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ENTERED
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February 22, 2022
Part of
Public Record

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

Dear Ms. Brown:

CN respectfully submits this reply to CP's February 14 letter motion asking the Board to strike CN's post-remand brief, expand the scope of the issues on remand, and set a briefing schedule. The Board should deny each of CP's requests, which have no basis in the Board's rules, conflict with the Seventh Circuit's decision, and would further delay the resolution of this long-pending dispute.¹

I. CP offers no basis to strike CN's post-remand brief.

Noting that the Board may reject a document that “does not comply with the rules,” CP contends that a post-remand brief “unaccompanied by any request” has “been deemed inappropriate.”² But CP's only authority for that point says the opposite. In *Western Fuels Association*, one party moved to strike a post-remand brief, arguing—like CP here—“that the Board has broad discretion to handle matters on remand and that it has not exercised that discretion to reopen the administrative record.”³ The Board denied that motion to strike, explaining that it

¹ Defined terms have the same meaning here as in CN's earlier briefs.

² CP Ltr. 1–2 & n.1 (citing *W. Fuels Ass'n, Inc. v. BNSF Ry.*, No. 42088, 2011 WL 308180, at *2 (S.T.B. served Feb. 1, 2011)).

³ 2011 WL 308180, at *1.

“has not adopted any specific regulation or procedure for handling cases on remand”; that its approach to remand proceedings has varied; and that the post-remand brief there addressed “important” questions.⁴

Western Fuels Association thus shows that an unsolicited post-remand brief is not improper. And CP does not contend that the issue CN’s brief addresses—whether CP must pay the BRC’s fees for CN-bound traffic that CP delivers to Clearing Yard—is not “important.” Nor could it. The Seventh Circuit suggested that “this fight is principally about who should bear the cost of Belt Railway’s services,” an issue the Board “did not resolve.”⁵ Indeed, this issue is not just important, but dispositive—as explained below, it is the only issue left in the case.

For the same reasons, CP misses the mark by noting that “redundant, irrelevant, immaterial, impertinent, or scandalous matter” may be stricken.⁶ Scandal aside, this provision applies to material that has “no essential or important relationship to the claim for relief” or “does not pertain and is not necessary to the issues in question in the case.”⁷ CP does not and cannot contend that this standard is met here.⁸

Nor is there any merit to CP’s suggestion that the Board could decide the “who pays” question without further briefing.⁹ Although the parties have briefed this issue before, that was almost two years ago—and it was before the Seventh Circuit disagreed with the Board’s approach. As CN’s post-remand brief explains, the Board will benefit from up-to-date information about the parties’ interchange operations and from briefing on how the Seventh Circuit’s decision requires the Board to approach the payment question on remand.¹⁰

⁴ *Id.* at *2.

⁵ *Wisconsin Cent. Ltd. v. STB*, 20 F.4th 292, 294 (7th Cir. 2021).

⁶ CP Ltr. 1 n.1 (quoting 49 C.F.R. § 1104.8).

⁷ See *Barnes v. AT&T Pension Benefit Plan*, 718 F. Supp. 2d 1167, 1170 (N.D. Cal. 2010) (construing the federal civil rules’ parallel provision).

⁸ See, e.g., *Clyde S. & Sandra Forbes & CSF Acquisition, Inc.—Control Exemption*, No. 31545, 1991 WL 198309, at *7 (I.C.C. Oct. 1, 1991) (refusing to strike material that “appears to be reasonably related to the issues raised”); *GLI Acquisition Co.—Purchase—Trailways Lines, Inc.*, No. MC-F-18505, 1988 WL 226400, at *1 (I.C.C. May 27, 1988) (“We see no need to strike the challenged material; it is relevant to the issues involved in this proceeding.”).

⁹ See CP Ltr. 1, 2.

¹⁰ See CN Post-Remand Br. 15, 18, 19; cf. *Denver & Rio Grande Ry. Hist. Found.—Pet. for Declaratory Order*, No. FD 35496, 2012 WL 591790, at *2 (S.T.B. served Feb. 23, 2012) (denying a motion to strike an allegedly tardy response “in order to allow the development of a more complete record”); *Jackson Cty., Mo.—Acquisition & Operation Exemption—Union Pac. R.R. Co., Fed. Carr. Cas. (CCH)* ¶ 37419 (S.T.B. served July 31, 2019) (denying a motion to strike matter that “helps illustrate the parties’ dispute and helps provide context to the filings before the Board”).

The Board should thus follow *Western Fuels Association* and deny the motion to strike.

II. The Seventh Circuit’s decision forecloses CP’s attempt to relitigate whether CN can designate Clearing Yard under § 10742.

