

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

STB FINANCE DOCKET NO. 36397

CN'S INITIAL POST-COMMENT BRIEF

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INTRODUCTION¹

After three years of litigation, including an appeal to the Seventh Circuit and two rounds of public comment, this matter boils down to a single, narrow question: Who should pay the Belt Railway Company's fees for CN-bound interchange traffic that CP delivers to Clearing Yard in Chicago? And that question has a clear, case-specific answer: CP should pay these fees, just as CN pays for the CP-bound traffic it delivers, because CP voluntarily agreed to do so in the BRC Operating Agreement. Every other issue this proceeding could raise has either been decided by the Seventh Circuit or forfeited by CP (and has a clear answer anyway). So, as the public comments uniformly reflect, the Board need not and should not use this adjudication to address any broader questions of interchange policy.

CN thus submits this post-comment brief to lay out the relevant background, describe the Seventh Circuit's ruling, and explain why the parties' voluntary contractual agreement as BRC co-owners provides a case-specific answer to the only question left open on remand. CN urges the Board to resolve that question without further delay and order CP to pay what it owes.

CN originally petitioned the Board to decide two questions: (1) whether CN can designate Clearing Yard to receive interchange traffic from CP, and (2) if so, whether each railroad must bear its own costs, including the BRC's switching fees.

¹ Defined terms have the same meaning here as in CN's earlier briefs. Those briefs used "CP" to refer to Soo Line Railroad Company. Since consummation of the CPKC merger, CP is now known as CPKC. To avoid confusion and maintain consistency with prior briefing, CN continues to use the term "CP" to refer to Soo Line Railroad Company.

The Board held that the answer to the first question was no, because the parties' lines did not physically connect at Clearing and CN would not "provide" anything if each party bore its own costs.

The Seventh Circuit disagreed, explaining that the first reason has no basis in the statute and the second mixes up the location and who-pays questions. The court also explained that this kind of dispute could potentially raise three questions: (1) Can the receiving carrier designate a third party's facilities, like Clearing Yard? (2) If so, is that location reasonable? And (3) if so, who pays the resulting costs?

In vacating the Board's decision, the court answered the first question. CN can designate Clearing Yard because CN, "the receiving line, is willing to accept traffic through the Belt Railway, and Belt Railway is willing to accept that traffic."² That holding is decisive, and CP cannot relitigate it.

The court did not address the second question—whether Clearing is a reasonable interchange point—because CP never disputed it. Before or during the appeal, CP did not contend that interchanging at Clearing was operationally unreasonable or hazardous. CP did not raise that question until after the remand, two years into the litigation. That is too late; CP has forfeited the issue.

In any event, CP's tardy reasonableness challenge is meritless and disingenuous. Although CP claims here that interchanging at Clearing is unreasonable, it pledged to the Board in seeking its now-approved merger with KCS that it would continue interchanging traffic with CN at Clearing. And with good

² *Wisc. Cent. Ltd. v. STB*, 20 F.4th 292, 295 (7th Cir. 2021).

reason: The Class I railroads co-own the BRC for this very purpose, and CN and CP have a long history of interchanging effectively through Clearing Yard, including (since 2019) the very traffic at issue here. Indeed, CP’s commitment to interchange with CN at Clearing is now a binding condition of the CPKC merger that CP accepted by consummating the merger on April 14, 2023.³ There is no sound argument that the BRC is not a reasonable interchange location.

That leaves only the third question, which the court remanded to the Board: Who pays the BRC’s switching fees for CN-bound traffic? The BRC Operating Agreement, to which both CN and CP are contractual parties, supplies the answer: 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.⁴ 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.⁵ This clear contractual language, which CP has never addressed, is decisive. It governs every interchange that the BRC’s Class I owners conduct through Clearing. It requires CN to pay BRC switching fees for traffic it delivers through Clearing to CP and other railroads. And it requires CP to pay BRC switching fees for traffic it delivers through Clearing to CN and other railroads.

³ *Canadian Pacific Ry. Ltd. et al.—Control—Kansas City So. et al.*, Decision No. 35 at 143, STB Fin. Docket No. 36500 (served Mar. 15, 2023) (“the Board will impose a condition requiring Applicants to adhere to all representations made on the record in this proceeding”) (hereafter “*CPKC Merger Decision*”).

⁴ CN Post-Remand Br., Exhibit B, BRC Rate Sheet.

⁵ CN Post-Remand Br., Exhibit A, BRC Operating Agreement, Art. III § 1(a).

There is no basis to give CP a special exemption by forcing CN to subsidize Chicago interchange costs for one of the largest railroads in North America.

The Board should uphold this contractual commitment, which also accords with industry custom and basic fairness. Or, if the Board believes that a question of contract interpretation requires resolution elsewhere, it should implement the Seventh Circuit’s decision by confirming CN’s ability to designate Clearing, and leave the parties to resolve any contractual cost-allocation issues in another forum.

BACKGROUND

This proceeding began in April 2020 with CN’s petition for a Board order declaring that CN can designate the BRC’s Clearing Yard to receive Chicago-area interchange traffic from CP. From 2010 to 2019, CN and CP interchanged Chicago-area traffic at Spaulding, near the Village of Bartlett, Illinois, except for some traffic (especially toxic-by-inhalation (TIH) traffic) interchanged through Clearing Yard. But interchanging traffic at Spaulding grew unworkable—for, CN, Metra, and the surrounding communities. Because of the tracks’ layout, interchanging traffic at Spaulding was impossible without repeatedly blocking several local at-grade roads, often for extended periods.⁶ These operations also blocked CN’s single-track main line nearly every day, sometimes for hours at a time.⁷ And the timing of CP’s

⁶ Verified Statement of William Albritton at 4–6, 9–11 (“Albritton V.S.”) (filed as an attachment to CN Pet.).

