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VIA ELECTRONIC FILING

May 10, 2022

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

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

Dear Ms. Brown:

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

Please do not hesitate to contact me with any questions.

Sincerely,

Stinson LLP

/s/ David F. Rifkind
David F. Rifkind

Counsel for Soo Line Railroad Company

Enclosure

cc: Parties of Record

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 MOTION FOR LEAVE TO FILE REPLY TO REPLY

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Soo Line Railroad Company d/b/a Canadian Pacific (“CP”) respectfully submits this Reply to the April 20, 2022 Motion for Leave to File Reply to Reply filed by Wisconsin Central Ltd. d/b/a Canadian National (“CN”) (the “Motion”).

I. The Board Should Reject CN’s Reply to Reply.

CN asserts that it is entitled to submit a 16-page reply to a reply (“CN’s Reply to Reply”) to CP’s March 21, 2022 Reply (“CP’s Reply”),¹ which was filed in Reply to CN’s *unauthorized* “Post-Remand Brief.”² CN’s Reply to Reply is now its second unauthorized post-remand brief and its proffered reason for filing its newest brief—that CP’s Reply raises new matters that “CN has not had a chance to brief”³—is simply incorrect. Not only did CP’s Reply not raise new arguments, CN is not entitled to another post-remand filing as the Board has not requested additional post-remand briefing and, in any event, the Motion and proffered reply were filed nearly a month after CP’s Reply. Accordingly, CN’s Reply to Reply should be rejected as an improper reply to reply.⁴

¹ On February 14, 2022, CP filed a letter motion requesting that the Board strike CN’s unauthorized and improper filing; 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, which CP in fact did on that date.

² See *infra* note 7.

³ Motion at 2.

⁴ See, e.g., 49 C.F.R. § 1104.13(c) (prohibiting a reply to a reply); *Pet. of the W. Coal Traffic League to Inst. a Rulemaking Proceeding to Abolish the Use of the Multi-stage Discounted Cash Flow Model in Determining the R.R. Indus.’s Cost of Equity Cap.*, Docket No. EP 664, 2017 WL 3482296, 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).

To begin, none of CN’s additional briefing is permitted. Following an appeal of the 2020 Board Decision,⁵ on December 8, 2021, the Seventh Circuit remanded this matter “for further proceedings consistent with [the Court’s] opinion.”⁶ Since then, the Board has not requested *any* briefing from either party. Despite the lack of a directive from the Board, on February 2, 2022, CN filed its “Post-Remand Brief” without any request for leave to file or for the Board to reopen the record on remand. The Board has not permitted that brief or otherwise indicated it wants additional briefing. Indeed, the Board has previously said that additional briefing on remand requires a motion for leave to file a petition to reopen or petition for other relief.⁷

Additionally, CN waited nearly a month to first seek permission to file its proffered (and now second) unauthorized brief, and offers no explanation for its delay. Not only was CN’s original brief unauthorized, and not only did CN wait a month to seek leave to file its current Reply to Reply,⁸ it was CN that unilaterally kicked off the round of post-remand briefing, notwithstanding the Board’s clear directive that

⁵ *Wisc. Cent., Ltd.—Pet. for Decl. Order—Interchange with Soo Line R.R. Co.*, FD 36397 (STB served Oct. 30, 2020) (the “2020 Board Decision”).

⁶ *Wisc. Cent. Ltd. v. STB*, 20 F.4th 292, 295 (7th Cir. 2021).

⁷ *See, e.g., W. Fuels Ass’n, Inc. & Basin Elec. Power Coop. v. BNSF Ry. Co.*, NOR 42088, 2011 WL 308180, at *2 (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).”).

⁸ And, of course, CN spent nearly two months on its first Post-Remand Brief, filed on February 2, 2022 following the Seventh Circuit’s December 8, 2021 Opinion.

such unilateral self-help actions by a party are entirely inappropriate. It is for the Board, not CN, to decide how to proceed on remand.

