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U.S. Surface Transportation Board
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Washington, DC 20423

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

Dear Ms. Brown:

Please find enclosed for filing the Initial Post Public Comments Brief of Soo Line Railroad Company d/b/a CPKC f/k/a CP.

Please do not hesitate to contact me with any questions.

Sincerely,

/s/ David F. Rifkind

Counsel for Soo Line Railroad Company

Enclosures

cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

STB Finance Docket No. 36397

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Dated: April 21, 2023

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Soo Line Railroad Company (“Soo”) d/b/a CPKC (formerly CP), pursuant to the Board’s decision served March 22, 2023, respectfully submits this Initial Brief following the Public Comments filed December 19, 2022 and January 17, 2023.¹

INTRODUCTION

For almost a decade, CPKC had delivered cars to CN at Spaulding, near Bartlett, IL. In 2019, CN started this long-running interchange dispute by unilaterally designating Kirk Yard, near Gary, Indiana, as the new location to receive cars in interchange from CPKC. CPKC petitioned this Board to declare Kirk unreasonable. After thorough review, the Board so declared.

In 2020, CN again attempted to unilaterally declare a new interchange point: this time, Clearing Yard, part of the Belt Railway of Chicago (“BRC”). CPKC argued Clearing was unreasonable for multiple reasons, but the parties worked out an interim arrangement allowing interchange to occur, at CN’s expense, during pendency of this proceeding. The Board’s October 30, 2020 Decision rejected CN’s designation of Clearing, holding that because CPKC and CN intersected at Spaulding, CN could not designate an interchange location that neither party owned.

On petition for review, the Seventh Circuit Court of Appeals found error in that decision, but not for the reasons that CN now suggests. The court held the Board was not entitled to reject Clearing solely because it would require CPKC to operate over

¹ This Initial Brief is supported by the Verified Statement of John Kay (“Kay V.S.”)

third-party (BRC) trackage. Instead, according to the Seventh Circuit, the Board was wrong to smuggle into that assessment an “assumption” that CPKC would be required to pay for the right to operate over BRC to reach Clearing.

The court’s narrow ruling leaves three potential questions for the Board’s decision, though the Board’s resolution of either the first or second may obviate the third.

First, may CN designate Clearing when CPKC’s delivery of cars there would in fact (based on CN’s own positions in this proceeding) rely on CPKC’s contract with BRC and require that CPKC pay BRC for the right to reach Clearing? The Board should answer that question in the negative, as it did when (in the eyes of the court) it merely “assumed” that CPKC would be required to pay. With CN’s assurances that CPKC will indeed be forced to pay, the Board can now definitively hold that CN would not be “providing” any interchange facilities, as required by the statute, if CPKC is required to pay for the use of BRC’s facilities.

Second, assuming the Board passes by the first question, is the designation of Clearing reasonable under all of the circumstances, which include all of the advantages associated with Spaulding and the disadvantages associated with Clearing? These circumstances must include that CPKC will be required to pay a third party to use Clearing when it is CN’s decision to designate it. CN argues that CPKC forfeited the question of reasonableness, but it has always been the focus of

CPKC's objections and evidence, and if the Board reaches it here (as it did when it rejected Kirk), the Board should reject Clearing as unreasonable.

Third, even if the Board ultimately determines that Clearing is a reasonable designation—perhaps because it chooses to disregard the fact that CN is seeking to force CPKC to pay a third party to reach and use Clearing to deliver cars to CN—the Board would still need to decide whether CN or CPKC should pay the BRC-related costs associated with that designation. In this context, CN's invocation of the BRC Agreement cannot be dispositive as to who pays, although if it is, then the first and second questions—does CN's designation of Clearing using CPKC's contractual rights and at CP's cost satisfy its duty “to provide” interchange facilities and, is Clearing reasonable as compared with alternative locations—could not be resolved in CN's favor. The only sensible approach here would be to require that CN bear the costs associated with its own designation, lest the regime of interchange be upended across the network by newly enabled, opportunistic behavior.

CP is not seeking—and this case does not require—any sweeping new policies regarding interchange. As public comments have confirmed, the existing framework created by statute, and Board and judicial precedent, works very well and provides a sound basis on which to resolve this dispute. The Seventh Circuit's ruling was a narrow one that did not alter any of those principles, and applying them here on this record supports CP's rejection of Clearing as unreasonable in the specific context of the CP-CN interchange.

By contrast, and despite CN's rhetoric to the contrary, CN is seeking to convert the court's ruling onto a mandate for sweeping and pernicious change. CN advances an expansive reading of the Seventh Circuit's decision that would revolutionize the Board's interchange dispute rules and create industry chaos. Among other things, CN wrongly contends that the Seventh Circuit's decision:

- o Eliminates the obligation of a physically connecting carrier to provide the delivering carrier with a free route from the delivering carrier's line to the designated interchange facility and free use of the facility, CN 2023 Reply Comment at 11-12;
- o Reverses the Supreme Court-based rule that a carrier cannot be compelled to use its own contractual operating rights over a third party for the benefit of another carrier, *id.* at 21.
- o Directs that, in determining reasonableness, the Board must consider the new location in a vacuum rather than relative to where the interchange would otherwise occur, *id.* at 18; and
- o Grants the receiving carrier a unilateral right to compel a change in interchange location, *id.* at 22.

That is not a narrow reading. In CN's reading, the Seventh Circuit decided this case and, as NS's Comments put it, "upended railroading."

The Board should reject CN's self-serving and incorrect arguments. Rather, the Board should apply settled Board precedent within the Seventh Circuit framework to the facts of this dispute and conclude that Clearing Yard does not satisfy CN's duty to provide, and is not reasonable for interchange of CN-bound cars²

² The reasonableness determination applies to non-Toxic by Inhalation (TIH) / Poisonous by Inhalation (PIH) traffic only. As discussed below, TIH/PIH traffic cannot be handled at Spaulding and must continue to be interchanged at Clearing.

as compared with the free, long-standing intersection point at Spaulding. Even if the Board finds Clearing reasonable, the Board should hold that the free transit rule and other settled precedents mean that CN, not CPKC, should pay the extra expenses associated with moving interchange to CN's preferred location.

ARGUMENT

Section I addresses the proper scope of the remand decision. Section II argues that while CN could designate a location not on its line, it cannot designate a location it does not “provide.” Section III explains why Clearing is unreasonable as compared to Spaulding if CPKC must incur significant third-party costs to use Clearing and in light of the operational concerns presented by Clearing. Lastly, Section IV argues that if the Board reaches the question of “who pays,” it should declare that CN must pay for CPKC's delivery of cars to CN at Clearing.