⁷ See *id.* at 4–8.

operations could interfere with Metra’s passenger traffic, despite Metra’s repeated pleas.⁸

CN thus sought to move the Spaulding interchange traffic elsewhere. CN first designated Kirk Yard in Gary, Indiana, but CP objected and sought relief from the Board. CN also formally designated Clearing Yard as a second location to receive interchange traffic from CP. Pending the Board’s decision, the parties signed the Interim Agreement in August 2019. The Interim Agreement moved the Spaulding interchange traffic to Clearing, with CN temporarily reimbursing CP for the BRC’s switching fees for this traffic until a final decision from the Board.

Moving this traffic to Clearing greatly reduced the blocked crossings around Spaulding. Before the move, each month saw an average of almost 80 blocked crossings longer than ten minutes; after, that number dropped to around 18, a roughly 78% reduction.⁹ Indeed, the Village of Bartlett sent several letters to the Board expressing “unequivocally . . . that the change has improved the daily life and overall public safety in the community.”¹⁰ “While train traffic has continued unabated, the reduction in the train stoppages has greatly improved traffic flow with a domino effect throughout the community.”¹¹

⁸ See Metra April 2022 Comment 2–6.

⁹ Albritton V.S. 12–13.

¹⁰ Letter from Kevin Wallace, Village President, to Cynthia T. Brown, Chief, Section of Administration Office of Proceedings (entered July 10, 2020).

¹¹ Letter from Kevin Wallace, Village President, to Cynthia T. Brown, Chief, Section of Administration Office of Proceedings (entered Oct. 7, 2020).

In November 2019, the Board held that CN could not designate Kirk Yard for interchange because it was too far from CP's lines.¹² The 2019 decision did not address whether Clearing was a reasonable interchange location.¹³

CN thus filed a new petition in April 2020, asking the Board to decide that (1) CN can designate Clearing Yard to receive interchange traffic from CP, and (2) each railroad must bear its own costs for those interchanges, including the BRC's switching fees.¹⁴ CN also explained in detail that "Clearing is a reasonable interchange location for CP to deliver[] CN's interchange traffic" because interchanging at Clearing "does not 'impose unusual, unreasonable, or impossible operating hazards' on" CP.¹⁵

In response, CP argued that "CN must designate a reasonable location *on its own line* . . . and must provide CP a free route over its line to the location," and that, if the parties interchanged at Clearing, CN should have to pay all of the costs of doing so.¹⁶ CP did not contend that interchanging at Clearing imposes operating hazards or is otherwise unreasonable. On the contrary, throughout these

¹² See *Soo Line R.R. Co.—Pet. for Decl. Order and Prelim. Inj.—Interchange with Canadian National*, STB Fin. Docket No. 36299 (served Nov. 29, 2019).

¹³ *Id.* at 4–5.

¹⁴ CN Pet. 1.

¹⁵ *Id.* at 14, 22.

¹⁶ CP's Reply to Petition for Declaratory Order at 1–2, FD No. 36397 (May 29, 2020) ("CP Reply") (emphasis altered).

proceedings, CP has “reiterate[d] [its] willingness” to interchange at Clearing, disputing only whether it should have to pay the BRC’s fees.¹⁷

The Board ruled for CP. It held that the interchange statute, 49 U.S.C. § 10742, does not apply unless two railroads share a direct, physical connection.¹⁸ It also held that “[w]hen two carriers physically intersect, the receiving carrier is required to designate a point on its own line where it will receive traffic and to provide a free route over its tracks to that point.”¹⁹ In so holding, the Board rejected CN’s argument that Clearing Yard is within its “power to provide” under § 10742, asserting that, if the parties interchanged at Clearing and CP had to pay the BRC’s switching fees, then CN “would itself be ‘providing’ nothing.”²⁰ The Board thus held that CN “cannot unilaterally designate Clearing Yard as an interchange point,” and concluded that it “need not decide” who should pay the BRC’s switching fees.²¹

The Seventh Circuit vacated the Board’s decision. To start, the court explained, the “exchange of rail traffic is governed by statute, not by regulation or common law,” and a “rail carrier can have the ‘power to provide’ facilities,” as

¹⁷ See, e.g., CP Post-Remand Reply at 4 n.1; see also Exhibit 7 to CN Pet. (April 18, 2019 Letter from R. Johnson to M. Cory at 1); Exhibit 6 to CN Pet. (April 3, 2019 Letter from R. Johnson to M. Cory at 2) (“With respect to CN traffic moving from CP to CN, we are willing to take it from Bensenville to . . . Clearing Yard . . . if CN pays the per car cost to BRC required under the CP/BRC trackage rights agreement.”).

¹⁸ 2020 Board Decision at 9.

¹⁹ *Id.* at 5.

²⁰ *Id.* at 7.

²¹ *Id.* at 10.

§ 10742 requires, “as a result of contract.”²² Likewise, § 10742 “does not contain” any requirement that “the two railroads have physically intersecting lines”; instead, “‘connecting line’ can include connection through an intermediary.”²³

The court also rejected the Board’s reliance on “what amounts to a common-law tradition”—the supposed rule that a receiving carrier with a physical connection must provide free passage to an interchange point on its own line.²⁴ “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.”²⁵

And the court explained that an interchange dispute generally can involve “three distinct questions”: (1) whether a “receiving carrier [can] ever designate a willing third party to receive traffic on its behalf,” (2) if so, whether the designated location is reasonable, and (3) if so, “who pays the third party.”²⁶ “By mixing these up, and smuggling an assumption about the answer to Question 3 into its decision about Question 1, the Board erred.”²⁷ The court thus “remanded for further proceedings consistent with this opinion.”²⁸ The court also noted the remaining open

²² *Wisc. Cent. Ltd. v. STB*, 20 F.4th 292, 294 (7th Cir. 2021).

