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**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 the Board to accept the attached reply to CP's March 21, 2022 reply. "While the Board's regulations do not generally permit replies to replies," the Board has accepted such filings that "address new matters contained in" the other party's briefing, "in the interest of having a more complete record."¹ That standard is met here, because CP's reply raises several new issues.

CN filed its post-remand brief on February 2, 2022, explaining that the Seventh Circuit's decision in this case leaves just one question for the Board to decide: Who should pay the BRC's fees for CP-to-CN traffic interchanged at Clearing Yard since August 2019. CP responded on February 14 by moving to strike CN's post-remand brief and asserting that two other issues, related to whether CN can designate Clearing in the first place, remain open. CP thus asked

¹ See *Nat'l Ass'n of Reversionary Prop. Owners—Pet. for Rulemaking*, No. EP 749, 2018 WL 3872778, at *1 (S.T.B. served Aug. 14, 2018); *accord Ulster & Delaware Ry. Revitalization Corp.—Pet. for Declaratory Order*, No. FD 36164, 2018 WL 3209656, at *3 (S.T.B. served June 29, 2018); *Diana Del Grosso—Pet. for Declaratory Order*, No. FD 35652, 2013 WL 275302, at *3 n.4 (S.T.B. served Jan. 24, 2013).

the Board to strike CN's brief, "determine whether and, if so, on what issues, further briefing should address in this matter," and set a briefing schedule. Alternatively, CP asked that it "be granted until March 21, 2022 to file its Reply to CN's Post-Remand Brief."

CP then filed its reply to CN's post-remand brief on March 21. That reply was a month late. Under the Board's rules, it was due on February 22,² and the Board did not grant CP an extension. And although the Board has not yet addressed CP's request to decide the scope of the issues on remand, CP's March 21 reply briefed several issues that CN did not address (because they are forfeited, foreclosed by the Seventh Circuit's decision, or simply meritless). Those issues include whether the BRC Operating Agreement establishes that the BRC will accept interchange traffic on CN's behalf, whether Clearing is a reasonable interchange location, and whether applying the BRC Operating Agreement here would conflict with the statutory language or "be highly disruptive to interchange arrangements."

The upshot is that CP's 25-page March 21 reply covers multiple issues that CN has not had a chance to brief. The Board thus lacks the benefit of both parties' views on these issues—including on how the Seventh Circuit's decision affects these arguments. In the interests of a complete record, and to assist the Board in deciding this dispute, the Board should thus accept CN's proposed reply, attached here.

² 49 C.F.R. § 1104.13(a).

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of April 2022, I caused a copy of the foregoing document to be served by U.S. Postal Service or more expeditious means upon the service list to Finance Docket No. 36397.

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ORDER—INTERCHANGE WITH SOO LINE RAILROAD COMPANY**

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CN'S REPLY TO CP'S MARCH 21, 2022 REPLY

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Wisconsin Central Ltd. (CN) respectfully submits this reply to respond to new arguments in CP's March 21, 2022 reply. CP tries to raise new issues on remand or reopen issues the Seventh Circuit decided. That is improper. And to the extent CP's arguments are not forfeited or foreclosed, they fail to grapple with the question here. The parties have agreed in the BRC Operating Agreement—and consistent with industry custom and their own past practice—that each carrier will pay the BRC's fees for interchange traffic it delivers to Clearing. That fact, combined with the Seventh Circuit's holding that Clearing is within CN's "power to provide," resolves this case. The Board need not decide whether, *absent* such an agreement, the statute would require the receiving carrier to make interchange facilities available for free.

I. CP cannot dispute that the BRC Operating Agreement allows CN to designate Clearing for interchange.

CP says that, while the Seventh Circuit recognized CN's right to contract with a third party to receive interchange traffic, the BRC Operating Agreement is not such a contract. This argument lacks merit and conflicts with the court's ruling.