In any event, contrary to CN’s purported justification for its newest Reply, CP’s Reply did not raise “new matters” that CN “has not had a chance to brief.”⁹ CN has had plenty of opportunity—in this proceeding and the prior proceeding¹⁰ (which CN did not appeal)—to make the arguments it now belatedly attempts to assert. Moreover, CN’s Reply to Reply continues to distort the facts, the Seventh Circuit’s opinion, and the Board’s precedent, and does not complete the record. CN’s Motion asserts that CP has raised three new issues: whether the Belt Railway of Chicago (“BRC”) Operating Agreement means that BRC has to accept the traffic, whether Clearing is a reasonable interchange, and whether the BRC Operating Agreement conflicts with the statute.¹¹ As explained below, none of these issues are new and it is CN that is attempting to inject new arguments over issues already rejected by the Board.

II. CN Continues to Overstate the Seventh Circuit’s Narrow Opinion While Raising Issues Already Decided by the Board.

CN’s Reply to Reply distorts the Seventh Circuit’s ruling: at times arguing that it is more sweeping than it was, and at times ignoring its explicit commands. First, CN incorrectly contends that the Seventh Circuit’s opinion construed the parties’

⁹ Motion at 1, 2.

¹⁰ *Soo Line R.R. Co.—Pet. for Decl. Order and Prelim. Injunction—Interchange with Canadian National*, FD 36299 (STB served Nov. 29, 2019) (“2019 Board Decision”).

¹¹ Motion at 2.

rights and responsibilities under the BRC Operating Agreement. But the opinion focused on the meaning of the language in the statute and did not consider or address the content of the BRC Operating Agreement. The Court did not even reference that agreement.

Second, CN tries to expand the Seventh Circuit’s opinion to re-open the issue of whether CN must provide a free route to the point of interchange. The Board concluded that CN had a statutory obligation to provide a free route to the interchange, and the Seventh Circuit did not address that issue.

Third, CN, in arguing that the Board should determine the reasonableness of Clearing as an interchange location without regard to Spaulding, improperly ignores the Seventh Circuit’s explicit instructions regarding how to analyze the reasonableness of CN’s designation of Clearing. The Court specifically said that such an analysis required consideration of reasonableness in light of the available alternatives—*i.e.*, in comparison to Spaulding.

Finally, CN’s other arguments, including its improper invocation of municipal concerns, are unavailing.

A. The Seventh Circuit did not analyze the parties’ rights under the BRC agreement.

CN reads the Seventh Circuit’s opinion too broadly with regards to the BRC Operating Agreement. The Seventh Circuit’s holding found error in the Board’s conclusion that “in the absence of agreement about where to exchange traffic, the receiving carrier must designate a place on its own property,” the effect of which would have been that a receiving carrier could *never* unilaterally designate a location

on a third party's property.¹² That narrow ruling was the only one the Seventh Circuit reversed. As a result, the opinion merely opened up the possibility for a receiving carrier to designate a location on a third party's property.

CN ignores the limited scope of the Seventh Circuit's holding and asserts that "[t]he court thus recognized that the BRC's contract with CN is an agreement to receive CN-bound traffic."¹³ The Seventh Circuit, however, did not analyze any of the obligations or provisions in the BRC Operating Agreement and so did not, and could not have, come to *any* conclusion about the parties' rights and obligations under that agreement. The Seventh Circuit did not even mention the BRC Operating Agreement. The Seventh Circuit simply held that a receiving carrier could designate a third party to receive traffic.

Nor could the Seventh Circuit have held that the BRC Operating Agreement automatically fulfills CN's statutory obligations. The opinion said that the third party would need to "receive traffic *on [the receiving carrier's] behalf*."¹⁴ The BRC Agreement does not obligate the BRC to step into the shoes of any of its owners to act on their behalf. In fact, that agreement carefully maintains BRC's independence as an entity.¹⁵ So, while the BRC Operating Agreement grants its owners the voluntary right to use its facilities, it does not require BRC to act on "behalf" of any of its owners. CN can argue all it wants that an agency relationship is not required, but the Seventh

¹² *Wisc. Cent. Ltd.*, 20 F.4th at 294.

¹³ CN's Reply to Reply at 2.

¹⁴ *Wisc. Cent. Ltd.*, 20 F.4th at 294 (emphasis added).

¹⁵ CP's May 29, 2020 Reply ("CP's May 2020 Reply") at 14 n.11.

Circuit opinion specifically says that the third party has to act on “behalf” of the receiving carrier. CN cannot avoid what the opinion actually says.