I. The Seventh Circuit's Decision Did Not Alter the Framework for Evaluating the Reasonableness of CN's Purported Interchange Designation or Constrain the Board in Considering that Issue on a Full Factual Record on Remand

In *Wisconsin Cent. Ltd. v. Surface Transportation Bd.*, 20 F.4th 292 (7th Cir. 2021), the court vacated the Board's October 30, 2020 Order that rejected CN's designation of Clearing Yard. The court identified two legal errors that required vacatur. First, the court held that the 49 U.S.C. § 10742 applies regardless of whether the lines of the interchanging partners intersect. *Id.* at 294. That issue is not relevant here, as all parties agree the statute applies to this matter. Second, the court held that the “power to provide” was not limited to a place the receiving railroad owned,

but could include locations the railroad had rights to access by contract. *Id.* at 295. The court then remanded the decision to the Board to proceed consistent with those two points. *Id.*

In addition to the two holdings, the court offered a useful framework for applying § 10742 to interchange disputes. That framework consists of “three distinct questions” that “could” require resolution. “(1) may the receiving carrier ever designate a willing third party to receive traffic on its behalf; (2) if yes, is the proposed location for interchange ‘reasonable’ (another important word in §10742) compared with the place where switching otherwise would occur; and (3) if yes to both these questions, who pays the third party.” *Id.* at 294.

Two months later, without awaiting guidance from the Board, CN filed its “Post-Remand Brief” to address what it called “the sole question remaining in this case: Whether CP must pay BRC’s switching fees.” CN Post-Remand Brief at 1. CN’s argument purposefully misreads both the court decision and basic administrative law. The court’s two holdings did not decide any issue in this case. Nor could they. It is long settled that “a judicial judgment cannot be made to do service for an administrative judgment.” *SEC v. Chenery Corp*, 318 U.S. 80, 88 (1943). Nor can an “appellate court ... intrude upon the domain which Congress has exclusively entrusted to an administrative agency.” *Id.* This is the “Ordinary Remand Rule”: “this remand rule exists, in part, because ambiguities in statutes within an agency’s jurisdiction to administer are delegations of authority to the agency to fill the

statutory gap in reasonable fashion. Filling these gaps ... involves difficult policy choices that agencies are better equipped to make than courts.” *Negusie v. Holder*, 555 U.S. 511, 523 (2009) (quotations omitted).

Nonetheless, CN represented that the court “resolved” that CN’s designation of Clearing Yard (and the associated need to use BRC facilities) fully satisfied CN’s obligations under the statute. CN Post-Remand Brief at 9. As noted above, the court did not resolve that issue, it merely held that the Board, when it decides that issue, could not categorically rule out Clearing Yard based solely on the fact that its use would entail the use of facilities owned by BRC. As CN informed the Seventh Circuit, “this appeal does not address whether Canadian National may “force” Canadian Pacific to interchange at Clearing Yard, or whether Canadian Pacific must “pay for” anything. The Board did not reach either of those questions, so they are not presented here.” CN Reply Br., *Wisconsin Cent. Ltd. v. Surface Transportation Bd*, No. 20-3507 (May 5, 2021). Because the issues were not presented to the court of appeals, they could not be decided by that court.

In light of CN’s argument that the court fundamentally recast the law of interchange to a system where the receiving carrier could seemingly pick anywhere regardless of the burdens imposed on the delivering carrier, the Board wisely requested public comment. In its October 19, 2022 Order establishing the procedure and schedule for this remand, the Board held that the stakes of this matter required a thorough process that will create a consequential decision. As the Board noted,

resolving this dispute has the potential to significantly alter precedent and practices regarding the interchange of rail traffic. October 19, 2022 Order at 4. Because of possible “wide reaching consequences for the rail industry,” the Board solicited public comments and two additional rounds of briefing to give itself a “better sense of the potential impacts” and enable itself to “make a more informed decision.” *Id.*

The railroad commenters unanimously—except for CN—agreed the court had not “upended railroading.” NS 2022 Comment at 7, 10; BNSF 2022 Comment at 2-3. Indeed, all agree the Board should continue to abide by its precedents in deciding the statutory issues. *Id.* The Board has rightly developed a full factual record and is now free to make its decision consistent with the two statutory points identified by the Seventh Circuit.

II. Now That We Know that CN’s Designation of Clearing Carries with It a Demand that CP Pay BRC to Deliver Cars There, the Board’s Prior Determination that Clearing Is Inappropriate Can Be Reinstated

The parties agree that this dispute hinges on 49 U.S.C. § 10742, which provides: “A rail carrier providing transportation subject to the jurisdiction of the Board under this part shall provide reasonable, proper, and equal facilities that are within its power to provide for the interchange of traffic between ... its respective line and a connecting line of another rail carrier.” The first issue for the Board is whether CN is “providing” the BRC facilities that CN says CPKC should use to deliver railcars to CN.

In its October 30, 2020 Order the Board agreed with CPKC that “by designating a third-party’s rail line as the interchange point and forcing a physically intersecting carrier (CP) to pay a switching fee, CN would itself be ‘providing’ nothing.” October 30, 2020 Order at 7. In other words, “shall provide” cannot reasonably be interpreted to include “shall provide *for a fee*.” To “provide” means something more than simply allowing. *See Cent. Midwest Interstate Low-Level Radioactive Waste Comm’n v. Pena*, 113 F.3d 1468, 1473 (7th Cir. 1997) (“[T]he Commission must ‘provide for’ the disposal of the region’s waste before it is rewarded with an incentive payment. The Commission asserts . . . that it could ‘provide for’ disposal *by allowing* a third party to act The Secretary, on the other hand, interprets ‘provide for’ to mean *something more than simply allowing* waste to make its way out of the region. We believe the Secretary’s position is correct.”) (emphasis added).

The requirement that the receiving carrier “provide” the interchange facilities for free is reflected in the STB’s long standing free transit, or free interchange, rule. That rule, as CN has acknowledged, requires CN to provide free transit from CP’s line to the interchange location, requires that CN pay the BRC fees. *See e.g., Toledo, Peoria & W. Ry. Corp. — Pet. for Declaratory Order*, Docket No. FD 35404, slip. op. at 10 (STB served April 26, 2011) (“*Toledo*”) (explaining that when a direct physical connection existed, the receiving carrier “was obligated to provide [the delivering carrier] with a free, direct interchange via that route”).

