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

STB FINANCE DOCKET NO. 36397

CN'S POST-COMMENT REPLY BRIEF

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INTRODUCTION¹

Now that the Seventh Circuit has confirmed CN's right to designate Clearing Yard to receive interchange traffic from CP, just one narrow question remains: Should each carrier pay the BRC's switching fees for the traffic it delivers to Clearing, or should CN have to pay for all traffic moving in both directions? The BRC Operating Agreement that CN and CP signed as co-owners, industry practice and precedent, and basic fairness all point to the same answer: Each carrier should pay its fair share.

CP, however, wants to relitigate the question the Seventh Circuit already decided. It strenuously disputes CN's right to designate Clearing, offering a series of arguments that contradict each other, the court's decision, and CP's own positions in this proceeding and elsewhere. These arguments fail for three main reasons.

First, while CP belatedly insists that Clearing is not a proper interchange point, it told the Board the opposite in the now-consummated CP-KCS merger proceeding, avowing that the BRC would “provid[e] the track infrastructure and classification services required to exchange carloads” for CP's interchange traffic with several Class I railroads, including “all of CP's traffic going to and from CN.”² CP cannot explain away these blatant contradictions—and it barely tries. In a buried footnote, it suggests that these operating plan statements just described the

¹ Defined terms have the same meaning here as in CN's earlier filings (including using “CP” instead of “CPKC” for consistency).

² Applicants' Amended Operating Plan (Exhibit 13) ¶ 27, *Can. Pac. Rwy. Ltd.—Control—Kan. City S.*, Docket No. FD 36500, (filed May 13, 2022) (“CP Am. Operating Plan”).

status quo, because CP did not want to “prejudge the outcome of this dispute.”³ But operating plans in major mergers do not just describe current operations—they are critical documents used to describe plans for *future* operations after the transaction is implemented. Indeed, CP testified at the public hearing that “[t]he operating plan is built to be the plan we use,”⁴ and responded to questions about whether it might add more trains on the Metra line through Spaulding over which CP operates than it had disclosed in the operating plan with assurances that “[w]e have a plan.”⁵

Nowhere in its operating plan or in the extensive testimony about its plans for Chicago operations did CP assert that it actually wanted to move CN-CP interchange operations back to Spaulding—a location that would require CP to use line owned by Metra to facilitate the interchange and in the midst of the Village of Bartlett, one of the communities that was part of the Coalition to Stop CPKC. CP and KCS presented no evidence to the Board about the implications of such an interchange-location change for CPKC’s Chicago operations or merger impacts on Metra and Chicago suburban communities. CPKC should not be allowed to pull a bait-and-switch on the Board and Chicago stakeholders by waiting until a week after completing its merger to renounce these representations and suggest that it actually had a different plan for operations on this critical Metra line all along.

³ CP Post-Comment Br. 18 n.3.

⁴ Transcript of Hearing on Proposed Merger of CP/KCS, *Can. Pac. Rwy. Ltd.—Control—Kan. City S.*, No. FD 36500, at 122:4–5 (Sept. 28, 2022) (testimony of R. Elphick) (“Merger Hearing Transcript”).

⁵ *Id.* at 126:6 (testimony of K. Creel).

Second, CP’s account of the Seventh Circuit’s decision is incoherent. CP says the court “did not decide any issue in this case” and “did not alter any” existing principles of interchange law—but also that the court prescribed a “framework for reasonableness” that mandates a “compar[ison]” between Clearing and Spaulding.⁶ And then in the next breath, CP says the “court did not offer any guide to ‘reasonableness’” and “in no way constrained the reasonableness determination.”⁷ And CP says the court “took issue with” the Board’s prior holding that CN had to designate an interchange point on its own line, but somehow “left . . . undisturbed” the “free-transit rule” of which the own-line requirement was part and parcel.⁸ None of this makes sense, and all of it reflects that CP is simply trying to dance around the court’s clear holding that CN can designate Clearing.

