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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

CANADIAN PACIFIC'S REPLY TO COMMENTS FILED IN RESPONSE TO
DECISION SERVED OCTOBER 19, 2022

Jeffrey J. Ellis
Chief Legal Officer
CANADIAN PACIFIC
7550 Ogden Dale Road S.E.
Calgary, AB T2C 4X9
Canada
Jeff_Ellis@cpr.ca

Charles W. Webster
Senior Counsel
CANADIAN PACIFIC
11306 Franklin Ave.
Franklin Park, IL 60131
(630) 860-4161
Charles_Webster@cpr.ca

David F. Rifkind
STINSON LLP
1775 Pennsylvania Avenue NW, Suite 800
Washington, DC 20006
(202) 785-9100
david.rifkind@stinson.com

David L. Meyer
LAW OFFICE OF DAVID L. MEYER
1105 S Street, NW
Washington, DC 20009
(202) 294-1399
david@meyerlawdc.com

Attorneys for Soo Line Railroad Company d/b/a Canadian Pacific

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Soo Line Railroad Company d/b/a Canadian Pacific (“CP”), pursuant to the Board’s decision served October 19, 2022 (the “October 19 Decision”), respectfully submits this Reply to the Comments filed December 19, 2022. As instructed by the Board, CP will limit its Reply to the broader issues set forth in the Board’s decision and will reserve for its “further brief the application of the issues discussed to the facts of this case” as anticipated by the October 19 Decision (at 5 n.4).

INTRODUCTION

In its October 19 Decision, the Board requested public comment on several topics related to interchange disputes in light of the Seventh Circuit’s decision vacating the Board’s October 30, 2020 decision in this proceeding. In response to the Board’s request for public comments, CP, CN, BNSF, Norfolk Southern Railway Company (“NS”), the American Short Line and Regional Railroad Association (“ASLRRA”), and the Freight Rail Customer Alliance each filed comments. The comments of other railroads – with the exception of CN, which opted to devote its comments to a rehash of its position on the specific facts of the present dispute – reflect a consensus that the Seventh Circuit’s holding was narrow and broad agreement on the general principles that continue to govern the selection of interchange facilities.

First, the non-CN railroad comments concur that the Seventh Circuit’s holding is narrow. As BNSF’s Comments explain, the court’s decision merely recognized that “there may be circumstances when a receiving carrier can designate

facilities for interchange located on a willing third party.” BNSF Comments at 2-3. *See also* NS Comments at 4-5. This narrow holding provides no basis for departing from established precedent.

Second, the non-CN railroad comments reflect a shared vision of the principles that continue to govern the selection of interchange locations and facilities, and emphasize that departing from the well-established precedent which has shaped interchange arrangements across the industry could have dire consequences. For example, NS rightly cautions the Board of the potential “havoc” that could ensue if the Board rewrote settled law and allowed receiving carriers to foist the costs of providing interchange facilities onto the delivering carriers. NS Comments at 8-9. BNSF warns of increased litigation and disputes. *See* BNSF Comments at 4.

CN, on the other hand, focuses on the facts of this case and continues to advance a position here that would require a wholesale upending of Board precedent based on its self-serving and wrong interpretation of the Seventh Circuit decision as expressly and impliedly overturning foundational Board and court (including U.S. Supreme Court) precedent. The Seventh Circuit did no such thing.

CN’s comments focused on the facts of this case despite the Board’s clear and explicit instructions that “[a]ll comments should be limited to the broader legal issues discussed above and should not address the specific facts.” October 19 Decision n.4. While CN’s case-specific arguments are both factually inaccurate and legally wrong, consistent with the October 19 Decision, CP will wait to address CN’s

case specific arguments and assertions in the round of post comment briefing that the Decision anticipates (at 5 n.4). In the meantime, the Board should disregard CN's comments at this stage of the proceeding.

COMMENTS

Rail carriers big (BNSF, NS, and CP) and small (ASLRRA) agree on two overarching principles: First, that the controlling precedent statutory framework governing the selection of interchange locations (and facilities) which has long guided rail carriers' dealings with each other in this arena, was undisturbed by the narrow holding of the Seventh Circuit's decision; and second, that the Board should continue to adhere to this longstanding precedent.