CN next incorrectly asserts that CP’s arguments were all rooted in long-standing common law doctrines that the Seventh Circuit supposedly “rejected.” Specifically, CN asserts that “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,’” and then suggests that the Seventh Circuit “flatly rejected” those “concepts.”¹⁶ The Seventh Circuit took issue with the Board’s reliance on common-law tradition when interpreting the obligations under the statute without a full explanation of how CN’s conduct violated those principles—it did not take issue with the principles themselves.¹⁷ And the Seventh Circuit certainly did not reverse these long-standing common law doctrines upon which railroads have long relied in structuring their interchange arrangements, and certainly would not have done so “implicitly.”

Moreover, because the permissive nature of trackage rights precludes one carrier from *requiring another to exercise trackage rights* and because the free transit rule requires that the delivering carrier be provided free passage to the point of interchange, CN cannot require CP to use CP’s permissive trackage rights and pay fees under the BRC Operating Agreement. This same principle was espoused in the 2019 Board Decision—a decision that CN did not appeal—wherein CN asserted “that

¹⁶ CN’s Reply to Reply at 4.

¹⁷ *Wisc. Cent. Ltd.*, 20 F.4th at 294-95.

it would be willing to grant CP trackage rights from the NSR line to Kirk Yard,” CN’s attempted chosen interchange location.¹⁸ In that Decision, the Board made clear that “CP cannot be forced by CN to exercise its trackage rights in order to reach Kirk Yard” as “in general, trackage rights are permissive with their holder.”¹⁹ Instead, CN must either enter in to a separate contract with the BRC that would allow CP to reach Clearing without charge or otherwise assume responsibility for the fees charged.

In short, according to CN’s magic ink interpretation of the Seventh Circuit’s Opinion, the Court somehow intended to wash away the Board’s well-settled precedent and the Supreme Court-rooted trackage rights rule without so much as a mention. That is not how federal courts of appeal operate.

B. The statute requires CN to provide a free route to the interchange location.

CN acts as if the issue of its statutory obligations is a new issue in this litigation but it has been the central concern since CN petitioned for declaratory judgment on its statutory obligations. From the beginning of this round of litigation in early 2020, CP has argued that CN’s statutory obligation that it “shall provide” interchange facilitates means that it cannot designate an interchange facility that requires CP to bear the costs of getting the cars there.²⁰ In its Reply to CN’s Petition, CP argued that CN’s obligation under the first part of the statute (“shall provide”) is

¹⁸ 2019 Board Decision at 6.

¹⁹ *Id.* at 6-7 (citing *Burlington N. R.R. v. United States*, 731 F.2d 33, 39 (D.C. Cir. 1984)).

²⁰ *See, e.g.*, CP’s May 2020 Reply at 9-10, 15-16.

to grant CP a “free route over its line to the location” of the interchange.²¹ CN’s response has consistently focused on whether CN can designate a location somewhere other than on its own lines.²² In fact, according to CN, despite its petition which asks the Board to determine who pays, “[t]his case boils down” to the issue of location.²³ Thus, CN devoted 11 pages to addressing the arguments about physical connection and whether the interchange must be on its own lines²⁴ and effectively dodged CP’s argument that the phrase “shall provide” means that CN cannot require CP to pay to reach the interchange location.

The Board decided the issue of who bears the cost in the 2020 Board Decision. The Board concluded that CN had a statutory obligation to “provide” a free route to the interchange:²⁵ “Requiring CP, a physically intersecting carrier, to not only travel to a third party’s line for interchange but also pay for the privilege of doing so would violate CN’s statutory obligation under § 10742 to ‘provide’ CP with reasonable interchange facilities.”²⁶ Tucked in the last section of its Reply to Reply, CN belatedly addresses CP’s argument that Section 10742 requires CN to *provide* a free route to the interchange location, and CN does so while attempting to raise entirely new (but

²¹ *Id.* at 1, 15-16.

²² CN’s June 18, 2020 Reply to Reply at 1 (“CN’s June 2020 Reply”).

²³ *Id.*

²⁴ *Id.* at 6-16.

²⁵ 2020 Board Decision at 6-7.

²⁶ *Id.* at 8.

irrelevant) arguments about the history of the statute. CN's arguments are too late and too little.

