburse CN its costs should the Board rule in CN’s favor on that issue. The agreement also provided that CN would pay 100% of the costs for any third party carrier charges for CN to deliver CN-to-CP

¹⁶ See Decision, STB Fin. Docket No. 36299, at 2 (served May 9, 2019).

¹⁷ See Letter from CN to A. Davis, STB Fin. Docket No. 36299 (filed July 12, 2019) (“CN submits this letter to inform the Board that the Board-mandated mediation that concluded on July 11, 2019 . . . was not successful.”).

traffic to CP at Bensenville, without the possibility of any reimbursement following a final decision from the Board. *See Exhibit 8, Interim Agreement.*}}

{{The Interim Agreement explicitly contemplated a decision from the Board on the issue of payment for costs at Clearing. *See Exhibit 8, Interim Agreement*, at 1 (defining “final Board decision in CN’s favor” to be a decision that “CN can force CP to interchange/deliver to Clearing at CP expense”)}}. Following completion of the Interim Agreement, CN informed the Board that the only open dispute remaining between the parties was cost: CP demanded that CN agree to reimburse CP for all of its BRC fees for interchange cars CP delivers to Clearing that were formerly interchanged at Spaulding. Following the end of the mediation period, CN informed the Board of the status of negotiations and asked the Board to “consider[] which party is ultimately responsible for paying Belt switching fees.” July 12, 2019 letter from M. Warren to A. Davis at 7.

D. The Board’s Decision in FD 36299 Did Not Address CN’s Designation of Clearing or Which Party Is Responsible for Paying BRC Switching Fees for CP Interchange Traffic at Clearing.

The Board limited its *November 29 Decision* to finding that CN’s designation of Kirk Yard as the interchange point for CP to deliver interchange cars was unreasonable under the circumstances of the case and denying the preliminary injunction request as moot. *Nov. 29 Decision*, at 3. The Board declined to address the reasonableness of interchange at Clearing, stating that “it remains unclear whether CN has designated Clearing Yard as an interchange point” and noting that

“at least one party believes the issue has not been fully briefed.” *Id.* at 4.¹⁸ The Board concluded that “[o]ther interested parties may not have had notice that the Board might determine whether Clearing Yard is a reasonable interchange point. Accordingly, the Board will not address this issue.” *Id.*

The Board further declined to address the reasonableness of Spaulding (although it noted the community’s concern over grade crossing blockages at Spaulding). *Id.* at 5, 7. Instead, it narrowly held that CN could not designate Kirk Yard to receive interchange traffic from CP because Kirk Yard was too far from CP’s lines. *Id.* at 7-8. The Board emphasized its belief that CP crews might not be able to deliver interchange traffic to Kirk on a single shift and that the possibility that CP might have to use multiple crews to effectuate interchange showed that the distance was unreasonably long. *Id.* at 5.

E. The Parties Have Been Unable to Reach Agreement Regarding Payment of BRC Switch Costs for CP’s Interchange Cars Delivered to Clearing and Require a Decision from the Board.

Since the *November 29 Decision*, CN and CP have continued negotiations in an effort to resolve the dispute over the interchange location. In spite of these efforts, the parties have been unable to reach agreement. The parties continue to interchange per the Interim Agreement, but no resolution as to the payment of BRC fees has been reached.

¹⁸ *But see* CN Letter to A. Davis, STB Fin. Docket No. 36299, Ex. 1, at 1 (filed July 12, 2019) (“CN also designates Clearing Yard as a second location for CN to receive interchange traffic from CP.”).

Accordingly, a decision from the Board is required.¹⁹ Through this Petition for Declaratory Order, CN requests that the Board rule that Clearing is a reasonable interchange location for CP to delivery CN's interchange traffic. CN further asks the Board to rule that each party must bear its own BRC switching fees.

II. LEGAL STANDARD

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 to begin a declaratory order proceeding to eliminate a controversy or remove uncertainty. *See CSX Transp. Inc. – Petition for Declaratory Order*, STB Docket No. 34662 at 5 (Mar. 14, 2005). There is a plainly a controversy for the Board to resolve here. CN and CP have attempted for over a year to resolve the dispute as to CN's rights to designate a location for CP to deliver interchange traffic in the Chicago region. Despite multiple rounds of negotiation, mediation, and an earlier Decision from the Board, no resolution as to CN's right to designate Clearing as a reasonable interchange point has been achieved. And the parties continue to disagree about whether each party must bear its own BRC switching fees.

Section 10742 sets forth the applicable legal standard for a carrier's duties and rights to choose an interchange point from which to receive another carrier's traffic. In particular, 49 U.S.C. § 10742 provides:

A rail carrier providing transportation subject to the jurisdiction of the Board under this part shall provide reasonable, proper, and equal facilities *that are within its*

¹⁹ 5 U.S.C. § 554(e) (an “agency ... may issue a declaratory order to terminate a controversy or remove uncertainty”).

power to provide for the interchange of traffic between, and for the receiving, forwarding, and delivering of passengers and property to and from, its respective line and a connecting line of another rail carrier or of a water carrier providing transportation subject to chapter 137.

49 U.S.C. § 10742 (emphasis added). Section 10742’s calibration to a carrier’s “power” to comply with interchange obligations has its roots in Section 3 of the Interstate Commerce Act of 1887, which provided:

Every common carrier subject to the provisions of this act shall, *according to their respective powers*, afford all reasonable, proper, and equal facilities for the interchange of traffic between the respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.²⁰

The ICC, Board, and federal courts have long recognized that a receiving carrier has the right to designate a reasonable location to receive interchange traffic. In particular, the ICC explained 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.”²¹

²⁰ Interstate Commerce Act, Ch. 104 § 3, 24 Stat. 379 (1887) (emphasis added).

²¹ *New York, C. & St. L. R. Co. v. New York Central R. Co.*, 314 I.C.C. 344, 345 (1961) (“*New York*”); *see also Norfolk So. Ry. Co.—Pet. for Declaratory Order—Interchange With Reading Blue Mountain & No. R.R. Co.*, STB Docket No. 42078, at 4 (Apr. 29, 2003) (“*RBMN*”) (“Custom requires the receiving railroad in a direct

The Board has also made clear that a railroad's discretion to choose a point for receiving interchange traffic is broad. *See RBMN*, at 5-7. In fact, the Board has confirmed a receiving carrier's statutory prerogative to designate a point of its choice for receiving interchange traffic even when: (1) a railroad is changing an interchange point purely for its own convenience or business reasons; (2) the existing interchange point remains operationally workable; and (3) the new interchange point entails more work for the other carrier.²² Moreover, the D.C. Circuit has explained that "[t]he courts have long recognized 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."²³

In addition, the interchange obligations in 49 U.S.C. § 10742 apply to *all* carriers—both receivers and forwarders.²⁴ Indeed, the ICC established that

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.”).

²² *RBMN*, at 7 (denying petition to declare that receiving carrier's selection of new interchange point was unreasonable, where prior interchange point remained workable and where new point would require the delivering carrier to make new 30-mile hauls over the receiving carrier's lines).

²³ *Burlington N. R.R. v. United States*, 731 F.2d 33, 40 (D.C. Cir. 1984) (“*Burlington Northern*”).

²⁴ *See, e.g., Missouri & Ill. Coal Co. v. Ill. Cent. R.R. Co.*, 22 I.C.C. 39, 46 (1911) (“[T]here can be no doubt as to the intent of Congress [in enacting interchange obligations and related provisions]. Our railroads are called upon to so unite themselves that they will constitute one national system[.]”).

forwarding carriers are obligated “to make delivery on the rails of their connections, either direct or *by bearing the charges of the intermediate switching line*, and this is the general practice of railroads throughout the country.”²⁵ In sum, forwarding carriers are obliged to abide by a receiving carrier’s reasonable designation of an interchange point and must bear their own costs for intermediate switching services.²⁶

III. CN HAS THE RIGHT TO DESIGNATE THE BRC’S CLEARING YARD TO RECEIVE INTERCHANGE TRAFFIC FROM CP.

The first question that CN asks the Board to resolve in this Petition for Declaratory Order is a simple one: does CN’s designation of Clearing Yard as its point for receiving interchange traffic from CP satisfy CN’s statutory responsibilities to provide reasonable interchange facilities? CP claimed in Finance Docket No. 36299 that the answer to this question was no, because CN supposedly is required to designate a point on CN’s own lines.²⁷ But CP’s theory has no basis in the statute, in past practice, or in common sense. The statute does not say a word

²⁵ *Chi., Rhode Island & Pac. Ry. Co. v. Baltimore & Ohio R.R. Co.*, 113 I.C.C. 681, 690 (1926) (emphasis added).

²⁶ *New York*, 314 I.C.C. at 345 (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”); *see RBMN*, at 4; *Kansas City Southern Ry. Co.*, 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)).

²⁷ *See* CP Reply, STB Fin. Docket No. 36299, at 2 (filed July 3, 2019); CP Reply, STB Fin. Docket No. 36299, at 2-3 (filed July 19, 2019).

about carriers needing to designate interchange receipt points on tracks that they own. On the contrary, it allows carriers to provide facilities that are within their “power to provide.” 49 U.S.C. § 10742. As set forth in the attached Belt Railway Operating Agreement, CN plainly possesses the power as a co-owner of the BRC to use Clearing Yard to receive interchange traffic. *See* Exhibit 9, BRC Operating Agreement, at 2-3. And the use of switching railroads or terminal railroads to effectuate interchange is commonplace in the rail industry. It would upset common practices throughout the nation for the Board to hold that carriers could only lawfully designate interchange receipt locations on tracks that they directly controlled. Indeed, a decision not to deem the BRC as a reasonable interchange point could have ripple effects through the industry, affecting many existing interchange agreements both in Chicago and at other interchange locations across the United States.

Moreover, there is no question that Clearing Yard has been and continues to be a reasonable interchange location that imposes no unusual, unreasonable, or impossible burdens on CP. Clearing was designed to accommodate interchange among the BRC’s co-owners, and it has readily accommodated the interchange volumes between CP and CN with no adverse impact to operations, fluidity in Chicago, or the surrounding community.

A. Carriers Have the Statutory Right To Designate a Reasonable Location to Receive Interchange Traffic.

CP’s claim that carriers are only allowed to designate interchange receipt locations on their own lines is undermined by the language of the statute. Section

10742 specifically discusses the “facilities” that carriers are required to provide for the interchange of traffic, but it tellingly does not require those facilities to be completely owned by the carrier. Instead, carriers are ordered to “provide reasonable, proper, and equal facilities that are within [their] power to provide.” 49 U.S.C. § 10742.

As CN has previously explained to the Board,²⁸ there is little case law interpreting the meaning of either the “within its power to provide” language of the current Section 10742 or the “according to their respective powers” language from the earlier Interstate Commerce Act. But in a statutory context, “power” has an ordinary meaning of “[t]he legal right or authorization to act or not act.”²⁹ Where a railroad holds legal rights to utilize a switching carrier’s facilities for interchange (whether through ownership, via contract, or both), the railroad plainly has the “power to provide” interchange facilities by utilizing those legal rights within the meaning of Section 10742.

In this instance, CN plainly has the power to provide Clearing Yard as an interchange receipt point as a co-owner of the BRC pursuant to the Belt Railway Operating Agreement. That Agreement {grants co-owners “the right and privilege of running and operating freight trains, locomotives, and cars” over the BRC.} Exhibit 9, BRC Operating Agreement, at 2. The ICC has recognized that such owners are entitled to equal status. *Belt Railway of Chicago—Operation*, 324 I.C.C.

²⁸ See CN Reply, STB Fin. Docket No. 36299, at 17-19 (filed Nov. 12, 2019).

²⁹ Black’s Law Dictionary 1189 (7th ed. 1999).

597, 606 (1965) (recognizing that “in owner-to-owner operations each owner company has the right to use, and uses, the Belt Railway on equal terms” and that “the right and privilege [to use the Belt] is coequal for all owner lines”).

The Belt Railway Operating Agreement {explicitly contemplates that co-owners will interchange at Clearing Yard, unless the parties mutually agree to another location. *Id.* at 7 (Article 3 § 1(e)). And it assesses charges for “services provided each Railway Company and Companies” related to “the transfer of cars between any of the Railway Companies through the facilities of the Belt Company.” *Id.* at 5 (Article 3 § 1). The Agreement further contemplates that co-owners may use the BRC “as a bridge for through movement of cars between portions of their own Railroad or between their yards and connections with other Railway Companies.” *Id.* at 3 (Article 1 § 5).} In short, both CN and CP, as co-owners of the BRC, have authority to use the BRC to interchange traffic with each other or with other co-owners, pursuant to the terms of the Operating Agreement. Thus Clearing Yard is plainly a facility that is within CN’s “power to provide” for interchange.

While CP alleged in Finance Docket No. 36299 that CN’s designation of Clearing was trying to force CP to exercise its “trackage rights,” that allegation is a red herring. Neither CP nor CN pays “trackage rights fees” as co-owners to operate over the BRC. The fees that CP wants CN to pay are switching fees paid for the services that the BRC performs for interchanges (services that significantly reduce the work that would have to be performed by CP crews). More importantly, it is a matter of public record that CP uses trackage rights over Metra’s “West Line” both

for Spaulding interchanges (*i.e.*, trains moving from Bensenville to Spaulding) and for Clearing interchanges (*i.e.*, trains moving from Bensenville to Clearing).³⁰ This is not a case in which a carrier is being asked to exercise trackage rights to effectuate interchange rather than using lines it owns. It is rather a case in which CN-owned lines and CP-owned lines do not connect at Spaulding or at Clearing, and where CP actually must use the same Metra trackage rights to deliver to either Spaulding or Clearing.

Therefore, CP's claims in Finance Docket No. 36299 that the supposed "physical connection" between CN and CP at Spaulding had a special legal significance that precluded CN from designating Clearing is based on a false factual premise.³¹ In the same vein, CP is wrong that *Burlington Northern* does not control here because the railroads in *Burlington Northern* were "non-contiguous."³² There is no meaningful factual distinction between the facts here and the facts in *Burlington Northern*—where the court affirmed a receiving carrier's right to choose

³⁰ See *Canadian Pacific Ry. et al.—Control—Dakota, Minnesota & E. R.R. Corp., et al.*, STB Fin Docket No. 35081, at 13 (served Sept. 28, 2008) (noting that Metra "acquired" the West Line in 1989, and Soo Line operates over it "by virtue of a 1985 trackage rights agreement"); see Exhibit 10, Metra Comments in Opposition to Proposed Transaction and Request for Conditions, STB Fin. Docket No. 35081, at 2 (filed Mar. 4, 2008) ("Metra acquired the West and North Lines in transactions with the Trustee of the Milwaukee Road in 1989. CP's Soo Line subsidiary was granted trackage rights over each line with the right to dispatch those lines by the Trustee in 1985."); see also CP Response to Oral Argument Questions, STB Fin. Docket No. 35081, at 2-3 (filed Oct. 21, 2019) (includes CP's response to the Board's questions about the details of CP's compensation to Metra for use of the line).

³¹ CP Reply, STB Fin. Docket No. 36299, at 2 (filed July 19, 2019).

³² *Id.* at 2 n.3.

to receive traffic on an intermediate switch carrier, even though that would require the delivering carrier to pay the intermediate carrier's switching fees.³³

B. Clearing Is A Reasonable Interchange Location.

It is well settled that a receiving railroad has the authority to designate a point where it wishes to receive interchange traffic, so long as that point does not “impose unusual, unreasonable, or impossible operating hazards” on the delivering carrier.³⁴ There is no question that Clearing passes that test.³⁵

In the first place, in April 2019, CP admitted that Clearing was an “agreeable” interchange location and that CP is “willing” to interchange there as an operational matter.³⁶ Moreover, CN and CP have long interchanged TIH/PIH

³³ *Burlington Northern*, 731 F.2d at 40 (“[C]ourts have long recognized 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.”).

³⁴ *New York*, 314 I.C.C. at 345 (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”); see *Norfolk So. Ry. Co.—Pet. for Declaratory Order—Interchange With Reading Blue Mountain & No. R.R. Co.*, STB Docket No. 42078, at 4 (Apr. 29, 2003) (“*RBMN*”) (“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.”).

³⁵ Though CN is filing this Petition to resolve the parties’ dispute, the burden of proof is on CP to prove that interchange at Clearing is “unusual, unreasonable, or impossible.” *RBMN*, at 5.

³⁶ See Exhibit 7, April 18, 2019 Letter from R. Johnson to M. Cory (“we re-iterate our willingness to voluntarily exercise our trackage rights on the Belt Railway of Chicago (BRC) and deliver CN’s traffic to the BRC at Clearing”); CP Petition for

traffic via Clearing, and both carriers operate trains to Clearing on a daily basis.

And there is nothing “unusual, unreasonable, or impossible” about interchange at a prominent Chicago yard whose primary purpose is to facilitate interchanges among its Class I owners.

The suitability of Clearing as a consolidated interchange location for CP and CN is confirmed by the parties’ experience in recent months. Since interchange operations at Clearing increased in mid-August 2019 to include traffic that was formerly interchanged at Spaulding, operations have been consistent and well executed. *Albritton V.S.* at 20-21. The interchange operations have worked well, with the BRC functioning as a switching carrier between two Class I co-owners, as intended. *See id.*

As CN reported to the Board in November 2019, blocked at-grade crossings at Spaulding have significantly declined since the interchange was re-located to Clearing Yard.³⁷ Prior to the Interim Agreement, the average total number of blocked crossings over 10 minutes at Spaulding, Stearns, and West Bartlett Roads was 79.2. Following implementation of the Interim Agreement, average blockages in excess of ten minutes fell to 18.1 per month—a decrease of over 75% as compared to when interchange operations occurred at Spaulding. *See supra*, Table 2.

Declaratory Order and Preliminary Injunction, STB Fin. Docket No. 36299, Walker V.S. ¶ 8 (filed Apr. 30, 2019).

³⁷ Wisconsin Central (CN) Reply, STB Fin. Docket No. 36299, at 2-3, 4-7 (filed Nov. 12, 2019).

While CP suggested that moving interchanges to Clearing could adversely impact transit times, that has not been CN's experience. Indeed, when CP was asked by the Board to provide data to support its claims of longer transit times through Clearing, it was unable to do so. *See* Wisconsin Central (CN) Reply, STB Fin. Docket No. 36299, at 2 (filed Nov. 12, 2019) ("In its October 21 letter, CP . . . indicates that data is 'inconclusive as to whether one routing on average is faster than the other.'"); *see id.* at 7-8.

IV. CP IS RESPONSIBLE FOR ITS SHARE OF BELT RAILWAY SWITCHING FEES.

The second question is whether CP is responsible for paying the BRC for the switching services it provides for the interchange traffic that CP delivers to Clearing. Fees for the traffic that CN delivers to CP are not at issue, as CN acknowledges its responsibility as a delivering carrier to pay costs for interchange traffic it delivers to CP (including BRC switching fees for CN-to-CP traffic delivered through Clearing). The question is whether CP is responsible for likewise paying fees for the traffic it delivers to CN through the BRC.

It should be noted at the outset that the BRC switching fees are not some burdensome toll that the BRC extracts from its owners. On the contrary, they are reimbursement for the valuable services that the BRC provides, such as blocking cars and assembling trains. CP crews that are operating CP's daily trains to Clearing can essentially "drop off" trains at Clearing and allow BRC personnel to break up the incoming CP trains into blocks that will be assembled into outgoing trains for the various railroads with which CP interchanges. In contrast,

interchange at Spaulding required time-consuming work for CP crews to pick up and drop off cars (which were often on multiple tracks due to the small size of the facilities at Spaulding).