²³ *Id.* (citing *Atchison, Topeka & Santa Fe Ry. v. Chicago*, 240 F.2d 930, 936–37 & n.17 (7th Cir. 1957), *aff’d*, 357 U.S. 77 (1958)).

²⁴ *Id.*

²⁵ *Id.* at 295.

²⁶ *Id.* at 294–95.

²⁷ *Id.*

²⁸ *Id.* at 295.

question—“the Board did not resolve” “who should bear the cost of [the BRC’s] services.”²⁹

The Seventh Circuit thus resolved the first question it noted: CN can designate Clearing Yard because CN, “the receiving line, is willing to accept traffic through the Belt Railway, and Belt Railway is willing to accept that traffic.”³⁰ The second question, whether Clearing is reasonable, was not disputed in this proceeding. Nor could it be: As the Seventh Circuit noted, the BRC is the nation’s “largest switching and terminal railroad,” dispatching “more than 8,000 cars a day.”³¹ That traffic includes the TIH traffic CN and CP have interchanged at Clearing for years, and the remaining interchange traffic they have successfully interchanged there under the Interim Agreement since 2019.

What’s more, CP specifically promised the Board, in seeking approval of its merger with KCS, that it would continue “operat[ing] two interchange trains daily in and out of the BRC’s Clearing Yard via BRC’s Kenton Line Subdivision,” including “*all of CP’s traffic going to and from CN*” and other Class I railroads.³² The Board relied on those statements in approving the merger and imposed a condition requiring CP to adhere to that representation.³³ Indeed, CP’s

²⁹ *Id.* at 294.

³⁰ *Id.* at 295.

³¹ *Id.* at 294.

³² *Can. Pac. Ry. Ltd.—Control—Kan. City S.*, No. FD 36500, CP Am. Operating Plan ¶ 27 (filed May 13, 2022) (emphasis added).

³³ *CPKC Merger Decision* at 67 (citing CP representations about interchange locations, including its representations about Chicago); *id.* at 143 (“Given the scope of this merger and the fact that Applicants’ many representations underlie critical

representations about Chicago operations were particularly critical to the CPKC merger proceeding, in which the Board addressed comments from Chicago-area communities, Chicago-area governmental representatives, and Metra. The Board directly relied on CP's assurances in approving the merger.

That leaves the third question the Seventh Circuit noted: "who should bear the cost of Belt Railway's services."³⁴ The answer will govern not only the parties' obligations forward, but also whether CP must repay the amounts CN has paid for CP's switching fees for traffic it delivered to CN at Clearing since August 2019 under the Interim Agreement.

Since the Seventh Circuit's remand in January 2022, there has been extensive additional briefing. CN filed a brief explaining the remand's limited scope and CP's voluntary contractual obligations. CP objected to that brief and suggested that a slew of other questions remained open, including (for the first time) whether Clearing is a reasonable interchange point. CN replied to the objection; CP eventually filed a (tardy) reply to CN's post-remand brief; and CN sought leave to reply to CP's reply, to which CP again objected.

The Board ultimately accepted all the parties' post-remand filings. The Board also sought public comment on eight broad questions of interchange policy it

Board findings regarding the Transaction's impact on service, competition, and the public interest, and the fact that the Board has relied on the entirety of the record in reaching its ultimate decision on the Application, the Board will impose a condition requiring Applicants to adhere to all representations made on the record in this proceeding.").

³⁴ *Wisc. Cent.*, 20 F.4th at 294; see 2020 Board Decision 10.

suggested may be implicated by the Seventh Circuit’s decision. But commenters, including two other Class Is and the American Short Line and Regional Railroad Association, uniformly responded that the Seventh Circuit’s ruling did not upend interchange law and that the Board should not use this proceeding to adopt new interchange rules. These commenters broadly agreed that interchange arrangements typically are a matter for mutual agreement, and 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. As a result, the commenters largely declined to address the abstract questions the Board posed, instead urging the agency to retain a case-by-case approach that does not upset industry practices.

Matters thus stand as they did after the Seventh Circuit’s remand: The court decided that CN can designate Clearing Yard, and CP forfeited any challenge to the reasonableness of that choice, so the Board need only decide the “who pays” question. It should do so now by enforcing CP’s voluntary contractual commitment in the Operating Agreement.

ARGUMENT

I. CP cannot relitigate the Seventh Circuit’s holding that CN can designate Clearing Yard.

The threshold question in this case was whether CN had the power to designate Clearing Yard to receive interchange traffic from CP. The Seventh Circuit said yes: A receiving carrier can “designate a willing third party to receive traffic” “as a result of contract,” the court explained, and that 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.”³⁵ That resolves this issue.

Yet CP claims 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.³⁶ But the Operating Agreement explicitly contemplates “interchange of cars between Railway Companies on the Belt Railway.”³⁷ And it gives each co-owner “the right and privilege” of “running and operating” over the BRC’s lines; to 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.³⁸ This language entitles CN, as a co-owner, to use the BRC to interchange traffic with CP, another co-owner.

Nor is there any other possible basis for the Seventh Circuit’s holding that CN can designate Clearing because the BRC “is willing to accept [CN-bound] traffic.”³⁹ The BRC is “willing” because the Operating Agreement says so. Indeed, that is what CN argued on appeal, with no disagreement from CP.⁴⁰ CP itself told

³⁵ *Wisc. Cent.*, 20 F.4th at 294–95.

