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

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

Dear Ms. Brown:

Please find enclosed for filing the Post Public Comments Reply 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

CPKC'S POST PUBLIC COMMENTS REPLY BRIEF

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Dated: May 11, 2023

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INTRODUCTION

The question at the heart of this dispute is whether, under 49 U.S.C. § 10742, a receiving carrier can unilaterally force the delivering carrier to use a third party's interchange facilities and incur both third-party costs and operational harms. As current events demonstrate, the answer to that question has implications well beyond this specific CN and CPKC interchange; it has very real and potentially catastrophic consequences for the rail industry.

Although CN claims that Clearing is operating smoothly, that is not accurate. For the past several weeks, Clearing has experienced severe congestion and, as a result, the BRC has imposed volume limits on the total number of cars and trains CPKC can send to Clearing daily. Congestion at Clearing has, in turn, caused congestion at CPKC's Bensenville and Milwaukee yards, and forced CPKC to institute significant countermeasures. Despite the need to reduce Clearing-bound traffic, CN is refusing to receive cars at Spaulding, where the parties interchanged for many years. CN's self-serving insistence on Clearing, and the declaration that it seeks from the Board that CPKC should have to pay for CN's choice of Clearing, are bad not only for CPKC, they are bad for the rail industry as a whole. If the Board were to ratify CN's conduct, it would incentivize other carriers to take similarly opportunistic actions that foist the cost of interchange onto delivering carriers, with inefficient and harmful consequences for the industry.

Fortunately, neither the statute nor precedent supports CN's novel conduct. The statute requires that a receiving carrier "provide" interchange facilities and that

those facilities be “reasonable.” As the Board has already held, by designating facilities that CPKC must bear the costs to reach, CN is providing nothing. Further, it would be patently unreasonable to force a delivering carrier to pay to interchange using a third party’s facility when a free, direct and longstanding interchange location exists. The statute and precedent authorize the Board to declare CN’s conduct proposed arrangement unreasonable.

Given the clarity of the statutory language, precedent, and the concerns expressed by railroads other than CN, it is not surprising that CN’s brief largely ignores the merits and instead focuses on three spurious arguments, each of which is designed to constrain the Board’s exercise of its authority. First, CN largely ignores reasonableness, except to argue that the statutory term excludes costs. Second, CN argues that the Board need not determine who should bear the third-party fees because the BRC Operating Agreement, not the statute, controls. Third, CN argues the Board should find that CPKC forfeited the issue of whether Clearing is reasonable so that the Board may not even consider evidence that Clearing is unreasonable.

CN’s self-serving arguments are baseless and wrong, and they are irresponsible in today’s rail network. No matter how the Board might arrive at a conclusion favoring CN’s position, allowing CN to shift the cost of interchange on to CPKC by unilaterally designating BRC’s Clearing yard, despite the existence of a longstanding direct interchange location, would “upend” interchange in the rail industry, risking “chaos” and “havoc.” The Board need only follow the law and the facts of this case to avoid that result.

ARGUMENT

I. Clearing Is Unreasonable Because It Imposes Impermissible Costs and Operating Problems on CP.

CN argues that Clearing is reasonable in a single sentence: “In all events, Clearing Yard is an eminently reasonable interchange point.” CN Initial Post-Public Comments Brief (“CN Brief”)¹ at 19.

Is it? CN’s argument rests on summarily divesting the Board of the right to consider the reasonableness of third-party costs. CN then offers nothing on whether Clearing is operationally reasonable. CPKC² has been offering evidence to the Board *since 2019* that Clearing is a problem for CPKC and the rail system. CN’s Brief rebuts none of it. In fact, during this briefing period, Clearing has continued to falter, bringing to life the fears of CPKC (and the industry commenters).

As noted by the court in *Wisc. Central*, one of the words in the statute that should guide the Board’s decision making in this matter is “reasonable.” *Wisc. Cent. Ltd. v. STB*, 20 F. 4th 292, 295 (7th Cir. 2021). “‘Reasonable’ gives the Board interpretive leeway.” *Id.* The statute gives the Board discretion to apply its judgment and expertise to the facts presented in assessing the appropriateness of the interchange arrangements designated by a receiving carrier. The court of appeals confirmed the Board’s “leeway” (to borrow the Seventh Circuit’s term), it did not

¹ Unless otherwise noted, all citations to briefs are to the party’s initial briefs filed in this phase of the proceeding filed on April 21, 2023,

² During this proceeding Soo Line Railroad Company commenced doing business as CPKC. For convenience, this brief uses CPKC throughout even when the actions under discussion took place prior to the name change.

remove it. After *Wisc. Central*, the only thing the Board may not rely on in rejecting “reasonableness” is the fact that the route to the proposed facilities is owned by a willing third party. Otherwise, the Board should decide whether Clearing is reasonable relative to Spaulding under long-standing precedent.

