

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

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INTRODUCTION

Opening comments confirm that the Board should resolve this long-pending proceeding with a narrow, fact-specific decision enforcing Soo Line Railroad Company d/b/a Canadian Pacific's ("CP's") contractual agreement to pay its share of the Belt Railway of Chicago's ("BRC's") switching fees. Comments by parties disinterested in this dispute—that is, by commenters other than CP—broadly support Wisconsin Central, Ltd.'s ("CN's") arguments on this point. These commenters, including two other Class Is and the American Short Line and Regional Railroad Association ("ASLRRA"), agree that the Seventh Circuit's decision does not alter interchange law and that the Board should not use this proceeding to adopt new interchange rules. They also agree that interchange arrangements typically are a matter for mutual agreement. And they agree that a receiving carrier generally may designate any interchange point that does not impose unusual, unreasonable, or impossible operating hazards or require the delivering carrier to do the receiving carrier's work.

These points of agreement support CN's position. As CN's opening comment explained, the Board should not delay resolving this adjudication to address broader policy questions not implicated here. That is why CN's comment focused on the specific context of this dispute. And it is surely why other commenters largely declined to address the abstract questions the Board posed, instead urging the Board to retain a case-by-case approach that does not upset industry practices. The Board should heed that advice.

The other commenters' focus on mutual agreement also supports CN's position on the merits. In the BRC Operating Agreement, CP and CN each agreed to pay the BRC's switching fees for interchange traffic they deliver to Clearing Yard. The Board need only recognize that agreement to resolve this dispute. And even if the Board could consider whether Clearing is a reasonable interchange location—even though CP forfeited the point by failing to raise it earlier—Clearing plainly meets the agency's long-standing test, on which the other commenters agree: Using the BRC's facilities for their intended purpose of interchanging traffic among its Class I co-owners imposes no operating hazards or improper work on CP.

For its part, CP largely retreads the arguments it has made on remand from the Seventh Circuit, simply couching them in more abstract terms. But even if these arguments had merit, they would miss the point, because they nowhere account for CP's voluntary commitment in the BRC Operating Agreement to pay the fees at issue. Thus, the Board need not consider these points.

In any event, CP's arguments are mistaken. As to costs, CP urges an inflexible rule that would bar the Board from ever allocating *any* third-party interchange costs to the delivering carrier, whatever the circumstances. Nothing in the statutory text or Board precedent requires that rigid rule, which conflicts with the case-by-case approach that other commenters rightly support. Anyway, this argument is again forfeited: In the prior proceedings, CP never disputed the Board's power to order it to pay the fees at issue, and the Seventh Circuit said nothing about the Board's cost-allocation power that could justify CP disputing it

only now. Under both the rules governing remands and the Board's standard rule barring arguments that could have been raised earlier, CP cannot raise this issue now. The Board should not let CP use the happenstance of the Board's public-comment request to inject yet another new issue into this long-pending dispute, further delaying resolution.

The reason for CP's belated attack on the Board's authority is obvious: Only by barring the Board from allocating costs at all could CP justify forcing CN to pay all the BRC's switching fees for interchange traffic moving in both directions. Moving the interchange from Spaulding to Clearing Yard allowed CP to cancel its daily train to Spaulding without adding another train to Clearing Yard—thus allowing CP to allocate those crews and locomotives elsewhere. And while CP must pay the BRC's switching fees for traffic it delivers, those fees cover services CP would otherwise have to perform directly, like blocking traffic for Class I recipients, including CN. So even if the Board could ignore the BRC Operating Agreement, there is simply no view of fairness that results in CN paying both parties' switching fees to interchange via a carrier they co-own for that very purpose.