CP is responsible for paying these BRC fees, for three independent reasons. First, in the rail industry these switching fees are customarily borne by the delivering carrier. The D.C. Circuit acknowledged this in *Burlington Northern*, noting that “[u]nder longstanding Chicago custom, the intermediate switching charges involved in [interchange] deliveries are normally borne by the forwarding carrier.”³⁸ And the ICC recognized it for many decades. *See Chicago, Rhode Island & Pacific Ry. Co. v. Baltimore & Ohio R.R. Co.*, 113 I.C.C. 681, 690 (1926) (forwarding carriers are obligated “to make delivery on the rails of their connections, either direct or by bearing the charges of the intermediate switching line, and this is the general practice of railroads throughout the country”); *Rates, Regulations, and Practices of Peoria & Pekin Union Railway Co. at Peoria, Ill. and Near-by Points*, 93 I.C.C. 3, 22 (1924) (switching charges should be “absor[bed] . . . by the line that delivers the traffic”). Indeed, this custom is reflected in the parties’ past practice at Clearing. CP historically paid the BRC switching fees for TIH and other non-TIH traffic that it interchanged with CN via the BRC. *See Albritton V.S.* at 3 (noting the “historic experience of the carriers, who had for years been interchanging CP-to-CN bound TIH traffic, as well as some non-TIH cars, at

³⁸ 731 F.2d at 35; *see also Baltimore & Ohio R.R. Co. v. United States*, 277 U.S. 291, 301 (1928) (“usually when interchange is effected by means of an intermediate carrier, the delivering carrier bears the cost of switching”).

Clearing, with CP paying the switching fees for the traffic it is delivering.”); *see also id.* at 1-2, 21.

Second, and independently, CP’s responsibility for switching charges is established by the Belt Railway Operating Agreement. {Pursuant to that Agreement, each co-owner has agreed that it will pay the BRC a charge for the transfer of cars at the BRC. Specifically, Article III Section 1 provides that “Each of the Railway Companies shall pay to the Belt Company a charge for the transfer of cars between any of the Railway Companies through the facilities of the Belt Company” and that “The Belt Company shall establish the charge or charges to cover services provided each Railway Company or Companies.” Exhibit 9, BRC Operating Agreement, at 5.}

{The charges that BRC has established pursuant to Article III Section 1 specifically place the responsibility for interchange transfer charges on the delivering carrier. The current BRC rate sheet, which is attached as Exhibit 11, sets forth “Intermediate Switch Rates” for “traffic delivered to the BRC at Clearing Yard by an inbound line haul carrier for an outbound line haul carrier” and calculates a volume incentive based on how much total monthly traffic the delivering carrier delivers to the BRC for all receiving carriers. *Id.* at 1. BRC switching charges are ordinarily billed to the delivering carrier.³⁹}

³⁹ {{The BRC has been billing CP directly for all CP-to-CN cars being interchanged at Clearing under the Interim Agreement; CN is complying with the Interim Agreement by reimbursing CP for the applicable portions of the bills CP pays to BRC. *See* Albritton V.S. at 3.}}

{CP's responsibility for paying the switching charges that every BRC co-owner pays for interchange traffic it delivers to Clearing is thus a fundamental provision of the BRC Operating Agreement to which CP is a party. BRC's reasonable practice of assessing switching charges on delivering carriers is consistent with the industry custom that delivering carriers pay switching fees. It is also a way of fairly allocating the costs of the switching services BRC provides among the BRC's co-owners. Here, CN is paying and will continue to pay the BRC switching fees for CP-bound interchange traffic that it delivers to CP through Clearing. CP is required to do the same for the CN-bound interchange traffic that it delivers to Clearing.}

Third, CP's demand that CN pay CP's switching fees would result in an unfair imbalance in the parties' interchange responsibilities. It may be true that railroads' interchange expenses need not be "precisely balance[d]," because circumstances may differ. *November 29 Decision*, at 6. But interchange is a mutual statutory obligation that imposes duties on both forwarding carriers and receiving carriers.⁴⁰ The Board has emphasized that a carrier cannot reasonably expect another railroad to bear all the costs of an interchange.⁴¹ A railroad's insistence

⁴⁰ *Chi., Rhode Island & Pac. Ry. Co.*, 113 I.C.C. at 690 (forwarding carriers are obligated "to make delivery on the rails of their connections, either direct or by bearing the charges of the intermediate switching line, and this is the general practice of railroads throughout the country").

⁴¹ *Minnesota N. R.R., Inc. v Canadian Nat'l Ry. Co.*, STB Docket No. 42080, at 6 (STB served Mar. 18, 2005) (railroad could not expect another railroad to pay all capital costs for establishing a new interchange connection, because "[i]nterchange is a mutual agreement that will benefit two carriers, not just one").

that its interchange partner pay virtually all of the costs associated with interchange—even to the point of reimbursement for its switching fees—is unreasonable on its face.

The unreasonableness of CP's position is confirmed by the fact that it is almost certainly reaping significant financial benefits from the consolidation of interchange traffic at Clearing. Since implementation of the Interim Agreement, CP has canceled its daily train to and from Spaulding. At oral argument in August 2019, CP estimated that each train start costs it \$4800.⁴² By CP's own estimate, therefore, it is saving approximately \$144,000 a month solely by virtue of canceling that daily Spaulding train start.⁴³ CP's crew cost savings would substantially offset the BRC switching fees at issue here. Indeed, it is a distinct possibility that CP's crew cost and other savings from canceling daily Spaulding trains actually outweigh the BRC switching fees for interchange cars CP delivers to Clearing for CN.⁴⁴

⁴² Aug. 6, 2019 Oral Argument Transcript, STB Fin. Docket No. 36299, at 49:18-50:17.

⁴³ Some of those savings could be canceled out by new trains to Clearing (if CP is unable to fit all the former Spaulding interchange traffic onto its existing trains to Clearing), but it is not clear that CP has needed to run any meaningful number of additional Clearing trains since implementation of the Interim Agreement.

⁴⁴ CN refers the Board to the cost analysis submitted in its November 12, 2019 filing for a discussion of how CP's crew cost savings might compare to the BRC fees at issue. See Wisconsin Central (CN) Reply, STB Fin. Docket No. 36299, at 8-12 (filed Nov. 12, 2019).

Nevertheless, CP continues to insist that CN permanently pay all of CP's BRC switching fees, using the threat of returning to Spaulding with all the associated adverse operational and community impacts as leverage for CP to avoid paying its share of interchange costs. The Board should put an end to these tactics and make clear that each party is responsible for paying its own share of BRC switching fees.⁴⁵

V. CONCLUSION

CN requests that the Board grant its Petition for Declaratory Order and find that interchange of CP-to-CN traffic at Clearing Yard via the BRC is reasonable and that each carrier must bear its own costs.

Respectfully submitted,

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Dated: April 14, 2020

⁴⁵ In making this ruling, the Board does not need to establish any general rules governing the appropriate division of interchange expenses or railroads' relative responsibilities. It would only need to rule that on the record before it in this proceeding, it is appropriate for CP to bear the switching costs associated with interchange deliveries to Clearing, as CP has historically done for its Clearing deliveries to CN, and as CN is doing for interchange traffic it delivers to CP.

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of April 2020, I caused a copy of the foregoing Petition for Declaratory Order to be served by U.S. Postal Service or more expeditious means upon:

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As a courtesy, the Petition has also been served on parties listed on the service list for Finance Docket No. 36299.

/s/ Hanna Chouest
Hanna M. Chouest

**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 WILLIAM ALBRITTON

My name is William Albritton, and I am a General Manager at CN. I joined CN in 1990 and have over 14 years of senior management experience, serving as Superintendent and General Superintendent prior to my appointment as General Manager in 2014. I am responsible for overseeing CN rail operations in the Chicago area. I have served in a variety of terminals on the CN network, including at the Chicago Rail Traffic Control Center. I am particularly familiar with CN's interchange operations with Canadian Pacific ("CP") at Spaulding and the Belt Railway's Clearing ("BRC") Yard and have been involved in negotiations with CP regarding the movement of the CN-CP interchange in the Chicago area.

In 2010, CN and CP entered into an interchange agreement that set Spaulding as the primary location to interchange traffic in Chicago. The selection of Spaulding was intended to consolidate operations to facilitate interchange for both railroads in the complex Chicago region. Historically, CN and CP also interchanged traffic at Clearing Yard; all hazardous traffic that requires a secure handoff must be

interchanged at Clearing, and other nonhazardous traffic was occasionally interchanged there.

CN is continuously striving to improve network fluidity, which is imperative to promote efficient asset utilization and good customer service. One way in which CN can improve fluidity is by eliminating chokepoints on its system. The Spaulding interchange was one such chokepoint. By moving interchange activities from Spaulding to a more suitable location, CN's network is more resilient, and fluidity in the important Chicago area has improved.

When the interchange was active, CN and CP interchanged traffic at Spaulding on a near-daily basis. Each day on average, CN delivered 42 CP-bound interchange cars to CP and CP delivered 29 CN-bound interchange cars to CN at Spaulding. In March and April of 2019, CN delivered as many as 97 cars to CP in one day, and CP delivered a high of 86 cars to CN in a day.

Over the last 8 years, it became clear that the Spaulding interchange was not an operationally feasible or equitable location for the interchange of CN and CP traffic, for three primary reasons: (1) CN's single-track main line was blocked while CP or CN placed or pulled interchange traffic; (2) interchange operations blocked nearby at-grade crossings at Spaulding Road, West Bartlett Road, and Stearns Road; and (3) CN classified all of the interchange traffic at Kirk Yard, resulting in CN performing a significant portion of the work and incurring significantly more expense than CP, because CN traveled between Spaulding and Kirk Yard twice for each interchange.

Since August 2019, CN and CP have been operating under an Interim Agreement, under which CP delivers its interchange traffic to CN at the BRC's Clearing Yard {{with CN reimbursing CP on an interim basis for 100% of the switching fees CP pays to the Belt Railway for Clearing interchange traffic that was formerly interchanged at Spaulding, pending a final Board decision as to who was responsible for those costs.}} These operations have been smooth and consistent with the historic experience of the carriers, who had for years been interchanging CP-to-CN bound TIH traffic, as well as some non-TIH cars, at Clearing, with CP paying the switching fees for the traffic it is delivering. Thus the only outstanding issue is who should pay for CP to deliver CN's cars to Clearing.

In the following statement, I explain the operational challenges that made Spaulding an infeasible interchange location. I also discuss interchange operations under the Interim Agreement, which have continued to work smoothly for traffic interchanged at Clearing.

A. CP and CN Interchange Operations Regularly Blocked CN's Single-Track Main Line When Interchanging Traffic at Spaulding.

When CP and CN were interchanging traffic at Spaulding , these interchange operations blocked CN's single-track main line nearly every day. Blocking the single-track main line during interchange operations caused congestion problems on CN's network that radiated across Chicago and beyond.

Specifically, CN's single-track main line was blocked in each of these three moves that were required to complete interchange:

- each time CN delivered CP-bound interchange cars to Spaulding,

- each time CP picked up CP-bound interchange cars from Spaulding, and
- each time CN picked up CN-bound interchange cars at Spaulding.

As Exhibit 2 illustrates, the CN single-track main line crosses both Bartlett and Spaulding Roads. CN's sidings (where CN delivered and picked-up cars for interchange to CP) are located between Bartlett and Spaulding Roads. CP's siding tracks are accessed from the Spaulding West Wye, which connects to CN's single-track main line, or from Metra's tracks. Any time either railroad needed to place or pull cars from CN's sidings, or any time cars were pulled from CP's siding, CN's single-track main line was blocked. Blocking CN's single-line main nearly every day deteriorated CN's fluidity on adjacent track segments in its network across Chicago.

Interchange operations involve a number of consecutive train movements that take time. CN has included photos of some of these operations at Spaulding, which illustrate the extent to which the single-track main line was blocked during interchange.

When CN conducted an interchange move at Spaulding to drop off cars for subsequent CP pick-up, it was required to complete the following steps:

- CN train arrives at the CN Bartlett Road crossing and pulls through the crossing, as illustrated by the following photo:



- CN sets out cars on the siding south of Bartlett Road. This operation blocks the at-grade crossing at Bartlett Road.
- CN blocks the main line to shove additional cars onto a second siding.
- CN moves north on to the CN Main and crosses Spaulding Road onto the CP siding to pick up cars.
- CN ties onto cars set out in the CP siding and does a brake test. The conductor must walk both sides of the train to complete a safety inspection.
- CN requests permission from the dispatcher to enter the main line and then must line the hand-thrown switches.
- CN enters the main and shoves back onto a second CP siding to pick up additional cars. It takes approximately 45 minutes to compile a train from cars placed on 3 interchange tracks. During this time, the single-track main line is blocked.
- CN pulls forward onto the mainline until the last car is completely on the main line.
- CN airs the cars and must perform an air test.

Given space limitations on each individual siding track, depending on the number of cars to be set off for interchange, these operations sometimes needed to be completed two or three times to place cars on the individual interchange tracks. On May 14, 2019, CN completed a typical interchange operation. The CN train arrived at Spaulding at 17:57 and completed operations at 19:29. During that time, CN's single-track main line was blocked for a minimum of thirty minutes.

CP's operations at Spaulding are similarly complicated. On May 14, 2019, CP arrived at Spaulding at 22:10 and departed nearly 7 hours later at 04:54. Those operations included the following movements:

- CP train arrives at the Metra Spaulding Road crossing, and crosses the CN single-track main line, as illustrated by the following photo:



- CP must wait until the CN single-track main line is clear.
- CP shoves back into the CP siding tracks and sets out cars.

- CP again crosses the CN single-track main line and through the Spaulding Road crossing to switch onto another CP siding and wait again for the CN single-track main line to clear.
- CP shoves back through the CN Spaulding Road crossing onto the CN single-track main line and blocking Bartlett Road to shove back into the siding and pick-up CP-bound cars.
- CP performs an air test.
- CP again enters the CN single-track main line to couple with cars set out on additional sidings.
- CP pulls interchange cars north through the Bartlett Road crossing and onto the CN main line to connect to the Metra tracks and depart the location. During this particular operation, Bartlett Road was blocked for 18 minutes and the CN single-track main line was blocked for a minimum of 12 minutes.

The following photo illustrates the final operation, where CP must block the CN single-track main line as well as the at-grade crossing at Bartlett Road. As the photo shows, vehicular traffic is blocked during these CP operations:



Throughout each of these operations, CN's single-track main line was blocked. Blocking the CN main line for these operations caused congestion on CN's network and reduced fluidity on CN's lines in the Chicago area. In fact, at times, the interchange operations at Spaulding required CN to hold trains on the main line while interchange operations occurred. This required CN to idle trains on sidings adjacent to other communities while waiting for interchange operations at Spaulding to be completed.

In the busy Chicago area, CN's single-track main line is in high demand. Portions of CN's line are utilized by Metra and Amtrak. There are increased Metra commuter trains during morning and evening rush hour, and fewer freight trains are able to operate during those times. CN's single-track main line also crosses the lines of other Chicago railroads, including CP. Because of various interlocking agreements,¹ CN's operating windows are already time-constrained. The Spaulding interchange operations further limited the number of runs CN could complete in a day because of the interference it caused on CN's single-track main line and thus further impaired the fluidity of CN's network in the Chicago area.

The nature of CN's largely single-line system also means that there are days in which CN could not allow interchange operations to occur at Spaulding, because of the priority that must be given to trains moving over the system. On other

¹ An interlocking system is a set of signals that prevents trains from conflicting movements through an arrangement of tracks, such as junctions or crossings, allowing trains to receive authority to proceed when routes have been detected to be safe. In the Chicago region, railroads have interlocking agreements that control when a railroad may cross the tracks of another railroad.

occasions, CN had to limit the amount of time CP could spend on the line conducting operations, which could result in CP only being able to pull a portion of the traffic slated for interchange on that day. This caused delays for the interchanged traffic.

The interference incurred on the main line as a result of interchange operations at Spaulding created a significant chokepoint on CN's system. By moving the interchange point for CN-to-CP and CP-to-CN traffic, significant improvement in network fluidity has been gained. Particularly in the busy Chicago area where each rail line seeks resiliency and improved fluidity, it is important to alleviate such chokepoints where possible.

B. CP and CN Interchange Operations at Spaulding Regularly Occupied the At-Grade Crossings at Spaulding Road, West Bartlett Road, and Stearns Road.

The tracks connecting CP and CN lines to facilitate interchange at Spaulding cross Spaulding Road at grade. As a result, Spaulding Road was blocked for daily interchange operations. Interchange operations often blocked other nearby roads as well. The at-grade crossings at West Bartlett Road and Stearns Road were often blocked when longer trains were interchanging traffic, because the crew had to make various forward and reverse moves over the crossings to set off or pick-up cars, as described above. The train must also stop during interchange movements to line hand-thrown switches before proceeding. In 2016, Spaulding Road was blocked for 10 minutes or more 167 times for interchange operations. West Bartlett Road was blocked 163 times and Stearns Road was blocked 84 times for more than 10 minutes while crews were conducting interchange moves at Spaulding. Interchange

operations accounted for the vast majority of blocked crossings at Spaulding, West Bartlett, and Stearns Roads in 2016, as illustrated by the table on the next page.

**Summary of 10 Minute Activations
at Crossings Near Spaulding²**

2015 - 2016

		Activations Caused by Interchange Operations			
Crossing	Total Activations	Total	Per Month	Per Day	% of total
Spaulding Rd.	434	402	16.8	0.6	92.6%
Stearns Rd.	295	154	6.4	0.2	52.2%
West Bartlett Rd.	458	279	11.6	0.4	60.9%
Total	1187	835	34.8	1.1	70.3%

2015

		Activations Caused by Interchange Operations			
Crossing	Total Activations	Total	Per Month	Per Day	% of total
Spaulding Rd.	251	235	19.6	0.6	93.6%
Stearns Rd.	137	70	5.8	0.2	51.1%
West Bartlett Rd.	211	116	9.7	0.3	55.0%
Total	599	421	35.1	1.2	70.3%

2016

		Activations Caused by Interchange Operations			
Crossing	Total Activations	Total	Per Month	Per Day	% of total
Spaulding Rd.	183	167	13.9	0.5	91.3%
Stearns Rd.	158	84	7.0	0.2	53.2%
West Bartlett Rd.	247	163	13.6	0.4	66.0%
Total	588	414	34.5	1.1	70.4%

² The data in this table was previously publicly reported to the Board in connection with *Canadian National Railway Co. & Grand Trunk Corp.—Control—EJ&E West Co.*, STB Fin. Docket No. 35087.