Additionally, application of the rule that “the exercise of trackage rights remains permissive with their holder,” *See Burlington N. R.R. Co. v. United States*, 731 F.2d 33, 39 (D.C. Cir. 1984) (“*Burlington Northern*”) (citing *Chicago, Rock Island & Pac. Ry v. Denver & Rio Grande R.R.*, 143 U.S. 596, 609 (1892)) dictates that CPKC cannot be compelled to exercise its operating rights over the BRC to access Clearing. Thus, CN must contract with the BRC to provide CPKC with those rights at CN’s cost.

Application of both the free transit rule and permissive trackage rights rule, each of which require that CN contract with BRC and pay BRC fees for CPKC access to Clearing, are fully consistent with the Seventh Circuit’s holding that CN may contract with a willing third party to receive cars on its “behalf.” 20 F.4th at 294. If BRC is acting on CN’s behalf, BRC effectively steps into CN’s shoes. Accordingly, BRC, acting for CN, must provide free use of BRC’s facilities from the intersection of the CPKC and BRC lines at Cragin Junction through delivery of the cars at Clearing.

CN’s reliance on the BRC Operating Agreement, on its face, fails to satisfy CN’s obligations to arrange with a third party to provide interchange facilities on its “behalf.” CN is not relying on CN’s contractual rights with the BRC, but instead is relying on CP’s own contractual rights to operate over BRC’s mainline to reach and utilize Clearing. In that scenario, the BRC is not acting on CN’s “behalf” to receive cars. Rather, the BRC is acting for itself and pursuant to its contractual relationship with CPKC.

The Board’s 2020 Decision on this point was not overruled by the Seventh Circuit. The court’s holdings addressed only the threshold question of whether a location, access to which was secured by contract with a third party, could ever fit within the “power to provide,” holding that it could. 20 F.4th at 292. The necessary next question—the question before the Board—is whether the non-owned facility satisfies the term “provided” in the statute. Here, the answer is “no.” At the time of the 2020 Order, the parties did not yet know who would pay the BRC fees. The court faulted the Board for making an “assumption” about who pays to decide whether a receiving carrier could provide a non-owned location for interchange. *Id.* at 294-95. The Board is no longer operating on an “assumption.” CN has argued tirelessly that if the Board allows CN to designate Clearing, CPKC will pay. *See* CN Post-Remand Brief at 2-3; CN 2022 Comment at 4-5; CN 2023 Reply Comment at 8-9.

Armed with this admission, the Board can now decide whether designating a location, but not providing access to it, suffices to “provide” under the statute. As during the 2020 briefing, CPKC is not aware of any prior decision by either the ICC or the STB that interpreted “provide” as merely “allow.” CPKC believes the Board can decide this case on “provide” alone and need not reach whether Clearing is reasonable and, if so, who should pay for it. However, it is within the Board’s discretion to address the costs issues under either, or both, of the next two questions.

Moreover, should CN take the position that the Board is free to shift compensation, CPKC agrees. And if the Board finds Clearing reasonable by setting

to one side the compensation issue, it should require that CN pay for the delivery of cars via BRC that it has demanded (we address this issue in Section IV).

III. Clearing Yard is Unreasonable Compared to Spaulding.

The second prong of the Seventh Circuit’s framework is reasonableness: “is the proposed location for interchange “reasonable” (another important word in § 10742) *compared with* the place where switching otherwise would occur?” 20 F.4th at 294 (emphasis added). The court noted that the word “reasonable” affords the Board “interpretive leeway” and any decision would likely be entitled to judicial deference. *Id.* at 295. When a court finds that an agency “has not yet exercised its *Chevron* discretion to interpret the statute in question, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.” *Negusie*, 555 U.S. at 523.

The court did not offer any guide to “reasonableness” so prior precedent is undisturbed. The Board can consider the competing merits of the intersection point or any other designated point, including comparing a location that extracts fees to a similarly situated free location, and consider operational issues and concerns.

Clearing is unreasonable compared to Spaulding for reasons beyond CN’s effort to shift BRC costs onto CPKC. Use of Clearing instead of Spaulding exacerbates congestion and has recently caused operational issues for CPKC. Before addressing costs or operational problems, this brief first addresses CN’s arguments that the

Board may not consider reasonableness and, if it does, it must consider only whether Clearing is “independently” reasonable.

A. CP Did Not “Forfeit” Its Argument that Clearing Yard is Unreasonable as “Compared with” Spaulding

CN argues that the Board is not allowed to consider reasonableness, the second prong of the Seventh Circuit’s test, because CPKC has supposedly “forfeit” that point. *See, e.g.*, CN 2023 Reply Comments at 16, fn. 50. This attempt to divest the Board of the power to determine reasonableness should fail. First, CPKC has raised the issue of reasonableness throughout these proceedings. Second, this proceeding does not implicate the Board’s rule against considering new arguments on reconsideration. Third, even if CP did “forfeit” the issue, it is now properly before the Board in the public comments including of the other railroads and the Board’s statutory role in determining whether a carrier such as CN has provided reasonable facilities for interchange to support the operation of the interconnected rail network.

In its initial Reply, CPKC argued that CN could not designate Clearing for interchange because it violated 49 U.S.C. § 10742, quoting the reasonableness provision. *See e.g.*, CP Reply to Petition for Declaratory Order at 23-24. That Clearing imposes operational issues, costs and risks have been fundamental to CP’s argument and evidence from the beginning. *Id.* CPKC argued that it would be unfair to force CPKC to use and pay for Clearing when Spaulding was free and had worked well for nearly a decade. *See id.* CPKC also explained that Spaulding was preferable because it enabled CPKC to ensure that CN-bound cars were cleared daily from Bensenville

regardless of what was happening at Clearing, helped keep the CPKC/Metra mainline free during the day and it kept cars out of Clearing and the Chicago Terminal Area, which as CN itself once argued, was an important benefit of its acquisition of the EJ&E. *See id.* The issue of reasonableness was before the Board prior to remand.

Second, even if the reasonableness arguments were new, they do not implicate the Board's practice rule barring "new" arguments on reconsideration. *See* CN 2022 Response Comment, citing *New Eng. Cent. R.R.—Trackage Rights Order—Pan Am S. LLC*, No. FD 35842, 2018 WL 1989070, at *4 (STB Apr. 24, 2018). Board practice precludes new arguments or evidence on *reconsideration* of a decision, because "If the Board allowed a party to litigate a case to completion using one set of arguments and then submit an entirely different case on reconsideration, it would waste the resources of the parties and the Board in litigating and ruling on the party's initial positions." This case has not been litigated to its completion and CPKC's supposed new arguments address issues left unresolved by the court. The earlier decision is vacated and does not exist. The Board has not yet ruled, and no resources are wasted.