Finally, the Board should ignore CP's musings about how to identify a reasonable interchange location, which are not relevant to this dispute. Again, CP forfeited this issue by failing to raise it in the earlier Board proceedings or on appeal. The *only* open issue now is the allocation of costs. Regardless, there is no reason to complicate the long-standing reasonableness standard—on which all other commenters agree—by adding the factors CP urges. CP's subjective and malleable

considerations, like the receiving carrier’s reasons for its designation or how hard the parties tried to reach agreement, are either unsupported or foreclosed by text and precedent. And the Seventh Circuit nowhere questioned the settled reasonableness standard.

Instead of wading into broader questions that are not implicated here, the Board should enforce CP’s contractual agreement to pay the BRC’s switching fees for the CN-bound traffic it delivers to Clearing. Alternatively, the Board should implement the Seventh Circuit’s ruling by recognizing CN’s power to designate Clearing for interchange and let the parties address contractual cost-allocation issues, if any, in the appropriate forum.

ARGUMENT

I. Industry comments support a case-specific resolution enforcing CP’s voluntary agreement to pay its share of the BRC’s fees.

Comments from other railroads confirm CN’s position that the Board should issue a narrow decision resolving this dispute on its facts. They also reflect that the governing law requires a decision in CN’s favor.

First, commenters agree with CN that the Seventh Circuit’s decision requires no big-picture rethink of interchange policy.¹ The court’s ruling “was narrowly tailored” and need not be read “as ‘significantly’ altering long-standing precedent.”² As a result, the Board should not use this “private dispute between two railroads in

¹ See CN December 2022 Comment 4, 15 & n.47.

² NSR December 2022 Comment 4; *see also* CP December 2022 Comment 2 (arguing that “the Seventh Circuit’s decision does not significantly affect the obligations of carriers under 49 U.S.C. § 10742”).

very specific and unique factual circumstances to make broad public policy through the announcement of new legal standards or processes,” which “could lead to an increase in disputes and litigation.”³

Indeed, the broader questions the Board posed are not implicated here.⁴ The Seventh Circuit has already held that CN can designate Clearing Yard to receive traffic from CP, leaving only the question of cost—a question that everyone agrees the Board can address in this proceeding. That is no doubt why neither of the Class I commenters, Norfolk Southern and BNSF, have addressed any of the Board’s abstract questions. And while ASLRRA addresses some of those questions, it does not suggest that the relevant law has changed or that any of those questions are disputed or implicated here.⁵ On the contrary, it notes that the agency’s established approach to evaluating interchange arrangements “follows the views expressed by the 7th Circuit.”⁶ As these commenters agree, there is no need to go beyond the facts of this case by addressing any broader questions.

Second, these comments broadly support CN’s requested relief: An order that CP should pay the BRC’s switching fees for CN-bound traffic because it agreed to do so in the BRC Operating Agreement. The industry commenters agree that interchange arrangements generally are, and should be, “the subject of mutual

³ BNSF December 2022 Comment 2, 4.

⁴ *See* CN December 2022 Comment 5–6.

⁵ *See* ASLRRA December 2022 Comment 4–7.

⁶ *Id.* at 4–5.

agreement,”⁷ “to be negotiated among railroads.”⁸ Again, this consensus mirrors CN’s position that resolving the one remaining question here merely requires the Board to follow its longstanding preference for enforcing contractually agreed-upon interchange arrangements.⁹ Doing so does not require reinterpreting the interchange statute (or any other provision).¹⁰

Third, even if this dispute implicated the broader question of “[h]ow the statutory term ‘reasonable’ should be interpreted”¹¹—even though CP forfeited any challenge to Clearing Yard as a reasonable interchange location¹²—that question already has a settled answer, as commenters agree. The agency has long held that a “receiving carrier necessarily has the right to designate where it will accept cars in interchange from its connections, provided ... [it] does not impose unusual, unreasonable, or impossible operating hazards or require the delivering carrier to do work which properly belongs to the receiving carrier.”¹³ The Seventh Circuit did not disturb this rule. Thus, as industry commenters agree, this standard continues

⁷ NSR December 2022 Comment 11 n.9.