Specifically, CN argues that prior to Interstate Commerce Commission Termination Act (ICCTA) recodification, the interchange statute required a receiver to “afford” interchange facilities for the delivering carriers.²⁷ CN now contends that the definition of “afford” is broader than the current statutory requirement to “provide” such facilities and means that CN can satisfy its statutory obligation to provide interchange facilities by directing CP to use a third party’s interchange facilities to deliver CN-bound cars at CP’s cost.²⁸ CN’s reliance on the prior statutory language does not help CN’s argument. As CN has already acknowledged, “afford” is synonymous with “provide.”²⁹ CN asserted in its Reply Brief to the Seventh Circuit that “[t]he original statute used ‘afford’ instead of ‘provide,’ § 3, 24 Stat. at 380, but these terms are essentially the same,” and that “afford” means ‘to make available, give forth, or provide.’”³⁰ That CN is willing to now argue to the Board otherwise when it made the opposite argument to the Seventh Circuit is concerning, and CN should be estopped from doing so. Further while CN attempts to downplay and ignore the precedent cited by CP which supports the correct interpretation of “shall provide,”

²⁷ CN’s Reply to Reply at 14-15.

²⁸ *Id.*

²⁹ *Id.* at 14 (“§ 10742’s current text follows a *non-substantive* 1978 recodification”) (emphasis added); Reply Br. for Pet’r Wisconsin Central Ltd. at 26 n.1, *Wisc. Cent. Ltd.*, 20 F.4th 292 (No. 20-3507) (filed May 5, 2021, ECF 46).

³⁰ Reply Br. for Pet’r Wisconsin Central Ltd. at 26 n.1.

as requiring CN to pay the cost to use the facilities, it is telling that CN cites no precedent of its own.

As CN well knows, both prior to and after the recodification, the Board and the industry consistently understood the language to impose the same obligation on a receiving carrier, *i.e.*, to provide an interchange facility without charge. It was, after all, CN's own Chief Operating Officer who acknowledged that CN cannot simply designate reasonable interchange facilities but must provide a "free route" to that location.³¹

C. Clearing Yard is an unreasonable interchange location relative to Spaulding.

Although CN contends that CP raised a new argument in challenging the reasonableness of Clearing, CP's briefing throughout the dispute has made clear its position on the relative reasonableness of interchange locations. CP has argued Clearing was practically unreasonable because it both would replace a reasonable interchange location at Spaulding,³² and would necessitate unreasonable changes to CP's train schedule.³³ The Seventh Circuit has indicated that the question is the reasonableness in light of available alternatives, calling for a comparative assessment of Spaulding and Clearing as the point to which CP must deliver CN-bound cars. The Seventh Circuit specifically instructed the Board to consider the

³¹ 2020 Board Decision at 8 (citing to CN's COO's own letter which stated that "CN's only legal responsibility is to provide reasonable facilities for interchange and a free route over its tracks to that interchange point").

³² CP's May 2020 Reply at 16-17.

³³ *Id.* at 22-23.

reasonableness of the proposed location with “where switching otherwise would occur[.]”³⁴ Another court in another context may have concluded that a receiving carrier can choose between reasonable locations, but for this case and this remand, the Seventh Circuit concluded that the question was the reasonableness of the proposed location “compared” to the prior location.³⁵

Relative to Spaulding, Clearing is not a reasonable interchange for a number of reasons, as was iterated in CP’s Reply. It imposes costs on third parties, it creates fluidity concerns in CP’s yard, and it risks congestion in the Chicago Terminal.³⁶

D. CN’s feigned concern for other stakeholders is not relevant.

CN’s repeated invocation of the community concerns as a basis for the Board’s decision in a Section 10742 proceeding is inconsistent with the statute, without precedent, and an argument to which CP has already responded.³⁷ In short, in enacting the ICCTA, Congress specifically sought to protect the rail industry from efforts by local and state governments to prioritize local interest over interstate rail operations. Local efforts to influence rail traffic are often well-intentioned, but to the extent they interfere with rail operations, they are categorically preempted.³⁸

³⁴ *Wisc. Cent. Ltd.*, 20 F.4th at 294.

³⁵ *Id.*

³⁶ CP’s Reply at 14-15.

³⁷ CP’s May 2020 Reply at 20-22.

³⁸ *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.—Pet. for Declaratory Order*, FD No. 34662 (STB served May 3, 2005) (District of Columbia law

In this case, it is clear that an effort by the Village of Bartlett to prevent CP and CN from interchanging in Spaulding would unreasonably interfere with rail operations. As such, that effort would be subject to federal preemption and therefore prohibited. The Board should not allow such prohibited regulation of rail operations to sneak in the back door in this proceeding.