A comparison of blockages at these grade crossings before and after implementation of the Interim Agreement further illustrates that the blockages at these three roads were primarily attributable to interchange operations at Spaulding:

Monthly Total Activations Over 10 Minutes at Spaulding Road, Stearns Road, and West Bartlett Road

January 2019 Through July 2019 (Before Interim Agreement)

Month	Spaulding Road	Stearns Road	West Bartlett Road	Total
Jan. 2019	24	19	38	81
Feb. 2019	16	18	28	62
March 2019	14	27	39	80
April 2019	20	30	42	92
May 2019	20	23	44	87
June 2019	20	18	41	79
July 2019	11	23	40	74
Average	17.9	22.6	38.9	79.2

In the first seven months of operations under the interim agreement, blockages over 10 minutes decreased to an average of 0.7 per month at Spaulding Road, 8 per month at Stearns Road, and 9.4 per month at West Bartlett Road, a total decrease of more than three quarters from when interchange occurred at Spaulding:

Monthly Total Activations Over 10 Minutes At Spaulding Road, Stearns Road, and West Bartlett Road

September 2019 Through March 2020 (After Interim Agreement)

Month	Spaulding Road	Stearns Road	West Bartlett Road	Total
Sept. 2019	1	14	16	31
Oct. 2019	1	9	7	17
Nov. 2019	0	7	9	16
Dec. 2019	1	6	9	16
Jan. 2020	0	4	9	13
Feb. 2020	0	7	5	12
March 2020	2	9	11	22
Average	0.7	8.0	9.4	18.1

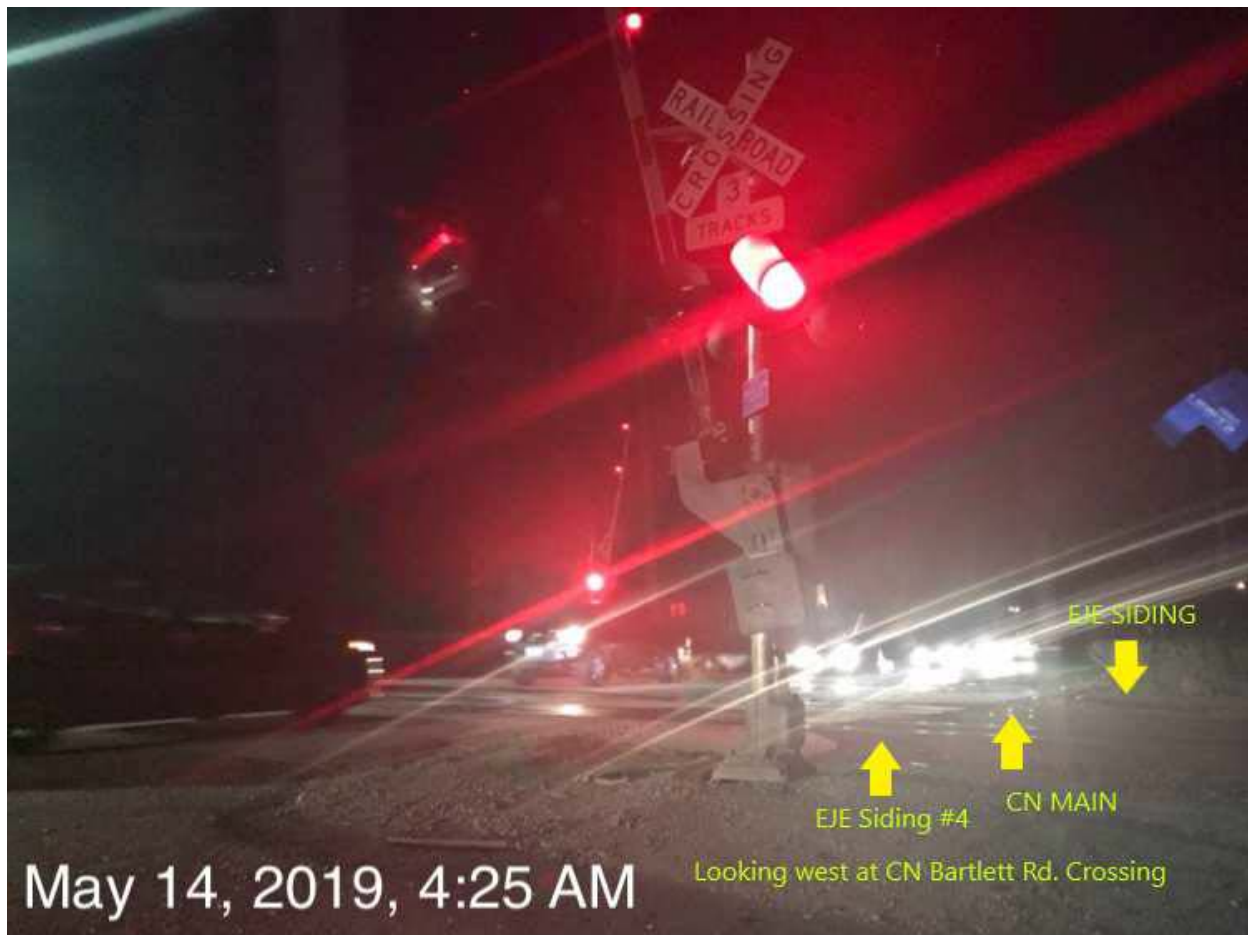
The following photos illustrate how interchange operations blocked nearby roads. First, the photo below illustrates how CP blocked Spaulding Road to reach the CN sidings in order to pick up CP-bound cars:



To leave the CN sidings with the coupled interchange traffic, CP blocked the Bartlett Road crossing:



CN's similar operations also blocked these crossings. Blockages could last as long as 30-45 minutes for each interchange event. Even in the early morning hours, upon completion of these interchange activities, vehicular traffic was waiting and would back up at the blocked crossings:



On 14 May, 2019, CN placed 63 cars on the EJE side tracks for CP interchange. It took the CN crew two and a half hours to complete the operation, during which West Bartlett Road was blocked for 12 minutes and Spaulding Road was blocked for eight minutes.

Before the Interim Agreement relocated the interchange operations to Clearing, CN received numerous complaints from the adjacent communities about blocked grade crossings. For example, the Village of Bartlett spoke to CN numerous times about the blockages at West Bartlett, Stearns, and Spaulding Roads. According to the Village's letter to the Board, the Village has complained not only to CN but to CP as well about the "prolonged backups on West Bartlett, Stearns and

Spaulding Roads.” *See* CN Reply to CP Petition for Declaratory Order, Exhibit 1, Fin. Docket No. 36299 (filed May 20, 2019).

It is not possible to conduct interchange operations at Spaulding without blocking at-grade crossings at Spaulding Road, West Bartlett Road, and Stearns Road. These blocked crossings are not necessary because there are suitable alternatives for interchange operations. Communities requested that the Board allow CN to move its interchange received point to another location to reduce these at-grade crossing blockages for interchange operations. *See id.* (“On behalf of our residents, the Village of Bartlett is coming to you . . . to ask that you **DO NOT** require the railroads to continue interchanging at Spaulding.”) (emphasis in original). And since the interchange has moved, communities have noted the “noticeable decrease” in blocked crossing complaints. Letter from Kevin Wallace, Village of Bartlett President, at 1, Docket No. 36299 (filed Oct. 7, 2019).

C. Use of The Spaulding Interchange Requires Significantly More Work for CN.

Use of the Spaulding interchange for both CN-to-CP and CP-to-CN interchange traffic requires significant operational and financial outlays by CN. Because of the limited size and location of the Spaulding interchange, no blocking or switching activity occurs at Spaulding.

Blocking is the process of coupling individual rail cars destined for the same location together into a “block,” which allows those cars to traverse the system together. Switching is the process of moving a rail car—or a block of rail cars—from one train to another, or from one train to a track in a yard, or from one track to

another track. Together, these activities result in the classification of cars— assembling cars destined for the same yard or location together to allow trains to be built efficiently. Classification activities, such as switching and blocking, typically occur at large yards that have tracks dedicated for this purpose. Some of the largest classification yards include a “hump” track, which facilitates efficient classification. A hump allows cars to be pushed up one side and then, with the assistance of gravity, pushed down the hump and into the appropriate classification track. A railroad employee utilizes remote control switching to control which classification track switch is set to ensure the car is blocked.

Spaulding is limited to 4 CN siding tracks and 5 CP siding tracks, with Spaulding Road crossing between the two. As CN has explained, any movement of cars between the interchange tracks blocks CN’s single-track main line. Given the location of CN’s single-line main plus the limited siding tracks and the at-grade crossing, it is not feasible to classify, block, or switch cars at Spaulding. To facilitate interchange at Spaulding, CN blocked and switched Spaulding interchange traffic at its closest classification yard, which is Kirk Yard. Kirk Yard is 80 miles from Spaulding, on the east side of Chicago. This resulted in CN having to haul both CN-to-CP interchange traffic and CP-to-CN interchange traffic across Chicago, to and from Kirk Yard, for blocking and switching. CN had to traverse Chicago twice to complete any interchange with CP. These operations required CN to incur not only the operational costs of doing the work, but also the financial crew costs. To complete these interchange movements, CN was responsible for 90% of the work

and 90% of the cost, while CP reaped the benefits of CN's work and expense. CN did this work for both interchange received and interchange forwarded traffic, without any compensation or reciprocation from CP for more than 8 years.

The allocation of work to complete these interchange activities fell primarily to CN. CN had to bear a disproportionate amount of the time and expense on a daily basis to complete these interchange activities. The solutions that CN proposed would still result in CN completing the bulk of the work, but would more equally share the burdens of interchange between the two carriers. For example, under the Interim Agreement, CN still blocks and switches CP-bound traffic at Kirk and hauls that traffic to the BRC for interchange with CP.

D. CN Cancelled the Interchange Agreement Designating Spaulding and Proposed Numerous Feasible Alternative Interchange Arrangements for CP to Deliver Cars to CN.

CN first raised these concerns about the use of the Spaulding interchange with CP more than one year ago. CN has been willing to be flexible and has offered multiple alternative solutions. CN's goal in moving the interchange has been to reach a more equitable, efficient, and commercially fair solution that does not have the same operational hurdles that are present at Spaulding. CP has been unwilling to finalize an agreement to alter operations for delivering traffic to CN, despite the many alternatives CN has proposed, unless CN would pay all costs.

Following a year of failed negotiations, CN elected to terminate the Spaulding Interchange Agreement, pursuant to its terms, which allow either party to terminate upon 60 days written notice. CN informed CP orally that it was going to terminate the agreement two weeks prior to tendering the 60-day written notice.

CN has consistently, and for over one year before CN terminated the Spaulding Interchange Agreement, aimed to have open communications with CP about the problems at Spaulding and its intent to close the interchange. Unfortunately, CP did not maintain the same levels of open communication with CN. On May 2, 2019, just two days after CP filed its Petition with the Board in Docket 36299, CP informed CN of its intent to exercise its option to terminate a different interchange agreement at Cardigan Junction, near St. Paul, MN. *See* Exhibit 4, May 2, 2019 Letter from C.E. Hubbard to M. Matteucci. At no time prior to the cancellation had CP informed CN of any concerns about the feasibility of interchange operations at Cardigan Junction.

When CN cancelled the interchange at Spaulding, CN proposed multiple locations where CP could deliver interchange traffic to CN, including CN's Glenn Yard, CN's Kirk Yard, and the BRC's Clearing Yard. Each of these options would have resulted in a more equitable division of labor at an operationally feasible location. Following the Board's November 27, 2019 Decision in Docket 36299, finding that Kirk is not a reasonable interchange location under the specific circumstances of that case, Clearing remains a feasible interchange option.³ As operations under the Interim Agreement have illustrated as well as long-standing

³ During negotiations, CN offered CP the option of interchanging traffic at CN's Glenn Yard. CP rejected that offer. Since the time of that offer, another carrier agreed to begin delivering interchange traffic to Glenn Yard. As a result, Glenn Yard is no longer a feasible option for these interchange activities because the yard does not have the capacity for interchange operations for both CP and the other carrier.

operations for TIH traffic and other cars, interchange at Clearing has been consistent and well executed, with the BRC functioning as a switching carrier, as intended.

Operationally, Clearing Yard has proved to be a reasonable and workable solution. Clearing Yard is a hump yard, which facilitates the classification of traffic that is tendered at that location. CP informed me that—even prior to the Interim Agreement—it had an existing two trains per day that operated between Bensenville Yard and Clearing Yard. Accordingly, CN believes that CP has often been able to include the approximately 30 cars per day destined for CN on one or both of those trains.⁴ CP would not even need to block the traffic—the BRC will hump the cars and classify them upon delivery at Clearing Yard.

Importantly, Clearing Yard has served as an existing interchange between CP and CN. Clearing has proven to be operationally feasible under the Interim Agreement and historically, as all hazardous interchange traffic was interchanged at Clearing rather than Spaulding, and CP tendered some non-hazardous traffic to that location. In 56 days, between March 22nd and May 14th, 2019, CP tendered 140 non-hazardous cars for CN at Clearing. Those cars amount to 69% of the traffic CP tendered to CN at Clearing during that period. At no time during this period

⁴ 30 cars was the average during peak volume times. With volumes lightening, it is all the more likely that CP can include those cars on one of the trains destined for Clearing. Even if volumes fluctuate and return to normal levels in the future, CP would still be able to put the interchange cars onto the existing trains.

were there congestion concerns at Spaulding that required this traffic to be delivered at Clearing.

Clearing Yard is also an equitable choice. Both railroads operate at Clearing already and interchange traffic there. Under the Interim Agreement, CP's workload has been alleviated because BRC classifies the cars, work that CP would otherwise have to do. Tendering traffic at Clearing also minimizes the distance that CP has to travel to effect the interchange. While CN still has to traverse more of the Chicago area than CP, the burdens are shared more equitably, as illustrated below:

Distance to Spaulding

Spaulding to Bensenville Yard (CP responsible)	17 miles
Spaulding to Kirk Yard (CN responsible)	84 miles

Distance to Clearing

Clearing Yard to Bensenville Yard (CP responsible)	17 miles
Clearing Yard to Kirk Yard (CN responsible)	39 miles

As the above tables illustrate, Clearing Yard is a more equitable solution, and does not require CP to travel additional mileage than it did to Spaulding. In comparison, CN still has to travel nearly twice as far as CP to accept the CN-bound traffic. But ultimately, this solution offers shorter routes, on existing trains, for both railroads and should be considered a win-win.

VERIFICATION

I, William Albritton, verify under penalty of perjury that the foregoing Verified Statement in support of Wisconsin Central, Ltd.'s Petition for Declaratory Order is true and correct. Further, I certify that I am qualified and authorized to sponsor this Verified Statement.

Executed on this 13 day of April, 2020.

A handwritten signature in black ink, appearing to read "William Albritton", is written over a horizontal line.

William Albritton

EXHIBIT 1



THE VILLAGE OF
BARTLETT

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VILLAGE PRESIDENT
Kevin Wallace

ADMINISTRATOR
Paula Schumacher

VILLAGE CLERK
Lorna Ollert

TRUSTEES
Michael E. Cameron D.C.
Vince Carbonaro
Raymond H. Deyne
Kristina Gabrenya, OD, FAAD
Adam J. Hopkins
Aaron H. Reinke

May 17, 2019

Ms. Cynthia T. Brown
Chief, Section of Administration Office of Proceedings
U.S. Surface Transportation Board
395 E Street, Southwest
Washington, DC 20023

Re: STB Finance Docket 36299 Soo Line Railroad Company Petition for Declaratory
Order and Preliminary Injunction - Interchange with Canadian National

Dear Ms. Brown:

In 2008, The Village of Bartlett wrote numerous letters to the STB on behalf of our residents in hopes of stopping CN's acquisition of the EJ&E rail line. The Village feared a significant increase in train traffic, considerably more at-grade crossings and an overall detriment to the public health and safety of our residents. Eleven years later, all of our fears have been realized. Over 1,300 Bartlett homes lie west of the CN rail line, often times cut off from Bartlett Fire Protection, Police, work and school for up to 45 minutes at a time because trains sit, stopped on the tracks crossing West Bartlett, Stearns and Spaulding Roads.

In an attempt to alleviate some of the hardship for our residents the village has discussed signaling options to vehicles on West Bartlett Rd., which could give an estimated time of when a train will clear the crossing, but CN informed us that the train schedules are unpredictable. Another option that has been considered is an overpass. This option wouldn't be viable for decades and comes with a massive cost to our residents.

Bartlett's earliest roots involve rail activity and we currently have three lines that crisscross our village. Our residents are no strangers to waiting for trains to pass, and all but a small handful of the railroad complaints we receive are in regards to the CN line and the prolonged backups on West Bartlett, Stearns and Spaulding Roads. The village has complained to CN and CP about this on numerous occasions. We understand that there is a proposal by CN to move the interchange operations from Spaulding and reduce at-grade blocked crossings. On behalf of our residents, the Village of Bartlett is coming to you, for a second time, regarding the CN/EJ&E line. This time, it is to ask that you **DO NOT** require the railroads to continue interchanging at Spaulding. The last ten years have greatly affected many of our residents. Moving the interchange would not only improve traffic flow, it would increase the safety of our residents west of the track, giving them better access to police, fire and ambulance services. We appreciate the opportunity to submit the village's concerns.

Sincerely,

Kevin Wallace
Village President

KW/sh

EXHIBIT 2

SPAULDING MAP

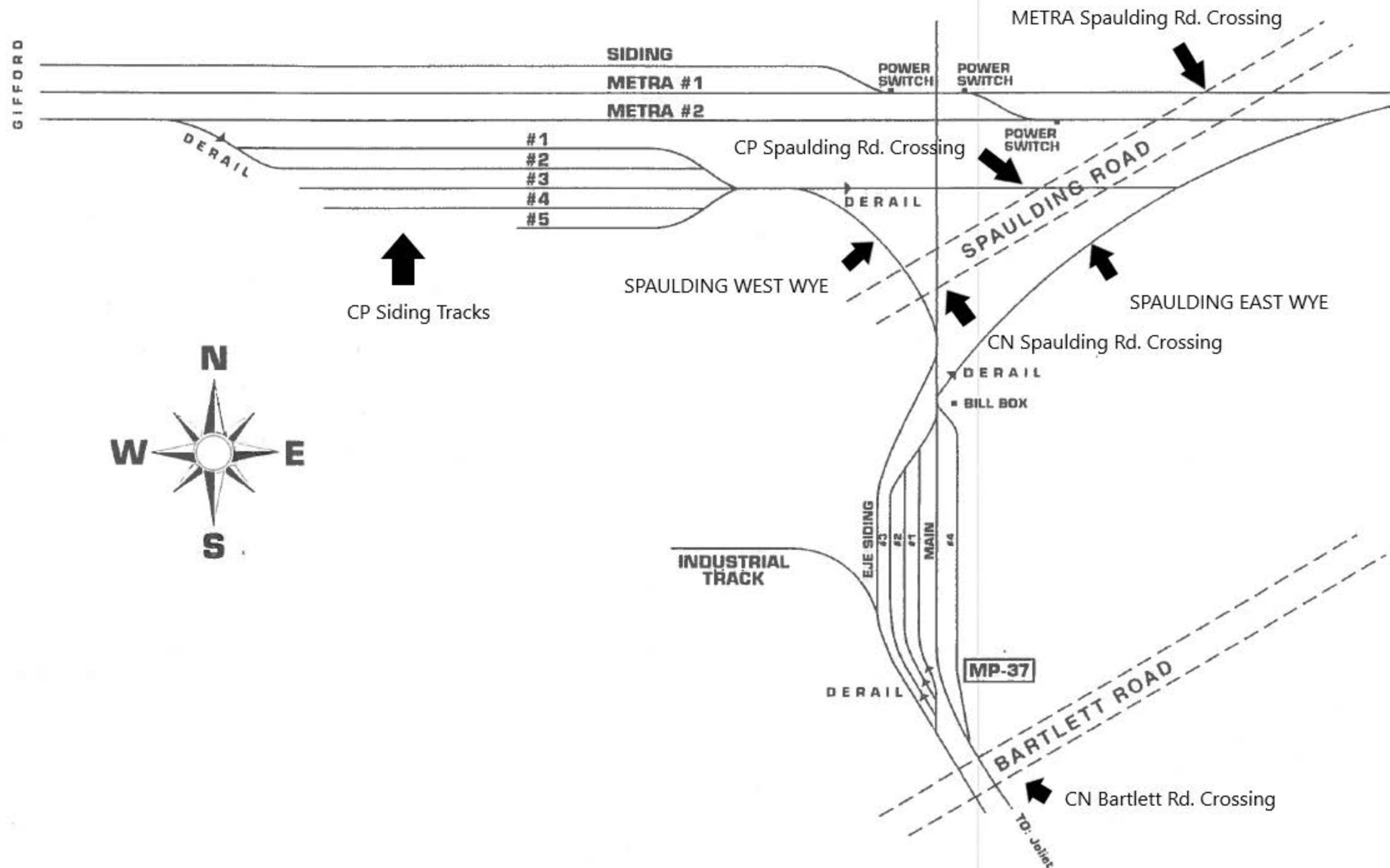


EXHIBIT 3



**Executive Vice-President & Chief
Operating Officer**

**Vice-président Exécutif et Chef
de l'exploitation**

Michael A. Cory

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Télécopieur: (514) 399-5240
Courriel: michael.cory@cn.ca

May 1st, 2019

Mr. Robert A. Johnson
Executive Vice President, Operations
Canadian Pacific Railway Co.
7550 Ogden Dale Road, SE
Calgary, Alberta Canada T2C4X9

Re: CN/CP Interchange at Chicago

Dear Mr. Johnson,

I am writing to respond to your April 18, 2019 letter regarding the designation of Kirk Yard as the point in the Chicago Terminal for CN to receive interchange traffic from Soo Line Railroad Company d/b/a Canadian Pacific (CP).