⁸ BNSF December 2022 Comment 1; *see also* ASLRRRA December 2022 Comment 4 (“most conversations involving one party wishing to alter an interchange point are resolved through informal negotiation”).

⁹ CN December 2022 Comment 12.

¹⁰ *Cf.* BNSF December 2022 Comment 4 (“there is no need for the Board to address any other aspect of settled law regarding Section 10742 or other parts of its organic statute”).

¹¹ Comment Order 4.

¹² *See* CN December 2022 Comment 7–11.

¹³ *Kan. City S. Ry. v. La. & Ark. Ry.*, 213 I.C.C. 351, 359 (1935); CN December 2022 Comment 5.

to govern.¹⁴ In other words, as has been true for decades, CN may “offer only that [interchange] option which best serves its own business interests,” provided that option is “independently reasonable, proper, and equal,”¹⁵ and CP “retains the burden of demonstrating the choice is unreasonable” under this settled test.¹⁶ Indeed, even CP agrees that this standard still controls.¹⁷

In short, industry comments confirm that the Seventh Circuit’s decision did not upend the relevant law, that the broader questions the Board posted are not implicated here, and that the relevant standards under the interchange statute are settled and clear. This does not mean the court’s ruling had no effect—as CN has explained, the court rejected both the physical-connection requirement created by the Board’s prior decision and the arguments the Board and CP offered to defend it.¹⁸ But that holding left no loose ends; the court conclusively held that CN could designate Clearing Yard to receive interchange traffic from CP, leaving only the who-pays question for the Board to decide. The Board should thus set aside the

¹⁴ See NSR December 2022 Comment 11 & n.9, 13–14; BNSF December 2022 Comment 2; ASLRRA December 2022 Comment 6.

¹⁵ *Burlington N. R.R. v. United States*, 731 F.2d 33, 40 (D.C. Cir. 1984); see also BNSF December 2022 Comment 2 (“The fact that interchange can be accomplished at one interchange point does not mean that the receiving carrier cannot select another reasonable interchange point.”).

¹⁶ NSR December 2022 Comment 14; see *Norfolk S. Ry.—Pet. for Decl. Order—Interchange with Reading Blue Mountain & N. R.R.*, No. 42078, 2003 WL 1963547, at *4 (S.T.B. served Apr. 29, 2003).

¹⁷ See CP December 2022 Comment 3–4 (quoting *Burlington N.*, 731 F.2d at 40).

¹⁸ See CN Post-Remand Reply to Reply 4–5.

broader questions the Comment Order raised and decide this narrow dispute without further delay.

II. CP's arguments are irrelevant, forfeited, or meritless.

CP's comment boils down to two basic arguments. First, CP contends (without saying so directly) that the Board can *never* allocate third-party interchange costs to a delivering carrier. Second, CP acknowledges the long-standing reasonableness standard (which other commenters endorse), but offers various unsupported or improper embellishments to it. Both arguments are irrelevant—the first because CP agreed in the BRC Operating Agreement to pay for interchange traffic it delivers to Clearing Yard, and the second because reasonableness is not an open question here. Indeed, both arguments are forfeited, since CP did not raise them earlier. And in any event, both arguments lack merit.

A. The BRC Operating Agreement renders CP's cost-allocation arguments irrelevant.

Like other commenters, CP agrees that interchange arrangements mostly are, and should be, conducted under “agreements between the delivering and receiving carriers as to the location . . . [and] the allocation of costs between the two carriers.”¹⁹ Indeed, CP concurs that “the costs associated with effecting interchange at a particular location, using particular facilities” are subject to Board adjudication *unless* “the delivering and receiving carriers ... reach agreement.”²⁰ CP's cost-allocation arguments thus come into play only absent an agreement on costs: “If a

¹⁹ CP December 2022 Comment 3.