Additionally, CN's reliance on Metra's preference for Clearing interchange turns out to be badly misplaced. Metra's most recent filing makes clear that its preference for Clearing is based on its experience nearly a decade ago. In fact, Metra seems to believe that interchange shifted from Spaulding to Clearing in 2011,³⁹ even though CN and CP continued to interchange at Spaulding until the fall of 2019.⁴⁰ There can be no better evidence of a lack of real concerns with interchange at

banning transportation of certain hazardous commodities within 2.2-mile radius of U.S. Capitol categorically preempted).

³⁹ Comments of Commuter Rail Division of the Regional Transportation Authority d/b/a Metra (attached to Metra's Petition for Leave to File Comment Out of Time), filed April 25, 2022, at 3 (asserting "the interchange point was moved from Spaulding to Clearing Yard" in "August of 2011" and that "[a]fter that, the amount of freight traffic on the MD-W line decreased significantly" and "Metra has not experienced delays caused by interchange traffic at Clearing Yard since the interchange was moved"); Oppenheim Verified Statement (submitted with Metra's Comments) at ¶¶ 12-14 (stating "Metra began keeping a log of delays caused by CP interchange traffic at Spaulding in September of 2010," "Metra ceased logging delays in June of 2011," and that "[t]he Interchange Delay Log should be considered a representative sample of the delays caused by the interchange traffic between September of 2010 and June of 2011"), ¶¶ 15-17 ("Interchange operations between CP and CN were moved to Clearing Yard in August of 2011. After the interchange traffic was moved to Clearing Yard, delays to Metra's operations decreased considerably. No delays to Metra's services were experienced due to the interchange traffic at Clearing Yard.").

⁴⁰ Moreover, CP had shifted interchange operations at Spaulding to the middle of the night thereby generally avoiding the potential for conflict with Metra. *See* CP's May 2020 Reply, Walker Verified Statement at ¶ 9.

Spaulding than the fact that Metra apparently was completely unaware that Spaulding interchange operations continued for nearly a decade.

E. CN's remaining arguments are a reiteration of prior arguments or otherwise unavailing.

CN's remaining arguments focus on its wrongful assertion that the BRC Operating Agreement determines whether CN can compel CP both to utilize Clearing (for CN's benefit) and to pay for the privilege of doing so. Whether CN may designate Clearing, and who pays, depends on the language of 49 U.S.C. § 10742—not the BRC Operating Agreement. CN's continued attempts to transform this case into a contract dispute rather than a question of statutory obligations should be rejected.

Section 10742 imposes specific obligations on the receiving carrier, namely, providing a location of interchange at no cost to the delivering carrier. The BRC Operating Agreement neither supersedes nor otherwise obviates these obligations. That agreement simply allows for its owners to use the BRC facilities for interchange on a voluntary basis or where there is no direct physical interchange and an intermediate carrier must be used by the delivering carrier to reach the receiving carrier. Neither is the case here. CP is not voluntarily agreeing to utilize Clearing (if it must pay) and CP and CN have direct physical connections nearby including at Spaulding where they interchanged for nearly a decade. Moreover the agreement does not address who must be the ultimate payor of the BRC fees.⁴¹

⁴¹ CP's Reply at 19-22.

CN could fulfill its statutory obligation to provide interchange facilities by paying the BRC fees as it currently does under the Interim Agreement. While CN dismisses such a possibility as “irrelevant,” it, in fact, is central to CN’s obligation. Further, it is industry norm for a receiving carrier that designates an interchange location other than at the intersection of the carriers’ respective lines to provide a free route to the interchange location. Accordingly, if CN is insistent on interchanging at Clearing—particularly where it is seeking to do so for its own benefit—then it must pay the BRC fees to remain consistent with the industry and satisfy its statutory obligation.

III. Conclusion

For the foregoing reasons, the Board should: (i) deny CN leave to file its Reply to CP’s Reply; (ii) reject CN’s unilaterally filed Post-Remand Brief; and (iii) deny the relief that CN has demanded, and confirm that Clearing is not reasonable relative to Spaulding for the traffic at issue, and that, if it is reasonable, CN must pay all associated BRC fees for CP’s delivery to that interchange point.

Respectfully submitted,

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Dated: May 10, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of May 2022, 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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