³⁶ CP Post-Remand Reply 10; *see id.* at 22–23.

³⁷ CN Post-Remand Br., Exhibit A, BRC Operating Agreement Art. III § 1(e).

³⁸ *Id.*, Art. I.

³⁹ *Wisc. Cent.*, 20 F.4th at 294–95; *see* CN Post-Remand Reply to Reply 2–3.

⁴⁰ *See* Br. for Pet’r Wisconsin Central Ltd. 12, 39, *Wisc. Cent.*, 20 F.4th 292 (No. 20-3507) (ECF No. 24) (explaining that CN 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

the court that “each railroad has its own right to utilize the Belt Railway for interchange pursuant to the governing Operating Agreement that also requires the delivering carrier to pay a fee.”⁴¹ In short, the parties squarely presented this issue to the Seventh Circuit, and the court decided it. CP cannot claim otherwise now.

CP has also invoked a pair of common-law concepts, contending that (i) trackage rights are permissive and (ii) a carrier must “allow a delivering carrier free interchange.”⁴² But the Seventh Circuit flatly rejected the idea that this sort of “common-law tradition” can limit a receiving carrier’s rights under § 10742, which “depend[] on the language of the statute, not on extra-statutory doctrines.”⁴³ And while CP says the permissive-trackage-rights concept “was not even mentioned” by the Seventh Circuit,⁴⁴ in fact the court specifically rejected CP’s reliance on this “common-law norm.”⁴⁵ 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.⁴⁶

interchange”); 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) (citing and discussing the Operating Agreement without disputing CN’s description).

⁴¹ Br. for Intervenor-Resp. 40.

⁴² CP Post-Remand Reply 11–12.

⁴³ *Wisc. Cent.*, 20 F.4th at 295.

⁴⁴ CP Post-Remand Reply 13.

⁴⁵ *Wisc. Cent.*, 20 F.4th at 295; see CN Reply to CP Mot. to Strike 3–4.

⁴⁶ See *Rock Island Ry. v. Rio Grande R.R.*, 143 U.S. 596, 609 (1892) (“Taking all the facts of this contract together, we regard it as quite clear that it was never intended

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 requirement⁴⁷—which is a key premise of the supposed “free-transit rule.”⁴⁸ And even if the “free-transit rule” could apply here, it would not help CP, because “CP does not have to pay trackage rights [fees]” to reach Clearing Yard.⁴⁹ Thus, CP *can* “reach Clearing without charge,” as this “free-transit” rule would require.⁵⁰

In short, the Seventh Circuit held that CN can designate Clearing to receive interchange traffic from CP. CP’s contrary arguments ignore the BRC Operating Agreement’s plain language and conflict with the Seventh Circuit’s explicit reasoning. This issue is closed.

II. CP’s tardy reasonableness challenge is forfeited and meritless.

A. By waiting two years to challenge Clearing’s reasonableness, CP forfeited the issue.

From the moment CN first filed its petition in April 2020, CP had every opportunity and incentive to dispute whether Clearing was a reasonable location to

to grant the use of terminal facilities except as appurtenant to the use of the road itself.”).

⁴⁷ *Wisc. Cent.*, 20 F.4th at 294–95.

⁴⁸ *See* CP Post-Remand Reply 12–13.

⁴⁹ *Id.* at 24 n.9; *see also* CN Post-Remand Br. 19–21.

⁵⁰ CP Post-Remand Reply 12. As CN explained in prior briefing, the Clearing fees that CP is refusing to pay are not trackage rights fees, but rather switching fees that compensate BRC for the work that its crews do to switch traffic—work that otherwise would have to be performed by the interchanging railroads.

interchange this traffic. It did not.⁵¹ CP first raised this issue only after remand from the court, in February 2022, almost two full years into the dispute.⁵² In response, CN has repeatedly pointed out that CP is trying to inject a new issue into the case on remand, which is improper. CP has never tried to show otherwise; it has simply ignored the point.

CP's reasonableness argument is thus foreclosed by the rule that "the Board will not consider arguments or evidence that should have been submitted at an earlier stage."⁵³ Again, CP had no reason not to make these arguments earlier; it simply chose not to. The Board should not excuse this unjustified about-face.⁵⁴

The Seventh Circuit's remand likewise prohibits CP from raising this new issue now. On remand, the Board may address only (1) remanded issues, (2) new issues arising after remand, and (3) issues "timely raised" in prior proceedings that "remain undecided."⁵⁵ The Seventh Circuit nowhere remanded the reasonableness of Clearing to the Board, as that issue was never disputed or raised before the court.⁵⁶ Nor is reasonableness a new issue arising only now; it has been in the case

⁵¹ See CN Post-Remand Reply to Reply 5–7.

⁵² CP Remand Reply 13–16.

⁵³ *New Eng. Cent. R.R.—Trackage Rights Order—Pan Am S. LLC*, No. FD 35842, 2018 WL 1989070, at *4 (STB served Apr. 24, 2018).

⁵⁴ See *Canadian Nat'l Ry. & Grand Trunk Corp.—Control—EJ&E W. Co.*, No. FD 35087, 2008 WL 8139694, at *26 (STB served Dec. 24, 2008) (holding a claim "waived" because the party "did not forcefully raise it in a timely manner").

⁵⁵ *United States v. Morris*, 259 F.3d 894, 898 (7th Cir. 2001).

⁵⁶ CP seems to now agree with CN on this point. See CP Reply Comment at 4 (explaining that the court "offered no guidance" on "whether particular facilities are reasonable" "on the facts of this case or otherwise").

since the start.⁵⁷ And CP did not timely raise the issue before the appeal; it did not raise the issue at all, despite having every reason and opportunity to do so.⁵⁸ It cannot do so now.