²⁰ *Id.* at 5–6.

particular interchange location designated by the receiving carrier is reasonable,” CP says, “the statute directs that (*absent agreement otherwise*) the party ‘providing’ those facilities bear the costs thereof”²¹

As CN has explained, this principle suffices to decide the who-pays issue, which is the only open question here.²² In CP’s own words, the BRC Operating Agreement “contemplates that the delivering carrier pay BRC’s fees for cars interchanged using Clearing.”²³ That is, CN-bound traffic that CP delivers to Clearing is “traffic delivered to the BRC at Clearing Yard by an inbound line haul carrier for an outbound line haul carrier” under the Operating Agreement.²⁴ And 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.²⁵ On its face, this language plainly covers the traffic at issue, and CP has never tried to show otherwise.²⁶

Thus, the two carriers have reached agreement on the who-pays issue, and CP’s remaining arguments—offering new default rules that would apply *without* an agreement—are irrelevant. And even if there were some dispute about what the

²¹ *Id.* at 6 (emphasis added); *see id.* at 7 (“as a general matter . . . the allocation of costs between [carriers] is a matter of agreement”).

²² CN December 2022 Comment 11–13; CN Post-Remand Reply to Reply 11–16.

²³ CP Post-Remand Reply 6.

²⁴ CN Post-Remand Br., Exhibit B, BRC Rate Sheet.

²⁵ CN Post-Remand Br., Exhibit A, BRC Operating Agreement, Art. III § 1(a).

²⁶ *See* CP Post-Remand Reply 19 (asserting that the BRC Operating Agreement governs only “cars that carriers have agreed to interchange via Clearing,” without pointing to any supporting contract language or addressing the language quoted above); CN Post-Remand Reply to Reply 12.

BRC Operating Agreement provides, that would be a contractual issue the parties could address without Board involvement.

B. The Board should reject CP's tardy effort to restrict the agency's power to allocate interchange costs.

Even if the Board could overlook the BRC Operating Agreement, CP's cost-allocation arguments would fail. CP's bottom line is that a delivering carrier can *never* be required to shoulder any third-party interchange costs—no matter the circumstances. According to CP, either (i) the “extra costs” of “a particular interchange location” will render it “unreasonable in light of available alternatives,” or (ii) the location will be reasonable but the receiving carrier must “bear the costs thereof.”²⁷ Either way, “there would be no occasion for the Board to ‘allocate’ any costs between the two carriers.”²⁸ In other words, CP urges “a rule giving the receiving carrier the obligation to bear the costs associated with its selection” in every case.²⁹ The Board should reject this novel, inflexible rule.

To start, CP's new argument is forfeited. As the Seventh Circuit noted, from the start this dispute has largely been “about who should bear the cost of Belt Railway's services”³⁰—yet CP did not raise this argument earlier. CN's April 2020 petition sought declaratory relief on two points: (1) CN has the right to designate

²⁷ CP December 2022 Comment 6.

²⁸ *Id.*

²⁹ *Id.* at 5; *see id.* at 7 (claiming the receiving carrier must “bear any costs associated with the facilities . . . and the delivering carrier's access to them”).

³⁰ *Wisc. Cent. Ltd. v. STB*, 20 F.4th 292, 294 (7th Cir. 2021).

Clearing, and (2) CP must pay its share of the BRC's fees.³¹ In response to the second point, CP nowhere disputed the Board's *power* to order CP to pay these fees; it merely contended that doing so would be "unfair."³² Thus, CP's attack on the Board's power is new. CP cannot use the happenstance of the Board's public-comment solicitation in this adjudication to belatedly raise a new argument that was always available to it. Doing so violates both the rule barring new arguments on remand from an appellate court and the principle that "the Board will not consider arguments or evidence that should have been submitted at an earlier stage."³³

In any event, CP's rule conflicts with the Seventh Circuit decision because it still depends on the existence of a "direct physical connection."³⁴ CP says a receiving carrier with a physical connection nearby that designates third-party facilities must provide "free" interchange, just as a carrier that designates its own facilities must provide free transit over "any distance from [the] direct physical connection."³⁵ But again, the Seventh Circuit made clear that "the statute does not

³¹ See CN Petition 1; *id.* at 24 (arguing that "CP is responsible for paying the BRC for the switching services it provides for the interchange traffic that CP delivers to Clearing").