First, CP says the "BRC Operating Agreement does not provide for BRC to receive cars on CN's behalf at Clearing."¹ But despite framing this argument around what the contract "provide[s]," CP never addresses the contractual language or responds to CN's explanation of it. The Operating Agreement gives each co-owner "the right and privilege" of "running and operating" over the BRC's lines; to

¹ CP Post-Remand Reply 10; *see id.* at 22–23.

use the BRC “as a bridge for through movement of cars . . . between their yards and connections with other Railway Companies,” and “to make up or break up trains or do switching upon the Belt Railway . . . through the agency of” the BRC.² And it explicitly contemplates “interchange of cars between Railway Companies on the Belt Railway.”³

Thus, as CN explained, the contract explicitly permits “the transfer of cars between any of the Railway Companies through the facilities of the Belt Company,” subject to a “charge” payable to the BRC.⁴ The BRC has implemented this requirement by setting rates for “traffic delivered to the BRC at Clearing Yard by an inbound line haul carrier for an outbound line haul carrier.”⁵ These provisions plainly cover CN-bound traffic that CP delivers to Clearing. CP has no answer.

Second, in any event, the Seventh Circuit decided this issue. It held that (i) a receiving carrier can “designate a willing third party to receive traffic” by contract, and (ii) this principle applies here because CN, “the receiving line, is willing to accept traffic through the Belt Railway, and Belt Railway is willing to accept that traffic.”⁶ The court thus recognized that the BRC’s contract with CN is an agreement to receive CN-bound traffic.

² CN Post-Remand Br., Exhibit A, BRC Operating Agreement, Art. I.

³ *Id.*, Art. III § 1(e).

⁴ *Id.*, Art. III § 1(a).

⁵ CN Post-Remand Br., Exhibit B, BRC Rate Sheet.

⁶ *Wisc. Cent. Ltd. v. STB*, 20 F.4th 292, 294–95 (7th Cir. 2021).

CP claims the court “never even mention[ed] the BRC Operating Agreement,” but it essentially admits that the court’s reference to the BRC’s “willing[ness]” to accept cars on CN’s behalf *is* a reference to the Agreement.⁷ Indeed, there is no other possible basis for the court’s statement. Nor can CP explain away this statement as “merely accept[ing] as true CN’s representation that BRC is willing to accept cars on its behalf.”⁸ CN argued on appeal that it had the “power to provide” Clearing for interchange because—under the BRC Operating Agreement, which was in the appellate appendix—“both railroads have the right to use the Belt Railway for interchange.”⁹ CP’s appellate brief similarly cited and discussed the Operating Agreement, without disputing CN’s description.¹⁰ This undisputed factual point was thus a premise for the Court’s ruling. And when a court accepts a factual premise as true and rules on that basis, the result is a binding holding, whether or not the court spells it out.¹¹

Third, CP infers—solely from the Seventh Circuit’s use of the word “behalf”—that the court’s holding applies only to a “receiving carrier’s agent” and thus

⁷ See CP Post-Remand Reply 10; *id.* at 22 (conceding the court “held . . . that the BRC is a willing third party”); CN Post-Remand Br. 15.

⁸ CP Post-Remand Reply 10–11.

⁹ See Br. for Pet’r Wisconsin Central Ltd. 12, 39, *Wisc. Cent.*, 20 F.4th 292 (No. 20-3507) (ECF No. 24).

¹⁰ See Br. for Intervenor-Resp. Soo Line R.R. Co. d/b/a Canadian Pacific 6–7, 40, 46 *Wisc. Cent.*, 20 F.4th 292 (No. 20-3507) (ECF No. 39).

¹¹ See *Black v. Lane*, 22 F.3d 1395, 1399 & n.5 (7th Cir. 1994) (in reversing a prior grant of summary judgment, an earlier appellate decision had “implicitly rul[ed] that the plaintiff had adduced sufficient facts to sustain his claim for relief,” so the district court on remand could not hold otherwise).

requires a common-law “agency relationship.”¹² Nonsense. No party made such an argument, and the opinion says no such thing. Only a contractual relationship is required.¹³