While we were disappointed to see that CP has filed a formal complaint at the STB in the midst of our continued commercial discussions, CN continues to believe that a fair commercial resolution can be reached that serves the interests of both our companies in moving traffic efficiently through the Chicago Terminal.

Continued use of Spaulding is not a reasonable option, however. CP's suggestion that Spaulding works well as an interchange point for both CP and CN to exchange interchange traffic ignores the communications that CN has had with CP for over a year about the problems caused by interchange operations at Spaulding. As CN has explained, interchange operations at Spaulding regularly block CN's single track main line, leading to congestion problems on CN's network and causing blockages at several at-grade road crossings. Moreover, as CN has explained, CN is currently transporting both CP-received interchange traffic and CP-bound interchange traffic from Spaulding to Kirk for blocking and switching. It is not fair for CP to expect CN to do the work in both directions.

What is fair is for CN and CP to share the operational costs and burden of interchanging traffic in Chicago. We believe that the following represents an appropriate compromise as has been discussed by our respective operating teams: CN would deliver interchange cars to CP at Bensenville using the IHB, paying the switching charge for IHB to deliver cars to CP. In turn, CP would deliver interchange cars to CN using BRC's Clearing Yard, bearing the switching charges for BRC. CP would bear the costs of trackage rights to move over Metra between B-12 and Craigin to deliver CN-bound cars to Clearing Yard.

When CN takes the cars from Clearing to Kirk, CN would in turn bear the trackage rights fees to move over the Elsdon subdivision to and from Clearing. This arrangement is more than fair to CP, in part because under it CN would be paying for more trackage rights miles than CP would have to pay to accomplish the interchange.

It is clear that this proposed arrangement will work for CP operationally—the Verified Statement filed with its STB complaint says that CP is “agreeable” to receiving interchange traffic at Bensenville and delivering CN-bound traffic to Clearing “if CN would pay the cost under [CP’s] trackage rights agreement with BRC to get CN’s traffic to Clearing.” While CN does not agree that it is required to pay for both its own trackage rights fees and CP’s trackage rights fees, that dispute is no barrier to CP and CN implementing this arrangement now, and reserving the question of who pays for CN’s exercise of its trackage rights for further negotiation.

Threats that CP will sabotage Chicago operations by refusing to agree to an interchange relocation in Railinc and by letting traffic pile up rather than deliver it to CN’s designated interchange point are not productive—particularly since the only current dispute between the parties is the pure financial question of whether CN is required to reimburse CP for its trackage rights costs. If CP wishes to have the STB adjudicate that question, it has that right. But there is no basis for CP to threaten to stop interchanging traffic altogether unless CN agrees in advance to pay for CP’s out-of-pocket costs for an interchange arrangement that CP otherwise finds to be “agreeable.”

We hope that CP will accept this reasonable compromise. If CP is unwilling to accept it, then CN will exercise its statutory right to designate Kirk as its point to receive interchange traffic from CP, effective May 11 per previous correspondence.

Sincerely,

A handwritten signature in black ink that reads "Mike Cory". The signature is written in a cursive, slightly stylized font.

Mike Cory

Executive Vice-President & Chief Operating Officer

EXHIBIT 4



C. E. Hubbard
Director
Interline & Passenger - South

Battle Creek Building
1010 Shop Road
St. Paul, MN
55106

T (612) 904-5964
C (612) 201-2527
E chuck_hubbard@cpr.ca

Mr. Michael Matteucci
Regional Director Contracts & Administration
Canadian National Railway Company
17641 South Ashland Avenue
Homewood, IL 60430-1345

May 2, 2019

**VIA EMAIL
AND U.S. MAIL**

Re: CP/CN Agreement for Interchange of Freight Traffic

Dear Mr. Matteucci:

SOO Line Railroad Company, d/b/a Canadian Pacific (CP) and Wisconsin Central LTD, d/b/a Canadian National (CN) are parties to a certain Interchange Agreement dated September 16, 2014 ("Agreement") which provides for interchange between CP and CN upon CP trackage located at Cardigan Junction in the vicinity of St. Paul, MN.

Section 16 of the Agreement provides for both term and termination of the Cardigan Junction interchange operation. Specifically Section 16 (a) states:

This Agreement commences on the Effective Date and remains in effect (hereinafter referred to as the "Term") until and/or unless terminated earlier pursuant to terms and conditions set forth herein.

Section 16 (c) of the Agreement further provides:

Either Party may, at any time and for any reason whatsoever, terminate this Agreement upon sixty (60) days written notice to the other Party.

Pursuant to Section 16 (c) of the September 16, 2014 interchange agreement, kindly consider this letter as CP's notice of termination effective July 1, 2019. Accordingly, June 30, 2019 will be the last day the parties will conduct interchange at Cardigan Junction. During the sixty-day notification period, CP looks forward to discussing a new interchange location with CN.

Sincerely,

A handwritten signature in blue ink, appearing to read "C. E. Hubbard".

C. E. Hubbard
Director Interline and Passenger - South

Cc: Robert A Johnson, EVP Operations
Tony Marquis, SVP Operations
Nicholas C. Walker, GM Operations
Adolph Gameiro, Director, Interline Agreements

EXHIBIT 5

**March 11, 2019 Letter from M. Matteucci
to C. Hubbard**



www.cn.ca

Southern Region

Michael Matteucci
Region Director Contracts and Administration

17641 So. Ashland Avenue
Homewood, IL 60430-1345
T 708.332.3598
F 708.332.3673

March 11, 2019

VIA EMAIL

Mr. Chuck Hubbard
Director Interline, Joint Facilities
& Passenger West
Canadian Pacific
120 South 6th Street
Minneapolis, MN 55402

Dear Mr. Hubbard:

This is in regard to the agreement between Soo Line Railroad Company d/b/a Canadian Pacific ("CP") and the Wisconsin Central Ltd ("CN"), successor in interest to the Elgin, Joliet and Eastern Railway Company, dated August 12, 2010 ("Agreement"), which, among other things, provided for the interchange of loaded and empty freight cars between CN and CP at Spaulding in Bartlett, Illinois.

Please regard this letter as CN's sixty (60) day notice of termination pursuant to Section 14 of the Agreement.

CN designates CN's Kirk Yard in Gary, IN as the location to receive all interchange traffic destined to CN from CP in Chicago and shall provide CP any necessary operating rights, as may be required, to operate into Kirk Yard.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Michael Matteucci', is written over a blue horizontal line.

Michael Matteucci

cc: File 6002560

EXHIBIT 6

**April 3, 2019 Letter from R. Johnson
to M. Cory**



Robert A Johnson
Executive Vice-President
Operations

7550 Ogden Dale Road SE
Calgary Alberta
Canada T2C 4X9

T 403 319 3600
C 612 760 1533
E Robert_Johnson@cpr.ca

April 3, 2019

Mr. Mike Cory
Executive Vice President and Chief Operating Officer
Canadian National Railway
935 de la Gauchetière Street West
Montreal, QC
Canada H3B 2M9

Re: CN/CP Interchange at Chicago

Dear Mr. Cory:

I am writing regarding Canadian National's sudden and unexpected notice to terminate, effective May 10, of the Interchange Agreement between the Elgin, Joliet and Eastern Railway Company (CN) and Soo Line Railroad Company d/b/a Canadian Pacific (CP) dated August 12, 2010, and the path forward to continue interchange of our respective traffic at Chicago.

The 2010 Agreement provided for mutual interchange of freight traffic (non-TIH/non-PIH) at Spaulding Yard, one of only two points of direct physical connection between our two railroads in the Chicago Terminal, the other being Rondout. Interchange at a single point of direct physical connection, Spaulding, provided and still provides efficient interchange for both our roads. It also enabled us to retire and consolidate seven separate sets of earlier, inefficient, interchange agreements. Whatever business reasons CN has to seek to change the Spaulding interchange point cannot be at CP's expense or detriment.

Notwithstanding a termination of the 2010 Agreement, CN will continue to have a legal obligation to effect reasonable interchange with CP at Chicago. As an alternative to Spaulding, CN has proposed to move our interchange to Kirk Yard in Gary, Indiana and provide CP with operating rights over the Elgin, Joliet and Eastern to get there. Interchange at Kirk Yard is unworkable and unreasonable. Kirk is located on the opposite side of the Chicago Terminal from CP's Bensenville Yard. CP has no assignment which goes there or near there. Given the distance to Gary, Indiana, were we to add an assignment our crew's tour of duty would likely expire under the Hours of Service law before they could return to Bensenville. In addition to the taxi cost to ferry the crew back, CP would lose the ability to use the crew on the return trip. In winter months, the length of time for the crew to return would likely extend and further erode our crew base. An assignment to Kirk would also require captive locomotive power, another costly inefficiency. Kirk Yard will not work.

CN has also suggested moving the interchange point to CN's Glenn Yard in Chicago, but this too is unreasonable. Given Glenn Yard's location and the density of traffic flows of the various roads in the Chicago Terminal, using Glenn Yard for interchange also runs the risk of our crews expiring on Hours of Service. Like Kirk, we do not go to Glenn today and have no reason to do so. Also, to get to Glenn Yard CP would have to exercise its trackage rights on the Indiana Harbor Belt Railroad (IHB). As I am sure you are aware, CP is under no obligation to exercise its trackage rights on CN's behalf. The exercise of trackage

Mike Cory
April 3, 2019
Page 2

rights is permissive with their holder. An assignment to Glenn would also require captive locomotive power, another costly inefficiency.

In the discussions between our operating officers, CN has suggested it would be willing to deliver CP interchange traffic at Bensenville via the IHB, and that CN would pick up the bridge carrier expense to get the cars there. That is fine as far as it goes.

With respect to CN traffic moving from CP to CN, we are willing to take it from Bensenville to the Belt Railway of Chicago's (BRC) Clearing Yard, and exercise our trackage rights on the BRC to do so, but only if CN pays the per car cost to BRC required under the CP/BRC trackage rights agreement. It is only reasonable for CN to pay to get CN's traffic to Clearing when the sole reason for the change is CN's business decision to move interchange from Spaulding Yard.

In a word, CN's unilateral imposition of an entirely new interchange point on CP in order to effect a business decision of CN should be at CN's expense, not CP's. If CN is not willing to shoulder the cost, then we will continue to interchange at Spaulding.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert A. Johnson".

Robert A. Johnson,
Executive Vice President, Operations

cc: Tony Marquis

EXHIBIT 7

**April 18, 2019 Letter from R. Johnson
to M. Cory**



Robert A Johnson
Executive Vice-President
Operations

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C 612 760 1533
E Robert_Johnson@cpr.ca

April 18, 2019

Mr. Mike Cory
Executive Vice President and Chief Operating Officer
Canadian National Railway
935 de La Gauchetière Street West
Montreal, QC
Canada H3B 2M9

Re: CN/CP Interchange at Chicago

Dear Mr. Cory:

I am in receipt of your letter of April 16. We do not intend to get into a letter writing battle, but a few things need to be said.

CN's claim that Spaulding is no longer a suitable interchange point because volumes have outgrown the facility is not supported by the data. CN/CP interchange volumes at Chicago have not materially changed in the last year as CN suggests. Rather those volumes have remained consistent. If anything, 2019 volumes have declined compared to 2018 and 2017. (A report of the CP/CN average daily interchange car count at Spaulding for 2017, 2018 and 2019 YTD is attached for reference.) We continue to view Spaulding as a suitable facility that has worked well for our two roads and our respective customers for the last eight plus years.

It is clear that for its own economic reasons CN wants to close Spaulding, move the interchange point, and change how it slots trains on its main line. CN is free to make such changes, but not at CP expense. A receiving carrier in a direct physical interchange has to designate a point on its own line and provide a free route to get there, without unreasonable conditions. For the reasons we explained previously, CN's designation of Kirk as the new location where it would receive traffic from CP is not reasonable. As CN now acknowledges, Kirk is unreasonable for distance, among other reasons, which for CP, Bensenville to Kirk, is further than CN, Kirk to Spaulding. As for CP designating a free route on its line, CN has one already at Spaulding (and Rondout) which is a point of direct physical contact on both our roads where we meet in the Chicago Terminal.

We re-iterate our willingness to voluntarily exercise our trackage rights on the Belt Railway of Chicago (BRC) and deliver CN's traffic to the BRC at Clearing, but only if CN pays the per car cost to BRC required under the CP/BRC trackage rights agreement. We would prefer to resolve this matter between ourselves, but if that is not possible we can take it to the Surface Transportation Board for resolution. Pending a decision by the Board we intend to seek a status quo order stipulating the existing interchange point of Spaulding for the benefit of our customers. That is only reasonable when viewed from our customers' perspective.

Mike Cory
April 18, 2019
Page 2

It should be mentioned too that CN's proposed termination of our commercial agreement is one matter, but the business rules administered by Railinc are another. Under those rules an interchange carrier cannot unilaterally change a bilateral interchange point, but rather both parties must agree. If we do not both agree, bills of lading cannot be issued and rates over Chicago at Spaulding cannot be quoted. Again for the benefit of our customers, status quo at Spaulding is what makes the most sense until this matter is resolved.

I am happy to discuss this with you face to face or on the phone, but must insist on a willingness of CN to shoulder the cost of moving the interchange point to further CN's business interest. That's only fair.

Sincerely,



Robert A. Johnson,
Executive Vice President, Operations

cc: Tony Marquis

CP/CN Spaulding Intechange Volumes - Average Cars Per Day			
Year	2019 YTD	2018	2017
CN to CP	38.4	43.9	44.9
CP to CN	27.6	32.6	34.1

EXHIBIT 8

Interim Agreement



Charles W Webster
Senior Counsel - US

11306 Franklin Avenue
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USA

T 630 860 4161
E Charles_Webster@cpr.ca

August 16, 2019

Matthew J. Warren
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005

Re: *Soo Line Railroad Company—Pet. for Declaratory Order and Preliminary Injunction—
Interchange with Canadian National, STB Finance Docket No. 36299*

Dear Mr. Warren:

I am writing to memorialize the interim agreement our clients reached today regarding interchange of their respective traffic at Chicago pending a final decision in this matter, now pending before the United States Surface Transportation Board (Board). Soo Line Railroad Company d/b/a Canadian Pacific (CP) and Canadian National Railway Company (CN) hereby agree:

- Pending final Board decision, CP to deliver CP to CN traffic to Clearing with CN paying BRC 100% of BRC costs regarding traffic that would otherwise be interchanged at Spaulding. CP will be responsible for BRC costs for TIH/PIH and other hazardous cars requiring attended transfer that CP already delivers to CN at Clearing. The parties agree to no cap on the number of CN cars that CP will deliver to Clearing on CN's account, provided the cars (non-TIH/PIH) would otherwise have been interchanged to CN at Spaulding;
- CN agrees to maintain and leave Spaulding in service pending final Board decision. CN may classify some tracks previously used for interchange as inactive for inspection or maintenance purposes (lock out), but CN will not remove any tracks pending final Board decision, and CN assumes full responsibility for restoring tracks to active service within 30 calendar days if interchange reverts to Spaulding pursuant to this agreement;
- Either party, CN or CP, may terminate this interim agreement upon 60 days written notice, at their individual discretion;
- If CN terminates the interim agreement, interchange will revert to Spaulding until final Board decision;
- If the final Board decision is in CP's favor (meaning CP cannot be forced to interchange/deliver to Clearing absent CP consent), interchange will continue at Clearing at

Matthew J. Warren
August 16, 2019
Page 2

100% CN cost (non-TIH/PIH), or will revert to Spaulding at CN's option; future agreement termination option to lock in economics of CN paying 100% at Clearing;

- If the final Board decision is in CN's favor (meaning CN can force CP to interchange/deliver to Clearing at CP expense), CP to reimburse CN for interim BRC charges consistent with any formula determined by the Board, CN to provide per car billing documentation; CP to CN interchange to continue at Clearing subject to an agreed termination provision;
- CN to deliver CN to CP traffic (now interchanged at Spaulding) to CP at Bensenville, with CN paying 100% of the costs of any third party carriers used in the interchange; no reimbursement for these third party carrier costs regarding CN to CP interchange if the final Board decision is in CN's favor;
- If either party takes an appeal from the final Board decision the interim agreement will continue in place until final decision of the appellate court;
- This interim agreement is without prejudice to either CN or CP with respect to any issue raised in FD 36299;
- The parties will conclude a permanent agreement regarding interchange at Chicago upon the final Board decision (or appeal), informed by the decision; and
- Upon execution, the parties will inform the Board of this interim agreement and that as a result CP's motion for a preliminary injunction would be moot.

If CN is in agreement with the foregoing, please execute below on its behalf.

Sincerely,



Charles W. Webster

Agreed and approved on behalf of Canadian National on this 16 day of August, 2019.



Matthew J. Warren
Counsel for Canadian National

EXHIBIT 9

BRC Operating Agreement

THE BELT RAILWAY COMPANY OF CHICAGO

OPERATING AGREEMENT

THIS AGREEMENT, made by and between THE BELT RAILWAY COMPANY OF CHICAGO (hereinafter called the Belt Company), party of the first part; and

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY
BURLINGTON NORTHERN RAILROAD COMPANY
CSX TRANSPORTATION, INC.
CONSOLIDATED RAIL CORPORATION
GRAND TRUNK WESTERN RAILROAD COMPANY
ILLINOIS CENTRAL RAILROAD COMPANY
MISSOURI PACIFIC RAILROAD COMPANY
NORFOLK AND WESTERN RAILWAY COMPANY
SOO LINE RAILROAD COMPANY

(hereinafter collectively called Railway Companies, and singly called Railway Company), party or parties of the second part.