CN envisions a much narrower role for the Board. According to CN, if the Board addresses reasonableness on the merits, the Board is limited to assessing whether Clearing “impose[s] unusual, unreasonable, or impossible operating hazards or require[s] the delivering carrier to do work which properly belongs to the receiving carrier.” CN Brief at 19, citing *Kan. City S. Ry. V. La. & Ark. Ry. Co.*, 213 I.C.C. 351, 359 (1935). CN contends that this reasonableness standard definitively excludes consideration of costs. CN Brief at 19-20. But the Board’s reasonableness standard has never been so constricted. As the ICC explained, “In naming of new points ... of interchange between the two carriers, there are matters of *cost*, mutual convenience, unusual hazard and mutual convenience that must be considered.” *New York, C. & St. L. R. Co. v. New York Central R. Co.*, 314 I.C.C. 344, 346 (1961) (emphasis added).

CN’s designation of Clearing is unreasonable by virtue of CN’s refusal to bear the third-party costs associated with that choice, and it is also unreasonable for operational reasons even under CN’s overly narrow reasonableness standard.³

³ CN also argues that the Board should consider Clearing’s reasonableness independent of Spaulding. CN’s argument, however, is directly contrary to the clear direction of the Seventh Circuit that reasonableness should be considered relative to where interchange would otherwise occur. 20 F.4th at 294; CPKC Post Public Comments Initial Brief (“CPKC Brief”) at 16-17.

A. The Board Should Also Consider the Costs CN Wants to Impose on CPKC in Deciding Whether Clearing Is Reasonable.

CN contends that “reasonable” cannot include costs. CN’s support for this is a single summary statement, unsourced, that “the court made clear reasonableness and cost are separate questions.” CN Brief at 19. However, the court drew no such distinction. Indeed, CN acknowledges that the court did not address “how the reasonableness analysis works.” *Id.* at 20. While the court provided guidance as to the questions that could require answering, including, if Clearing is reasonable as compared to Spaulding, who pays; the court in no way circumscribed the Board’s consideration of costs in determining reasonableness. Rather, the court’s formulation acknowledges that the Board enjoys wide latitude in determining reasonableness. It does not prejudge the role that costs might play in making that determination but rather allows for the possibility that the Board might not address who pays in the reasonableness determination. The Board’s discretion is in no way constrained by the *Wisc. Cent.* decision which expressly preserved the Board’s latitude (i.e. “leeway”) in assessing the reasonableness of interchange facilities.

The Board’s own precedent supports consideration of costs. *See, e.g. New York*, 314 I.C.C.at 346. More specifically, the Board has stated clearly that “Section 10742 requires a receiving railroad in a direct physical interchange 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 for the delivering railroad.” *Toledo, Peoria & W. Ry. Corp.—Pet. for Declaratory Order*, Docket No. FD 35404, slip. op. at 10 (STB served April 26, 2011) (“*Toledo*”) citing *Norfolk S. Ry.—Petition for Declaratory Order—Interchange with*

Reading Blue Mountain & N. R.R., NOR 42078, slip op. at 4 (STB served April 29, 2003) (“*Reading Blue Mountain*”). Both *Toledo* and *Reading Blue Mountain* were cited in the October 30, 2010 Decision (that found Clearing unreasonable) for expressing the “fundamental understanding by the agency that receiving carriers must provide free routes to an interchange point on their own line to physically intersecting carriers.” Slip. op. at 6. The Seventh Circuit found error here, but only in one narrow respect, effectively replacing “on their own line” with the words “on their own or a willing third party’s line.” The Seventh Circuit did not address whether the receiving carrier must provide a free route over that willing third party’s lines.

The public commenters also agree that the Board’s application of the statute can and should consider costs. NS and BNSF’s public comments both agree with CPKC that designation of a third-party location that imposes significant third party costs on the delivering carrier would be unreasonable. *See* BNSF 2022 Comment at 3; NS 2022 Comment at 6, n.3.

Finally, the health and soundness of the rail system demands that the Board consider costs and the potentially catastrophic implications for the network that would flow from opening the door to opportunistic carriers to shift the costs of interchange onto connecting roads.

