

EXPEDITED CONSIDERATION REQUESTED

February 14, 2022

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VIA ELECTRONIC FILING

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

ENTERED
Office of Proceedings
February 14, 2022
Part of
Public Record

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

Dear Ms. Brown:

Soo Line Railroad Company d/b/a Canadian Pacific (“CP”) respectfully requests that the February 2, 2022 “Post-Remand Brief” filed by Wisconsin Central, Ltd. (“CN”) be stricken from the record as an unauthorized filing¹ and the Board determine whether and, if so, on what issues, further briefing should address in this matter, or, in the alternative, if the Board determines to accept CN’s brief, that CP be granted until March 21, 2022 to file its Reply to CN’s Post-Remand Brief. CP will address fully the appropriate scope of the Board’s review of the issues on remand and the merits of those issues in accord with any schedule established by the Board. Herein we only briefly address the propriety of CN’s unauthorized filing.

1. CN’s Post-Remand Brief Was Unauthorized

Following an appeal by CN of the Board’s Decision served on October 30, 2020, the U.S. Court of Appeals for the Seventh Circuit issued a decision on December 8, 2021 which remanded this matter to the Board “for further proceedings consistent with [the Court’s] opinion.” On February 2, 2022, without any Board directive concerning post-remand briefing and unaccompanied by *any* request for leave to file or for the Board to reopen the record on remand, CN unilaterally filed its “Post-Remand Brief,” along with a Verified Statement and exhibits. Such unilateral self-help actions by a party have been

¹ See, e.g., 49 C.F.R. § 1104.10(a) (“The Board may reject a document, submitted for filing if the Board finds that the document does not comply with the rules.”); 49 C.F.R. § 1104.8 (“The Board may order that any redundant, irrelevant, immaterial, impertinent, or scandalous matter be stricken from any document.”).

deemed inappropriate. See, e.g., *W. Fuels Ass'n, Inc. & Basin Elec. Power Coop. v. BNSF Ry. Co.* (“*W. Fuels*”), NOR 42088, slip. op. at 2-3 (STB served Feb. 1, 2011) (“BNSF, however, has not identified any similarly situated proceeding where a party filed comments on remand without an accompanying motion for leave to file or petition, whether pursuant to 49 C.F.R. § 1115.4 (petitions to reopen administratively final actions) or pt. 1117 (petition for relief not otherwise covered).”).

The filing by CN of its Post-Remand Brief would improperly arrogate the Board’s authority to decide what action and procedures should be followed on remand. “The Board has not adopted any specific regulation or procedure for handling cases on remand.” *W. Fuels*, NOR 42088, slip. op. at 2. “In some instances, the agency has proceeded on remand without reopening the matter for further comment from the parties,² while in other instances the agency has reopened the record on its own accord or at the request of one of the parties.”³ *Id.* But fundamentally, the parameters of agency proceedings on remand are controlled by the Board, not by one party’s unilateral, self-help measures. See, e.g., *Sierra Club v. EPA*, 325 F.3d 374, 382 (D.C. Cir. 2003) (noting the “usual rule that a reviewing court should leave the agency free on remand to determine whether supplemental fact-gathering is necessary”) (citing *Nat’l Grain & Feed Ass’n v. OSHA*, 903 F.2d 308, 310-11 (5th Cir. 1990)). Thus, it is for the Board, not CN, to decide the next course of action in this proceeding on remand.

2. CN’s Post-Remand Brief Improperly Presumes an Unduly Narrow Scope of Issues on Remand

Likewise, it is up to the Board, not CN, to determine the issues to be addressed on remand.⁴ CP will address more fully the appropriate scope of issues on remand at a later time, in accord with the Board’s yet-to-be-adopted schedule, but there is no doubt that CN’s Post-Remand Brief overstates the breadth of the Seventh Circuit’s decision and improperly suggests that only a “sole question remain[s] in this case” as to “[w]hether CP must pay the BRC’s switching fees for the CN-bound interchange traffic that CP delivers to the BRC’s Clearing Yard.” CN’s Post-Remand Brief at 1. That is not the “sole” remaining issue in this proceeding.

² See, e.g., *Market Dominance Determinations—Product & Geographic Competition*, 5 S.T.B. 492, 496 (STB 2001) (denying petition to reopen record on remand from D.C. Circuit and instead addressing the issues on remand without further briefing).

³ See, e.g., *GS Roofing Prods. Co. v. Ark. Midland R.R.*, NOR 41230, slip. op. at 2 (STB served Dec. 17, 2001) (reopening proceeding on remand from the Eighth Circuit and setting a procedural schedule for briefing).

⁴ See *W. Fuels*, NOR 42088, slip. op. at 2-3.

To the contrary, although the Seventh Circuit determined that CN's proffer of a Clearing Yard interchange was not ruled out by the fact that CN does not own Clearing Yard, that decision left for the Board at least two questions that precede any determination of who must pay for access to Clearing Yard. First, the court of appeals did not consider or address whether CN's proffer of Clearing Yard satisfied its statutory obligation to "provide reasonable, proper, and equal facilities that are within its power to provide." 49 U.S.C. § 10742 (emphasis added). The Board has already noted that by forcing CP to pay a fee to reach CN's chosen interchange location of the BRC's Clearing Yard, "CN would itself be 'providing' nothing." Oct. 30, 2020 Board Decision at 7.