Fourth, CP invokes a pair of common-law concepts, contending that (i) trackage rights are permissive and (ii) a carrier must “allow a delivering carrier free interchange.”¹⁴ But the Seventh Circuit flatly rejected the idea that this sort of “common-law tradition” can limit a receiving carrier’s rights under § 10742: “Whether [CP] can be required to tender its traffic [at Clearing] rather than at the Spaulding yard depends on the language of the statute, not on extra-statutory doctrines.”¹⁵ And while CP says the permissive-trackage-rights concept “was not even mentioned” by the Seventh Circuit,¹⁶ CN has already explained that the court specifically rejected CP’s reliance on this “common-law norm.”¹⁷ CP also protests that this concept came from the Supreme Court, but the cited case merely interpreted a specific contract provision, and never suggested any limits on a receiving carrier’s rights under the interchange statute, which was not at issue.¹⁸ And while CP emphasizes that CN did not appeal the 2019 Kirk Yard decision

¹² CP Post-Remand Reply 11.

¹³ *See Wisc. Cent.*, 20 F.4th at 294 (“A rail carrier can have the ‘power to provide’ facilities as a result of contract, just as it can have that power by ownership.”).

¹⁴ CP Post-Remand Reply 11–12.

¹⁵ *Wisc. Cent.*, 20 F.4th at 295.

¹⁶ CP Post-Remand Reply 13.

¹⁷ *See* CN Reply to CP Mot. to Strike 3–4.

¹⁸ *See Rock Island Ry. v. Rio Grande R.R.*, 143 U.S. 596, 609 (1892).

discussing this concept,¹⁹ the Seventh Circuit’s more recent ruling overrides the Board’s earlier decision to the extent they conflict.

Likewise, while CP says the Seventh Circuit “did not question” the “free-transit rule,” the court both reiterated that such “extra-statutory doctrines” cannot “cut[] down on the scope of this statute” and held that “the statute does not contain” any physical-intersection requirement²⁰—which is a key premise of the supposed “free-transit rule.”²¹ But even if the “free-transit rule” could apply here, it would not help CP, because “CP does not have to pay trackage rights” to reach Clearing Yard.²² Thus, CP *can* “reach Clearing without charge,” as the rule would require.²³

In short, CP grasps at straws to evade the clear import of the BRC Operating Agreement. As the Seventh Circuit said, the Agreement means the BRC is willing to accept CN-bound traffic from CP, so Clearing is within CN’s power to provide.

II. CP cannot belatedly challenge whether Clearing is a reasonable interchange location.

CP also argues—for the first time, after years of litigation—that “Clearing is not a reasonable interchange location.”²⁴ This argument comes too late.

CN’s April 2020 petition included a whole section arguing that “Clearing is a reasonable interchange location” because it “does not ‘impose unusual,

¹⁹ CP Post-Remand Reply 12–13.

²⁰ *Wisc. Cent.*, 20 F.4th at 294–95.

²¹ *See* CP Post-Remand Reply 12–13.

²² *Id.* at 24 n.9; *see also* CN Post-Remand Br. 19–21.

²³ CP Post-Remand Reply 12.

²⁴ *See id.* at 13–16.

unreasonable, or impossible operating hazards’ on the delivering carrier.”²⁵ In response, CP’s May 2020 reply argued that *Spaulding* was a *reasonable* location, but not that *Clearing* was *unreasonable*.²⁶ As to Clearing, CP put all its eggs in one basket: The idea, which the Seventh Circuit has now rejected, that CN “must designate a reasonable interchange point *on its own line*.”²⁷ CP simply never challenged Clearing’s reasonableness. Indeed, CN has repeatedly pointed out on remand that “whether Clearing is reasonable[] was not disputed in this proceeding,”²⁸ and CP—despite contending that other issues remain open—has never suggested otherwise.²⁹

It is thus too late for CP to raise this issue now. The Board “will not consider arguments or evidence that should have been submitted at an earlier stage.”³⁰ That principle applies here. CN’s petition argued that Clearing is reasonable two years ago, and CP had both the opportunity and the incentive to respond directly. It chose not to.

Likewise, under the mandate rule, post-remand proceedings may address only (i) “the issues remanded” by the appellate court, (ii) “issues arising for the first

²⁵ CN Pet. 22 (initial capitals omitted).