The Board should also reject CP’s effort to expand the scope of the issues on remand, which would violate the mandate rule and the law-of-the-case doctrine. The mandate rule requires “an administrative tribunal” to “adhere to the commands of a higher court on remand.” *Delgado v. U.S. Dep’t of Justice*, 979 F.3d 550, 557 (7th Cir. 2020). Likewise, the law-of-the-case doctrine “prohibits a [tribunal] from reconsidering on remand an issue expressly or impliedly decided” on appeal. *Id.* Thus, post-remand proceedings may address only (i) specifically remanded issues, (ii) “issues arising for the first time on remand,” and (iii) issues “timely raised” in prior proceedings that “remain undecided.” *See United States v. Morris*, 259 F.3d 894, 898 (7th Cir. 2001). These principles foreclose CP’s arguments here.

The Seventh Circuit made clear that this case raises only “three distinct questions”: “(1) may the receiving carrier ever designate a willing third party to receive traffic on its behalf?; (2) if yes, is the proposed location for interchange ‘reasonable’ ... ? (3) if yes to both of these questions, who pays the third party?”¹¹ The Seventh Circuit resolved the first question in CN’s favor, holding that a “rail carrier can have the ‘power to provide’ facilities as a result of contract,” not just by “ownership,” and that CN has the power to provide Clearing Yard because CN, “the receiving line, is willing to accept traffic through the Belt Railway, and Belt Railway is willing to accept that traffic.”¹² The second question has never been disputed, and CP does not suggest otherwise. That leaves only the third question—which CN’s post-remand brief addresses.

Even so, CP says that “it remains an open issue as to whether CN may properly designate the BRC’s Clearing Yard.”¹³ This claim depends on two mistaken assertions.

First, CP says the court “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.’”¹⁴ To support this point, CP reiterates an argument it made before the Board, which the Board accepted: “that by forcing CP to pay a fee to reach . . . Clearing Yard, ‘CN would itself be

¹¹ *Wisconsin Cent.*, 20 F.4th at 294–95.

¹² *Id.*

¹³ CP Ltr. 3.

¹⁴ *Id.* at 3 (quoting 49 U.S.C. § 10742).

“providing” nothing.”¹⁵ But the court disagreed with this exact reasoning. It explained that “the Board erred” by “mixing . . . up” the “three distinct questions” above “and smuggling an assumption about the answer to Question 3 [payment] into its decision about Question 1 [power to provide].”¹⁶ The court thus rejected CP’s arguments that “provide” means “provide for free” because “payment and location are inextricable.”¹⁷ In so holding, the court also necessarily rejected CP’s related argument that some distinction exists between exercising the “power to provide” a third-party’s facilities and actually “provid[ing]” them.¹⁸

In short, CP made these arguments to the Board and to the Seventh Circuit. The Board agreed. The court did not.

Second, CP says the court “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.”¹⁹ CP says the court “suggest[ed] that a receiving carrier may designate a willing third party to receive traffic in interchange on its behalf,” but claims “that is a different question from whether CP can be forced to bring cars to CN at Clearing Yard.”²⁰ But the court did not “suggest” that CN can designate the BRC, “a willing third party”—it so held.²¹ And these questions are not different. By holding that Clearing is within CN’s “power to provide” because the BRC is “willing” under its Operating Agreement to accept traffic there, the court necessarily held that CP can be required to transport that traffic to Clearing. Otherwise, that holding would be meaningless.

The court also specifically disagreed with the Board’s reliance on the same principle CP invokes now. Before the Board, CP relied on *Burlington Northern* to argue that CN cannot “[d]emand[] that CP exercise permissive rights over BRC’s line.”²² The Board agreed, similarly relying on *Burlington Northern*.²³ But the court again disagreed. It explained that the Board was wrong to “rel[y] on a common-law norm that a delivering railroad cannot compel a receiving railroad to exercise a contractual right to require a third party to receive traffic”—*i.e.*, the

¹⁵ *Id.* (quoting 2020 Board Decision at 7); see CP Reply 15 (“By designating Clearing . . . and insisting that CP pay BRC’s fees to utilize Clearing, CN is not ‘providing’ an interchange facility . . .”).

¹⁶ *Wisconsin Cent.*, 20 F.4th at 295.

¹⁷ Brief for Intervenor-Respondent Soo Line Railroad Company d/b/a Canadian Pacific 41–42, *Wisconsin Cent.*, 20 F.4th 292 (No. 20-3507), 2021 WL 1584006, at 41–42 (“CP Br.”).

¹⁸ See CP Br. 45.

¹⁹ CP Ltr. 3.

²⁰ *Id.*

²¹ *Wisconsin Cent.*, 20 F.4th at 295.

²² CP Reply 15 (discussing *Burlington N. R.R. v. United States*, 731 F.2d 33 (D.C. Cir. 1984)).