B. CP's sworn representations about Clearing in the KCS merger proceeding belie its arguments here.

Forfeiture aside, CP's reasonableness argument lacks merit. In this proceeding, CP now says that Clearing and the Chicago terminal are too congested, so traffic must be kept away.⁵⁹ But that claim is diametrically opposed to CP's representations to the Board in support of the CPKC merger—representations that were made largely to alleviate substantial concerns about the possible impact of the merger, and the resulting increased traffic in the Chicago terminal, on Chicago communities and commuter rail. CP's Operating Plan promised that CP will continue to deliver all interchange traffic to CN at Clearing: "Two major intermediate switching terminal railroads, the BRC and the IHB, play key roles in CP's interchange traffic with other Class I railroads by providing the track infrastructure and classification services required to exchange carloads."⁶⁰ CP also explained that "CP operates two interchange trains daily in and out of the BRC's

⁵⁷ See CN Petition 22 (explaining why Clearing Yard is a reasonable interchange location).

⁵⁸ Compare CP May 2020 Reply 8, 17 (CP arguing that Spaulding was a reasonable location but not that Clearing was unreasonable), *with* CP Post-Remand Reply 5 ("On April 30, 2019, CP asked the Board to declare that Kirk is not a reasonable interchange location.").

⁵⁹ CP Post-Remand Reply 13–16.

⁶⁰ *Can. Pac. Rwy. Ltd.—Control—Kan. City S.*, No. FD 26400, CP Am. Operating Plan ¶ 27 (filed May 13, 2022).

Clearing Yard via BRC's Kenton Line Subdivision,” including “*all of CP's traffic going to and from CN*” and other Class I railroads.⁶¹ These amended operating plan statements were verified by CP and KCS officers months after CP claimed on remand in this proceeding that Clearing was not a reasonable interchange point.⁶² The Board has since relied on these representations to approve CP's merger with KCS.⁶³

CP cannot now contend that Clearing is operationally unworkable when it convinced the Board to approve its merger by swearing that the BRC “play[s] a key role[] in [its] interchange traffic” with CN by providing the “required” infrastructure. In fact, CP is estopped from doing so.⁶⁴ CP's claims here about Clearing are inconsistent with its statements in the merger proceeding; CP secured Board approval for the merger through those statements; and allowing CP now to reverse position would be inequitable. Estoppel thus bars CP's about-face.⁶⁵

CP's claims in this proceeding similarly clash with the representations it made in the merger proceeding about planned train counts east of Bensenville Yard,

⁶¹ *Id.* (emphasis added).

⁶² *Id.*, Verifications of Raymond A. Elphick and John F. Orr.

⁶³ *See Can. Pac. Rwy. Ltd.—Control—Kan. City S.*, No. FD 26400, Decision Approving Merger at 66-67 (served March 15, 2023).

⁶⁴ *EJ&E W.*, 2008 WL 8139694, at *26 (“Estoppel protects the integrity of the judicial process by preventing a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in another proceeding or a different phase of the same proceeding.”).

⁶⁵ *See id.* (applying estoppel to a party that took “clearly inconsistent positions before the Board and Congress” on the same issue).

including to and from BRC's Clearing Yard. In this proceeding, CP complains that interchanging at Clearing may force it "to add an additional train to Clearing in order to handle CN bound traffic from Bensenville," atop the two Bensenville-to-Clearing trains CP currently operates—though CP does not contend it has had to add a train since the interchange moved to Clearing in August 2019, over three years ago.⁶⁶ But in seeking approval for the CPKC merger, CP told the Board that "the only increases will be west of the [Bensenville] yard" and that there will be "No Change" to the east (*e.g.*, toward Clearing).⁶⁷ Indeed, Mr. Elphick assured the Board at the public hearing that "we do not anticipate any increase in trains to BRC" and that "there are no additional trains planned east of Bensenville."⁶⁸ These representations are now binding merger commitments, and CP must be held to them.⁶⁹

For that matter, even here CP says "the outcome of this proceeding is unlikely to change where the parties interchange traffic."⁷⁰ If Clearing were an unreasonable choice because of congestion or operational constraints, it is hard to understand why CP would countenance the interchange staying there. The true reason, of course, is that Clearing is a reasonable interchange point. Indeed, this is

⁶⁶ CP Post-Remand Reply 15 n.6; *see* Walker V.S. ¶ 18.

⁶⁷ No. FD 36500, CP Am. Operating Plan ¶ 211 & tbl.8; *see also* CP Rebuttal Hearing Slides at 23 (slide asserting that "0 Trains [will be] added" to east of Bensenville track on route to Clearing).

⁶⁸ Transcript of Public Hearing at 1665:2-4 & 1667:2-4, FD 36500 (October 6, 2022).

⁶⁹ *CPKC Merger Decision* at 143.

⁷⁰ CP Post-Remand Reply 4 n.1.

why the BRC exists, to facilitate this kind of interchange among its co-owner railroads. That is also surely why CP never hinted otherwise until it lost on the key issue on appeal.

C. Even if CP could raise the issue now, Clearing is a reasonable interchange location.

In all events, Clearing Yard is an eminently reasonable interchange point. Clearing complies with the decades-old standard that every commenter (including CP) endorsed, because interchanging there “does not impose unusual, unreasonable, or impossible operating hazards or require the delivering carrier to do work which properly belongs to the receiving carrier.”⁷¹ As the party contending otherwise, CP bears “the burden of demonstrating the choice is unreasonable” under this settled test.⁷²

Instead of trying to carry that burden, CP essentially asks the Board to make the same logical error the Seventh Circuit already identified. CP contends that the BRC’s fees make Clearing an unreasonable interchange location.⁷³ But the court made clear that reasonableness and cost are separate questions, so deciding the former based on the answer to the latter (which the Board hasn’t actually decided yet) is circular and improper.