Third, the Board itself has already ruled that reasonableness is at issue. The Board is tasked with setting rail transportation policy. The STB, like its predecessor, is "not the prisoner of the party's submissions, but rather ha[s] the duty to 'weigh alternatives and make its choice according to its judgment of how best to achieve and advance the goals of the National Transportation Policy.'" *Public Service Co. of CO*

d/b/a Xcel Energy v. The Burlington Northern and Santa Fe Ry Co., FD 42057, Slip op. at 4 (Jan. 19, 2005).

By contrast to reconsideration, the Board is free to receive new evidence and argument on remand. *See, e.g., Consol. Papers, Inc. et al. v. Chicago & N. W. Transportation Co., et al.*, 37626, 1991 WL 206576, at *2 (I.C.C. Sept. 26, 1991). In *Consol. Papers*, the Seventh Circuit remanded a decision in market dominance because “the Commission failed to articulate adequately the standard of rate reasonableness employed in the decision.” *Id.* After remand the case was reopened for new evidence, and to take public comments on the reasonableness issue. *Id.*

Consistent with this long established procedure, the Board invited public comments on the issue of “reasonableness.” Having invited public comment, BNSF, NS and CPKC’s comments are all properly part of the record and must be given due consideration. All three, like the Seventh Circuit, have urged the Board to use “reasonableness” to decide this and all future dispute. *See* BNSF 2022 Comment, December 19 at 3 (“[T]he Board can resolve the dispute at issue here by exercising its statutory responsibility to judge the reasonableness of facilities for interchange under section 10742”); NS 2022 Comment at 11-14.

Put simply, CPKC is aware of no doctrine that requires or even allows an agency to ignore public comments because a litigant supposedly waived the issue. It would be harmful to public policy to disregard these comments on the disputed and tenuous ground that one of the parties supposedly “forfeit” the issue. The Board’s

orders in this docket and the Seventh Circuit have correctly held that “reasonableness” is one of the key questions in this dispute. The Board should clarify what “reasonableness” means both in this case and for future disputes.

B. Reasonableness Is Not to Be Determined in Isolation Without Consideration of the Available Options, but in Comparison with Those Alternatives

The Seventh Circuit’s framework for reasonableness is clear and it comports with long-standing practice and common sense: is the proposed location reasonable “compared with the place where switching would otherwise occur.” 20 F.4th at 294. NS and BNSF agree with this has always been the scope of the inquiry. *See* NS 2022 Comment at 6-7; BNSF Comments at 3. CN alone contends that reasonableness should focus solely on whether Clearing, by itself, is independently reasonable. CN 2023 Reply Comment at 18-19.

CN bases its unique understanding of “reasonableness” on *dicta* in *Burlington Northern* that a carrier is not required to offer all options for interchange but can instead offer the one that best serves its own business purposes. *Id.* CN’s proposed rule rests on an overly broad interpretation of *Burlington Northern*. In *Burlington Northern*, there was no direct connection. In fact, the delivering carrier was trying to establish a direct connection by either piercing the corporate veil between the receiving carrier and the third party intermediary or forcing the receiving carrier to exercise trackage rights to establish a direct connection. *See* 731 F.2d at 39. Here there is a direct connection, Spaulding, and the existence of that alternative renders

Clearing unreasonable. At most, *Burlington Northern* stands for the proposition that a receiving carrier can choose from a slate of reasonable locations, not that it can choose an unreasonable location.

C. As Compared to Delivery of CN-Bound Cars at Spaulding, Delivery at Clearing is Unreasonable

1. Delivery at Clearing Presents Significant Operational Disadvantages for CPKC and the Chicago Terminal

As the record developed early in this case showed, interchanging traffic at Spaulding helps ensure fluidity at Bensenville Yard by enabling CPKC to clear CN-bound cars from Bensenville Yard, even when Clearing is congested. *See* CP Reply to Petition for Declaratory Order, Verified Statement of Nicholas C. Walker, ¶ 16 (“Walker V.S.”). In addition to helping to ensure that Bensenville remains fluid, direct interchange at Spaulding helps keep the CPKC/Metra mainline fluid during the day, mitigates congestion risks at Clearing, and helps to preserve fluidity in the Chicago Terminal area in general. *Id.* When it served its own interests, CN championed reducing volumes to Clearing. It told the Board that keeping cars out of Clearing was a primary benefit of its EJ&E acquisition and the Board approved the acquisition based in part on this representation. *See Canadian Nat’l Ry Co. and Grand Trunk Corp. – Control – EJ&E West Co.*, STB Finance Docket No. 35087, slip op. at 5, 10 (STB served Dec. 24, 2008) (“*EJ&E*”).

Now, CN contends that CPKC's concerns are overwrought as Clearing has been operating smoothly for the past three years.³ However, as recent events demonstrate, the risk of congestion at Clearing continues to be very real. We are submitting a verified statement of John Kay, CPKC's General Manager of Operations, US East, to bring the record on this issue up to date. CPKC's previous testimony in this case—provided by Nick Walker (*see* Walker V.S. ¶ 16)—expressed concerns about the potential for Clearing Yard to become congested, and as John Kay's statement shows, those concerns have in fact come to fruition.

Just in the past few weeks, Clearing has repeatedly experienced congestion which has forced CP to hold traffic in Bensenville, and take other mitigation measures. As background, Clearing's status is monitored using a green, yellow, and red color system. Green indicates that Clearing is operating smoothly and has capacity. Verified Statement of John Kay ("Kay V.S."), ¶ 5. Yellow indicates that volumes at Clearing exceed 4800 cars and is a signal for the Class Is to take

³ CN makes much of CP's description of the interchange in the Operating Plan submitted by CP in the CP-KCS control proceeding. The Operating Plan reflected the fact that, pursuant to the Interim Agreement, then as now, the traffic was being exchanged between CP and CN at Clearing Yard. CP was not in a position to prejudge the outcome of this dispute by assuming a different arrangement. CP interchanged with CN at Clearing on May 13, 2022 when it filed the plan; CPKC interchanges there today following the control date; it will continue to interchange there unless and until this proceeding leads to a different arrangement. CN's argument that the CP/KCS Operating Plan referenced interchange at Clearing is thus merely an effort to bootstrap Clearing as the permanent location for interchange merely because CP agreed to it for purposes of the Interim Agreement (with CN bearing the cost) as a compromise despite its strong preference for Spaulding. CP has never contended that Clearing Yard is physically impossible, simply that it is not reasonable compared with the interchange at Spaulding which is free and better protects fluidity of operations in CPKC's Bensenville Yard, operations in the Chicago Terminal.

countermeasures to ease congestion at Clearing. *Id.* Typically, Clearing averages approximately 3000 cars a day. However, beginning in early January, volumes have increased steadily. On March 1, the seven-day average count was approximately 4100 cars and on April 1, approximately 4700 cars. In the days both before and after April 1, the inventory at Clearing exceeded the 4800 mark, and at times has exceeded 5000 cars which triggered the change in status from green to yellow. Fortunately, this deterioration in conditions at Clearing occurred in decent weather. *Id.* at ¶¶ 4-5. Had the terminal been experiencing severe weather, the network could have experienced significant service disruptions similar to 2013-14. Those disruptions were caused by the confluence of severe winter weather and surge in volumes centered primarily in Clearing and radiating out across the North American rail network.