³² *E.g.*, CP Reply to CN Petition 23.

³³ See *New Eng. Cent. R.R.—Trackage Rights Order—Pan Am S. LLC*, No. FD 35842, 2018 WL 1989070, at *4 (STB Apr. 24, 2018); *United States v. Morris*, 259 F.3d 894, 898 (7th Cir. 2001); CN December 2022 Comment 8.

³⁴ CP December 2022 Comment 4.

³⁵ *Id.*

contain” any requirements or conditions based on “physically intersecting lines.”³⁶ And the court specifically rejected the Board’s prior reliance on “this free-transit aspect of historical practice” as limiting a receiving carrier’s statutory right to designate interchange locations.³⁷

What’s more, CP’s proposed rule makes another mistake the court already identified—it conflates questions of location and cost. As the court said, an interchange dispute can generally raise three questions: 1) can the receiving carrier designate a third party, 2) if so, is the location reasonable, and 3) if so, who pays the third party?³⁸ The Board’s prior decision, the court explained, “mix[ed] these [questions] up” by conflating the first and the third.³⁹ CP makes the same error here by contending that costs can make “a particular interchange location . . . unreasonable in light of available alternatives”⁴⁰—CP just conflates the third question with the second instead of the first.

CP’s rigid rule would also remove the case-by-case discretion that other commenters rightly urge the Board to retain. Norfolk Southern, for example, encourages the Board to preserve its ability to consider, “on a case-by-case basis . . . alternative interchange methods, cost considerations, long-standing practice, and

³⁶ *Wisc. Cent.*, 20 F.4th at 294.

³⁷ *Id.* at 294.

³⁸ *Id.* at 294–95.

³⁹ *Id.*

⁴⁰ CP December 2022 Comment 6.

operational concerns.”⁴¹ BNSF similarly says the Board should “balance all of the facts and circumstances related to the dispute in determining whether the designation of interchange facilities is reasonable.”⁴² CN agrees: Resolving an interchange dispute will generally involve certain case-specific considerations, and cost is one of them. A rule barring the Board from ever allocating third-party costs restricts this salutary flexibility.

The rigidity of CP’s rule also produces absurd results. Imagine that a receiving carrier is considering two interchange points: One, on the receiving carrier’s own line, costs each carrier \$300 per car in expenses (crew, fuel, etc.). The other, using an intermediate switching carrier’s facilities, also costs each carrier \$300 per car in total: \$100 in expenses and \$200 in switching fees. According to CP, the receiving carrier could designate (and the Board could order the use of) the first point, but not the second—even though each carrier’s total costs are the same. The receiving carrier could designate the second point over objection only if it agreed to pay *all* of both carriers’ fees.⁴³ That makes no sense. And if the first interchange point raised operational problems for the receiving carrier, the delivering carrier could extract a windfall by withholding its consent to the second point unless the receiving carrier paid up. It is thus CP’s rule, not CN’s, that creates perverse incentives.

⁴¹ NSR December 2022 Comment 14.

⁴² BNSF December 2022 Comment 3.

⁴³ See CP December 2022 Comment 5–7.

This case illustrates the problem. CP has no operational problems with interchanging at Clearing Yard; it does so with multiple other carriers, and CP and CN have done so for years for traffic requiring a secure handoff. Indeed, CP testified in the CP-KCS merger proceeding that it planned to continue CP-CN interchanges at Clearing and that it anticipated no increases in train counts for this interchange traffic.⁴⁴ But for CN, the old interchange at Spaulding created serious fluidity problems, with CN's main line being blocked for hours at a time, on a corridor that already has restricted freight operating windows to accommodate Metra passenger operations (because CP operates over track owned by Metra).⁴⁵ Spaulding interchanges also created serious blocked-crossing problems for the surrounding community.⁴⁶ Since CP is agnostic about causing congestion on CN's lines (and indeed might see it as a competitive benefit), CP has tried to obtain regulatory leverage to force the interchange back to Spaulding unless CN pays for *all* the traffic moving in both directions. The interchange statute should not be construed to prevent the Board from considering whether this kind of rent-seeking is fair.