CN’s summary argument that the Board should not consider costs lacks support and flies in the face of settled law and public policy. The shifting of such costs should not be merely a consideration of reasonableness, it should be outcome

determinative that Clearing is unreasonable when free direct interchange is available at Spaulding.⁴

B. Clearing Has, Is, and Will Continue to Pose Operating Challenges that Make It Unreasonable Under the Statute.

In its very first filing in this docket, four years ago, CPKC warned the Board that CN's unilateral change to Clearing would create unreasonable risks to CPKC's operations and the flow of traffic through Chicago more generally. *See* CPKC Reply, May 29, 2020, at 23-24. Specifically, Clearing limited CPKC to two daily trains of 8,000 feet each. *See id.* at 23-34; Verified Statement of Nicholas C. Walker, ¶ 18 ("Walker 2020 V.S.") The addition of CN traffic to the Clearing trains put CPKC at the limit. Walker 2020 V.S. ¶ 18. CPKC doubted that, after the pandemic, two daily trains would be enough. *Id.* More generally, CPKC noted that "even a small amount of cars can make a large difference when Clearing is seizing up." *Id.* at ¶ 16. In sum, CPKC warned that the unilateral switch to Clearing could have "catastrophic consequences for the rail system." *Id.* Since the initial brief was filed, CPKC has moved closer to realizing this risk.

CPKC recently updated the Board on events at Clearing. CPKC Brief at 18-20. CPKC's General Manager of Operations, US East, John Kay, reiterated that the Chicago terminal, specifically Clearing, is a fragile place that cannot handle extra traffic, like the interchange traffic CN forced onto it. *See id.*, Kay Verified Statement

⁴ CN continues to invoke the blocked crossing issue at Spaulding but ignores critical facts that have been fully addressed elsewhere. *See* May 29, 2020 CPKC Reply to Petition at 16-20; *see also*, June 18, 2019 Letter from CPKC to the Board in docket FD36299

(“Kay V.S.”) ¶ 7. Clearing has been suffering congestion since early January 2023 and BRC has refused CPKC requests to send a third train to Clearing. *Id.* at ¶ 4. This congestion impacted CPKC’s own fluidity and forced CPKC to institute countermeasures. *Id.* at ¶ 6; Nick Walker Supplemental Verified Statement (“Walker Supp. V.S.”) ¶ 4 These measures include blocking traffic in Milwaukee and shifting to direct interchange with CSX all of which generate additional costs for CP. *Id.* Congestion at Clearing imposing additional crew costs on CPKC as it now takes two or three crews to take the train from Bensenville to Clearing because of inordinate delays accessing Clearing. *Id.* at ¶ 6.

Since filing of the parties’ Initial Briefs, congestion at Clearing has continued. As John Kay explained, Clearing normally processes 3,000 cars a day. Kay V.S. ¶ 4. As shown in the chart below, in the past two months, daily inventories at Clearing have been elevated well above the normal operating conditions. Indeed, on several days Clearing has approached its capacity limits.⁵ Walker Supp. V.S. ¶ 3.

⁵ As Nick Walker explains, the elevated volumes at Clearing, Bensenville and Milwaukee are unrelated to the CP-KCS control transaction. Rather, these volumes relate to all carriers serving Chicago, and began to build in early 2023. They became elevated in March and April before the April 14 control date. Walker Supp. V.S. ¶ 3.



To alleviate the congestion at CPKC’s Bensenville and Milwaukee yards, and help reduce pressure on Clearing, on April 19, CPKC asked CN to temporarily interchange traffic at Spaulding. *See* Walker Supp. V.S. ¶ 7. After all, CPKC was already pre-blocking CN traffic into Clearing. CN flatly refused. *Id.*

In order to combat the increasing congestion, the BRC imposed hard limits on the number of cars and trains (two) per day CPKC could deliver to Clearing. *Id.* at ¶ 5. Within the last month, CPKC’s rolling average had increased to 700 Clearing-bound cars. *Id.* at ¶ 4. While CPKC’s countermeasures helped reduce this rolling average, those efforts have been costly. *Id.* CN-bound cars are generally what puts CPKC over the BRC limits. *Id.* at ¶ 5.

Interchange at Spaulding would ensure that the CN-bound cars are cleared from CPKC’s yards daily and would go a long way to reducing congestion in CPKC yards in particular.