Made for full term of at least 5 years, running to April 1, 1995, and to continue in effect thereafter, until amended by agreement of the parties hereto.

WITNESSETH THAT:

WHEREAS, the Belt Company is the owner of the properties hereinafter referred to as "Belt Railway"; and

Whereas, each of the Railway Companies now is the owner of at least 2600 shares, of the par value of \$100 each, of the capital stock of the Belt Company and each of the Railway Companies has agreed to execute this Agreement; and

Whereas, at rates agreed upon between the Railway Company and the Belt Company, each of the Railway Companies desires to avail itself of the services of the Belt Company and of the use and enjoyment of the rights, privileges, property and facilities of the Belt Company, upon the terms and conditions in this Agreement stated.

ARTICLE ONE.

Grants.

Now, THEREFORE, in consideration of the premises, and of the sums to be paid by the Railway Companies, respectively, and subject to the terms and conditions of this Agreement, the Belt Company grants to each of the Railway Companies, to the extent that the Belt Company has the right and ability to do so, the right and privilege of running and operating the freight trains, locomotives and cars of such Railway Company over and upon, or to use and enjoy, for the purposes of freight traffic, in common with the Belt Company and with the other Railway Companies and with such other companies as hereafter may receive from the Belt Company grants of similar or other rights of use, the following described premises, rights and privileges (herein referred to as "Belt Railway"):

(1) The line of railway of the Belt Company situated in the County of Cook, in the State of Illinois, as shown on File No. 114.12-89 dated January, 24, 1990, marked Exhibit "A", attached to and made a part hereof, which line of railway, together with all rights, privileges, powers, estates and licenses thereto pertaining, is more fully described in that certain deed dated September 1, 1962 (as modified by subsequent Belt Company transactions), wherein Chicago and Western Indiana Railroad Company is Grantor and Belt Company is Grantee, and by this reference is made a part hereof.

(2) The right of way, tracks, bridges, switches and

turnouts, yards, lands, shops, engine house, turntables, structures of every kind, machinery, tools and all other property and appurtenances upon the real estate now owned or as may hereafter be acquired or constructed by Belt Company.

(3) Together with all the franchises, ordinance rights, licenses and other rights and privileges, at any time possessed by the Belt Company, in anywise belonging or appertaining to said property and facilities, or any enlargements thereof or additions thereto.

(4) Also the right and privilege of using the communication facilities owned or leased by Belt Company, subject, however, to the rights and conditions set out in any contracts with parties other than the parties to this Agreement.

(5) The Railway Companies may use the Belt Railway as a bridge for through movement of cars between portions of their own Railroad or between their yards and connections with other Railway Companies and any other railroads not party to this Agreement.

TO HAVE AND TO HOLD the said rights and privileges unto each of the Railway Companies, its successors and assigns, from the effective date of this Agreement, for and during the full term of at least 5 years, running to the first day of April, 1995, and to continue in effect thereafter until amended by the parties, as provided herein, each such Railway Company, its successors and assigns, yielding and paying, therefore, unto The Belt Company, its successors and assigns, or to or for its or their use, the payments established pursuant to this Agreement, and keeping and performing all and singular the covenants and agreements hereinafter set forth, to be by the Railway Companies severally kept and performed;

PROVIDED, that the Belt Company expressly reserves to itself, its successors and assigns, all its corporate franchises and powers in its own behalf to use and to operate, and to grant to other railroad companies the right to use and to operate the same, consistent with the rights and privileges by this Agreement granted to the Railway Companies, respectively; and,

PROVIDED further that, except with the written permission of the Belt Company and in accordance with its rules and regulations from time to time prescribed, the rights and privileges hereby granted shall not include the right to make up or break up trains or do

switching upon the Belt Railway otherwise than through the agency of the Belt Company; and PROVIDED further, that said rights and privileges of using the Belt Railway shall be exercised in common with the Belt Company, and with each of the Railway Companies, and with such other companies as may obtain from the Belt Company similar or other rights of user; and nothing herein shall abridge the corporate powers of the Belt Company to operate the Belt Railway on its own behalf, and to grant to other companies similar rights, consistent with privileges by this Agreement granted to the Railway Companies, respectively, and,

PROVIDED, Further that, notwithstanding any provision or language contained in this Agreement to the contrary, it is hereby expressly agreed that the Belt Company shall have the right to enter into separate agreements with one or more of the Railway Companies, or other companies not party to this Agreement, providing for, but not limited to, lease of tracks, servicing of locomotives and cabooses, repair of cars, switching services on and/or off Belt Railway, and use of office space. Such separate agreements shall not, at the time entered into, materially infringe the rights granted herein to Railway Companies.

And it is hereby expressly covenanted and agreed that the said rights and privileges hereby granted to the Railway Companies respectively, shall be held, used and enjoyed by each of the Railway Companies, subject to the following further covenants, conditions and provisions, and the Belt Company and each of the Railway Companies hereby covenant and agree to and with each other as follows to-wit:

ARTICLE TWO.

Covenants Of Belt Company.

Section 1. The Belt Company will pay all taxes, assessments and governmental charges imposed upon the Belt Railway, subject to reasonable contests as to the validity thereof.

Section 2. The Belt Company will pay or cause to be paid all rentals payable by it under leases covering any part of the Belt Railway, and will faithfully perform all of its obligations under such leases, and will not do or omit to do any act the doing or omission of which will cause any of the rights of the Belt Company under such leases to be forfeited.

Section 3. The Belt Company will pay or cause to be paid all interest on its debt, funded or otherwise, and interest at six per cent, or at such other rate as the Belt Company Board of Directors shall from time to time determine shall be paid to the Railway Companies on their respective advances.

Section 4. The Belt Company will pay or cause to be paid principal payments on its debt, equipment obligations and the cost of capital improvements.

Section 5. The Belt Company will not do or omit to do any act the doing or omission of which will operate, directly or indirectly, to forfeit any of the rights, privileges and franchises acquired under its charter, or howsoever acquired, or which will in any manner impair the value of any of the privileges, rights or property the right to use which is hereby granted to the Railway Companies, or impair its power or ability to perform all of its obligations under this Agreement; and it will, at the expiration of the present term of its corporate existence, cause the same to be renewed and extended in manner and form as may be provided by law, and will cause similar renewals and extensions to be made from time to time as the same shall be necessary to maintain during the full term of this Agreement the existence and powers with which it is now vested.

Section 6. The Belt Company will at all times, and from time to time during said term, when requested by the Railway Companies or any of them, put forth and exercise each and every corporate power, and do each and every corporate act which the Belt Company might now or may at any time hereafter lawfully put in force or exercise, to enable the Railway Companies and each of them to enjoy and avail themselves of and exercise every right, franchise and privilege hereby granted, in the proper management and operation of the Belt Railway, according to the terms of this Agreement.

ARTICLE THREE.

Mutual Covenants.

Section 1.

(a) Each of the Railway Companies shall pay to the Belt Company a charge for the transfer of cars between any of the Railway Companies through the facilities of the Belt Company. The Belt Company shall establish the charge or charges to cover services provided each Railway Company or Companies.

(b) The Belt Company shall establish contract charges and tariff rates for each and all of its services. Such charges and tariff rates shall, in total, be at least sufficient to cover all its expenses.

(c) For each calendar year that the Belt Company's accounts reflect net revenues from operations, such revenues shall be applied as directed by any mortgage or mortgages of the Belt Company then in effect. If the amount deposited pursuant to the provisions of the then existing mortgage or mortgages may be drawn down, or if there be no mortgage or mortgages, then such amounts available to Belt Company, subject to the affirmative vote of not less than two-thirds of the Belt Company Board of Directors, to be expressed by resolution, shall be distributed to the Railway Companies as a reduction of advances in the same manner and in the same order of time as advances were made unless otherwise provided by special agreements in effect at the time. If at any time there shall be no advances outstanding as provided by special agreement or agreements, such funds available, if distributed, shall be distributed in the form of repayment of Belt Company Account 795 - Other Capital balances by the affirmative vote of not less than two-thirds of the Belt Company Board of Directors. If at any time there shall be no balances outstanding in Belt Company Account 795, such funds available, if distributed, shall be distributed as directed by the affirmative vote of not less than two-thirds of the Belt Company Board of Directors.

(d) Proceeds from the sale or other disposition of property shall be applied as directed by any mortgage or mortgages of the Belt Company then in effect. If the amount deposited may be drawn down by Belt Company under said mortgage or mortgages, or if there be no mortgage requirements, then net proceeds of such sale or other disposition of property shall be distributed to the Railway Companies as a reduction of advances in the same manner and in the same order of time as advances were by them made. If at any time there shall be no advances outstanding as provided by special agreement or agreements, such proceeds, if distributed, shall be distributed in the form of repayment of Belt Company Account 795 - Other Capital balances by the affirmative vote of not less than two-thirds of the Belt Company Board of Directors. If at any time there shall be no balances outstanding in Belt Company Account 795, such proceeds, if distributed, shall be distributed as directed by the affirmative vote of not less than two-thirds of the Belt Company Board of Directors.

(e) Subject to the mutual agreement of the involved parties, interchange of cars between Railway Companies on the Belt Railway will be at Clearing Yard. Interchange of cars between the Belt Company and a Railway Company will be at Clearing Yard, unless other locations have been agreed to in writing by the parties.

Cars moving between Railway Companies via the Belt Company shall be taken into the car hire or mileage accounts of the Belt Company as follows:

- (i) Cars moving inbound to the Belt Company shall be taken into Belt Company Accounts at the time they are yarded on a designated delivery track and the engine of the delivering Railway Company is cut off from the train.
- (ii) Cars moving outbound to the Railway Companies shall be taken into the Railway Company accounts at the time the car is humped or placed on a designated classification track.
- (iii) Except as modified by this Agreement, the Rules of the Association of American Railroads regarding the interchange of cars between railroads shall govern.

Section 2. The several sums payable by each of the Railway Companies under the provisions of Section 1 of this Article, shall be payable to the Belt Company, or pursuant to its written order, at the office of the Belt Company at Chicago, Illinois, within ten days after a statement thereof shall have been mailed or delivered by the Belt Company to such Railway Company, stating the sum to be paid by it. At the expiration of said ten days the Belt Company is authorized to make sight drafts against any of the Railway Companies for any such sum. Any errors or omissions shall be adjusted in the statement for the month during which the error or omission shall have been located and agreed upon by the Belt Company and the other party or parties interested.

Section 3. Each of the Railway Companies, in respect of the exercise by it of the rights and privileges by this Agreement granted, shall do and perform to the public all the duties which now or hereafter, under the laws of the United States or of the State of Illinois, or under the ordinances of cities, towns or villages, or by other competent authority may be required of either of the parties hereto; and each of the Railway Companies shall and will indemnify and save harmless the Belt Company from any violation by such Railway Company of

any such law or ordinance.

Section 4. Outstanding capital stock of the Belt Company of 2,600 or more shares shall be held by each of the Railway Companies.

Section 5. The Board of Directors of the Belt Company shall always be composed of at least one nominee of each of the Railway Companies, and each Railway Company shall have one Director for each block of 2,600 shares of outstanding stock of Belt Company held by it.

Section 6. The President of the Belt Company shall be elected annually by the Board of Directors. When present, he shall preside at all meetings of the Board of Directors. He need not be a stockholder, and shall have no vote at meetings of the Board of Directors.

Section 7. The Belt Company shall have and exercise the exclusive management and control of the operation, maintenance, repair and renewal of the Belt Railway and every part thereof, and shall keep and maintain the Belt Railway at all times during said term in good order, condition and repair, and shall protect or cause the same to be protected by such insurance, if any, against loss or damage as, in the judgment of the Belt Company, may be necessary and adequate; and shall establish rules and regulations governing the operation of trains upon the Belt Railway, and the use and enjoyment thereof in all other respects; provided always, that such rules and regulations shall apply to all the Railway Companies. Train movements of the same class shall enter and exit Belt Railway on a first-come, first-serve basis, to the extent practicable. Belt Company shall not unduly restrict the length and speed of Railway Companies' trains. Each of the Railway Companies shall comply, and cause its employees to comply, with such rules, safety rules and special instructions. Should a dispute arise with or between any of the Railway Companies using the Belt Railway, as to the arrangement of trains, the use of the Belt Railway, or the time table or train schedule of such Railway Companies, the Belt Company expressly reserves the right and power to determine and enforce the arrangement and order of trains, the use of the Belt Railway and the arrangement of such train schedules or time tables, and to direct the adoption thereof.

Section 8. Except with the unanimous written consent of the parties hereto, no scheduled passenger train shall be regularly operated over any part of the Belt Railway by any of the Railway Companies.

Section 9. The plan, character and cost of any improvement, change or addition, to cost more than \$100,000, hereafter made to the Belt Railway, shall be determined by the affirmative vote of not less than two-thirds of the Board of Directors of the Belt Company.

Section 10. If any improvements or extensions of or additions to the Belt Railway, the expenditure for which has not received the affirmative vote required in Section 9 above, shall be desired by one or more of the Railway Companies, such Railway Company or Railway Companies, with the approval of a majority of the Board of Directors of the Belt Company to be expressed by resolution, may make or cause to be made such improvements, extensions or additions at its or their own expense, providing said Railway Company or Railway Companies shall pay rent to be fixed by the Board of Directors for Belt Company's property used for such improvements, extensions or additions. At any time during the term of this Agreement, the Belt Company may acquire the ownership of any such improvements, extensions or additions by payment to the Railway Company or Railway Companies which shall have constructed the same, at a price to be agreed upon by the owner or owners thereof and the Belt Company. Upon such acquisition thereof by the Belt Company, such improvements, extensions, or additions so acquired shall become parts of the Belt Railway. Until so acquired by the Belt Company, such Railway Company or Railway Companies shall have the exclusive use of such additions, extensions or improvements, and shall, at its or their own expense, maintain, repair, renew and operate the same and pay all taxes and assessments thereon and all expenses for demolition, removal, etc., whether caused by obsolescence or otherwise.

Section 11. For purposes of this Section 11, cars delivered to the Belt Company shall be deemed to be "in the possession" of the Belt Company after mechanical inspection has been completed and the cars have been accepted by the Belt Company. Cars delivered to a Railway Company by the Belt Company shall be deemed to be "in the possession" of the Railway Company after mechanical inspection has been successfully completed by the Belt Company. The responsibility of the parties as between themselves for injury to, or death of, any person or persons whomsoever, or for loss of, damage to, and destruction of any property whatsoever, resulting from, arising out of, incidental to, or occurring in connection with this Agreement shall be apportioned as follows:

(a) Whenever any loss of, damage to, or destruction of any property whatsoever, or injury to or death of any person or persons whomsoever, occurs with any of the trains, locomotives, cars or other equipment of, or in the possession of, either the Belt Company or a Railway Company only being involved, the party hereto whose equipment is so involved shall defend and assume all liability therefore and all cost and expenses in connection therewith, regardless of considerations of fault or negligence.

(b) Whenever any loss of, damage to, or destruction of any property whatsoever, or injury to or death of any person or persons whomsoever, occurs with any of the trains, locomotives, cars or other equipment of or in the possession of the Belt Company and a Railway Company or more than one Railway Company being involved, the parties hereto whose equipment is so involved agree to separately assume all liability for loss or damage to said trains, locomotives, cars (including without limitation lading), and equipment operated by or in the possession of each of them and for injury to or death of each of their sole employees and persons in each of their care and custody, and the Belt Company and the Railway Company or Railway Companies whose equipment is so involved further agree that injury to or death of any other person or persons whomsoever, and loss, damage or destruction of all other property (including without limitation the Belt Company trackage) so occurring, shall be borne equally by them, regardless of considerations of fault or negligence.

(c) Whenever any loss of, damage to, or destruction of any property whatsoever, or injury to or death of any person or persons whomsoever, occurs with any of the trains, locomotives, cars or other equipment of, or in the possession of, two or more parties to this Agreement (excluding the Belt Company), the parties hereto whose equipment is so involved agree to separately assume all liability for loss or damage to said trains, locomotives, cars (including without limitation lading), and equipment operated by or in the possession of each of them and for injury or death of each of their sole employees and persons in each of their care and custody, and each party whose equipment is so involved further agrees that injury or death of any other person or persons whomsoever, and loss, damage or destruction of all other property (including without limitation the Belt Company trackage) so occurring, shall be borne equally by them, regardless of consideration of fault or negligence.

(d) Whenever any loss of, damage to, or destruction of any property whatsoever, or injury to or death of any person or persons whomsoever, occurs with any of the trains, locomotives, cars or other equipment of, or in the possession of a Railway Company or Railway Companies, and any other user of the Belt Company trackage (other than the Belt Company and another Railway Company) being involved, then any such other user shall be considered as the Belt Company for the purpose of determining between the parties to this Agreement the Belt Company's assumption and apportionment of liability, cost and expense under subparagraph (b) above.

(e) Whenever any loss of, damage to, or destruction of any property whatsoever, or injury to or death of any person or persons whomsoever, occurs with any of the trains, locomotives, cars or other equipment of, or in the possession of, a Railway Company or Railway Companies, and the Belt Company and any other user of the Belt Company trackage being involved, then the Belt Company and any such other user shall be considered as the Belt Company for the purpose of determining between the parties to this Agreement the Belt Company's assumption and apportionment of liability, cost and expense, pursuant to subparagraph (b) above, and the Belt Company's share shall then be a two-thirds portion.

Section 12. Each party to this Agreement shall pay for all loss, damage and expenses, both as to person and property, the risk of which it has assumed under Section 11 of this ARTICLE THREE, and shall forever indemnify and save harmless the other parties hereto and each of them, and the successors and assigns of each, from and against all liabilities, claims and judgments therefor or by reason thereof, and each such party shall pay, satisfy and discharge all costs, charges, attorneys' fees and other expenses incidental thereto, including the expenses of investigating both valid and invalid claims, and all judgments which may be entered or rendered by reason thereof.

In case a claim or suit or suits shall be commenced against any party to this agreement for or on account of damage or injury for which any other party hereto is liable under Section 11 of this ARTICLE THREE, the party against whom the claim or suit is brought shall give to such other party reasonable notice in writing of the pendency of such claim or suit, and thereupon such other party shall assume the defense of such claim or suit, and shall save and hold harmless the party against whom

the claim is brought or the suit is instituted, from all loss, cost, expense and liability by reason thereof. If the party so notified shall fail to assume the defense of such claim or suit, such party so notified shall be concluded by the settlement or judgment as to all matters which could have been compromised or litigated in such settlement negotiations or suit.

It is recognized that for purposes of provisions under Section 11 of this ARTICLE THREE, pilots furnished by the Belt Company for a Railway Company shall be considered the employee of the Railway Company from such time as the pilot starts his tour of duty until he concludes his tour of duty at the Belt Company's designated point of starting and concluding such tour of duty.

Section 13. The Belt Company and each of the Railway Companies agree that incidents have occurred whereby sums will be payable by the parties hereto at a future date as a result of the application of the liability clauses in the Amended Operating Agreement made as of September 1, 1962, effective January 1, 1967, and as amended by Agreement dated as of October 1, 1966, and supplemented by the Agreement dated as of November 1, 1977.