²⁶ CP May 2020 Reply 8, 17.

²⁷ *E.g., id.* at 17 n.14.

²⁸ *See* CN Post-Remand Br. 6, 9; CN Reply to CP Mot. to Strike 3.

²⁹ CP Mot. to Strike 2–3 (arguing that CN “presume[d] an unduly narrow scope of issues on remand” and identifying two specific issues CP believed were still open—not including reasonableness).

³⁰ *New Eng. Cent. R.R.—Trackage Rights Order—Pan Am S. LLC*, No. FD 35842, 2018 WL 1989070, at *4 (Apr. 24, 2018).

time on remand,” and (iii) issues “timely raised” in prior proceedings that “remain undecided.”³¹ As just explained, CP’s argument that Clearing is not reasonable was not “timely raised” before the appeal; it was not raised at all. Likewise, this issue did not “aris[e] for the first time on remand”; it was fully teed up from the outset by CN.

That just leaves “the issues remanded.” CP suggests that the Seventh Circuit “left to the Board to resolve” whether Clearing is reasonable.³² But the court did not remand this issue; it noted merely that whether a “proposed location for interchange [is] ‘reasonable’” is one of “three distinct questions [that] *could* require resolution” in an interchange dispute.³³ The court did not suggest that this question requires resolution here, or that CP would be free on remand to raise issues it could have raised earlier, but did not. On the contrary, the Seventh Circuit has made clear that “parties cannot use the accident of remand as an opportunity to reopen waived issues.”³⁴ This argument is thus foreclosed.

But even if the Board could reach the reasonableness issue now, CP’s arguments are framed under the wrong standard. CP latches onto the Seventh Circuit’s observation that an interchange dispute “could” require resolving whether the proposed location is reasonable “compared with the place where switching

³¹ *United States v. Morris*, 259 F.3d 894, 898 (7th Cir. 2001); *see also Delgado v. U.S. Dep’t of Justice*, 979 F.3d 550, 557 (7th Cir. 2020) (mandate rule applies equally to “an administrative tribunal”).

³² CP Post-Remand Reply 1.

³³ *Wisc. Cent.*, 20 F.4th at 294 (emphasis added).

³⁴ *Morris*, 259 F.3d at 898.

otherwise would occur,”³⁵ arguing that the Board must therefore compare Clearing to Spaulding.³⁶ But “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.”³⁷

Thus, Clearing need not be the *most* reasonable option; it need only be reasonable, period—meaning it cannot “impose unusual, unreasonable, or impossible operating hazards or require the delivering carrier to do work which properly belongs to the receiving carrier.”³⁸ The Seventh Circuit did not question this settled rule. In turn, because CP’s (forfeited) reasonableness arguments try to show that Spaulding is superior to Clearing—which is not the test—CP could not prevail on this issue anyway.³⁹ And the rule that a receiving carrier may choose a reasonable interchange location based on its own business interests also addresses CP’s repeated assertions that “the move to Clearing for traffic interchanged in both

³⁵ *Wisc. Cent.*, 20 F.4th at 294.

³⁶ CP Post-Remand Reply 13–16.

³⁷ *Burlington N. R.R. v. United States*, 731 F.2d 33, 40 (D.C. Cir. 1984) (emphasis added).

³⁸ *New York, C. & St. L. R.R. v. New York Cent. R.R.*, 314 I.C.C. 344, 345 (1961).

³⁹ CP’s comparison also relies on mere speculation. CP says Spaulding is superior because: “*If* Clearing is encountering fluidity issues,” then “CN cars *may* congest CP’s Bensenville Yard,” which “*could*” have consequences elsewhere on the network. CP Post-Remand Reply 15 (emphasis added). These suppositions do not suggest that Clearing is not a reasonable interchange location.

directions is entirely for CN's benefit."⁴⁰ In all events, the move to Clearing was not solely for CN's benefit; interchanging at Spaulding is unreasonable because it both clogged CN's single-track main line and (as discussed below) harmed the surrounding communities.