The extra costs, extra crews, and now BRC limits on the amount of cars and trains it will accept daily make Clearing unreasonable as compared to Spaulding.

II. Even if Clearing is Reasonable, CN Must Pay.

A. The BRC Agreement Does Not Determine Who Pays.

Although CN agrees that the statute gives the Board the authority to decide who pays for the terminal carrier's fees, it seeks to disregard the statutory language that requires that it "provide" the interchange facilities. Instead, CN contends that CPKC somehow bargained away any statutory right to free interchange facilities when it entered into the BRC Operating Agreement and that the Board should simply defer to the private agreement. CN Brief at 23-27. That is wrong, for reasons set forth in CPKC's Brief at 26-28. The BRC Operating Agreement was entered into in an entirely different context and says nothing about who ultimately should bear the burden of BRC's fees.

What's more, there is no limiting principle to CN's argument. Every Class I railroad in Chicago is a signatory to the BRC Operating Agreement. Similar arrangements are replicated at terminals across the network. If the agreements that the railroads have with third party intermediate switching carriers controlled who ultimately pays in all instances, the receiving carrier would have an unfettered right and a clear economic incentive to designate the third party's facilities at the delivering carrier's cost in place of alternative interchange locations that are both free to the delivering carrier and direct. NS aptly described the results that this sudden change in bargaining power would have as "chaos." *See* NS 2022 Comment at 8-9.

No railroad has ever understood the BRC Operating Agreement as negating a intersecting delivering carrier's statutory right to free direct interchange. Not even

CN contemplated this possibility until the current dispute, as it conducted direct interchange with CPKC at Spaulding for nearly a decade, and at other locations around Chicago before that. Indeed, when CN acquired the EJ&E, it negotiated with Bartlett and paid the town money to address concerns related to CP-CN interchange at Spaulding and remove their opposition to CN's acquisition of the EJ&E. *See* June 18, 2019 Letter from CPKC to the Board, FD36299, at 4, Ex. 1. Why would CN go to all that trouble if it could simply have insisted on a Clearing interchange at CP's expense? The answer is because it could not. The BRC Operating Agreement does not control who ultimately pays for interchange; the statute does.

The statute plainly states that a carrier "shall provide reasonable" interchange facilities. As the Board held in its original order, "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 Decision at 7. This logic is undisturbed by the Seventh Circuit. *See* CPKC Brief at 8-10. If reasonableness does not provide a basis to answer the question of "who pays," the plain statutory language of "shall provide" answers it.

Accordingly, should the Board determine that Clearing is reasonable as compared to Spaulding, it should nevertheless declare that it is CN that must pay the BRC's fees.

B. CNs Citation to Common Law and Customs Rebuts Its Own Argument and Ignores Plain Statutory Language.

CN's Initial Brief does not offer the Board any guidance on the statutory basis for "who pays." It does not offer an alternative definition of "shall provide." Instead,

CN purports to rely on “industry practice and precedent” to show a delivering carrier must pay for switching. CN Brief at 24. Elsewhere, it describes this as “custom and basic fairness.” *Id.* at 27.

As a threshold matter, CN’s reliance on these sources seems odd in light of its dismissal as irrelevant the common law doctrines regarding permissive trackage rights and free transit that the Board and CPKC relied on in the last proceeding. *Id.* at 13-14. Yet, CN now puts forth its own alleged practice, custom and precedent without any attempt to show how they fit with the statutory language “shall provide.”

Indeed, to the extent CN’s precedent considers “shall provide,” that precedent holds against a rigid rule that the delivering carrier always pays. In fact, both of CN’s cases reject that rule. CN quotes *dicta* from *Kan. City S. Ry.* for precedent of the “general practice” that forwarding carriers paying for intermediate switching. CN Brief at 24, fn. 91. In that matter, as here, the delivering carrier rejected the receiving carrier’s unilateral imposition of a new interchange point that would require the delivering carrier to travel some three miles over the receiver’s line. 213 I.C.C. at 352. The ICC ultimately sided with the *delivering* carrier and dismissed the receiving carriers claim that the interchange was reasonable. *Id.* at 360. The I.C.C. did not order the deliverer to accede to, let alone pay for, the new interchange location that the receiving carrier sought to unilaterally impose. *Id.* The ICC held that, on the record before it, it could not conclude that travelling three miles, for free, on the receiving carrier’s line was “reasonable.” *Id.*

Similarly, CN's cite *Baltimore & O.R. Co. v. United States*, 277 U.S. 291, 301 (1928) does not support CN's position. CN relies upon the case for the proposition that the delivering carrier should "usually" bear the cost of intermediate switching. CN Brief at 24, fn. 90. Yet in the sentence following the one quoted by CN, the Court rejected that proposition as inconsistent with the statute and held that under the circumstances it was not unreasonable for the *receiving carriers to pay*. 277 U.S. at 301.