The apportionment to be used in the settlement of these liabilities between the parties will be the working expense ratios, as defined in aforesaid Amended Operating Agreement, as of the date the incident occurred.

Section 14. By the affirmative vote of two-thirds of the Board of Directors of the Belt Company, any other railroad company (not named herein as one of the Railway Companies) owning, leasing or controlling any railroad which connects with the Belt Railway, by direct connection or under lease or trackage rights over other lines, may become a party of the second part to this Agreement, on the following conditions, viz.:

- (1) That such company shall acquire or purchase not less than the required number of par value shares of the capital stock of the Belt Company; and payment of a proportionate amount of other contribution of capital at such date of acquisition.
- (2) That such company shall execute this Agreement or a counterpart thereof, or supplement thereto, or such other agreements as may be specified by the Board of Directors of the Belt Company, as one of the Railway Companies, parties of the second part; and

- (3) That there shall be obtained the authorization or approval of the appropriate governmental regulatory body or bodies before such company's becoming a party to such agreement or agreements or counterparts thereof if such authorization or approval is required by law.

Section 15. All covenants of the Railway Companies under this Agreement are several and not joint, and in no event shall any of the Railway Companies be liable for any default under this Agreement of any other of the Railway Companies.

Section 16. Except as provided in Article Seven hereof, this Agreement shall not be altered or amended except by the consent of all of the parties hereto, to be expressed in writing.

Section 17. The by-laws of the Belt Company shall be so amended as to make them consistent with the provisions of this Agreement.

ARTICLE FOUR.

Rights and Remedies in Case of Default.

Section 1. If any of the Railway Companies shall fail to pay any sum by it payable under this Agreement, on or before the date when the same shall become due, or shall fail to perform and comply with any other covenant or condition by it to be performed or complied with under this Agreement, and such default shall continue for a period of sixty days after written demand for such payment, performance or compliance shall have been made upon such Railway Company by the Belt Company, or if at any time during the term of this Agreement, any of the Railway Companies in any manner shall cease to be beneficial owner of at least 2600 shares of the capital stock of the Belt Company, then and in any such case the Belt Company shall have and is hereby given the right, at its election, to exclude such Railway Company from the use of the Belt Railway, and upon giving notice in writing to such Railway Company of such election, all rights of such Railway Company to use the Belt Railway or any part thereof, and all other rights of such Railway Company under this Agreement shall then and there by such notice be terminated, and the Belt Company may wholly exclude such Railway Company from the Belt Railway; but such termination shall not relieve such

Railway Company from any liability which may have accrued prior, or shall accrue subsequent, to the date of such termination, or deprive the Belt Company of the right to enforce such liability. Nevertheless, if such Railway Company, within sixty days after receipt of any statement rendered to it under this Agreement by the Belt Company, shall give notice in writing to the Belt Company that it contests the correctness of any specified item or items in such statement, and shall pay to the Belt Company all sums then due to the Belt Company, other than the item or items so specified, and also, if demanded by the Belt Company, shall furnish adequate security for the contested item or items, then, so long as such Railway Company in good faith shall contest the correctness of the item or items specified in such notice, the right of such Railway Company to use and enjoy the Belt Railway shall not be terminated under this Section by reason of the failure of such Railway Company to pay in full such item or items so contested. But no such notice, exclusion or termination shall relieve such Railway Company from the payments to be made by it as in ARTICLE THREE of this Agreement provided; it being understood and agreed, as a part of the consideration for this Agreement, that each of the Railway Companies binds itself to make such payments absolutely and at all events.

Section 2. In case any of the Railway Companies shall be excluded from the use of the Belt Railway under Section 1 of this Article, such Railway Company shall be entitled, at any time within the period of one year thereafter but no longer, to be reinstated in its rights and privileges under this Agreement, upon payment to the Belt Company within such period of all sums then in arrears with interest thereon from the respective dates when the same became due, at the rate of six per cent per annum, payable semi-annually, and upon compliance with such other conditions as the Board of Directors of the Belt Company may impose.

ARTICLE FIVE.

Successors and Assigns.

Section 1. The rights by this Agreement granted to each of the Railway Companies shall extend to and inure to the benefit of and may be enforced by any railroad company whose railway at the time shall be leased, operated or controlled by such Railway Company or its successors, and any railroad company which shall lease or purchase all, or substantially all, of the properties of a Railway Company, and any railroad company which at the time shall own a majority of the capital stock of

such Railway Company, and any railroad company a majority of whose capital stock at the time shall be owned by such Railway Company, and any railroad company a majority of whose capital stock at the time shall be owned by any company which shall then own a majority of the capital stock of such Railway Company.

Section 2. The covenants of this Agreement are made for the exclusive benefit of the Belt Company and the Railway Companies, their successors and assigns, and no other party shall be entitled to enforce any of the said covenants. Said covenants shall be binding upon the successors, and assigns of the respective parties hereto, but no such assignment shall release the assigning company from its obligations under this Agreement. If any of the Railway Companies shall be consolidated with other companies, the company formed by such consolidation shall be entitled to all the rights and privileges under this Agreement of any of its constituent companies and shall be liable for all payments obligatory thereunder upon any of its constituent companies.

ARTICLE SIX.

Assignment.

The Belt Company may assign this Agreement to the trustee or trustees in any mortgage or mortgages of the Belt Company which, at the time of such assignment, shall be existing liens upon the Belt Railway, or any part thereof, as and for further security for the payment of the obligations secured by any such mortgage or mortgages. Any such trustee or trustees to which the Belt Company may assign this Agreement shall have the right to enforce every provision of this Agreement which might be enforceable by the Belt Company.

In consideration of such assignment of this Agreement, each of the Railway Companies, so long as it shall not be in default under this Agreement and shall faithfully perform all its obligations under said Agreement, shall be entitled to all of the protection afforded to it under the provisions of this Agreement, in respect of the quiet and peaceable possession and enjoyment of the rights herein granted to each of the Railway Companies, notwithstanding any default of the Belt Company or any Railway Company or Railway Companies, or any sale of the property of the Belt Company under any such mortgages or otherwise.

ARTICLE SEVEN.

Alteration or Amendment.

Section 1. This Agreement shall not be altered or amended during the initial term hereinafter specified in Article Eight, except by the consent of all parties hereto.

Section 2. Any party to this Agreement wishing to alter or amend any of its provisions after April 1, 1995 may serve all other parties hereto with written notice of such desire, setting out in specific detail what alterations or amendments it seeks. Within thirty days of the date of such notice, the parties hereto shall meet for the purpose of reviewing the proposed amendments and shall negotiate, in good faith, to resolve any issues which those proposals create.

Section 3. If the parties are unable to resolve the issues raised by said proposed amendments within one year from the date of the written notice referred to in Section 2 of this Article Seven, the parties hereby agree that the unresolved issues will be submitted to binding arbitration, upon written demand by any party to this Agreement.

Section 4. All unresolved issues shall be settled through binding arbitration by a sole, disinterested arbitrator to be selected jointly by the parties. However, if they fail to select such arbitrator within thirty days after demand for arbitration is made by any party hereto, then they shall jointly submit the matter to binding arbitration under the Commercial Arbitration Rules of the American Arbitration Association. The decision of the arbitrator so selected or appointed shall be final and conclusive upon the parties. Each party to the arbitration shall pay the compensation, costs, fees, and expenses of its own witnesses, exhibits, and counsel. The compensation and expenses of the arbitrator, if any, shall be borne equally by the parties.

ARTICLE EIGHT.

Term and Execution.

Section 1. This Agreement shall be for a full term of at least five (5) years commencing upon the unanimous acceptance and execution of the Railway Companies, and upon the date chosen for execution and implementation by the Belt Company, which date shall be no later than April 1, 1990, and running to April 1, 1995. This Agreement shall thereafter continue in full force and effect until altered or amended as provided above in Section 2 of Article Seven.

Section 2. After this Agreement has been executed by all the shareholder Railway Companies and prior to Belt Company execution and implementation, the Belt Company shall have full authority to solicit new business and to enter into any new agreements, as if this Agreement were in full force and effect.

Section 3. Except as specifically provided herein, this Agreement amends, cancels, and supercedes the existing Belt Company Amended Operating Agreement dated September 1, 1962 and all supplements thereto.

This Agreement may be executed in any number of counterparts, all of which, collectively, shall be held to constitute one instrument.

In Witness Whereof, the parties hereto have caused these presents to be signed by their respective Presidents or Vice-Presidents, and their respective corporate seals to be hereunto affixed and to be attested by their respective Secretaries or Assistant Secretaries.

THE BELT RAILWAY COMPANY OF CHICAGO,

BY (signed) James E. Martin

President

DATE: March 30, 1990

(Corporate Seal)

Attest:

(signed) Ruth A. Taylor

Secretary

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY,

BY (signed) A. W. Rees
Vice President - Operations
DATE: March 12, 1990

(Corporate Seal)

Attest:

(signed) Michael W. Blaszak
Assistant Secretary

BURLINGTON NORTHERN RAILROAD
COMPANY,

BY (signed) W. W. Francis
DATE: March 17, 1990

(Corporate Seal)

Attest:

(signed) Victoria Hanel

CSX TRANSPORTATION, INC.,

BY (signed) J. R. Davis
DATE: February 22, 1990

(Corporate Seal)

Attest:

(signed) David M. Yearwood
Assistant Secretary

CONSOLIDATED RAIL CORPORATION,

BY (signed) H. W. Brown
DATE: February 26, 1990

(Corporate Seal)

Attest:

(signed) Allan Schimmel

THE BELT RAILWAY COMPANY OF CHICAGO
OPERATING AGREEMENT

GRAND TRUNK WESTERN RAILROAD
COMPANY,

BY (signed) G. L. Maas
President

DATE: February 26, 1990

(Corporate Seal)

Attest:

(signed) W. J. McKnight

ILLINOIS CENTRAL RAILROAD COMPANY,

BY (signed) E. H. Harrison

DATE: March 5, 1990

(Corporate Seal)

Attest:

(signed) P. F. Healy, Jr.
Assistant Secretary

MISSOURI PACIFIC RAILROAD COMPANY,

BY (signed) R. K. Davidson

DATE: February 27, 1990

(Corporate Seal)

Attest:

(signed) C. W. Saylor

NORFOLK AND WESTERN RAILWAY
COMPANY,

BY (signed) C. M. Irvin

DATE: February 26, 1990

(Corporate Seal)

Attest:

(signed) Dezora M. Martin
Assistant Secretary

THE BELT RAILWAY COMPANY OF CHICAGO
OPERATING AGREEMENT

SOO LINE RAILROAD COMPANY,

BY (signed) E. V. Dodge

DATE: March 30, 1990

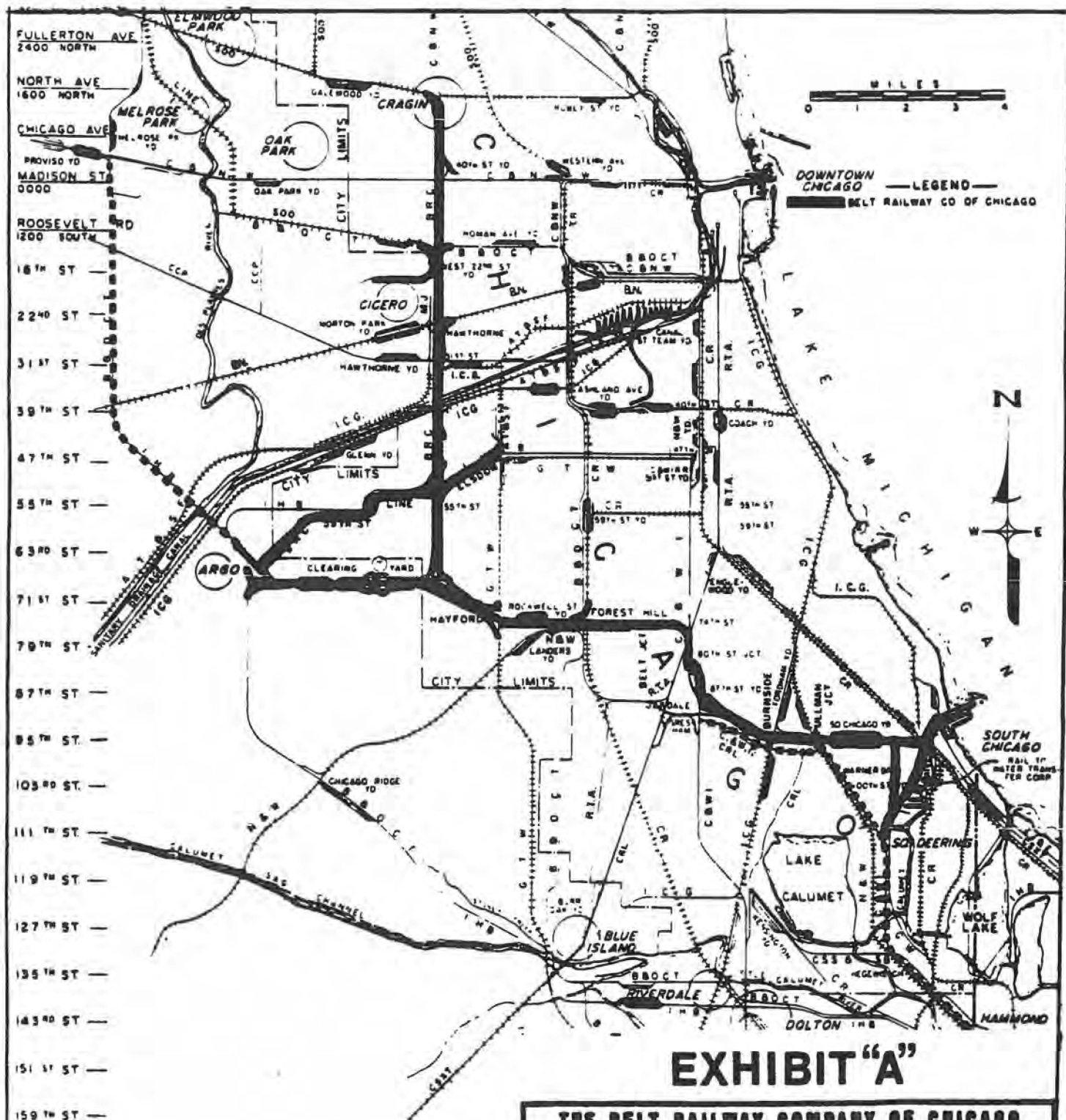
(Corporate Seal)

Attest:

(signed) Teresa M. Keener

Assistant Secretary

THE BELT RAILWAY COMPANY OF CHICAGO
OPERATING AGREEMENT



**THE BELT RAILWAY COMPANY OF CHICAGO
OFFICE OF THE CHIEF ENGINEER**

MAP OF
THE BELT RAILWAY COMPANY
OF
CHICAGO

**DRAWN
TRACED
CHECKED
SCALE**

WGT

FILE NO.
114.12-89

APPROVED:

DATE 1-24-90

MANNHEIM RD
25th AVE
9th AVE
DESLAINES AVE.
9000 WEST
HARLEM AVE.
7200 WEST
NARRAGANSETT AVE.
6400 WEST
CENTRAL AVE.
3600 WEST
CICERO AVE
4800 WEST
PULASKI RD
4000 WEST
MEDZIE AVE

EXHIBIT 10

**Metra Comments,
STB Fin. Docket No. 35081
(Excerpt)**



FOLEY & LARDNER LLP

March 4, 2008

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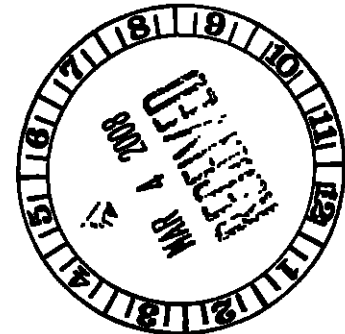
BY E-FILING AND BY HAND

Ms. Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Suite 101
Washington, D.C. 20423-0001

221744
ENTERED
Office of Proceedings

MAR 4 - 2008

Pct of
Public Record



Subject: Finance Docket No. 35081 – *Canadian Pacific Railway Company, et al. – Control – Dakota Minnesota & Eastern Railroad Corporation, et al.*

Dear Acting Secretary Quinlan:

Enclosed for filing in the above proceeding are an original and ten copies of the Public Version of Metra's Comments in Opposition to Proposed Transaction and Request for Conditions, and ten copies of the Highly Confidential Version of Metra Comments to be filed under seal pursuant to the terms of the Protective Order issued by the Board in this proceeding. Also enclosed is a disc containing an electronic copy of the Public Version of Metra's Comments.

Please acknowledge receipt of the above identified filings by date stamping the extra copies provided and return same to our messenger for our files.

Sincerely yours,

Robert P. vom Eigen

RVE: dmo
Encls:

cc. Michael C. Noland (w/Highly Confidential and Public Versions of Metra's Comments)
Parties of Record (w/ Public Version of Metra's Comments)
Counsel for Applicants (w/Three Copies of Highly Confidential Version of Metra's Comments)

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

221744

Finance Docket No. 35081

CANADIAN PACIFIC RAILWAY COMPANY, *ET AL.* – CONTROL –
DAKOTA, MINNESOTA & EASTERN RAILROAD CORP., *ET AL*

**METRA COMMENTS IN OPPOSITION TO PROPOSED TRANSACTION AND
REQUEST FOR CONDITIONS**

NORTHEAST ILLINOIS REGIONAL
COMMUTER RAILROAD CORPORATION
AND
THE COMMUTER RAIL DIVISION OF THE
REGIONAL TRANSPORTATION AUTHORITY,
BOTH d.b.a. METRA
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Chicago, IL 60661

ENTERED
Office of Proceedings

MAR 4 - 2008

Part of
Public Record

Protestant

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Attorneys for Protestant

Due Date: March 4, 2008

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.**

Finance Docket No. 35081

**CANADIAN PACIFIC RAILWAY COMPANY, *ET AL.* – CONTROL –
DAKOTA, MINNESOTA & EASTERN RAILROAD CORP., *ET AL***

**METRA COMMENTS IN OPPOSITION TO PROPOSED TRANSACTION AND
REQUEST FOR CONDITIONS**

The Northeast Illinois Regional Commuter Railroad Corporation and The Commuter Rail Division of the Regional Transportation Authority, both doing business as Metra, hereby oppose the application of Canadian Pacific Railway Company ("CP") for authority to control the Dakota, Minnesota & Eastern Railroad Corp. ("DM&E") and the Illinois, Chicago & Eastern Railroad Corp. ("IC&E") unless the Board conditions approval of the transaction upon measures that will protect Metra's commuter rail service.

Background and Summary of Position

Metra provides commuter rail service in the six counties of Northeastern Illinois. Metra service currently operates on 11 different rail lines that link suburban communities with downtown Chicago. A map depicting the 11 routes is attached as Exhibit A to these comments. In 2007, Metra provided 83 million passenger rail trips, and set numerous ridership records as demand for commuter rail service reached its highest level in Metra's 24 year history. Metra prides itself on its on-time performance, which on a system-wide basis was 95.7% on-time within a 5 minute level of tolerance during 2007, one of the highest on-time performance records

in the United States. Over the last six years, the average on-time performance for the system has been 96.5%.