⁷¹ *Kan. City S. Ry.*, 213 I.C.C. at 359; see CN Reply Comment 6–7 (collecting comments embracing this standard).

⁷² See NSR December 2022 Comment 14; *Norfolk S. Ry.—Pet. for Decl. Order—Interchange with Reading Blue Mountain & N. R.R.*, No. 42078, 2003 WL 1963547, at *4 (STB served Apr. 29, 2003).

⁷³ See CP Post-Remand Reply 2, 16.

Beyond that, CP urges a totally new approach to evaluating reasonableness. It claims the Board must now compare Clearing with Spaulding to determine which location is *more* reasonable. CP does not try to square this novel argument with the statutory text, which says simply “reasonable, proper, and equal”—not “more reasonable” or “most reasonable” or “best.”⁷⁴ Nor does CP acknowledge that “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.”⁷⁵ Under this long-settled rule, a designated point need not be the *most* reasonable; it need only be reasonable, period.⁷⁶

To support its contrary approach, CP points to the Seventh Circuit’s observation that an interchange dispute might require such a comparison. But precisely because CP never challenged Clearing’s reasonableness before or during the appeal, the court had no reason to, and did not, address how the reasonableness analysis works. It certainly did not purport to override, in *dicta*, the decades-old

⁷⁴ 49 U.S.C. § 10742.

⁷⁵ *Burlington N. R.R. v. United States*, 731 F.2d 33, 40 (D.C. Cir. 1984) (emphasis added).

⁷⁶ See, e.g., *Soo Line R.R. Co.—Pet. for Decl. Order and Prelim. Inj.—Interchange with Canadian National*, STB Fin. Docket No. 36299 (served Nov. 29, 2019) (“[I]n general, the reasonableness of a given interchange point is determined by its own characteristics. A railroad may, therefore, have more than one reasonable interchange point.”).

standard just noted. As CP itself observes, “the Seventh Circuit’s decision does not significantly affect the obligations of carriers under 49 U.S.C. § 10742.”⁷⁷

And even if a comparative analysis were warranted, it would have to account for stakeholder interests in keeping the interchange away from Spaulding, which CP dismisses.⁷⁸ Metra, municipal governments, fire departments, and business leaders have all urged the Board not to revive the routine blockages of three at-grade crossings that interchanging traffic at Spaulding caused.⁷⁹ Overriding these interests by removing the interchange from Clearing—which, again, exists for this very purpose—would hardly be reasonable.

III. The BRC Operating Agreement provides a clear, case-specific answer to the who-pays question: Each carrier must bear its own costs.

The BRC Operating Agreement requires each carrier to pay for the traffic it delivers to Clearing. That contractual arrangement, which tracks industry custom and precedent, suffices to decide this case.

A. CP agreed to pay for interchange traffic it delivers to CN via the BRC at Clearing.

Because the Seventh Circuit held that CN can designate Clearing as the interchange point, and because CP cannot now dispute whether interchanging at

⁷⁷ CP Comment 2. CP also points to *N.Y., Chi., & St. Louis R.R. v. N. Y. Cent. R.R.*, 314 I.C.C. 344, 345 (1961). *See* CP Comment 12. But this decision does not support CP’s claim. The ICC held merely that it was unreasonable for the receiving carrier to designate a new interchange location without even “consider[ing] or consult[ing] with the interchange carrier.” *Id.* at 345. Indeed, the ICC also held that the receiving carrier was well within its rights to terminate the contracts that required it to interchange at the initial location. *Id.*

⁷⁸ CP Post-Remand Reply to Reply to Reply 11–13.

⁷⁹ CN Post-Remand Reply to Reply 9–11.

Clearing is reasonable, the only question left is whether CP must pay for the CN-bound traffic it delivers to the BRC, just as CN pays for its CP-bound traffic. As CN has explained at length, the answer is yes.⁸⁰

Resolving this issue merely requires applying the settled principle that interchange arrangements should “be determined by agreement” whenever possible.⁸¹ Indeed, commenters endorse this principle and agree that parties can allocate this kind of cost by contract.⁸² So the only question is whether the BRC Operating Agreement is such a contract.

It is. CN-bound traffic that CP delivers to Clearing is (in the Agreement’s words) “traffic delivered to the BRC at Clearing Yard by an inbound line haul carrier for an outbound line haul carrier” under the Operating Agreement.⁸³ 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.⁸⁴ On its face, this language covers the traffic at issue.⁸⁵

⁸⁰ See CN Post-Remand Brief 10–21; CN Post-Remand Reply to Reply 11–16; CN Comment 11–13; CN Reply Comment 8–9.

⁸¹ STB 7th Cir. Br. 45; *see id.* (emphasizing the Board’s “clear preference for private resolution over agency involvement”); 2020 Board Decision at 5 (similar); *N.Y., Chi. & St. Louis R.R. v. N.Y. Cent. R.R.*, 314 I.C.C. 344, 346 (1961) (similar).

⁸² CP Comment at 7 (“If a particular interchange location designated by the receiving carrier is reasonable, the statute directs that (*absent agreement otherwise*) the party ‘providing’ those facilities bear the costs thereof” (emphasis added)).

⁸³ CN Post-Remand Br., Exhibit B, BRC Rate Sheet.

⁸⁴ CN Post-Remand Br., Exhibit A, BRC Operating Agreement, Art. III § 1(a).