⁴⁴ See CN December 2022 Comment 9–10; CN Petition, Ex. 3, 7.

⁴⁵ The record contains extensive and un rebutted evidence on this point. See CN Petition 5–6 & Albritton V.S. 3–9.

⁴⁶ The evidence of the negative impact that Spaulding interchanges had on local residents is likewise extensive and essentially un rebutted. See CN Petition 6–9; Village of Bartlett Letter (filed May 6, 2020) (“reiterat[ing] the importance of keeping the interchange operations out of Bartlett from a safety and economic standpoint”).

It is unsurprising that CP wants to tie the Board’s hands in this way: CP’s position that CN should pay all interchange costs in both directions is objectively unreasonable. Interchanging at Clearing Yard has allowed CP to cancel its daily train to Spaulding, repurpose those locomotives and crews for other tasks, and rely on BRC for blocking the traffic to various Class I receiving carriers.⁴⁷ And there has been no offsetting increase in CP trains to Clearing Yard as a result: In the three-plus years since the interchange moved to Clearing Yard in August 2019, CP has apparently not needed to add another train to Clearing Yard to handle this traffic, instead reporting in the merger proceeding that “we do not anticipate any increase in trains to BRC.”⁴⁸ True, CP must now pay the BRC’s switching fees—but those fees cover valuable services by the BRC, like blocking cars and assembling trains, which CP crews would otherwise have to perform (and did perform at Spaulding). In short, nothing removes this case from the “general rule” that “the delivering carrier[] switches or trucks the freight to its connection, or pays the expense of that service if performed by a third party.”⁴⁹

⁴⁷ See CN Petition 28; CP Reply to Petition 22–23.

⁴⁸ Public Hr’g Tr. 1665:2–4, 1667:2–4, FD 36500 (October 6, 2022).

⁴⁹ *Kan. City S. Ry.*, 213 I.C.C. at 359; *see also Chicago, Rock Island & Pacific Railway v. Baltimore & Ohio Railroad*, 113 I.C.C. 681, 690 (1926) (carriers must “make delivery on the rails of their connections, either direct or by bearing the charges of the intermediate switching line”), *rev’d sub. nom. on other grounds by Balt. & Ohio R.R. v. United States*, 277 U.S. 291 (1928).

* * *

The BRC Operating Agreement renders CP’s cost-allocation arguments irrelevant. But even setting aside this voluntary contractual arrangement, the Board should reject CP’s belated attack on its authority to grant the relief CN first requested three years ago, and should hold that CP must pay its fair share of the BRC’s switching fees, as it voluntarily agreed to do.

C. CP’s reasonableness arguments are irrelevant and mistaken.

Finally, the Board should ignore CP’s arguments about what makes an interchange location reasonable. From the outset of this proceeding, CP had both the incentive and the opportunity to dispute whether Clearing Yard was a reasonable interchange location. It did not do so. It instead raised this point for the first time on remand from the Seventh Circuit. Thus, as CN has explained, this tardy argument is forfeited.⁵⁰

CP rejoins that the Seventh Circuit “specifically instructed” the Board to consider reasonableness on remand and to compare Clearing Yard to Spaulding.⁵¹ The court did no such thing. It merely noted generally that questions of reasonableness “*could* require resolution” if two carriers “cannot agree about where to exchange traffic.”⁵² It did not suggest that CP could raise forfeited issues on remand or that reasonableness was an open question here. And precisely because

⁵⁰ See CN December 2022 Comment 7–8; CN Post-Remand Reply to Reply 5–7.