The mitigation measures that CPKC have implemented, as Nick Walker predicted, include the addition of a third train to Clearing Yard (provided Clearing will accept one). Walker V.S. ¶ 18. As John Kay explains, during the March and early April 2023 time-frame,⁴ increased volumes in Bensenville have sometimes warranted operating a third train in a day to Clearing in order to ensure that Bensenville remains fluid. However, adding an extra train to Clearing has not always been possible. BRC has told CPKC on several occasions that it could not handle the additional train due to congestion at Clearing. Kay V.S. ¶ 6. Consequently, CPKC has

⁴ These issues first arose prior to CP's exercise of control over KCS which occurred on April 14, 2023. For consistency, we generally refer to CP as CPKC throughout this brief.

held cars and taken other measures to keep Bensenville fluid. For example, CPKC built and staged Clearing bound trains in Milwaukee, blocked specific carrier cars (BN and CN bound cars) for the BRC to accept an extra train, and blocked CSX bound cars for direct delivery to CSX. *Id.* If the parties had been interchanging at Spaulding, CPKC could have reliably cleared the CN-bound cars from Bensenville, likely avoiding the need to add an extra train to Clearing or take other extraordinary measures. Interchanging at Spaulding would also ease pressure on Clearing and the oft-congested Chicago terminal. *Id.* ¶ 8.

2. Delivery at Clearing—Unless Costs Are Borne by CN—Would Unreasonably Impose on CP Significant Payments to a Third-Party That Are Not Required for Interchange at Spaulding

The Board has long considered costs to the delivering carrier when considering reasonableness of interchange facilities. *See N.Y., Chi., & St. Louis R.R. v. N.Y. Cent. R.R.*, 314 I.C.C. 344, 345-46 (1961). *See also* Norfolk Southern 2023 Letter Reply Comment at 2. (“The comments were nearly unanimous that the *Wis. Cent.* Decision does not change the Board’s longstanding precedent, procedures, or authority to determine the reasonableness of an interchange and that *additional costs* associated with changes in interchange points should be part of that reasonableness analysis.”) And BNSF and NS both agree with CPKC that a location that imposed third party costs on a delivering carrier is unreasonable. *See* BNSF 2022 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 2022 Comments at 6 n.3.

Spaulding does not require CPKC to incur any third party costs. Thus, if CPKC must pay the BRC in order to deliver cars at Clearing, Clearing is not reasonable. To avoid this obvious fact, CN argues that the Seventh Circuit foreclosed the Board’s consideration of third party costs in determining reasonableness. CN 2023 Comment at 7. CN, in the space of a single paragraph, claims the Seventh Circuit “did not upend” the relevant law, but also that it “left no loose ends” except “who pays.” *Id.* But the court in no way constrained the reasonableness determination. Nor could it: reasonableness, and what goes into deciding it, is not for the court to decide in the first instance. Indeed, consistent with administrative law, the court stressed that the word ‘reasonable’ gives the Board “interpretive leeway.” 20 F.4th at 295.

Under the Board’s long-standing decisional framework, if the carriers physically intersect the receiving carrier must designate an interchange location within its power to provide and it must provide a free route to reach the interchange. *See Burlington N. R.R. Co. v. United States*, 731 F.2d 33, 38 (D.C. Cir. 1984) (“*Burlington Northern*”). *See also Norfolk S. Ry. Co.—Pet. for Declaratory Order—Interchange with Reading Blue Mountain & N. R.R. Co.*, Docket No. NOR 42078, slip op. at 4 (STB served Apr. 29, 2003) (“*Reading Blue Mountain*”); *Toledo, Peoria & W. Ry. Corp. — Pet. for Declaratory Order*, Docket No. FD 35404, slip. op. at 10 (STB

served April 26, 2011) (“*Toledo*”). The Seventh Circuit referred to this rule as the free-transit rule. While the Seventh Circuit took issue with the Board’s holding that the receiving carrier must designate a location on a line that it owned, it left the free-transit rule undisturbed. 20 F.4th at 294. To the extent that the court addressed the free-transit rule, it was merely to observe that the Board had not explained why CN’s designation of Clearing would frustrate the rule. *Id.* The Board has the opportunity to explain that in this docket.

CN also contends that CPKC would actually save money because BRC would be performing classification and blocking services that CPKC would otherwise have to perform, and because interchanging at Clearing eliminates the assignment to Spaulding. These arguments are red herrings and should be rejected. CPKC can perform, and prefers to use its own crews and equipment to perform, the classification and blocking. Because CPKC has available crews and equipment, it incurs little or no additional costs to perform this work itself. Notably, CPKC has not reduced its crew or equipment as a result of moving the interchange from Spaulding to Clearing. *See Walker V.S.* ¶ 17.

In any event, any cost savings that might result from eliminating the Spaulding work assignment would be offset if the increased volumes warrant operating an additional train from Bensenville to Clearing, as has been the case recently. *See Walker V.S.* ¶ 17. Prior to interchanging with CN at Clearing under the Interim Agreement, CP operated two trains daily to Clearing. However, as John Kay

explains, more recently, increased volumes have warranted operating a third train to Clearing, but Clearing has not always been able to accept an extra train. *Kay V.S.* ¶ 6.

As one commenter noted, “In railroading, cost is a major consideration.” NS 2022 Comment at 7. As such, “in future Board cases applying the [Seventh Circuit] Decision, costs should indeed be a central consideration to the ultimate determination of whether the interchange is “reasonable, proper, and equal.” *Id.* In this case, applying the Seventh Circuit decision, the costs, including operational costs, that CN’s unilateral designation of Clearing would impose weigh in favor of Spaulding.