Third, CP urges the Board to repeat the exact same errors that already led to the court’s vacatur. The Seventh Circuit made clear that an interchange dispute could raise three separate, *sequential* questions: 1) whether a receiving carrier has a right to choose a certain interchange point, 2) whether that choice is reasonable, and 3) who pays associated third-party costs.⁹ The court thus held that the Board erred by “smuggling” an answer to the who-pays question into its analysis of the right-to-designate question.¹⁰ Yet CP now urges the Board to make that exact same

⁶ CP Post-Comment Br. 3, 6, 16, 23.

⁷ *Id.* at 12, 21.

⁸ *Id.* at 22.

⁹ *Wis. Cent. Ltd. v. STB*, 20 F.4th 292, 294–95 (7th Cir. 2021).

¹⁰ *See id.* at 295.

mistake twice more, by deciding *both* the (foreclosed) right-to-designate question and the reasonableness question based on the answer to the who-pays question.¹¹ CP also invokes the same “common-law norm[s]” the court already rejected.¹² The Board should decline this invitation to defy the Seventh Circuit’s mandate.

The Board should reject CP’s attempts to evade its merger commitments and the Seventh Circuit’s ruling and hold that CP must pay its fair share of the BRC’s fees for the parties’ interchange traffic.

ARGUMENT

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

CP’s lead argument is an attempt to relitigate the issue it lost on appeal: Can CN designate the BRC’s Clearing Yard facilities to receive interchange traffic from CP?¹³ To support this futile effort, CP narrows the court’s decision to the vanishing point while accusing CN of a maximalist reading that would “create industry chaos.”¹⁴ And having essentially dismissed the court’s ruling as irrelevant, CP urges the Board to repeat the same errors that led to the first vacatur. The Board should reject these arguments.

¹¹ CP Post-Comment Br. 8–12.

¹² *Wis. Cent.*, 20 F.4th at 295.

¹³ See CN Post-Comment Br. 11–14.

¹⁴ See CP Post-Comment Br. 4–8.

A. CP is wrong to claim that the Seventh Circuit decided nothing.

According to CP, the Seventh Circuit’s decision has no real effect. CP claims the court (1) “did not decide any issue in this case,”¹⁵ (2) merely faulted the Board for making a factual “assumption” about whether CN wanted CP to pay the BRC’s switching,¹⁶ and (3) left untouched the common-law norms on which the Board’s now-vacated decision relied.¹⁷ None of that is right.

1. Courts can and do decide issues in agency appeals.

CP says administrative-law principles barred the Seventh Circuit from actually resolving any issues presented here.¹⁸ That is wrong. CP invokes the *Chenery* rule, but “*Chenery* does not apply to legal principles”¹⁹; it applies only to “a determination of policy or judgment which the agency alone is authorized to make.”²⁰ Likewise, the “Ordinary Remand Rule”²¹ only requires courts to eschew a “definite answer” to a legal question *if* the agency could answer that question by “exercis[ing] its *Chevron* discretion.”²² So when an agency appeal presents a legal question with a clear answer, courts can and do decide those questions. And that is

¹⁵ *Id.* at 6 (“The court’s two holdings did not decide any issue in this case. Nor could they.”)

¹⁶ *Id.* at 11–12.

¹⁷ *Id.* at 9–10.

¹⁸ *Id.* at 6–7.

¹⁹ *Canonsburg Gen. Hosp. v. Burwell*, 807 F.3d 295, 304 (D.C. Cir. 2015).

²⁰ *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

²¹ CP Post-Comment Brief 6–7 (citing *Negusie v. Holder*, 555 U.S. 511, 523 (2009)).

²² *Negusie*, 555 U.S. at 523.

what happened here. As the Seventh Circuit held, the relevant statutory language is “not ambiguous” and does not “give[] the Board interpretive leeway,” so the court construed and applied that language itself.²³

In any event, the Seventh Circuit *did* resolve this issue. After hearing all of CP’s arguments about the statutory language, the court held that a receiving carrier can “designate a willing third party to receive traffic” “as a result of contract”—and thus that CN can designate Clearing because, as “the receiving line, [CN] is willing to accept traffic through the Belt Railway, and Belt Railway is willing to accept that traffic.”²⁴ If CP thought this ruling exceeded the court’s power, it should have petitioned the Seventh Circuit for rehearing or the Supreme Court for certiorari. It did not, so it cannot now urge the Board to disregard the court’s ruling as exceeding its authority.²⁵

2. By conflating cost and location, CP invites the same error that led to vacatur.

Having asked the Board to revisit a question the court already decided, CP compounds its error by urging the Board to resolve that question on the same basis the court already rejected. The court vacated the Board’s prior order in part

²³ *Wisc. Cent.*, 20 F.4th at 295.