²³ 2020 Board Decision at 6, 9 n.9.

permissive-trackage-rights norm from *Burlington Northern*²⁴—because “[w]hether [CP] can be required to tender its traffic” at Clearing “depends on the language of the statute, not on extra-statutory doctrines.”²⁵ And the statutory language nowhere immunizes a delivering carrier from having to exercise permissive trackage rights. Indeed, the idea that a delivering carrier can avoid interchanging via “a willing third party” by refusing to exercise trackage rights *over that third party* is precisely the sort of atextual engraftment that improperly “cuts down on the scope of this statute.”²⁶

Taking a step back underscores the futility of CP’s attempt to keep disputing whether CN “may properly designate the BRC’s Clearing Yard.”²⁷ The parties extensively litigated that question before the Board, addressing every point CP makes now. The Board said that CN could not designate Clearing Yard, relying on these same points. The Seventh Circuit vacated the Board’s decision, disagreeing with essentially every aspect of its reasoning and instructing that CN’s right to choose a reasonable interchange location cannot be restricted by conditions “the statute does not contain.”²⁸ In short, the parties fought this fight; CP lost. And every point it seeks to relitigate now was “expressly or impliedly decided” on appeal. *Delgado*, 979 F.3d at 557.

Finally, CP says it may try to raise even more (unspecified) issues at some (unspecified) “later time.”²⁹ The Board should not allow that. Even CP’s own letter asks the Board—now—to “identify what issues should be addressed on briefing” and set a briefing schedule *on those issues*.³⁰ Even if the Board takes up CP’s proposal to set a new briefing schedule, it should make clear that CP cannot inject still more issues into this case later.

III. The Seventh Circuit has already rejected CP’s merits argument.

CP also includes a preview of its argument on the “who pays” question.³¹ But that preview simply confirms that the Seventh Circuit has rejected CP’s view. CP faults CN for relying on the BRC Operating Agreement because “[n]othing in the

²⁴ *Burlington N.*, 731 F.2d at 39 (“Even if an extensive trackage rights agreement does exist between the [receiving carrier] and the [third party], the [receiving carrier] is under no obligation to exercise those rights on [the delivering carrier’s] behalf.”).

²⁵ *Wisconsin Cent.*, 20 F.4th at 295.

²⁶ *Id.* at 294.

²⁷ CP Ltr. 3.

²⁸ *Wisconsin Cent.*, 20 F.4th at 294.

²⁹ CP Ltr. 2.

³⁰ *Id.* at 4.

³¹ *See id.* at 1, 3.

carriers' agreements with BRC supersedes the Section 10742 obligation 'to provide' interchange facilities." CP Ltr. 3. But as just explained, the court rejected the idea that CN would not be "provid[ing]" Clearing Yard unless it paid all the BRC's fees for traffic in both directions.³² And while CP notes that the BRC's payment provisions "apply as much to CN as to CP,"³³ that is precisely the point—the parties agreed, in this voluntary contractual arrangement, that each carrier should pay the BRC's fees for the traffic it delivers to Clearing. Nothing in § 10742 overrides this voluntary agreement or authorizes the Board to do so.

IV. The Board should reject CP's stalling tactics and order it to reply promptly.

Because there is no basis to strike CN's post-remand brief, and because the court's decision forecloses the other issues CP wants to raise, there is no reason to further delay the resolution of this dispute by adopting a new briefing schedule "for initial and reply briefs."³⁴ The Board should instead order CP to file a reply to CN's brief by March 4, 2022—30 days after CN filed and served its post-remand brief. That is ten days longer than the 20-day period the Board's rules require for replies,³⁵ and 85 days after the Seventh Circuit issued its opinion ordering a remand for further proceedings. That is ample time for CP to address the "who pays" question that has been part of this case since the beginning.

The Board should thus reject CP's request to delay its reply until March 21—47 days after CN's filing and a full 103 days after the court ruled.³⁶ CP says a March 21 deadline "would give CP the same time that CN had,"³⁷ apparently referring to the time between the court's December 8 ruling and CN's February 2 filing. But CN filed its brief just two days after the court closed the appellate case. Filing earlier would have been premature.³⁸ Indeed, the gap between the court's ruling and CN's filing counsels *against* giving CP even more time to reply. CP has known since early December that it would need to address on remand the question of "who should bear the cost of Belt Railway's services," which "the Board did not resolve" before.³⁹ Nothing stopped CP from using the time after the court ruled to prepare its arguments on this point, as CN did. And while CP says a deadline before March 21 "would be unduly prejudicial" because CN's brief contains

³² *Wisconsin Cent.*, 20 F.4th at 295.

³³ CP Ltr. 3.

³⁴ *Id.* at 4.

³⁵ *See* 49 C.F.R. § 1104.13(a).

³⁶ *See* CP Ltr. 4.

³⁷ *Id.*

³⁸ *See* Fed. R. App. P. 41 (court's mandate does not issue until time to seek rehearing expires).

³⁹ *Wisconsin Cent.*, 20 F.4th at 294.

“statements that CP should be allowed to answer,”⁴⁰ CP does not try to explain why “answer[ing]” CN’s arguments will take almost two-and-a-half times longer than the Board’s rules contemplate for replies—especially since all of CN’s current arguments address issues that have been in the case since the start.

* * *

For these reasons, the Board should (i) deny CP’s motion to strike, (ii) decline CP’s invitation to revisit issues the Seventh Circuit explicitly or implicitly decided, and (iii) order CP to file a reply to CN’s post-remand brief by March 4, 2022.

Sincerely,

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⁴⁰ CP Ltr. 4.