D. That the Parties Interchange TIH/PIH Traffic at Clearing Does Not Make Clearing Reasonable for All CPKC-CN Traffic

According to CN, the fact that the parties have long interchanged TIH/PIH traffic at Clearing demonstrates that Clearing is reasonable. Notably, however, the parties are not able to interchange TIH/PIH traffic at Spaulding. Because of the hazardous nature of such commodities, TIH/PIH traffic are subject to a heightened level of monitoring and security which neither CPKC nor CN are able to provide at Spaulding. *See* 49 C.F.R. Part 1580. Thus, Spaulding is not an available option for interchange of such traffic. But that does not mean that Clearing is a reasonable option as compared to Spaulding for non-hazardous commodities that do not require the heightened safety and security precautions and can be interchanged for free at Spaulding.

E. CN's Contention that CPKC is Seeking to Force Interchange at Spaulding for Anticompetitive Reasons is Baseless.

According to CN, interchange at Clearing actually benefits CPKC and CPKC's real motive in favoring interchange at Spaulding is anticompetitive; namely, to disrupt CN mainline operations on the EJ&E. CN also accuses CPKC of rent seeking for insisting that CN pay the BRC fees. CN's accusations omit and distort several important facts and are baseless.

First, CN omits the fact that, following CN's acquisition of the EJ&E, the parties mutually agreed to consolidate interchange at Spaulding for mutual convenience where they then interchanged for nearly a decade to both parties' benefit. As noted above, CN even represented to the Board that keeping cars out of Clearing (such as those interchanged at Spaulding) was a primary benefit of the EJ&E transaction. *See EJ&E*, slip op. at 5, 10.

Second, CN omits the fact that the move to Clearing is entirely for CN's benefit and to CPKC's detriment. As Nick Walker previously explained, interchange at Clearing increases risks to fluidity at Clearing, Bensenville, and on the CPKC/Metra mainline. *See Walker V.S.* ¶ 16. As John Kay explains, those risks have been realized in recent weeks. *See Kay V.S.* ¶ 6.

Third, CN claims that Clearing is less costly than Spaulding, but there is no evidence that this is the case. As noted in III.C. above, interchange at Clearing has not enabled CPKC to reduce its crew or locomotive pool. *See Walker V.S.* ¶ 17.

Furthermore, if CPKC must add a third train to Clearing to accommodate CN traffic, any supposed cost saving would be more than offset. *See id.* at ¶ 18.

Fourth, CN's current concerns with interchange at Spaulding's impact on its mainline operations could be addressed by reconfiguring Spaulding, a solution that CPKC would prefer. *See e.g., id.* at ¶ 20. CN has rejected this proposed solution because it is easier and less expensive for CN if CPKC delivers CN-bound cars to Clearing at CPKC's expense.

Given that the move is entirely for CN's benefit⁵ and is to CPKC's detriment, it is hardly rent seeking or anticompetitive to insist that CN bear the cost of the move. Rather, it is CN that is demanding that CPKC (1) put its own operational fluidity at risk and (2) subsidize CN's operations by allowing CN to foist the costs of providing an interchange on to CPKC.

In any event, in enacting § 10742, Congress, not CPKC, mandated that CN "provide...reasonable" interchange facilities to receive cars from CPKC. It is hardly anticompetitive for CPKC to insist that CN continue to fulfill its clear statutory obligations.

⁵ To the extent CN invokes the impact on the surrounding communities, CN ignores the fact that it could easily have addressed the impacts at Spaulding by changing its operating windows and practices. Instead, CN chose to interchange during rush hour when it would most impact the surrounding communities. CN's own data shows that it also blocked grade crossings when it was holding trains short of the CPKC/Metra main line diamond. If CN has since stopped this practice it could also reduce blocked grade crossing. But CN has not provided the data that would allow the Board to reach any conclusions about impacts to the surrounding communities and there has been no discovery in this proceeding.

IV. If the Board Determines that Clearing Yard Is Reasonable, the Board Should Require CN to Reimburse the BRC Fees.

The third prong of the Seventh Circuit’s framework is the allocation of costs. That is, if the receiving carrier may “provide” a third party’s facilities, and if the proposed location is reasonable, “who pays the third party?” 20 F.4th at 295. The Board should hold that CN must pay the BRC, either directly or via reimbursement to CPKC. Before stating the relevant cost principles, the brief addresses CN’s argument that this issue is “irrelevant” because the BRC Operating Agreement supposedly forecloses CN’s responsibility for BRC’s fees.

A. The BRC Operating Agreement Does Not Mandate that CP bear the Burden of BRC Charges

If CN is correct that the BRC Operating Agreement requires CPKC to bear the cost of CN’s designation of Clearing, then CN has neither met its statutory obligation to “provide” interchange facilities nor would Clearing be reasonable as compared with Spaulding, which is free to CPKC. If the Board, however, does reach the “who pays” prong of the inquiry, there is no basis for concluding that the BRC Operating Agreement ties the Board’s hands such that it must require CP to bear those costs, and certainly not that CP has accepted interchange along with those costs. As the Seventh Circuit instructed, if the Board finds Clearing Yard “reasonable,” then the Board must address itself the cost allocation issue. 294 F.4th at 295. CN insistence that the BRC Operating Agreement dictates that CPKC bear the BRC’s costs is wrong. CN 2023 Reply Comment at 8-9.

The BRC Operating Agreement nowhere addresses who bears the financial burden associated with the use of BRC facilities. At best, it addresses by implication who gets billed and cuts the check in the first instance, not how those burdens get allocated among the carriers involved. Article Three, Section 1(a) states that “Each of the Railway Companies shall pay ... a charge for the transfer of cars between any of the Railway Companies through the facilities of the Belt Railway Company,” but does not distinguish between receiving and delivering carrier. CN Post-Remand Brief at Ex. A. The Agreement grants BRC the right to establish the fees for services which the BRC does by rate sheet for each carrier. As a rule, the BRC bills the delivering carrier because it is an administratively workable approach for BRC. *See* CP 2020 Reply to Petition for Declaratory Order, Verified Statement of Chuck Hubbard at ¶ 15. Given the fact that the BRC handles thousands of cars daily, it would be an administrative nightmare for the BRC to bill receiving carriers for some cars and the delivering carrier for others depending on private agreements between those carriers.