Finally, even if the Board could reach this issue, CP's argument that Spaulding is superior to Clearing because "Spaulding is free"⁴¹ is just another take on CP's argument that CN cannot designate a third party's facilities for interchange. As CN explained and CP nowhere disputes, industry custom requires the delivering carrier to cover the costs of interchange, including third-party switching fees.⁴² On CP's view, the existence of such third-party costs would render an interchange location unreasonable, meaning a receiving carrier could only designate an interchange point on its own lines—precisely the position the Seventh Circuit rejected.⁴³

III. CP ignores the unanimous view of other stakeholders.

CP's effort to compare Spaulding and Clearing also fails for another reason. Despite vaguely invoking "Chicago area stakeholders,"⁴⁴ CP ignores the unanimous views of area stakeholders who have gone on the record in this proceeding to oppose returning interchange operations to Spaulding.

⁴⁰ CP Post-Remand Reply 3, 23–25.

⁴¹ *Id.* at 2, 16.

⁴² CN Post-Remand Br. 17.

⁴³ *See Wisc. Cent.*, 20 F.4th at 294.

⁴⁴ CP Post-Remand Reply 15.

Metra has written to advise the Board that, “for reasons related to the impact of the interchange between the two railroads on Metra’s operations if such interchange were to occur at Spaulding, Metra would prefer that the interchange take place at . . . Clearing Yard.”⁴⁵

Many local bodies have similarly written to emphasize the significant problems caused by interchanges at Spaulding before they moved to Clearing in August 2019. The Supervisor for Hanover Township writes: “Keeping the interchange out of Bartlett, would continue to improve traffic flow, and it would increase the safety of our residents west of the track, giving them better access to police, fire and ambulance services. Since the interchange has been moved our constituents and emergency services have noticed a significant difference.”⁴⁶ The Fire Chief of the Bartlett Fire Protection District raises similar safety concerns about the “1,300 homes . . . located west of the CN rail [that] are protected primarily by the fire station located east of the rail.”⁴⁷ Indeed, “the Spaulding interchange effectively cuts off the residents west of the tracks from emergency services,” which poses serious dangers: The “effectiveness of our emergency services is heavily dependent upon our ability to reach the scene quickly,” and a “delay in response as minimal as one minute can have a tremendous adverse impact on the outcome of a patient’s medical condition or the growth of a fire.”⁴⁸

⁴⁵ Metra Motion to Withdraw 1 (Feb. 24, 2022).

⁴⁶ Ltr. from Brian P. McGuire to Cynthia T. Brown 1 (Feb. 23, 2022).

⁴⁷ Ltr. from William Gabrenya to Cynthia T. Brown 1 (Feb. 25, 2022).

⁴⁸ *Id.*

The Village of Bartlett President makes the same points, also noting that “moving the interchange away from Spaulding” has improved “the daily lives of our residents” and had “significant economic benefits to the village as more people come through town patronizing local businesses.”⁴⁹ The Superintendent of the “second largest school district in Illinois” likewise urges that “a switching station at Spaulding Road will cause significant delays to school bus transportation.”⁵⁰ And the Bartlett Area Chamber of Commerce writes on “behalf of the Bartlett area businesses and residents affected by lengthy delays and safety concerns” to “ask that you **DO NOT** bring back the interchange at Spaulding.”⁵¹

If the Board reached the reasonableness issue despite CP’s forfeiture—and certainly if it compared Clearing to Spaulding, despite the governing test—these considerations would weigh heavily against a conclusion that Spaulding is reasonable, let alone superior to Clearing.⁵²

IV. CP’s payment arguments lack merit.

Finally, CP says that if the Board recognizes CN’s right to designate Clearing, CN must pay the BRC’s fees for all traffic in both directions—regardless of the BRC Operating Agreement’s contrary terms, to which CP voluntarily agreed. This argument focuses on the statutory phrase “shall provide.” But even if CP’s

⁴⁹ Ltr. from Kevin Wallace to Cynthia T. Brown 1 (Feb. 25, 2022).

⁵⁰ Ltr. from Tony Sanders to Cynthia T. Brown 1 (Feb. 23, 2022).