CN stands alone in its contention that the Seventh Circuit decision must be read expansively in a manner that would sweep aside a century of court and agency jurisprudence. But there is no basis for reading the court's decision in that way. Both the plain words of the decision and the scope of the issues before the court, compel the opposite conclusion. The court's mandate applies only to those issues actually decided. *Moore v. Anderson*, 222 F.3d 280, 283 (7th Cir. 2000) ("On remand, the district court retains the authority to dispose of other issues not addressed. To determine what issues were actually decided by the mandate, we require a 'careful reading of the reviewing court's opinion.'").

Among parties other than CN, there is broad agreement that the Seventh Circuit's mandate addresses only the narrow issue of whether a receiving carrier is precluded from *ever designating* a third party facility as the location for receiving

cars in interchange. The court answered that question with a “no” and went no further. Indeed, the court expressly acknowledged the agency’s broad discretion in determining whether particular facilities are reasonable and offered no guidance on that question on the facts of this case or otherwise. *See Wisc. Cent. Ltd. v. STB*, 20 F.4th 292, 295 (7th Cir. 2021). Such broad discretion necessarily includes the discretion to continue to apply the well-settled rules, industry customs, common law norms and principles that have long governed interchange arrangements, and collectively have ensured that disputes about interchange are nearly always resolved privately without the need for Board intervention.

Commenters—other than CN—generally agree that departure from established precedent is both unwarranted and unwise. As NS correctly points out, a departure from existing precedent, particularly one that creates an economic incentive to carriers to designate third party facilities, could wreak “havoc” and sow “chaos” on the rail system. NS Comments at 7, 9.

In addition to the overarching principles, there is general consensus among these carriers as to the precedent and principles which the Board should apply in resolving interchange disputes:

- Interchange arrangements should be negotiated, not unilaterally imposed.
- A designated interchange location must be “reasonable, proper and equal.”
- A receiving carrier cannot force a delivering carrier to incur third party costs.
- Reasonableness should be determined relative to where the interchange location would otherwise occur.

We address each of these points in turn.

A. Interchange Arrangements Should Be Negotiated, Not Unilaterally Imposed.

In the first instance, interchange arrangements should be negotiated between carriers. *See* BNSF Comments at 2; NS Comments at 5; ASLRRRA Comments at 7. Indeed, negotiation and agreement has long been the norm under the current legal regime. Ensuring that negotiation and agreement continues to be the norm is a crucial reason for the Board to steer clear of actions that could upset the existing regime by, for example, reading the Seventh Circuit’s Decision over-broadly or establishing bright line rules that could undermine the incentives of carriers to negotiate in the first instance. *See* NS Comments at 12.

B. A Designated Interchange Location Must be “Reasonable, Proper and Equal.”

The non-CN railroad comments recognize that a receiving carrier may designate a preferred interchange point if an agreement cannot be reached, but there is also consensus that that right is not absolute. The designation must comply with the statutory standard, *i.e.*, the location and facilities must be “reasonable, proper, and equal.” In making the designation, the receiving carrier must “not impose unusual, unreasonable, or impossible operating hazards or require the delivering carrier to do work that properly belongs to the receiving carrier.” BNSF Comments at 2 (quoting *New York, Chi, & St. L.R. Co. v. New York Central R. Co.*, 314 I.C.C. 344, 345 (1961)). *See also* NS Comments at 11 n.9; ASLRRRA Comments at 6.

This reasonableness determination is best made on a case-by-case basis taking into account the specific facts and circumstances of the case. *See* BNSF Comments at 3; NS Comments at 11-13. The Seventh Circuit’s decision did not limit the Board’s broad discretion to determine reasonableness. *See Wisc. Cent. Ltd.*, 20 F.4th at 295.

C. Reasonableness Should Be Determined Relative to Where the Interchange Location Would Otherwise Occur.

Reasonableness should be determined as compared to where interchange would otherwise occur and take into account the relative costs associated with the alternatives. *See* NS Comments at 6-7; BNSF Comments at 3. A location that may be operationally reasonable but that imposes significant costs on the delivering carrier would not be “reasonable, proper, or equal.” NS at 8 n.5.

The principle that a receiving carrier may not unilaterally burden the interchange arrangements by insisting on a change that imposes significant additional costs on the delivering carrier is good policy. It promotes negotiation between carriers to maximize efficiency, helps to level the bargaining table, and minimizes the potential for a receiving carrier to force a delivering carrier to, in effect, subsidize the receiving carrier’s operations. *See* NS Comments at 10.