Significantly, nothing in the BRC Operating Agreement prohibits carriers from entering into a reimbursement agreement, such as the Interim Agreement, or CP’s agreement with another Class I carrier. *See* CP Reply to CN Post-Remand Brief at 20-21. In fact, the Board has long recognized the custom and practice of receiving carriers agreeing to reimburse the delivering carrier for third party fees. *See, e.g., Kan. City S. Ry. Co. v. La. & Ark. Ry. Co.*, 213 I.C.C. 351, 355-56 (1935).

In short, nothing in either contract or law prevents the Board from concluding that, in the context of a designation of Clearing by CN, CN should bear those costs.

Notably, none of the public comments support CN's argument that the BRC Agreement decides CN claims. The fact that BNSF and NS also believe that a preexisting agreement with a third party does not control who must ultimately bear the third party's costs is particularly salient. BNSF 2022 Comment at 3; NS 2022 Comment at 7-8. Together, BNSF, NS and CPKC represent three of the six owners of BRC and each is signatory to the BRC Operating Agreement. None of these carriers understand that, in executing the BRC Operating Agreement, they can shirk their statutory obligation "to provide reasonable, proper and equal" interchange facilities to other contiguous carriers, or cede their statutory right to free access to such facilities to deliver cars to their connections. All of these carriers agree with CPKC that it would be terrible policy to arm carriers with the power to shift costs of interchange. CN is alone in arguing that the BRC Operating Agreement requires a delivering carrier to be the ultimate payee of the BRC fees and trumps a receiving carrier's statutory duty to provide reasonable interchange facilities.

B. The Board Should Decide Who Pays Based on the Statute and Long-Standing Principles Governing Interchange

1. Section 10742, the Free Transit Rule and Supreme Court Precedent Each Require that CN Pay the BRC Fees

As discussed in II. above, the statute requires that CN actually "provide reasonable, proper and equal" interchange facilities. 49 U.S.C. § 10742. As the Board

previously held, if CPKC must pay BRC's fees, then CN has provided "nothing." Likewise, the free transit rule, which requires CN to provide free transit from CP's line to the interchange location, *see e.g., Toledo*, slip op. at 10, and the rule that "the exercise of trackage rights remains permissive with their holder," *Burlington Northern*, 731 F.2d at 39, each requires that CN pay the BRC fees.

The Seventh Circuit did not reject the free transit rule. As noted above, it merely noted that the Board had not explained how Clearing would frustrate the application of that rule. *See* III.C.2, *supra*. Importantly, the free transit rule, while described by the court as a "common law tradition," is also consistent with the portion of the statutory text that the court did not analyze. Namely, the receiving line's statutory requirement "to provide reasonable" interchange facilities. If CPKC must rely on its own contractual rights to use BRC's tracks and interchange facilities, and pay for such use, then, as the Board previously held, CN has provided "nothing." STB October 30, 2020 Order at 7.

According to CN, the Seventh Circuit decision overturned the permissive trackage rights rule. CN 2023 Reply Comment at 20. The Seventh Circuit did no such thing. Rather, the Seventh Circuit discussed the inapplicability to this particular dispute of the common law norm that a "delivering carrier cannot compel a receiving carrier to exercise a contractual right to require a third party to receive traffic." 20 F.4th at 295. The Court observed that, in contrast to the common law norm, here "the receiving line, is willing to accept traffic through the Belt Railway, and the Belt

Railway is willing to accept that traffic.” *Id.* Thus, the Court merely held that CN could designate a willing third party to act on its “behalf.” The Court neither rejected the common law norm that it identified nor held either explicitly or impliedly that the receiving carrier (CN) could compel the delivering carrier (CPKC) to use its own contractual rights to use the BRC’s facilities for CN’s benefit.

2. Fairness Concerns Support Requiring that CN Pay the BRC’s Fees

CN contends that a move to Clearing will benefit CN because it will clear up CN’s mainline. CPKC, on the other hand, claims that Spaulding reduces congestion in Chicago, including in CPKC’s terminal in Bensenville and helps to keep its shared mainline with Metra free during the day. *Kay V.S.* ¶ 8. If the Board weighs these issues and decides the operational factors weigh in favor of Clearing being more reasonable, it should order CN to pay because CN will enjoy the operational benefits while CPKC will suffer the operational harms.

CN also argues that because CN is delivering CPKC-bound cars via a third party intermediate switch carrier at CN’s cost, it is only fair that CPKC bear the cost of delivering CN-bound cars via the BRC at Clearing. CN’s argument, however, ignores the key fact that CN asked CPKC to accept cars via a third party intermediate switching carrier at CN’s cost and entirely for CN’s benefit. As discussed above, CPKC derives little or no benefit from receiving cars from CN via a third party intermediate switch carrier. In fact, receiving cars from CN at Spaulding enables CPKC to better manage the inflow of cars to Bensenville, in addition to reducing the volume of cars

in the Chicago Terminal Area and is therefore, preferable. Notwithstanding CPKC's preference to continue to receive cars at Spaulding, during the pendency of the first interchange proceeding, CP and CN entered into an Interim Agreement in which CP agreed to accommodate CN's request that CP receive CN cars via a third party. Notably, CP could have continued to insist on receiving cars at Spaulding, but instead agreed to a compromise which is entirely for CN's benefit. It would be unfair and bad policy to penalize CPKC's willingness to accommodate CN demands by using CPKC's accommodation as a basis for compelling CPKC to incur significant third party costs.

Moreover, the fact that one party pays the fees in both directions is not necessarily unfair, unjust or unreasonable. *See Baltimore & Ohio Railroad Co. v. U.S.*, 277 U.S. 291, 301 (1928) (holding that it was neither unjust nor unreasonable for certain carriers to bear the cost of the intermediate switch carrier's fees on interchange traffic moving in both directions in order to be competitive). Likewise, it is neither unfair, unjust nor unreasonable for CN to pay the fees in both directions when it is entirely CN's choice to use an intermediate switch carrier and entirely for CN's benefit.

The simple fact is, CPKC did not designate Clearing for interchange in either direction, CN did. It is only fair that CN, who stands to reap the supposed benefits, bear the third party fees associated with its choices. In fact, should the Board deem CN's designation of Clearing to receive cars reasonable provided that CN is responsible for BRC fees, it will still be up to CPKC whether to designate its preferred

interchange at Spaulding or Clearing (or another third party's facility) for receipt of cars from CN. That determination likely will be influenced by CN's willingness to pay the third party fees to make those deliveries to CPKC.