Second, the court of appeals did not reach the question whether CN may require CP *to exercise its permissive trackage rights* to reach and deliver its traffic to CN at the BRC's Clearing Yard. To be sure, the court's opinion does suggest that a receiving carrier may designate a willing third party to receive traffic in interchange on its behalf, but that is a different question from whether CP can be forced to bring cars to CN at Clearing Yard. Because the exercise of trackage rights remains permissive with their holder under long-held law,⁵ on remand it remains an open issue as to whether CN may properly designate the BRC's Clearing Yard, which CP can reach only by exercising its permissive trackage rights, as a location to receive CP's CN-bound interchange traffic.

3. CN's Contentions About the Effect of the Belt Railway of Chicago Operating Agreement Are Wrong

Finally, CP wishes to correct CN's plainly wrong assertions about the import of the Belt Railway of Chicago Operating Agreement, to which both CP and CN are parties. Even if the existing BRC Operating Agreement could be used to justify CN's designation of BRC's Clearing Yard as the interchange location, that agreement does not answer the statutory question – under § 10742 – of who is to pay. The payment provisions contained in the BRC Operating Agreement are simply ones of administrative convenience to govern how the BRC bills the carriers utilizing its services without becoming entangled in payment disputes between carriers. See, e.g., CP's May 29, 2020 Reply to CN's Petition for Declaratory Order at p. 16, Hubbard V.S. at ¶ 15. Those provisions apply as much to CN as to CP, and thus do not resolve which party has financial responsibility to pay for the operations over BRC that would be at issue. Nothing in the carriers' agreements with BRC supersedes the Section 10742 obligation "to provide" interchange facilities. Certainly, the BRC Operating Agreement cannot be used to unilaterally force one of the railroads to accept a new interchange location contrary to the statutory obligation. Nor does the Agreement prohibit CN and CP from entering into a separate agreement that requires CN to reimburse CP for the BRC interchange fees, as is currently the case.

⁵ *Burlington N. R.R. v. United States*, 731 F.2d 33, 39 (D.C. Cir. 1984) (citing *Chi., Rock Island & Pac. Ry. v. Denver & Rio Grande R.R.*, 143 U.S. 596, 609 (1892)) ("[T]he exercise of trackage rights remains permissive with their holder.").

CN's pivot away from its statutory obligation to one of fairness and equity conveniently ignores the fact that the change from Spaulding to Clearing Yard is for CN's, not for CP's, benefit.⁶ Indeed, the change to the Clearing Yard adversely affects CP, given that it pays no fee to interchange at Spaulding and prefers Spaulding from an operations perspective.

4. The Board Should Proceed to Establish a Schedule for Briefing of the Issues on Remand

Notwithstanding CN's attempt to dictate the Board's next steps following remand, the Board, if it finds additional briefing to be appropriate, should:

- (1) order CN's brief stricken;
- (2) identify what issues should be addressed on briefing; and
- (3) set a schedule for initial and reply briefs.

In the alternative, should the Board decide not to strike CN's Post-Remand Brief, CP respectfully requests that it be given until March 21, 2022 to file a Reply to CN's Post-Remand Brief. This would give CP the same time that CN had to submit its 21-page brief and accompanying Verified Statement. Anything less than this period would be unduly prejudicial to CP, particularly given that CN's Post-Remand Brief is littered with self-serving statements that CP should be allowed to answer. CP's requested time to file a reply is also in line with the time provided in similar situations. *See, e.g., W. Fuels*, NOR 42088, slip. op. at 3 (allowing 45 days from the Order's service date to file a Reply to BNSF's "Comments on Remand" that BNSF had filed without prior permission); *AEP Texas North Co. v. BNSF Co.*, No. 41191, slip. op. at 1-2 (STB served Jan. 21, 2011) (allowing more than two months to file a Reply to post-remand comments that were filed "with neither prompting by the Board nor [with] an accompanying motion or petition"). *See also W. Fuels Ass'n, Inc. & Basin Elec. Power Coop. v. BNSF Ry. Co.*, NOR 42088, slip. op. at 2 (STB served July 21, 2014) (granting BNSF's requested reply deadline of 60 days from a decision granting a petition for leave to file comments on remand).

Accordingly, CP respectfully requests that the February 2, 2022 Post-Remand Brief filed by Wisconsin Central Ltd. ("CN") be stricken and the Board, if it finds further briefing appropriate, set the issues to be addressed and briefing schedule, or, in the alternative, that CP be granted until March 21, 2022 to file its Reply to CN's Post-Remand Brief.

⁶ CN claims that moving interchange from Spaulding to Clearing Yard also benefits Bartlett by reducing blocked crossings frequency. The Board and the Seventh Circuit have already found these allegations of no, or little, moment to the statutory interpretation at issue. In addition, as a factual matter, the reduction in blocked crossings at Bartlett is explained by many factors other than the shift in interchange location, including reductions in train volumes and changes in operational practices.

Respectfully Submitted,

Stinson LLP

/s/ David F. Rifkind
David F. Rifkind

Counsel for Soo Line Railroad Company

cc: Parties of Record