⁵¹ Ltr. from Nanette Gudenkauf to Cynthia T. Brown 1 (Feb. 24, 2022).

⁵² CP’s other arguments on this point make the same error the Seventh Circuit pointed out: They conflate the separate questions of where the interchange should be located and who should pay for the BRC’s services. *See* CP Post-Remand Reply 2, 10, 16.

statutory argument were tenable in a vacuum, this case involves a voluntary contractual agreement about payment. CP agreed, in the BRC Operating Agreement, to pay the BRC's fees for interchange traffic it delivers to Clearing. Thus, whatever the statute would require *without* such an agreement, the question here is simply whether to give effect to this existing contractual arrangement, consistent with the Board's stated preference and the Seventh Circuit's focus on contractual rights.⁵³ CP's contrary arguments lack merit.

First, CP says the BRC Operating Agreement governs only “cars that carriers have agreed to interchange via Clearing,” and does not apply to interchanges under § 10742.⁵⁴ But CP again fails to address the contract's language. As already explained, CP agreed to “pay to the [BRC] a charge for the transfer of cars between any of the Railway Companies through the facilities of” the BRC.⁵⁵ The BRC has thus set rates for “traffic delivered to the BRC at Clearing Yard by an inbound line haul carrier for an outbound line haul carrier.”⁵⁶ This language plainly encompasses the traffic at issue here. If CP believes more is required to “bargain away” any supposed right not to pay the BRC's fees, it does not try to explain why.⁵⁷

⁵³ See CN Post-Remand Br. 13–15.

⁵⁴ CP Post-Remand Reply 19.

⁵⁵ CN Post-Remand Br., Exhibit A, BRC Operating Agreement, Art. III § 1(a).

⁵⁶ CN Post-Remand Br., Exhibit B, BRC Rate Sheet.

⁵⁷ See CP Post-Remand Reply 21.

Nor does it address the general rule that “ordinary contract principles govern a contractual waiver” of a statutory right.⁵⁸

Second, CP observes that CN and CP could sign a separate contract for “CN to reimburse CP” for the BRC fees.⁵⁹ True, but irrelevant. The only such agreement is the interim agreement, which is temporary (and requires CP to repay CN if CN ultimately prevails).⁶⁰ Without some other agreement about “who is ultimately responsible for paying the fees,”⁶¹ which not exist here, the delivering carrier who receives the BRC’s invoice must pay it.

Third, CP says “this is not a contract dispute” (and if it were, a court should address it).⁶² That misunderstands the issue. As explained above, there is no real dispute about what the BRC Operating Agreement provides. The question is simply whether the Board should adhere to its stated view that “the payment scheme” for an interchange through “an intermediate switching carrier . . . is a matter for mutual consultation and agreement.”⁶³ But even if the contract’s terms were meaningfully disputed, the proper result would be to affirm CN’s right to designate Clearing for interchange, and let the parties address any contractual issues in the appropriate forum.

⁵⁸ See, e.g., *Snapper, Inc. v. Redan*, 171 F.3d 1249, 1261 (11th Cir. 1999) (discussing waiver of the statutory right to remove a case to federal court).

⁵⁹ CP Post-Remand Reply 20.

⁶⁰ See CN Post-Remand Br. 16.

⁶¹ CP Post-Remand Reply 21.

⁶² *Id.* at 23.

⁶³ Joint Brief of Respondents 11 n.4, *Wisc. Cent.*, 20 F.4th 292 (No. 20-3507), 2021 WL 1584008, at 11 n.4; see CN Post-Remand Br. 13–14.

Fourth, CP acknowledges the industry custom “requir[ing] the delivering carrier to pay the intermediate switch fees,” but says this custom “applies only where there is no direct physical connection.”⁶⁴ But the Seventh Circuit made clear that “the statute does not contain” any requirements or conditions based on “physically intersecting lines.”⁶⁵ The court’s use of the word “behalf” does not suggest that interchanging through a third-party carrier must work exactly like a direct interchange.⁶⁶ Simply put, CP must give up the idea that the parties’ interchange obligations depend on whether “there is a direct connection” in the area.⁶⁷

Fifth, CP insists that “shall provide” in § 10742 means provide for “free.”⁶⁸ But CP’s lead authority for this argument is the “free-transit” rule, whose premise—that the statute requires a direct physical connection⁶⁹—the Seventh Circuit has rejected.⁷⁰ CP also emphasizes case law interpreting the word “provide.” But as CN explained on appeal, § 10742’s current text follows a non-substantive 1978 recodification⁷¹; thus, the controlling term is not “provide,” but “afford.”⁷² And

⁶⁴ CP Post-Remand Reply 18.