3. Public Policy Supports Requiring that CN Pay the BRC's Fees

Allowing receiving carriers to unilaterally shift costs of interchange to the delivering carrier is also bad policy. It would allow opportunistic carriers to foist costs on to the delivering carrier, tilt the bargaining table significantly in the receiving carrier's favor, and in effect force the delivering carrier to subsidize the receiving carrier's operations. *See* NS 2022 Comment at 10. In doing so, it would undermine the guiding principle that the location of interchange in the first instance is a matter for mutual agreement and risk the harms to railroading described in the NS 2022 Comment at 8-10. It would incentivize receiving carriers to designate third parties to push infrastructure costs onto the deliverer. *Id.* at 8. Overwhelmed third-parties would raise costs to combat the additional traffic, shifting even more of the burden onto the delivering carrier (who is paying the costs). *Id.* at 9. In sum, "A receiving carrier could arrange for interchange via a third party by agreeing to a disadvantageous switching fee and then force the delivering carrier to pay it." *Id.* at 10.

CPKC and CN are not the only carriers that interchange directly in the Chicago Terminal area or elsewhere around the national network, despite the availability of third party intermediate carriers. If other railroads were to follow CN's

lead in Chicago and elsewhere, the third party intermediate carriers could be overwhelmed and “chaos” and “havoc” could ensue. *Id.* at 7. As it stands, Clearing is operating close to, and sometimes at, maximum capacity.

This does not mean that a receiving carrier who designates a third party intermediate carrier to receive cars on its behalf always pays. In most instances, if there are mutual benefits to utilizing a third party intermediate carrier, the parties will agree privately on how fees should be allocated. However, allowing a receiving carrier to unilaterally compel the delivering carrier to incur an intermediate switch carrier’s fees, as CN is attempting to do here, would remove the receiving carrier’s incentive to reach mutual agreement. Application of long standing precedent here will preserve the balance of power, maintain existing interchange arrangements, protect against opportunistic behavior and ensure that interchange locations continue to be mutually agreed upon.

CONCLUSION

For the foregoing reasons, the Board should issue an order declaring that CN may not unilaterally compel CPKC to deliver CN-bound cars at Clearing Yard. Specifically, the Board should declare that if CN fails to provide CPKC with free route to its designated interchange location, CN has not met its duty to provide reasonable interchange facilities. If the Board deems it necessary to reach the reasonableness of Clearing, the Board should declare that, if CPKC must pay to use Clearing and due to the operational difficulties and concerns related with using Clearing, Clearing is

not reasonable as compared to Spaulding. Lastly, if the Board deems it necessary to reach the question of who pays, the Board should declare that CN must pay the BRC fees consistent with its statutory obligation to provide interchange facilities and Board precedent requiring a contiguous receiving carrier to provide free interchange.

Respectfully submitted,

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Dated: April 21, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of April, 2023, I caused a copy of the foregoing CPKC'S INITIAL POST PUBLIC COMMENTS BRIEF to be served by email or first-class mail upon the following parties of record:

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 36397

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

VERIFIED STATEMENT OF JOHN KAY

1. My name is John Kay. I am employed by Soo Line Railroad Company (CPKC formerly CP) as General Manager of Operations, US East, and am based in Chicago at Bensenville Yard. I was promoted to this position in May of 2021. Prior to that I served as Asst. Superintendent St Paul, Superintendent Quad Cities, Superintendent Toronto, and Superintendent of Transportation in CP's Operations Control Center in Minneapolis. Previously, I was employed for 5 1/2 years in various operations positions at Canadian National Railway (CN) and Illinois Central Railroad.

2. My current responsibilities as General Manager include overall supervision of rail transportation operations of CPKC in the greater Chicago Terminal, and specifically operations to and from Bensenville Yard and the other major rail yards within the Chicago Terminal, as well interchange with other Class I railroads including CN.

3. I am submitting this Verified Statement to share information regarding recent congestion in the Terminal, in particular at the Belt Railway of Chicago's Clearing Yard (BRC), and how that has impacted CPKC at Bensenville. The purpose is to add context and explain further why CPKC continues to prefer interchange at Spaulding.

4. In my experience, car inventory at Clearing typically averages approximately 3000 cars a day, and at the end of the first week this year on January 7, the seven-day average was just that, approximately 3000 cars. Since early January, however, the daily average car inventory at Clearing has steadily climbed. On March 1, the seven day average car count was approximately 4100 cars, and on April 1 approximately 4700 cars.⁶ In the days both before and after April 1, the inventory at Clearing exceeded the 4800 mark, and at times has exceeded 5000 cars.

5. When Clearing exceeds 4800 cars, its status changes from green to yellow. Yellow indicates that congestion has reached a point in the Yard such that the Class I's should take countermeasures to ease Clearing's congestion.

6. During this March/April time frame inventories here at Bensenville Yard have been elevated as well. Normally we send two trains a day to Clearing for interchange and processing. Recently, however, we have asked BRC to take an additional third train from time to time in order to maintain fluidity at Bensenville. When BRC can they have, but understandably BRC has been unable to do so in this

⁶ I say approximately because car inventory fluctuates throughout the day as cars are received and trains depart.

recent period of congestion due to its own inventories and capacity limitations. We have had to take other measures to keep Bensenville fluid. For example, we have built and staged Clearing bound trains in Milwaukee, blocked specific carrier cars for the BRC to accept an extra train (BN and CN bound rail traffic), and blocked CSX bound traffic for direct delivers to the CSX when they agree to take these directly to Barr Yard rather than via the BRC.

7. I write to share this recent experience not to criticize BRC, but rather to show the value in keeping cars out of Clearing. The Chicago Terminal is fragile and it can and does become congested, even in good weather.

8. For these reasons we continue to prefer to interchange with CN at Spaulding. Spaulding has its idiosyncrasies, like all rail locations in Chicago, but it worked for 8+ years. As we have maintained throughout this proceeding, Spaulding keeps cars out of the oft congested Chicago Terminal, and also ensures that those cars do not congest CPKC's Bensenville Yard until conditions at Clearing Yard ease. We prefer direct interchange because we control our own destiny that way. With direct interchange we are not constrained by the situation at Clearing or by the actions of others which may cause congestion to and from Clearing. Direct interchange to Spaulding via our own railroad and setting the time for the interchange assignment at night also works to keep our mainline with Metra fluid during the day. The supposed benefits of utilizing Clearing Yard as the interchange point are not what

they appear given the disruption and costs elsewhere in the system at times like these.

VERIFICATION

I, John Kay, declare under penalty of perjury that I am authorized to make this verification on behalf of Soo Line Railroad Company (CPKC), and that the information included in the foregoing statement is true and correct to the best of my knowledge and belief.

Executed on this 17th day of April, 2023.



John Kay