The quality of Metra service over two of those rail lines, the Milwaukee District West Line ("West Line") and the Milwaukee District North Line ("North Line") (depicted MD-W and MD-N on the map attached as Exhibit A), will be threatened should this transaction be approved without conditions. Metra acquired the West and North Lines in transactions with the Trustee of the Milwaukee Road in 1989. CP's Soo Line subsidiary was granted trackage rights over each line with the right to dispatch those lines by the Trustee in 1985. The North Line extends between Fox Lake, Illinois and Chicago Union Station, and the West Line extends between Alton (or Big Timber), Illinois and Tower A-5 in Chicago, where it joins the North Line (between the Healy and Western Avenue stations) for movement to and from Chicago Union Station.

The North Line has considerable daily traffic, and currently is operating at capacity during the peak commuter periods on weekdays. On weekdays, there are 60 Metra trains, 16 Amtrak trains,¹ and an average of 17.3 CP trains,² and two Wisconsin & Southern Railroad ("WSOR") trains. WSOR is contractually limited to one round trip per day over Metra

¹ Amtrak is proposing to add six additional trains on the North Line.

² From June 1, 2006 through May 31, 2007, CP operated 6320 trains past Rondout, which is the point along the North Line where the branch to Fox Lake leaves the main Chicago – Milwaukee or "C&M" CP route. That averages 17.3 trains for a 365 day year, but train frequencies fluctuate monthly. For instance, during July 2006 there was an average of 18.9 trains per day, as contrasted with 15.4 trains per day during April 2007. Only one local CP freight train and one WSOR train in each direction operates over the Rondout to Fox Lake branch in addition to Metra's service.

property.³ The North Line has 5.2 miles of triple track, 27.0 miles of double track and 17.5 miles of single track on the Fox Lake subdivision. The single track section has one passing track, 0.83 miles in length. The North Line has a Centralized Traffic Control ("CTC") signal control system on the triple and double track segments and is Automatic Block System ("ABS") on the single track segment.

The West Line also has considerable daily traffic. On weekdays, Metra operates 79 trains, CP an average of 11.2 trains,⁴ IC&E operates an average of 6 trains,⁵ CN operates an average of 4.5 trains over the six-mile segment between Tower B12 in Franklin Park and Cragin and WSOR operates the same two trains per day over the two-mile segment between Tower A5 and the connection with the Belt Railway of Chicago at Cragin. Starting at Tower A5, where the West Line diverges from the North Line, the West Line has 5.2 miles of triple track, 27.6 miles of double track and 0.3 miles of single track. The entire West Line has a CTC signal control system.

³ WSOR has recently obtained rights from CP to operate unit grain trains over the C&M route between Milwaukee and Rondout, but Metra has not granted WSOR rights to operate any additional trains over its North or West Lines. Nevertheless, Metra's Jack Bauer learned last Fall from an article in a trade magazine that WSOR had, indeed, operated at least one additional grain train over the North and West Lines. Mr. Bauer complained to his counterpart at CP, Jim Bender, that this additional service was unauthorized, and Mr. Bender blamed the incident on WSOR. To Metra's knowledge no additional WSOR unit grain trains have been permitted to operate over the North and West Lines, but it has no ability to monitor that because CP dispatches these lines.

⁴ Using the same period from June 2006 to May 2007, CP operated 4,081 trains through the segment between Tower B-12 (Franklin Park) and Tower A-5, which averages to 11.2 trains during a 365 day year. That traffic fluctuated between 9.6 trains per day in July 2006 and 13.2 trains per day during March of 2007.

⁵ IC&E operated 2,190 trains from June 2006 to May 2007 through the Alton to Elgin section of the West Line which yields the average of six trains per day for a 365 day year. The monthly figures fluctuated between 4.9 trains in April 2007 and 7.1 trains in August and October 2006.

While Metra owns the North and West Lines, the 1985 Trackage Agreement between CP and the Milwaukee Trustee, as supplemented and amended from time to time ("Metra/CP Trackage Agreement"), grants CP the right to dispatch these lines subject to the requirement to provide priority to Metra's schedules and operations, and to insure that there be no material interference with that service. CP dispatches these lines from the Soo Line building in Minneapolis, MN.

The on-time performance average on the two CP dispatched Metra routes over the period of 2007 has been worse than Metra's system-wide average, and worse than each of the four lines Metra dispatches. The North Line has the third worst on-time performance record over that period of any of Metra's lines. The average number of "delayed" trains, defined as trains 6 or more minutes late, on the North Line are the second highest on the Metra system.

Average On-time Percentage 2002-2007⁶

Metra System-Wide	- 96.5%
Metra Electric – ML	- 97.9%
Metra Electric – BI	- 98.7%
Metra Electric – SC	- 96.4%
CP – North Line	- 94.3%
CP – West Line	- 95.7%

Metra dispatches lines under its control through its Consolidated Control Facility ("CCF") located at 1501 South Canal Street in Chicago. Constructed in the early 1990's, this facility was intended to house personnel from Metra to dispatch lines over which Metra trains operate and for tower operators from those lines. At the CCF, Metra currently dispatches the two lines of the Rock Island District, the three lines of the Electric, and the North end of Metra's Southwest Service (between 21st Street and 74th Street). The CCF also houses the operator of

⁶ These data are derived from the Table, attached hereto, as Exhibit B to these Comments, captioned "Annual Train Delays and On-Time Performance."

**METRA-2
PUBLIC VERSION**

EXHIBIT A

System Map

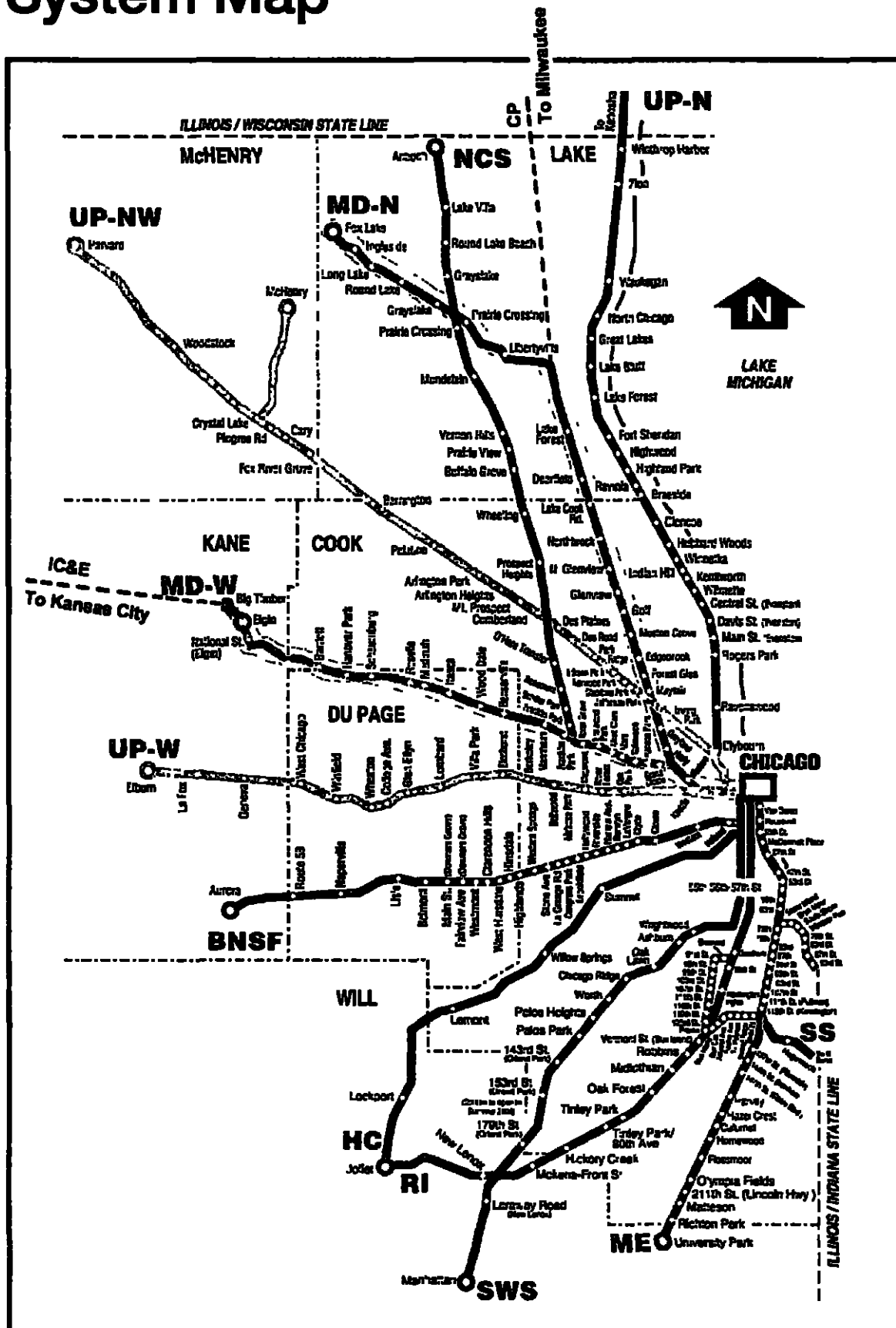


EXHIBIT 11

BRC Rate Sheet

REDACTED

Attachment 2

**May 29, 2020 CP Reply to Petition for Declaratory Order
(Confidentiality Designations Removed)**

**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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**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

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 {{CN reimburses CP for the BRC's fees for traffic that would otherwise have been interchanged at Spaulding}}. 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 ({{“I am writing to memorialize the interim agreement our clients reached today regarding interchange of their respective traffic at Chicago pending a final decision in this matter”; “Pending final Board decision, CP to deliver CP to CN traffic to Clearing with CN paying BRC 100% of BRC costs regarding traffic that would otherwise be interchanged at Spaulding.”}}).

The Interim Agreement further provided that {{“[i]f the final Board decision is in CP’s favor (meaning CP cannot be forced to interchange/deliver to Clearing absent CP consent), interchange will continue at Clearing at 100% CN cost (non-TIH/PIH), or will revert to Spaulding at CN’s option; future agreement termination option to lock in economics of CN paying 100% at Clearing.” Interim Agreement at 1-2. Conversely, “[i]f the final Board decision is in CN’s favor (meaning CN can force CP to interchange/deliver to Clearing at CP expense), CP to reimburse CN for interim BRC charges consistent with any formula determined by the Board” *Id.* at 2. And

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.

the Interim Agreement specified that “[t]he parties will conclude a permanent agreement regarding interchange at Chicago upon the final Board decision (or appeal), informed by the decision.” *Id.*}}

Despite the Board’s *FD 36299 Final Decision* and the parties’ Interim Agreement in which CN agreed {{to reach a permanent agreement regarding interchange at Chicago that was informed by the *FD 36299 Final Decision*}}—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 {{CN is paying the BRC all of the BRC fees regarding traffic that would otherwise be interchanged at Spaulding, is that the benefits to CN of Clearing outweigh the costs of paying for Clearing}}. 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: {{CN pays the associated BRC’s fees and Spaulding remains an option for interchange.}}

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 {{reflects the commercial realities that moving the interchange location to Clearing is of sufficient benefit to CN that CN is willing to bear all of the BRC's fees}}. 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 {{real estate taxes, an annual lump sum amount to cover fixed costs, and shares in maintenance costs. *Id.* at ¶ 9. Ordinary, routine capital expenses are generally evenly divided between CP and Metra. *Id.*}} And, of course, CP is not a mere tenant on the main line but rather {{has a 99-year Trackage Agreement governing CP and Metra’s respective rights and obligations on the two shared CP Metra lines,¹⁰ which agreement identifies those lines as the “Joint Line.” *Id.* at ¶¶ 5-6. In fact, CP’s operational control over the line during non-commuter peak times is such that, Metra requires CP’s consent to add trains or adjust existing schedules. *Id.* at ¶ 11.}}

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) (“The Belt Company shall have and exercise the exclusive management and control of the operation, maintenance, repair and renewal of the Belt Railway and every part thereof, and shall keep and maintain the Belt Railway at all times during said term in good order, condition, and repair . . .”). 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)) ({requiring owner railroads to pay for the transfer of cars between owners “through the facilities of the [BRC] and the BRC to charge fees “sufficient to cover all its expenses”}). 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"). {{The Interim Agreement between CP and CN does exactly that}}. 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 {{agreement to reimburse the 100% of the BRC fees incurred by CP for interchanging CN cars at Clearing}}. 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

David F. Rifkind

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Attorneys for Soo Line Railroad Company

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:

Raymond A. Atkins
Matthew J. Warren
Morgan B. Lindsay
Sidley Austin LLP
1501 K Street, N.W.
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Kevin Wallace
Scott Skrycki
228 S. Main Street
Bartlett, IL 60103
sskrycki@vbartlett.org

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

Tony Sanders
355 E. Chicago Street
Elgin, IL 60120

William Gabrenya
234 N. Oak Avenue
Bartlett, IL 60103

James R. McCarthy
234 N. Oak Ave
Bartlett, IL 60103

Brian P. McGuire
250 South Il Route 59
Bartlett, IL 60103

Nanette Gudenkauf
335 S. Main Street
Lower Level Bmo Harris Bank
Bartlett, IL 60103

/s/ David F. Rifkind
David F. Rifkind

EXHIBIT A

CN Website Charts

CN > Investors > Key Weekly Metrics

Share this page



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.

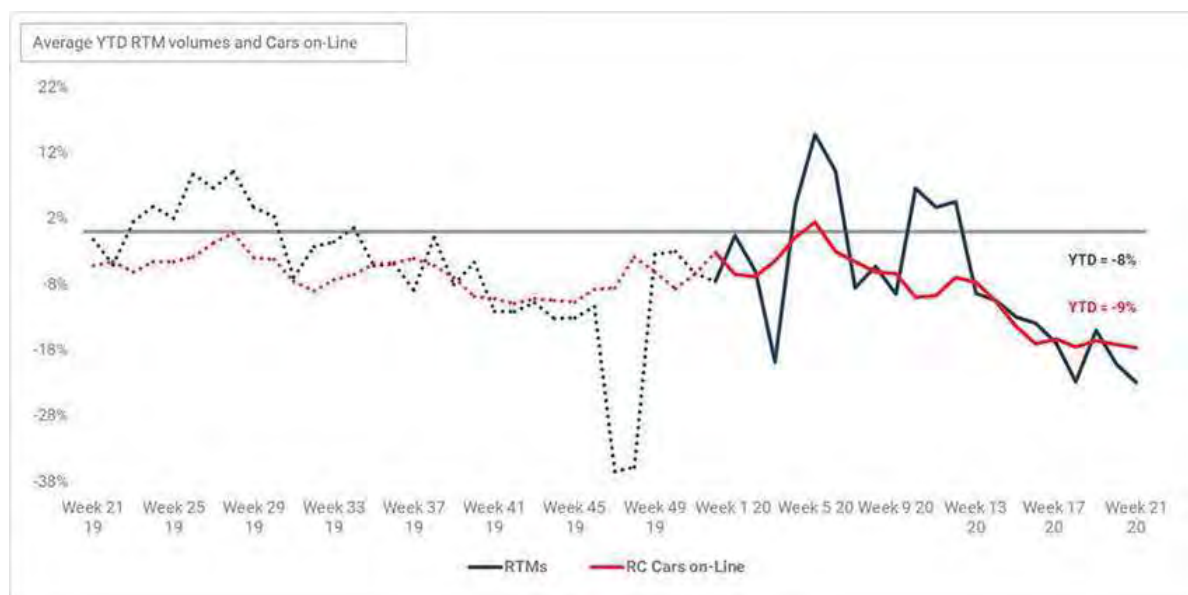
Weekly Volumes

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.

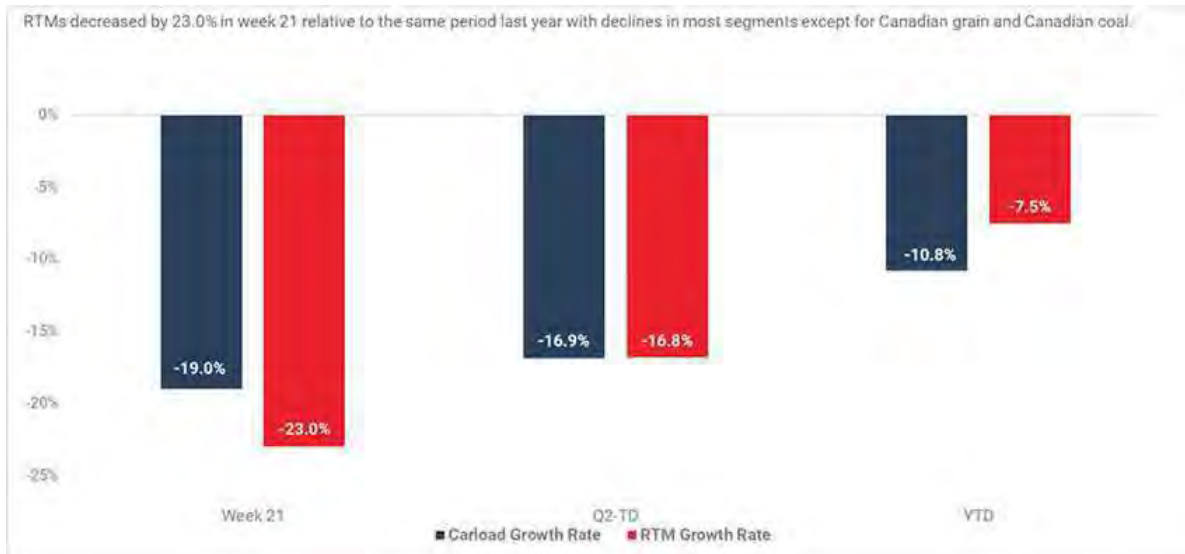
The chart below highlights the year-over-year (YoY) growth rate in total system RTMs for the past 52 weeks in relation to the YoY growth rate in railway-controlled cars on-line. As to be expected, CN's strategy of growing volumes faster than the economy requires additional railcars (railway-owned or 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. {{I was agreeable to that but only if CN would pay the per car fee that BRC charges CP. CN initially declined to do this. However, we subsequently entered into the Interim Agreement pursuant to which CN reimburses CP for the fees it pays the BRC for us to deliver their traffic to Clearing and preserve Spaulding as an option.}}

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. {{This is why CP insisted that the Interim Agreement include provisions that preserve Spaulding as an interchange location option.}}

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 {{provided that CN reimburse CP for BRC's fees and preserve Spaulding as an interchange location option.}} 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