D. A Receiving Carrier Cannot Force a Delivering Carrier to Incur Third Party Costs.

Similarly, it is unreasonable for a receiving carrier to force a delivering carrier to incur third-party costs. *See* BNSF Comments at 3 (“BNSF believes that as a general matter it would not be reasonable for a receiving carrier to unilaterally designate an interchange location that would require the delivering carrier to incur

costs associated with using or accessing any third-party facilities absent agreement from the receiving carrier to reimburse the delivering carrier for such costs.”); NS Comments at 6 n.3.

One implication of this principle is that, contrary to CN’s assertion, the fact that a delivering carrier may have an agreement with another carrier respecting the use of that carrier’s trackage or the switching of railcars on behalf of the delivering carrier does not does not automatically require that the delivering carrier ultimately bear such costs in connection with an interchange arrangement proposed by the receiving carrier. *See* BNSF Comments at 3. The existence of a pre-existing arrangement between the delivering carrier and another carrier (such as a terminal carrier switching agreement) does not relieve the receiving carrier of its statutory obligation to “provide reasonable, proper and equal facilities.” Of course, the delivering and receiving carriers are free to work out whatever cost-sharing arrangements they might agree to at arm’s length, but the receiving carrier may not simply foist costs on the delivering carrier unilaterally.¹

Adopting a legal regime that allows receiving carriers to designate third party tracks or terminal railroads and force the delivering carriers to incur the third party charges would create an incentive for receiving carriers to act opportunistically by insisting on the use third party facilities. It would allow the receiving carriers to foist the cost of providing and maintaining interchange

¹ CN ignores longstanding Board precedent that recognizes the custom and practice of receiving carriers agreeing to reimburse the delivering carrier for third party fees. *See, e.g., Kan. City 8. Ry. Co. v. La. &Ark. Ry. Co.*, 213 I.C.C. 351, 355-56 (1935). CN also overlooks evidence of the existing agreements CP has with other carriers. *See* CP Reply to CN Post Remand Brief at 20-21.

facilities on the delivering carriers. *See* NS Comments at 8. As NS astutely observes, adopting such a regime “could indeed have widespread industry consequences,” “create chaos and immediate change,” and overwhelm intermediate carriers. NS Comments at 8-9.

Finally, such a regime would contravene longstanding Supreme Court precedent that a carrier cannot be compelled to exercise trackage rights for another carrier’s benefit. *See Chi., R.I. & P. Ry. Co. v. Denver & R.G.R. Co.*, 1403 U.S. 596, 609 (1892); NS Comments at 10.

CONCLUSION

The opening comments of other parties in this proceeding support CP’s observations in response to the Board’s October 19 Decision. The Seventh Circuit decision does not require altering, nor should the Board alter, the well-established law governing interchange arrangements. In particular, any change in those principles that would enable receiving carriers to foist the costs of providing interchange facilities onto the delivering carrier would violate 49 U.S.C. § 10742’s requirement to “provide reasonable, proper and equal [interchange] facilities” and could wreak havoc and chaos in the industry.

Respectfully submitted,

Jeffrey J. Ellis
Chief Legal Officer
CANADIAN PACIFIC
7550 Ogden Dale Road S.E.
Calgary, AB T2C 4X9
Canada
Jeff_Ellis@cpr.ca

Charles W. Webster
Senior Counsel
CANADIAN PACIFIC
11306 Franklin Ave.
Franklin Park, IL 60131
(630) 860-4161
Charles_Webster@cpr.ca

/s/ David F. Rifkind

David F. Rifkind
STINSON LLP
1775 Pennsylvania Avenue NW,
Suite 800
Washington, DC 20006
(202) 785-9100
david.rifkind@stinson.com

David L. Meyer
LAW OFFICE OF DAVID L. MEYER
1105 S Street, NW
Washington, DC 20009
(202) 294-1399
david@meyerlawdc.com

Attorneys for Soo Line Railroad Company

Dated: January 17, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of January, 2023, I caused a copy of the foregoing CANADIAN PACIFIC'S REPLY TO COMMENTS FILED IN RESPONSE TO OCTOBER 19, 2022 DECISION to be served by email and/or first-class mail upon all parties of record.

/s/ David F. Rifkind
David F. Rifkind