⁸⁵ See CP Post-Remand Reply 19 (asserting that the BRC Operating Agreement governs only “cars that carriers have agreed to interchange via Clearing,” without

Although CP apparently disagrees, it has never offered a different interpretation of this language. And it has repeatedly acknowledged the resulting obligation: “CP must pay the BRC a fee to use BRC’s facilities and services” and it is “the delivering carrier,” *i.e.*, CP, who must “pay BRC’s fees.”⁸⁶ In other words, the Operating Agreement “contemplates that the delivering carrier pay BRC’s fees for cars interchanged using Clearing.”⁸⁷ By voluntarily accepting that contractual obligation, CP resolved the only issue outstanding here.

CP’s only substantive response has been that “[r]ailroads can and do enter into *separate* reimbursement agreements” for costs like these.⁸⁸ True, but irrelevant. The only such agreement between the parties is the Interim Agreement, which merely moved the interchange to Clearing pending resolution of this dispute (and which requires CP to repay CN if CN ultimately prevails). So the question here is who pays the BRC’s fees *absent* a separate reimbursement agreement. And the BRC Operating Agreement supplies the answer.

There is thus no “disagreement about what the BRC Operating Agreement requires” that would need to be “resolved by a court, not the Board.”⁸⁹ But if such a disagreement existed, the proper course would be for the Board to confirm that (as

pointing to any supporting contract language or addressing the language quoted above); CN Post-Remand Reply to Reply 12.

⁸⁶ CP May 2020 Reply 15–16 & n.12.

⁸⁷ CP Post-Remand Reply 6.

⁸⁸ CP Post-Remand Reply 20–22.

⁸⁹ 2020 Board Decision 11 n.11.

the Seventh Circuit already held) CN can designate Clearing Yard, and leave the parties to resolve any contractual issues in the appropriate forum.

B. Requiring CP to pay its fair share comports with industry practice and precedent.

As just explained, the Board need not look beyond the BRC Operating Agreement to resolve this issue. But if it does take a broader view, it will find that precedent, industry custom, the parties' long-term course of dealing, and basic fairness all support CN's position too.

The Supreme Court long ago noted that “usually when interchange is effected by means of an intermediate carrier, the delivering carrier bears the cost of switching.”⁹⁰ The ICC similarly recognized that forwarding carriers must “make delivery on the rails of their connections, either direct or by bearing the charges of the intermediate switching line, and this is the general practice of railroads throughout the country.”⁹¹ Thus, switching charges should be “absor[bed] . . . by the line that delivers the traffic.”⁹² And the D.C. Circuit has acknowledged the “longstanding Chicago custom” that “the intermediate switching charges involved in [interchange] deliveries are normally borne by the forwarding carrier.”⁹³

The parties' past practice at Clearing reflects this custom. CP historically paid the BRC switching fees for both TIH and non-TIH traffic that it interchanged

⁹⁰ *Baltimore & Ohio R.R. Co. v. United States*, 277 U.S. 291, 301 (1928).

⁹¹ *Kan. City S.*, 213 I.C.C. at 356 (emphasis added).

⁹² *Rates, Regs., & Practices of Peoria & Pekin Union Ry.*, 93 I.C.C. 3, 22 (1924).

⁹³ *Burlington N. R. Co. v. United States*, 731 F.2d 33, 35 (D.C. Cir. 1984).

to CN through the BRC.⁹⁴ And, of course, CN paid the fees for the traffic it delivered to Clearing. Adhering to that historical practice would thus comport with industry custom.

The Board’s prior decision rejected CN’s reliance on this custom, asserting that the cases describing this practice do not “address[] or nullify[] the separate obligations that apply when there is a physical intersection between two carriers.”⁹⁵ But it is now clear that no such “separate obligations” exist. The Seventh Circuit held that the interchange statute “does not contain” a physical-connection requirement; instead, a “connecting line” under § 10742 “can include connection through an intermediary.”⁹⁶ The Board’s prior reason for failing to follow this history and these precedents is thus unsound.⁹⁷

Further, CP’s position is fundamentally unfair. Requiring CN to pay for all traffic interchanged at Clearing Yard under § 10742 in *both* directions creates an inequitable imbalance. Interchange is a mutual statutory obligation that imposes duties on both forwarding carriers and receiving carriers.⁹⁸ Because interchanging “will benefit two carriers, not just one,” CP cannot reasonably expect CN to bear all

⁹⁴ See *Albritton V.S.* at 1–2, 3, 21.

⁹⁵ 2020 Board Decision at 7.