⁵¹ CP Reply to Motion for Leave to File Reply to Reply 10–11.

⁵² *Wisc. Cent.*, 20 F.4th at 294–95 (emphasis added).

CP never disputed reasonableness until *after* the appeal, the court had no occasion to consider the standard governing that inquiry, let alone to depart from the courts’ “long recogni[tion]” that a receiving carrier need not designate the *most* reasonable interchange point.⁵³ Whether Clearing Yard is reasonable is not an open question in this case, so the Board need not consider CP’s views about how to identify a reasonable interchange point in general.

In all events, CP’s arguments lack merit. The only correct part of CP’s reasonableness discussion is this: “Facilities are reasonable as long as that location or operation ‘does not impose unusual, unreasonable, or impossible operating hazards or require the delivering carrier to do work which properly belongs to the receiving carrier.’”⁵⁴ Indeed, all commenters seem to agree on this standard.⁵⁵ But CP goes on to suggest that the Board has “discretion” to “further interpret[]” the statute’s reasonableness requirement “within the bounds of the specific facts and circumstances” of a given dispute, including “the existence of a direct physical interchange.”⁵⁶ But again, the statute’s application does not turn on the presence or lack of a physical track connection. And there is no reason for the Board to further embellish the long-standing reasonableness test, which has served as a stable default rule for decades.

⁵³ *Burlington N.*, 731 F.2d at 40 (emphasis added).

⁵⁴ CP December 2022 Comment 8 (quoting *N.Y., Chi., & St. Louis R.R. v. N.Y. Cent. R.R.*, 314 I.C.C. 344, 346 (1961)).

⁵⁵ See NSR December 2022 Comment 11 & n.9, 13–14; BNSF December 2022 Comment 2; ASLRRA December 2022 Comment 6.

⁵⁶ CP December 2022 Comment 8–9.

CP also says that “reasonableness [turns] in the first instance on whether there has been a concerted effort by the parties to reach an agreement as to the interchange location.”⁵⁷ Nonsense. Nothing in the statutory text suggests that whether a particular location is reasonable depends on how hard the parties tried to reach agreement.⁵⁸ A location is reasonable, or it is not.⁵⁹ And the Board has made clear that its “strong preference” for negotiated arrangements does not mean the receiving railroad must carry some burden of persuasion before moving the interchange—rather, a *delivering* carrier who objects to a new interchange point bears “the burden . . . to show that such a point is ‘unusual, unreasonable, or impossible.’”⁶⁰ CP is thus wrong to suggest that a receiving carrier’s designation under § 10742 is just a “propos[al].”⁶¹

CP similarly contends that “where there is an established interchange, the reasonableness of a new interchange should be determined relative to the existing location.”⁶² That is wrong. Again, “courts have long recognized that when a carrier

⁵⁷ CP December 2022 Comment 8.

⁵⁸ And of course, even if this factor mattered, it would be irrelevant to the facts in this case, which included lengthy pre-litigation negotiations between operating officials of both railroads and indeed which saw multiple rounds of Board-sponsored mediation and appellate mediation. CN Petition, *Albritton V.S.* 19–20.

⁵⁹ CP cites *New York, Chicago* to support this how-hard-did-you-try element, but the ICC merely said there that interchange generally “is a matter to be arranged between the parties,” 314 I.C.C. at 346—not that a given location can be reasonable (or not) based on the extent of the parties’ efforts to agree.

⁶⁰ *Reading Blue Mountain*, 2003 WL 1963547, at *4.

⁶¹ CP December 2022 Comment 14.

⁶² *Id.* at 9; *see id.* at 12.