²⁴ *Id.* at 294–95.

²⁵ *Wilder v. Apfel*, 153 F.3d 799, 803 (7th Cir. 1998) (an “administrative agency, on remand from a court, [must] conform its further proceedings in the case to the principles set forth in the judicial decision”). CP notes CN’s observation that the appeal did “not address whether [CN] may ‘force’ [CP] to interchange at Clearing,” CP Post-Comment Br. 7, but CN’s point was merely that the appeal did not raise the reasonableness question because it was neither disputed nor decided in the prior Board proceedings.

because the agency erred by “smuggling an assumption about” who would pay the BRC’s fees into the analysis of the separate, upstream question of whether CN can designate Clearing in the first place.²⁶ Yet CP now asks the Board to “reinstate[]” its vacated ruling because—while “the parties did not yet know [in 2020] who would pay the BRC fees”—“now [] we know that CN’s designation of Clearing carries with it a demand that CP pay BRC to deliver cars there.”²⁷ This nonsensical argument conflicts directly with the court’s decision.

CN’s “demand that CP pay” is not a new development. Indeed, the question of who pays is the reason behind this dispute. CN has been clear from the start of this proceeding that CP should pay the BRC’s switching fees for CN-bound traffic, just as CN pays for CP-bound traffic.²⁸ CP does not contend otherwise—it neither claims that CN has changed position nor addresses CN’s earlier arguments. CP’s assertion that CN’s position on payment is only “now” clear is inexplicable.

In any event, until the Board decides this case, we still do not “know who would pay the BRC fees.”²⁹ Indeed, it is bizarre for CP to claim we now “know” the answer to this question even as it insists that “if the Board determines that Clearing Yard is reasonable, the Board should require CN to reimburse the BRC

²⁶ *Wisc. Cent.*, 20 F.4th at 295.

²⁷ CP Post-Comment Br. 8, 11 (initial capitals omitted).

²⁸ CN Pet. 24–29 (arguing that “CP is responsible for its share of Belt Railway switching fees” (initial capitals omitted)).

²⁹ CP Post-Comment Br. 11.

fees.”³⁰ CP describes CN’s arguments on this point as “admission[s],”³¹ but an admission involves *agreeing* with your opponents, not seeking relief they oppose.

Since nothing has changed on this score since the court ruled, CP’s argument to “reinstate” the Board’s vacated decision amounts to a bald plea to repeat the same mistake that produced the last vacatur. Under the court’s analytical framework—which CP claims to accept³²—these three questions are *separate and sequential*: 1) can CN designate the BRC’s third-party facilities; 2) if so, is that choice reasonable, and 3) if so, who pays the BRC’s fees for CN-bound traffic?³³ As the court held, the Board’s prior decision erred by deciding question 1 based on an assumption about question 3.³⁴ And that is exactly what CP urges again here: Declare that CN cannot designate Clearing because, “*if CN fails to provide [CP] with [a] free route . . . CN has not met its duty to provide reasonable interchange facilities.*”³⁵ CP thus says “[t]he Board should answer [the right-to-designate] question in the negative, *as it did when (in the eyes of the court) it merely ‘assumed’ that [CP] would be required to pay.*”³⁶ But that will not look any different to the court’s eyes a second time, and would thus invite a second vacatur.

³⁰ *Id.* at 26 (initial capitals omitted).

³¹ *Id.* at 11.

³² *Id.* at 6.

³³ *Wisc. Cent.*, 20 F.4th at 294–95; see CP Post-Comment Br. 26 (acknowledging that the who-pays question arises “if” the other two questions are answered).

³⁴ *Wisc. Cent.*, 20 F.4th at 295.