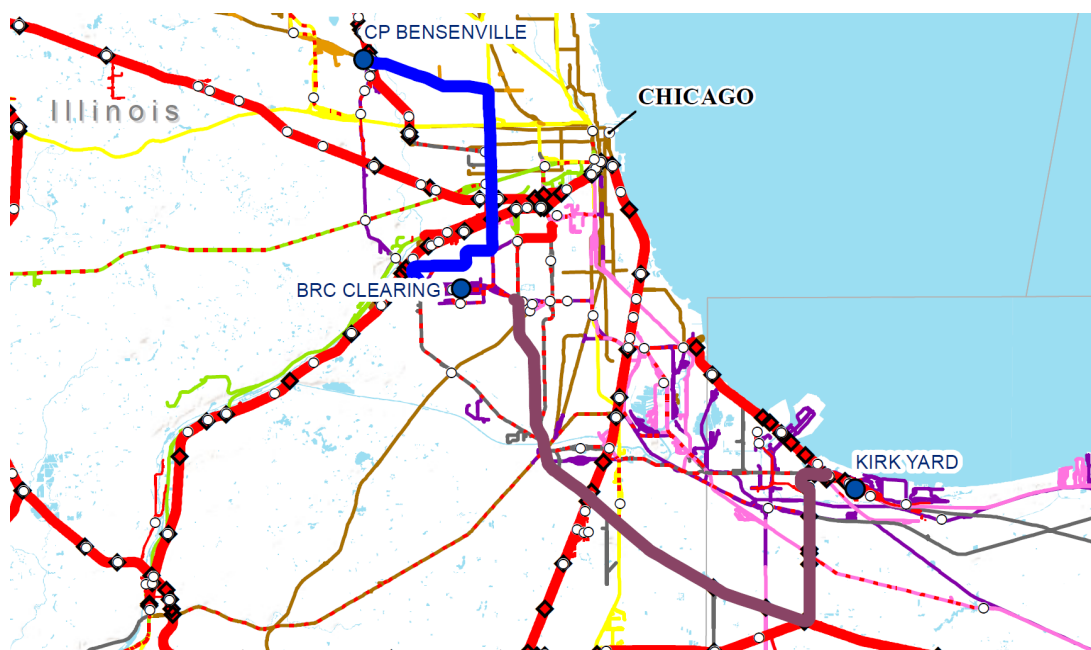
⁹⁶ *Wisc. Cent.*, 20 F.4th at 294 (citing *Atchison*, 240 F.2d at 936–37 & n.17).

⁹⁷ The Board also said the Supreme Court “disagreed with” the ICC’s description of this custom in *Chicago, Rock Island*, see 2020 Board Decision at 7, but that was wrong. As the ICC later noted, this aspect of *Chicago, Rock Island* “was not criticized by the Supreme Court,” and so the Commission relied on it again. *Kan. City S.*, 213 I.C.C. at 359.

⁹⁸ See *Kan. City S.*, 213 I.C.C. at 356.

the costs of interchanging in both directions.⁹⁹ This does not mean, of course, that interchanging railroads will always pay exactly the same amount of switching fees; one may deliver more traffic, or different kinds of traffic, and it may pay more for that. But it does mean there is no basis for CP's insistence that CN can exercise its right to designate a reasonable interchange point only if CN pays all of CP's switching fees.

Requiring each railroad to pay for the traffic it delivers is also fair because each carrier must exercise trackage rights to reach Clearing Yard—but CP does not pay trackage rights to do so, while CN does. CN must also cover a greater distance:



CP's route between its Bensenville Yard and BRC's Clearing Yard is marked in blue, and CN's route between its Kirk Yard and Clearing Yard is in purple.

⁹⁹ *Cf. Minnesota N. R.R., Inc. v Canadian Nat'l Ry. Co.*, STB Docket No. 42080, slip op. at 6 (STB served Mar. 18, 2005) (one railroad could not expect another to pay all capital costs for establishing a new interchange connection).

To reach Clearing Yard from its Kirk Yard in Gary, Indiana, CN must travel over the Elsdon line operated by CSXT, paying a per-car trackage rights fee to do so.¹⁰⁰ This is a total distance of 39 miles, roughly 17 of which are on CSXT's track.¹⁰¹ By contrast, to reach Clearing from its Bensenville Yard—a total distance of 17 miles¹⁰²—CP travels roughly 7 miles over Metra's West Line to Cragin, which connects to the BRC's line to Clearing.¹⁰³ And CP does *not* pay a per-car trackage rights fee to Metra to do so.¹⁰⁴ So, to interchange at Clearing, CN must travel further and pay for doing so—in addition to paying the BRC's switching fees for the traffic CN delivers there.

Thus, even if the Board looks beyond the BRC Operating Agreement, industry custom and basic fairness make plain that CP must pay its fair share of the BRC's switching fees.

¹⁰⁰ See Albritton V.S. at 22.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Verified Statement of Charles E. Hubbard ¶ 7 (filed as an exhibit to CP Reply). CP is the freight rail common carrier operating over Metra's line, and CP even dispatches Metra's line. See *Can. Pac. Ry. Co.—Control—Dakota, Minnesota & E. R.R. Corp.*, Docket No. FD 35081 (STB served Sep. 30, 2008), slip op. at 34 (referring to CP as “dispatcher of the West Line” and explaining that “CPRC has the right to dispatch the West Line and North Line by virtue of a 1985 trackage rights agreement with the Trustee of the Milwaukee Road.”)

¹⁰⁴ CP Reply at 13. For this reason, CP's resort to the “free-transit” rule rings hollow. Apart from the fact that the court set aside the premise of the free-transit rule, *i.e.*, a physical-intersection requirement, *Wisc. Cent.*, 20 F.4th at 294–95, CP concedes that it can reach Clearing without charge, as the rule would require.

IV. The Board need not address any broader questions of interchange law or policy.

The Board’s request for public comments suggested that this matter “has the potential to significantly alter . . . precedent and practices regarding the interchange of rail traffic.”¹⁰⁵ But the simple fact-specific question that remains for the Board to decide will not alter any existing law, which is why nearly every commenter warned the Board away from making any sweeping changes in this case.¹⁰⁶ The “standard for designating interchange locations”¹⁰⁷ is not in play here. And even if reasonableness were on the table, all commenters (except CP) agree that the Board should retain the standard the courts have long endorsed. The Board should thus end this long-running adjudication without further delay, and without reaching any broader questions that are not presented here.

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, including the past fees that CN paid under the Interim Agreement.

¹⁰⁵ Comment Order at 4.

¹⁰⁶ CN Comment at 13 (“this dispute does not require the Board to address any broader questions”); *see also* BNSF Comment at 5; NS Comment at 7; CP Comment at 2.

¹⁰⁷ Comment Order at 5.

Alternatively, the Board should implement the Court's ruling 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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April 21, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of April 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
Matthew J. Warren