SPAULDING MAP

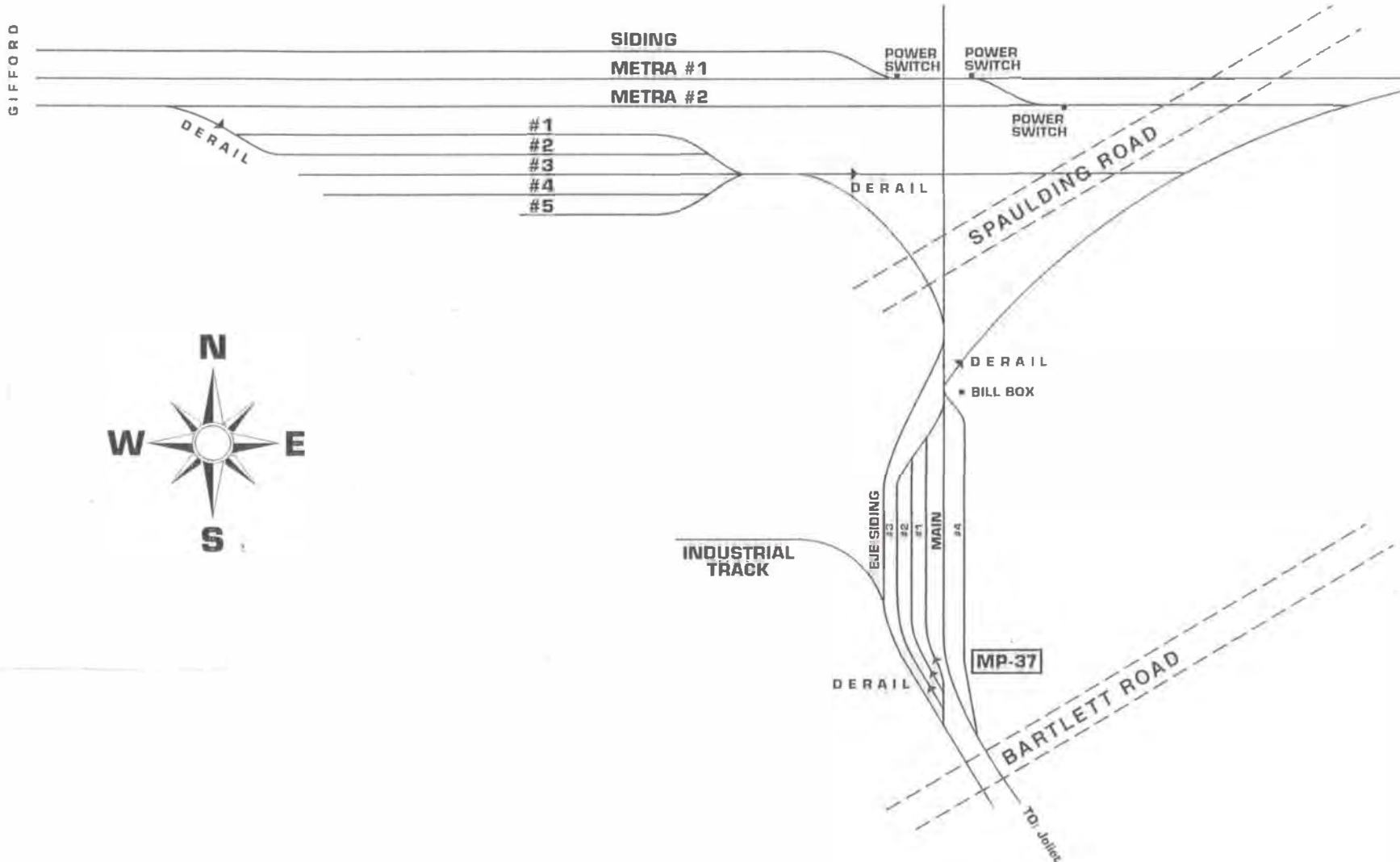


EXHIBIT B

to Verified Statement of Daniel Sabatka



LEGEND

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



STEARNSROAD

TO JOLIET

BARTLETT ROAD

SPALDING ROAD

NORTH SIDING

TRACK 1

TRACK 2

TRACK 3

CN MAIN

TRACK 4

BP-5
BP-4
TRACK 3
TRACK 2
TRACK 1
NO. 2 MAIN TRACK
NO. 1 MAIN TRACK
#1 NORTH

PARALLEL

WEST WYE

EAST WYE

NYPRO

TO B-35

OPTION 1

CHICAGO, ILLNOIS
ELGIN SUBDIVISION

LEGEND

EXISTING TRACK

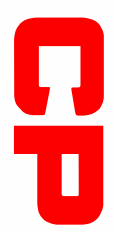
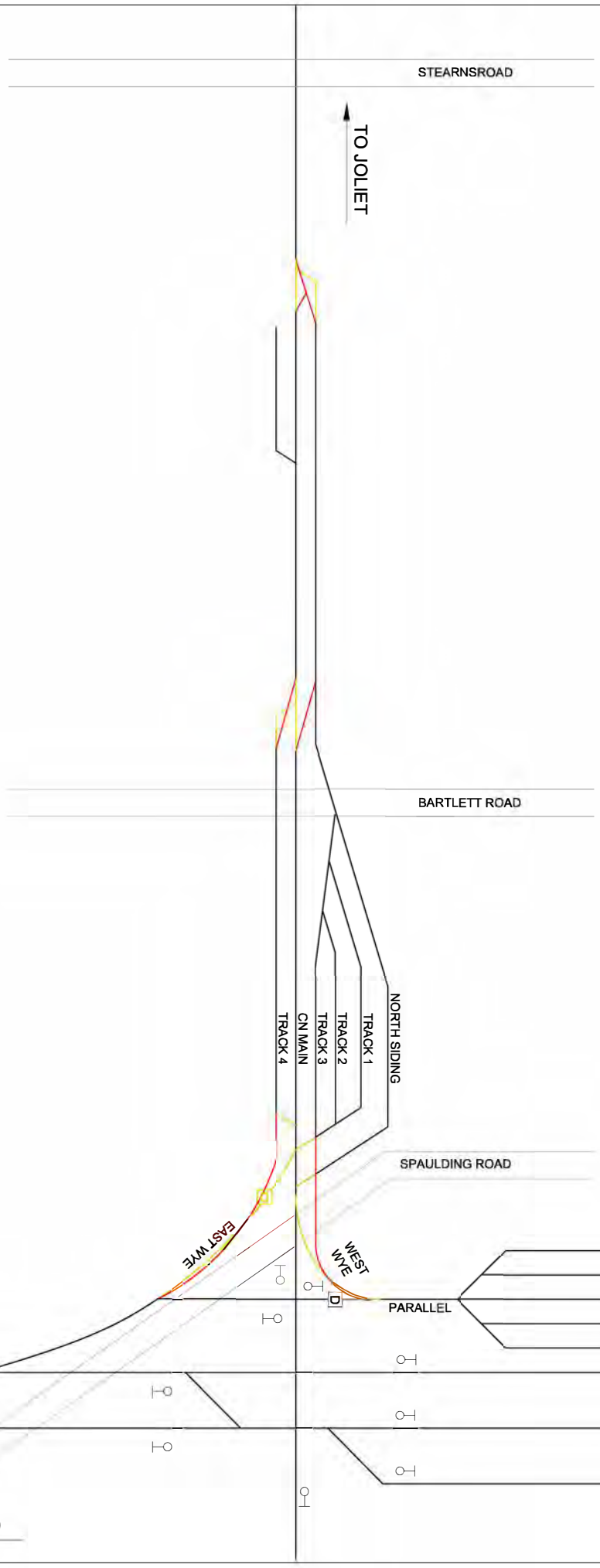
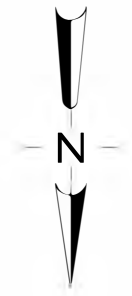
PROPOSED TRACK

REMOVE TRACK

ELECTRIC LOCK

DERAIL

SIGNAL



OPTION 2

CHICAGO, ILLINOIS
ELGIN SUBDIVISION

EXHIBIT C

to Verified Statement of Daniel Sabatka

Canadian Pacific
PRELIMINARY ESTIMATE
CN Spaulding
Bartlett, IL
Option 1 - With Crossovers

<u>TRACK</u>					
Description	Unit	Material Cost	Quantity	Extension	Notes
New #9 XO	EA	360,000.00	2	\$ 720,000	
New #15 TO	EA	225,000.00	2	\$ 450,000	
New #9 TO	EA	180,000.00	3	\$ 540,000	
Turnout Removal	EA	15,000.00	9	\$ 135,000	
New #136 Track	TF	230.00	2600	\$ 598,000	
Remove Track	TF	25.00	1400	\$ 35,000	
Shift Track	TF	40.00	2400	\$ 96,000	Both wye tracks & double tracks south of Bartlett
Relay Rail (1 Side)	FT	50.00	13500	\$ 675,000	6700 TF from South Wye to SSS
Tie Renewal	EA	\$ 140	1000	\$ 140,000	6700 TF from South Wye to SSS
At-Grade Crossing	TF	\$ 1,300	228	\$ 296,400	Three crossings - Bartlett/Spaulding/Pvt
<u>CONTRACTORS</u>					
Description	Unit	Unit Cost	Quantity	Extension	Notes
Contractor - Cutover	EA	\$ 75,000	7	\$ 525,000	Each TO/XO plus south side realignment
Grading	LF	\$ 170	2600	\$ 442,000	
<u>S&C</u>					
Description	Unit	Unit Cost	Quantity	Extension	Notes
S&C - Spaulding, etc.	LS	\$ 5,000,000	1	\$ 5,000,000	Spaulding plant reconfiguration, crossings, SSS CP
Engineering (5%)	LS	\$ 232,620		\$ 232,620	
Capital Overhead (7%)	LS	\$ 325,668		\$ 325,668	
Total \$ 10,210,688 Class 4 Estimate (+40%/-10%)					

Canadian Pacific
PRELIMINARY ESTIMATE
CN Spaulding
Bartlett, IL
Option 2 - Without Crossovers

Date					
<u>TRACK</u>					
Description	Unit	Material Cost	Quantity	Extension	Notes
New #15 TO	EA	225,000.00	2	\$ 450,000	
New #9 TO	EA	180,000.00	2	\$ 360,000	
Relocate Turnout	EA	50,000.00	8	\$ 400,000	
New #136 Track	TF	230.00	2600	\$ 598,000	
Remove Track	TF	25.00	825	\$ 20,625	
Shift Track	TF	40.00	2400	\$ 96,000	Both wye tracks & double tracks south of Bartlett
Relay Rail (1 Side)	FT	50.00	13500	\$ 675,000	6700 TF from South Wye to SSS
Tie Renewal	EA	\$ 140	1000	\$ 140,000	6700 TF from South Wye to SSS
At-Grade Crossing	TF	\$ 1,300	228	\$ 296,400	Three crossings - Bartlett/Spaulding/Pvt
<u>CONTRACTORS</u>					
Description	Unit	Unit Cost	Quantity	Extension	Notes
Contractor - Cutover	EA	\$ 75,000	4	\$ 300,000	Each TO/XO plus south side realignment
Contractor- Turnout Install	EA	\$ 40,000		\$ -	
Grading	LF	\$ 170	2600	\$ 442,000	
Utility relocation	LS	\$ 40,000		\$ -	
<u>S&C</u>					
Description	Unit	Unit Cost	Quantity	Extension	Notes
S&C - Spaulding, etc.	LS	\$ 3,000,000	1	\$ 3,000,000	Spaulding plant reconfiguration, crossings, SSS CP
Engineering (5%)	LS	\$ 188,901		\$ 188,901	
Capital Overhead (7%)	LS	\$ 264,462		\$ 264,462	
Total				\$ 7,231,388	Class 4 Estimate (+40%/-10%)

**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 {{exclusive freight rail rights and operational control on the rail lines in the Chicago Terminal for 99 years.}} 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. {{The rent is set at a flat rate, and does not distinguish between the two Lines. CP also pays Metra a flat rate lump sum for shared maintenance of the West and North Lines. Ordinary and routine capital costs are generally evenly divided between CP and Metra. The 1985 Trackage Agreement also required CP to pay real estate property taxes.

10. Neither the rent nor the maintenance sums CP pays Metra are affected by the operation of G35, the CP assignment which handled CN interchange at Spaulding. Likewise, the rent and maintenance sums CP pays Metra are unaffected by CP's operations to BRC for interchange purposes.}}

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 {{is limited in the number of passenger trains that it can operate and

requires CP consent to add trains or make changes to its schedule.}} 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. {{That fee varies based on whether CP utilizes Clearing Yard for interchange or interchanges directly with another carrier. The fees for Clearing are tiered based on daily volumes and are adjusted annually. The BRC is required to establish fees that are sufficient to cover all its expenses.}}

15. The agreement with BRC controls how BRC bills the carriers utilizing its services. {It requires the delivering carrier to pay BRC's fees for cars interchanged using Clearing.} 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

Attachment 3

**June 18, 2020 CN Motion for Leave to File Reply to Reply
(Confidentiality Designations Removed)**

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

STB FINANCE DOCKET NO. 36397

MOTION FOR LEAVE TO FILE REPLY TO REPLY

Wisconsin Central, Ltd. (“CN”) respectfully moves for leave to submit the attached Reply to the Reply that Soo Line Railroad Company d/b/a Canadian Pacific Railway (“CP”) filed in the above-captioned proceeding on May 29, 2020 (“CP Reply”). The CP Reply features new arguments and misleading factual and legal assertions, and there is good cause for the Board to permit CN to submit the Reply to Reply to complete and correct the record under these circumstances.¹

For example, CP’s Reply misstates the significance of the Interim Agreement that CP and CN entered into on August 16, 2019, claiming that this Interim Agreement reflected a permanent solution and that CN has initiated this proceeding to “get a better deal.” CP Reply at 2. The Interim Agreement is just

¹ See, e.g., *Soo Line R.R. Co.—Pet. for Declaratory Order and Preliminary Injunction—Interchange with Canadian Nat’l*, FD 36299, slip op. at 1 n.1 (STB served July 19, 2019) (accepting letter submissions replying to replies “in the interest of a more complete record”); *National Ass’n of Reversionary Prop. Owners—Pet. for Declaratory Order*, EP 749, slip op. at 1 n.1 (STB served Aug. 13, 2018) (accepting reply to reply “in the interest of having a more complete record”); *City of Alexandria—Pet. for Declaratory Order*, FD 35157, slip op. at 2 (STB served Nov. 6, 2008) (accepting reply to reply to complete record).

that—an interim agreement that explicitly contemplates that {{the Board will determine which party is responsible for paying CP’s switching costs for cars delivered to CN at BRC’s Clearing Yard. The Interim Agreement conditioned responsibility for switching fees on that decision, and it remains in effect precisely because the Board never resolved that issue.}} CP’s claim that CN is trying to change the terms of a deal is mistaken. Indeed, it is CP that is trying to change the deal, by arguing that {{the Board should not decide an issue that the Interim Agreement explicitly contemplated that the Board would decide.}}

Similarly misleading are CP’s efforts to persuade the Board that CN may not designate a co-owned terminal railroad to receive its interchange traffic because “well settled” law requires carriers in “direct physical connection[s]” to designate interchange receipt points on only their “own line[s].” CP Reply at 7-9; *see id.* at 14-16. CP does not even attempt to explain how the “own line” principle it now advances is required by the language of § 10742, but instead derives this supposedly “well settled” rule entirely from dicta in cases that never considered whether a carrier could designate a co-owned terminal carrier to receive its interchange traffic.

There is good cause to allow CN to respond to new arguments and factual assertions CP has raised in its Reply that were not raised in the prior Finance Docket No. 36299 proceeding.² For example, CP’s Reply asserts that the Board is legally required to ignore the unmistakable evidence that moving the interchange

² *See City of Alexandria—Pet. for Declaratory Order*, FD 35157, slip op. at 2 (STB served Nov. 6, 2008) (finding it “appropriate” to accept reply to reply addressing new evidence).

point from Spaulding in August 2019 pursuant to the Interim Agreement dramatically reduced grade crossing delays affecting the adjacent communities. CP Reply at 20-22. CP’s claim that the Board is somehow forbidden from considering community impacts when determining whether an interchange point is reasonable was never raised in FD 36299, and CN should be allowed to address this new and extraordinary proposition. In addition, CP used its Reply to make proposals regarding discovery and a future procedural schedule. CN should be permitted to respond to each proposal.

Finally, there is plainly good cause for the Board to permit CN to respond to the arguments in CP’s Reply so that the Board has a complete record on which to issue a decision.³ In the Board’s final decision in FD 36299, it recognized the need to have the parties “fully brief[]” the question of which party is responsible for paying CP’s switching costs at Clearing.⁴ Accepting CN’s Reply to Reply will permit full briefing on these important questions.

³ See *National Ass’n of Reversionary Prop. Owners—Pet. for Declaratory Order*, EP 749, slip op. at 1, n.1 (STB served Aug. 13, 2018) (accepting reply to reply “in the interest of having a more complete record”); *City of Alexandria—Pet. for Declaratory Order*, FD 35157, slip op. at 2 (STB served Nov. 6, 2008) (finding it “appropriate” to accept reply to reply addressing new evidence)

⁴ *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).

For these reasons, CN respectfully requests that the Board accept its Reply to Reply.

Respectfully submitted,

/s/ Matthew J. Warren

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Dated: June 18, 2020

CERTIFICATE OF SERVICE

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

:

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/s/ Matthew J. Warren
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Attachment 4

June 18, 2020 CN Reply to Reply

(Confidentiality Designations Removed)

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

STB FINANCE DOCKET NO. 36397

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 {{whether CP must pay its own switching fees for CN traffic interchanged at Clearing. The Interim Agreement provided that it would be in place until a “final

Board decision,” which it explicitly defined to be a decision on the Clearing issue.^{2}}}
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. {{CN did not agree to pay CP’s switching costs permanently—it agreed to pay them in the interim pending a Board decision as to ultimate responsibility and subject to reimbursement from CP if the Board’s decision is in CN’s favor.}}⁴ The only party trying to “get a better deal” is CP, which is inexplicably backing away from its agreement {{to have the Board decide which party is responsible for CP’s BRC switching costs}} and is instead asking the Board to leave the parties in indefinite limbo.⁵

² {{See Exhibit 8 to CN’s Petition for Declaratory Order (“Interim Agreement”) at 1-2 (defining “final Board decision in CP’s favor” as whether “CP can[] be forced to interchange/deliver to Clearing absent CP consent” and whether “CN can force CP to interchange/deliver to Clearing at CP expense”).}}

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 ({{“If the final Board decision is in CN’s favor (meaning CN can force CP to interchange/deliver to Clearing at CP expense), CP to reimburse CN for interim BRC charges consistent with any formula determined by the Board.”}}).

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 {{defined decisions in a party’s favor to mean a decision about Clearing costs}}. 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. {{CP and all BRC co-owners have free access to Clearing under the BRC Operating Agreement.^{27}}} Exhibit 11 to CN’s Petition is the BRC rate sheet, which {{clearly indicates that the fees at issue are for switching services, not for trackage rights.}} 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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Attachment 5

**July 8, 2020 CP Reply to Motion for Leave to File Reply to Reply
(Confidentiality Designations Removed)**

**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, {{controls operations on the line, and pays no trackage rights fee for use of the line}}, 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 {{the delivering carrier pay the BRC fees in the first instance}} 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 {“defin[es] ‘final Board decision in CP’s favor’ as whether ‘CP can[] be forced to interchange/deliver to Clearing absent CP consent’ and whether ‘CN can force CP to interchange/deliver to Clearing at CP expense.’” CN’s Reply at 4 n.2}. The agreement, however, actually states: {“If the final Board decision is in CP’s favor (meaning CP *cannot* be forced to interchange/deliver to Clearing absent CP consent)” Interim Agreement at 1 (Ex. 8 to CN’s Petition) (emphasis added).} 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 {“[t]he parties will conclude a permanent agreement regarding interchange at Chicago upon the final Board decision (or appeal), informed by the decision.” Interim Agreement at 2.} 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*, {{Spaulding remaining an option. This is clear from the parties' Interim Agreement, pursuant to which "CN agrees to maintain and leave Spaulding in service pending final Board decision." Interim Agreement at 1.}} 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,

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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:

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