⁶⁵ *Wisc. Cent.*, 20 F.4th at 294.

⁶⁶ *Contra* CP Post-Remand Reply 19.

⁶⁷ *See id.* at 18.

⁶⁸ *Id.* at 16–18.

⁶⁹ 2020 Board Decision 5.

⁷⁰ *Wisc. Cent.*, 20 F.4th at 294.

⁷¹ *See Burlington N.*, 731 F.2d at 40.

⁷² *See State of N.Y. v. United States*, 568 F.2d 887, 889 n.2 (2d Cir. 1977) (reciting the pre-recodification text of Interstate Commerce Act § 3(4): “All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all

“afford” is a broader term: It means to “supply, provide, offer (something sought, or something useful or desirable); to be a source of, to be capable of providing or yielding.”⁷³

In any event, CP’s only authority construing the phrase “shall provide” is a footnote in a state court decision about retirement benefits, which contrasted this phrase with different language (absent here) in an adjacent statutory provision.⁷⁴ This case does not suggest that Congress meant the interchange statute to override the industry custom discussed above. CP also cites a Seventh Circuit case construing the phrase “provide for,”⁷⁵ but “provide” and “provide for” are different terms with different meanings.⁷⁶ And even if these cases interpreted the correct phrase, they would suggest at most that the statute “does not *necessarily* involve a payment” by the delivering carrier⁷⁷—not that it cannot involve payment.

Regardless, the question here is not what the statute would require in a vacuum. It is whether to give effect to the parties’ existing agreement about how to

reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines . . .”).

⁷³ Oxford English Dictionary, *Afford*, <https://bit.ly/3Dr0F5K>.

⁷⁴ See CP Post-Remand Reply 17 (citing *St. Louis Police Officers’ Ass’n v. Bd. of Police Comm’rs of City of St. Louis*, 259 S.W.3d 526, 529 n.4 (Mo. 2008)).

⁷⁵ *Id.* (citing *Cent. Midwest Interstate Low-Level Radioactive Waste Comm’n v. Pena*, 113 F.3d 1468, 1473 (7th Cir. 1997)).

⁷⁶ See Oxford English Dictionary, *Provide*, <https://bit.ly/3IUgd3k> (“provide for” means “To take appropriate measures in view of a possible event; to make adequate preparation for the future” or “To supply the necessary resources *for* a thing to happen or exist.”).

⁷⁷ CP Post-Remand Reply 18 (emphasis added).

pay for interchanges at Clearing. CP's attempts to parse the statutory language thus miss the point.

Sixth, CP says CN's position would "obliterat[e]" existing industry arrangements.⁷⁸ But as already explained, and as CP nowhere disputes, requiring each party to pay for the interchange traffic it delivers through a third party *is* the existing industry norm. And this case is not about whether a carrier "can be compelled to pay" anything⁷⁹—CP voluntarily agreed in the BRC Operating Agreement to pay the BRC's charges for traffic it delivers to Clearing.

V. CONCLUSION

For these reasons and those in CN's post-remand brief and its reply to CP's motion to strike, the Board should grant CN's petition and declare that each carrier must bear its own costs for interchanging traffic at Clearing Yard, and that CP must reimburse CN for the fees it has paid on CP's behalf since August 2019.

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⁷⁸ CP Post-Remand Reply 19.

⁷⁹ *Id.*

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of April 2022, I caused a copy of the foregoing document to be served by U.S. Postal Service or more expeditious means upon the service list to Finance Docket No. 36397.

/s/ Matthew J. Warren
Matthew J. Warren