Moreover, CN ignores the fact that the asserted custom and practice upon which it relies arose solely in the context of carriers that did not physically connect with one another in a terminal, *i.e.*, where the delivering carrier *must* use a third party carrier in order to reach the receiving carrier's track. Here, there is a direct connection at Spaulding and, thus, CPKC does not need to use a bridge carrier to deliver cars to CN. The only reason to use a third party here is entirely for CN's own benefit to support its unilateral designation of an interchange location that requires such use. In these circumstances, forcing CPKC to incur third party costs (as well as operational harm) would be unfair, unjust, and unreasonable, and inconsistent with CN's statutory obligation to "provide."

The precedent and custom cited by CPKC, on the other hand, directly relates to, and are fully consistent with the statute's requirement that the receiving carrier "provide" interchange facilities. CPKC Brief at 9-10. The free transit and permissive trackage rights rules have been applied by courts and the Board for decades and together they describe what the party who designates the interchange location "shall

provide”: free transit from the point of intersection with the delivering carrier’s tracks to the interchange facility and free access to the facility. *See Toledo*, slip. op. at 10; *Reading Blue Mountain*, slip op. at 4.

With the focus properly on the statutory language, whether the receiving carrier or a third party owns the tracks or facilities it proposes is irrelevant to the question of who pays. The plain language of “shall provide” and the case law establish that—consistent with long-standing practice—the receiver must either choose a free location for interchange or fund the use of a willing third party’s facilities.

III. CN’s Efforts to Shift Attention Away from the Issues in this Case Ignore the Facts.

Given the long and well-settled history and precedent that reject CN’s position that it can unilaterally impose a new interchange location *and* force the delivering carrier to pay for that choice, it is unsurprising that CN urges the Board instead to set aside and ignore the actual facts of this case in deciding for CN. CN argues that CPKC waived any ability to address the reasonableness of Clearing as CN’s designated place to receive cars from CP, and CN argues that the Board need not wade into the thicket of policy issues raised by CPKC and other industry commenters. Both gambits fail for the same reason: they ignore the basic facts. First, CPKC did not waive anything but instead consistently raised the unreasonableness of CN’s effort to force interchange to Clearing. Second, it is CN’s position—not CPKC’s—that would lead the Board down the path of upending the interchange regime to the detriment of the rail network.

A. CPKC Did Not Waive the Ability to Address the Reasonableness of CN's Designation of Clearing Yard.

CN's argument that CPKC has somehow forfeited or is estopped from raising arguments about the reasonableness of Clearing strings together inapposite or inapplicable judicial efficiency doctrines. There are many flaws in CN's position, which CPKC has addressed previously. CPKC Brief at 13-16. But the central error is one of fact. Contrary to CN's imaginary world, in the real world of this proceeding CPKC long-ago made the point that Clearing was not a reasonable designation given the available alternative, the third party costs it would impose on CPKC, the added operational costs (including if CPKC must operate a third train), and the risks to CPKC's network (and the broader Chicago Terminal) if Clearing is congested (risks that have been realized in the last few weeks). *See* CPKC Reply, May 29, 2020 at 23-24. Indeed, contrary to CN's assertions, CPKC first argued that Clearing fails to meet CN's obligation to provide "reasonable" and "proper" interchange facilities in the prior docket. *See* July 19, 2019 Letter, FD 36299, 2-3); *see also, Soo Line Railroad Company—Petition for Declaratory Order and Preliminary Injunction—Interchange with Canadian National*, FD36299 (STB served November 29, 2019) (noting that, "during the course of the [Kirk] proceeding CN and CPKC have raised arguments about the reasonableness of Clearing Yard as the interchange point for CN-bound traffic"). As addressed in CPKC's Initial Brief, it has continued to challenge the reasonableness of Clearing as compared to Spaulding throughout this proceeding. CPKC Brief at 13-16.