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.”⁶³ Thus, an interchange point need not be the most reasonable, or more reasonable than the prior one—it need only be reasonable, period. The Seventh Circuit had no reason to question this rule and did not purport to do so. And while CP says agency precedent requires this comparative analysis, its cited authority says no such thing.⁶⁴

Likewise, the “reasons for the proposed change” and “whether the change shifts costs on to the delivering carrier for the receiver[']s benefit”⁶⁵ are not proper grounds to reject an interchange location that meets the established standard discussed above. As just explained, a receiving carrier is free to choose an interchange point based on its own business interests, even if that point is not the most convenient or inexpensive option for the delivering carrier. And once again, even if this were part of the standard, it would not help CP. The record amply documents the harms that Spaulding interchanges were causing to CN main-line fluidity, to Metra’s operations,⁶⁶ and to the surrounding communities, which immediately saw a drastic reduction in blocked crossings when the interchange moved away. There is no doubt about “the reasons for the proposed change” or that

⁶³ *Burlington N.*, 731 F.2d at 40 (emphasis added).

⁶⁴ See CP December 2022 Comment 12 (citing *N.Y., Chi.*, 314 I.C.C. at 345).

⁶⁵ *Id.* at 9.

⁶⁶ See Metra April 2022 Comment 2–6.

they are justifiable. And the only “cost-shifting” at issue in this adjudication is CP’s extraordinary proposal that CN be forced to permanently bear all costs of interchanges in both directions, contrary to the BRC Operating Agreement.

Finally, CP retreads another failed argument: A delivering carrier cannot be forced to interchange through a third party, CP says, because “the Supreme Court long ago held that a rail carrier cannot be compelled to exercise its own contractual rights to use a third party’s facilities for the benefit of another carrier.”⁶⁷ But the Seventh Circuit held that a receiving carrier *can* designate a willing third party’s facilities.⁶⁸ And the question in the cited Supreme Court case was simply whether a specific contract between two railroads allowed one of them to use the other’s terminal facilities only when running over the other’s lines, or also when reaching those facilities by a third carrier’s lines.⁶⁹ The Court suggested no broader principle and said nothing about the interchange statute, which was not at issue. Likewise, CP’s argument that the receiving carrier “must provide the running rights to reach” designated third-party facilities⁷⁰ again ignores the Seventh Circuit’s rejection of

⁶⁷ *Id.* at 10.

⁶⁸ *Wisc. Cent.*, 20 F.4th at 295.

⁶⁹ *See Chi., Rock Island & Pac. Ry. Co. v. Denver & Rio Grande R.R.*, 143 U.S. 596, 609–12 (1892) (“Taking all the facts of this contract together, we regard it as quite clear that it was never intended to grant the use of terminal facilities except as appurtenant to the use of the road itself.”).

⁷⁰ CP December 2022 Comment 13.

the “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.”⁷¹

In sum, the proper test of a reasonable interchange point is not at issue here because CP forfeited the issue. But even if this question were open, there is no reason to change the workable standard the agency has long applied. And there is no serious question that Clearing Yard satisfies that standard: Interchanging at Clearing Yard “does not impose unusual, unreasonable, or impossible operating hazards or require the delivering carrier to do work which properly belongs to the receiving carrier.”⁷² CP designated Clearing Yard as the location for interchange with CN in its Operating Plan for its merger with KCS. Indeed, the BRC exists largely to interchange traffic among its Class I co-owners, and CP has delivered all CN-bound traffic to Clearing Yard since August 2019. Likewise, CP has long delivered CN’s traffic requiring a secure hand-off to Clearing Yard and paid the BRC’s switch fees under the BRC Operating Agreement. Using Clearing Yard to interchange traffic between Class I co-owners is eminently reasonable.

CONCLUSION

The Board should hold that CP is responsible for paying the agreed fees under the BRC Operating Agreement for CP-CN interchange traffic that CP delivers to Clearing. Alternatively, the Board should implement the Court’s ruling

⁷¹ *Wisc. Cent.*, 20 F.4th at 295.

⁷² *Kan. City S. Ry.*, 213 I.C.C. at 359.

by recognizing CN's power to designate Clearing Yard for interchange and let the parties address any contractual cost-allocation issues elsewhere.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of January 2023, 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
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