CN also claims CPKC is estopped from arguing operational unreasonableness because it described the 2022 *status quo* in a control application. CN Brief at 17. Yet at no point did CPKC agree that Clearing was reasonable. Further, the Board was well aware of this proceeding, pending before it at the same time, when it reviewed CPKC's control application.⁶ CN's claim that CPKC represented that it would always interchange CN bound traffic at Clearing, and that the Board relied on this alleged representation in approving the merger, is, in a word, fiction.

CN also argues that CPKC's claims in this proceeding "clash" with prior representations about trains that CPKC operates to Clearing. CN Brief at 17-18. CPKC testified in 2022 that it "had no plans" to send a third a third train to Clearing at that time. *Id.* CPKC did not "plan" for the BRC to reach this current state of congestion, causing Clearing-bound cars to back up in its yards. *See Walker Supp. V.S.* ¶¶ 4-6 Of course, if interchange reverted to Spaulding, this would significantly reduce the likelihood that, in the future, CPKC will need to send a third train to Clearing.

⁶ CN's citation in support of estoppel is from the *EJ&E* proceeding. CN Brief at 17, fn. 64. In that proceeding, CN's President told Congress it need not legislate any new authority because the Board already had the right to impose environmental mitigation conditions as part of the acquisition. *Canadian Nat'l Ry. Co. & Grand Trunk Corporation—Control—EJ&E W. Co.*, No. FD35087, 2008 WL 8139694, at *26 (S.T.B. served Dec. 24, 2008). Three weeks later, CN filed a brief disputing the Board's right to impose environmental conditions. *Id.* That was a textbook example of estoppel. In that same proceeding, as pointed out in CPKC's Brief at 24, CN informed the STB that a primary benefit of allowing the transaction to go through was to keep cars *out* of Clearing.

B. The Board Should Affirm Longstanding Interchange Practice, Not Upend Railroad Operations and Economics.

In a last ditch attempt to avoid a decision on the merits, CN attempts to convince the Board that it “need not and should not address broader questions of interchange policy.” CN Brief at 1. CN understandably wants to avoid those questions, since it is CN’s position—not CPKC’s—that would lead the Board down the path of dramatically upending the normally well-functioning regime of interchange in this country.

On that central question, industry comments (other than CN) agree that the Board should reaffirm long-standing precedent and reject the unilateral imposition of third party costs. CN misrepresents industry comments as “reflecting” CN’s view that Board need not “*address* broader questions of interchange policy.” CN Brief at 1 (emphasis added). In fact, the railroads (other than CN) urged the Board not to *change* broader interchange policy.

The commenters (and CPKC) agree if the Board does not consider third party fees, it will necessarily change broader interchange policy. NS’s Comment, cited in CN’s Brief at 28, n. 106, refutes CN’s belief that costs should be ignored in considering reasonableness. NS urges the Board that “costs should be a central consideration” in determining reasonableness, and that this issue should not be deemed foreclosed by the *Wisc. Cent.* decision. NS Comment at 7. BNSF’s comment likewise does not “reflect” CN’s argument that the Board should somehow dodge “broader questions of interchange policy.” The comment merely agrees with NS (and CP) that the Board should decide this dispute “without making any significant legal or policy changes.”

BNSF Comments at 4-5. That means, “[i]n many situations, the cost to the delivering carrier of making the interchange at the point designated by the receiving carrier will be a relevant consideration.” *Id.* at 3.

Simply put, there is broad disagreement with CN’s position on the extent of a carrier’s right to unilaterally impose a third party interchange location, as CN attempts here, under § 10742. NS, BNSF, and CPKC all agree that costs should be considered in analyzing reasonableness and who pays. CN argues they must be ignored. The “narrow decision” CN urges the Board to take is precisely the decision that non-CN railroad commenters (including CPKC) believe would “upend railroad operations and economics.” NS 2022 Comment at 7.

The railroad industry operates on well-settled expectations that receiving carriers may not unilaterally designate a new interchange location and impose costs on the other deliverer. BNSF 2022 Comment at 1-2 (describing the well-established history of law and custom” that undergirds interchange). This expectation creates the conditions for the vast majority of interchange agreements to be worked out among parties, with no need to resort to the Board. Both commenting carriers (and CPKC) agree that a decision ratifying a carrier’s unilateral imposition of a third party’s facility at the delivering carrier’s expense will lead to chaos. It will shift all the bargaining power to the receiving carrier. NS 2022 Comment at 19.

NS’s comments go a step further in explaining the consequences of a decision that sanctions CN’s practices and shifts all power to the receiver. *Id.* With carte blanche and no responsibility for costs, the receiving carriers would be incentivized

to shift all traffic to the terminals. *Id.* Indeed, they would be leaving money on the table if they did not. The obvious result would be every railroad would do this and promptly overwhelm the terminals. *Id.* This scenario would play out “across the nation, in every major city with terminal switching services provided by intermediate carriers.” *Id.*

As a result, the only way to avoid making *changes* to broader interchange policy is to *address* broader interchange policy and reaffirm long-standing practice by deciding this case against CN. Whether the Board decides to consider costs or not will decide the power receiving carriers have to unilaterally impose interchange sites in future § 10742 actions. CN’s disingenuous offer of a path to avoid “broader questions” is not only unsupported by the industry, it is impossible in practice. The Board is tasked with administering this statute and advancing rail transportation policy. Only a decision rejecting CN’s efforts to unilaterally impose Clearing at CPKC’s expense serves those ends.

Respectfully submitted,

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Dated: May 11, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of May, 2023, I caused a copy of the foregoing CPKC'S POST PUBLIC COMMENTS REPLY BRIEF to be served by email or first-class mail upon the following parties of record:

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/s/ Joshua Poertner
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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**

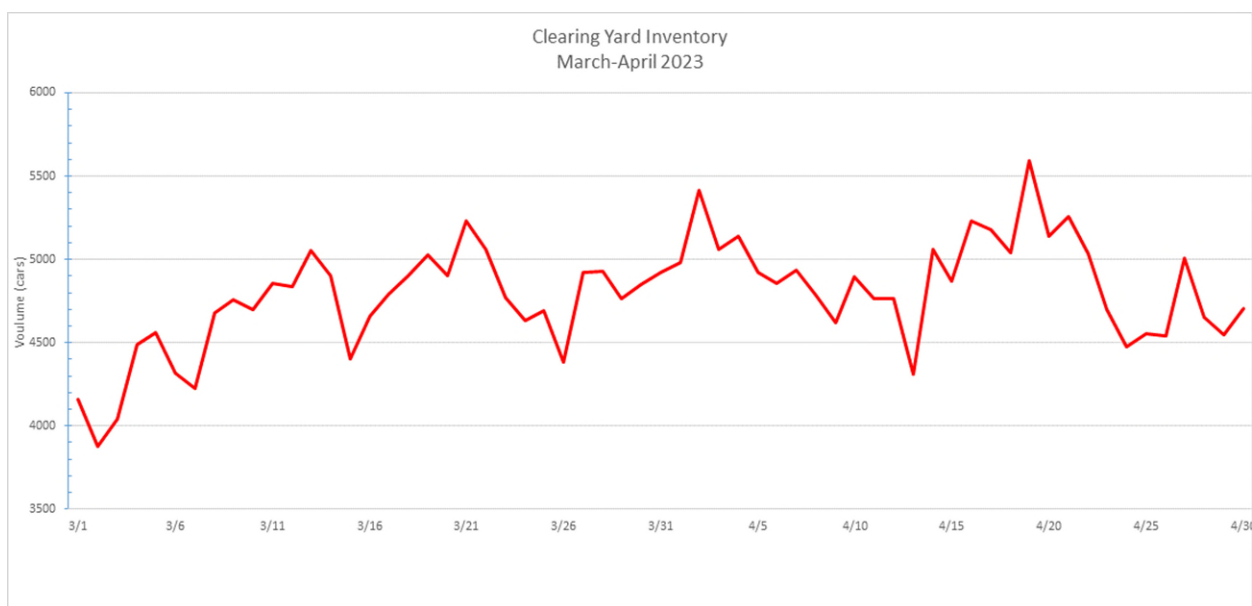
SUPPLEMENTAL VERIFIED STATEMENT OF NICHOLAS WALKER

1. My name is Nicholas Walker. I am employed by Soo Line Railroad Company (CPKC) as Senior Vice President of Operations, Eastern Region, and am again based in Chicago at Bensenville Yard. I was promoted to this position on April 14, 2023. Prior to this I served in the capacity of Vice President of Operations Western Region at Calgary, Alberta, following service as Assistant Vice President of Operations, US East, at Chicago. I was promoted to that position from General Manager Operations, and before that Operations Superintendent, both at Bensenville Yard. I have also served as Assistant Superintendent at CP's Winnipeg, Manitoba Yard, and at St. Paul, Minnesota. I began my railroad career in 2005 as a conductor with CP at Chicago. Of my 18 years of railroad service, most have been in the Chicago Terminal.

2. As Senior Vice President of Operations, I am responsible for all rail operations on the CPKC network in eastern Canada and its network in the States of North Dakota, South Dakota, Minnesota, Wisconsin, Illinois, Indiana, Michigan, New York, Vermont and Maine. These responsibilities include supervision of rail transportation operations of CPKC in the greater Chicago Terminal. I am familiar with CPKC 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 Canadian National Railway (CN).

3. I am submitting this Supplemental Verified Statement to update General Manager John Kay's information regarding recent congestion in the Terminal, in particular at the Belt Railway of Chicago's Clearing Yard (BRC), as well as to update the Verified Statement I submitted in this proceeding in May, 2020. The purpose is to provide a picture of operational reality as relates to Clearing and congestion, and explain further why CPKC continues to prefer interchange at Spaulding.

As this Board knows from the weekly filings made by the Chicago Transportation Coordination Office (CTCO) and the recent Verified Statement supplied by CPKC's John Kay, BRC's Clearing Yard has been experiencing increasing heavy volumes beginning in early March of this year, and on several days in March and April experienced volumes approaching its capacity limit. This is readily evident from the attached chart:



4. As of this writing, Clearing's car inventory has moderated somewhat but remains elevated. CPKC's rolling average of cars destined for Clearing—"rolling average" is a cumulative total over and above the norm which is carried over to the next day because those cars could not be accepted by Clearing—was as high as approximately 700 cars per day three weeks ago. This

elevated inventory was due in part to Clearing's inability to accept more than two trains a day from us, and those trains are subject to Clearing's 8000-foot train length limit. We have now brought the rolling average down to near current due to the countermeasures we have taken to aid BRC. These countermeasures consist of shifting to direct interchange when possible (CSX), and our blocking CN and BNSF cars for BRC at Milwaukee and Bensenville to alleviate work that BRC would otherwise do at Clearing. While that adds additional cost for us to perform switching normally done at Clearing, it represents our doing what we can, short term, to alleviate congestion. We intend to continue these countermeasures until Clearing's total volumes settle.

5. BRC has imposed a daily restriction of the number of cars that it will accept from CPKC at Clearing due to the ongoing congestion. This continuing restriction also includes a slot limitation, based on these "quotas." There have been several instances where the cars that we have for Clearing exceed what the BRC will accept. The CN-bound cars that we are sending to Clearing under the Interim Agreement with CN typically have been the reason our Clearing-bound volumes exceed the number of cars BRC will accept. Cars in excess of the BRC limit get rolled over to the next day.

6. Congestion at Clearing has already impacted fluidity at our yards in Bensenville and Milwaukee, as well as the yards of other carriers, and has added expense. For example, in our experience where previously one crew could deliver and pull a train to/from Bensenville/Clearing, now it takes a minimum of two crews and at times three crews.

7. On Wednesday, April 19, 2023, I reached out to Derek Taylor, my counterpart at CN, and asked if we could return CN/CP CP/CN interchange to Spaulding on a temporary basis given the congestion at Clearing. Mr. Taylor refused.

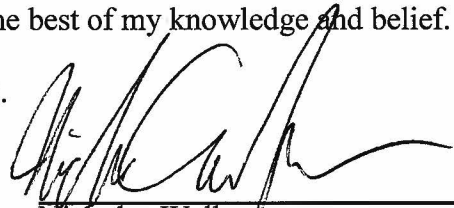
8. We continue to prefer to interchange with CN at Spaulding. As I explained in 2020, Spaulding has its idiosyncrasies but it works. Spaulding keeps cars out of the Chicago Terminal, which as we have seen yet again these past weeks becomes congested even in good weather. Spaulding also allows us keep Bensenville Yard fluid until conditions at Clearing Yard ease. As I stated previously, direct interchange allows us to control our own destiny—we are not restricted by the situation at Clearing or by what others are doing or not doing to cause congestion there. Direct interchange to Spaulding via our own railroad and performing the interchange at night also works to keep our mainline with Metra fluid. The sustained congestion of recent weeks shows the benefits of utilizing Clearing Yard as the interchange point do not exist when it matters most—when volumes are elevated.

9. Increased volumes at Clearing, Bensenville and Milwaukee are not related to the CPKC control transaction. Rather, these volumes involve all carriers serving Chicago. These volumes began to build in early 2023, and became elevated in March and April before the April 14 control date.

VERIFICATION

I, Nicholas Walker, 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 11 day of May, 2023.



Nicholas Walker