³⁵ CP Post-Comment Br. 33.

³⁶ *Id.* at 2 (emphasis added); see *id.* at 9, 11.

3. CP's common-law arguments conflict with the court's decision.

CP errs by again invoking the same common-law norms the court faulted the Board for relying on.

First, CP points to the “free-transit rule.”³⁷ But even if this rule were sound, it would be satisfied here. CP says this rule requires “free transit from CP’s line to the interchange location, requir[ing] that CN pay the BRC fees.”³⁸ But “the BRC fees” at issue are not for “transit”—they are for the switching services that BRC crews provide at Clearing. And CP reaches the BRC via Metra’s West Line, paying no per-car trackage rights fee to do so.³⁹

In any event, CP’s supposed rule is unsound. The “free-transit rule” that the Board’s now-vacated decision relied on was this: “When two carriers *physically intersect*, the receiving carrier is required to designate a point *on its own line* where it will receive traffic and to provide a *free route over its tracks* to that point.”⁴⁰ But the Seventh Circuit rejected both aspects of this rule—the statute says nothing about “physically intersecting lines,” and the power to designate an interchange point is not “limited to portions of line that the designating carrier owns.”⁴¹

³⁷ *Id.* at 9; *see id.* at 21–22 (same, as part of the reasonableness analysis); *id.* at 29 (same, as part of the who-pays analysis).

³⁸ *Id.* at 9.

³⁹ Verified Statement of Charles E. Hubbard ¶ 7 (filed as an exhibit to CP Reply); CP Reply 13.

⁴⁰ 2020 Board Decision 5 (emphasis added); *see id.* at 6–9.

⁴¹ *Wis. Cent.*, 20 F.4th at 294.

Since the “free-transit rule” required “a free route over [the receiving carrier’s] tracks,”⁴² and the court explicitly rejected any requirement involving the receiving carrier’s own tracks, it is startling for CP to claim that the court “left the free transit rule undisturbed.”⁴³ CP’s position is essentially that, even as the court erased every other part of this rule, it left the words “free route” standing by themselves. That is not how judicial decision-making works. What’s more, the court made clear that this supposed rule “amounts to a common-law tradition”—and that “exchange of rail traffic is governed by statute, not by . . . common law.”⁴⁴

In any event, the “free-transit rule” as formulated by CP was *never* the law, even before the Seventh Circuit ruled. This rule supposedly came from *Burlington Northern*.⁴⁵ But as CP observes, “there was no direct connection” in *Burlington Northern*, so any statement there about the rules that apply “if the carriers physically intersect” would have been *dicta*.⁴⁶ And this “rule” does not even come from a statement by the *Burlington Northern* court itself. This was a description of one party’s position, which the ICC at most “implicitly accepted”—and the D.C. Circuit said only that it could “find little to fault” in the ICC’s analysis.⁴⁷ CP’s position thus boils down to the notion that *Burlington Northern*’s “little to fault”

⁴² 2020 Board Decision 5.

⁴³ CP Post-Comment Br. 22.

⁴⁴ *Wis. Cent.*, 20 F.4th at 294.

⁴⁵ CP Post-Comment Br. 21.

⁴⁶ *See id.* at 16, 21.

⁴⁷ *See Burlington N. R.R. v. United States*, 731 F.2d 33, 38–40 (D.C. Cir. 1984).

remark—referring to an agency decision that only “implicitly” accepted a point that would have been *dicta* anyway—produced a binding rule that (at best) sits uncomfortably with the court’s actual holding that the receiving carrier satisfied its obligations there. That is not plausible.

To be clear, the Seventh Circuit did not disturb agency precedent that a railroad *may* satisfy its interchange obligations by providing a free route over its tracks to a reasonable interchange point on its own line. Nor did the court question that a railroad can interchange elsewhere than the precise geographic point where tracks connect. What the Seventh Circuit rejected is CP’s novel gloss on that rule, under which a railroad with a physical connection *must* satisfy its interchange obligations by providing a free route over its tracks to a reasonable interchange point on its own lines and cannot instead provide facilities on a third-party carrier. As the Seventh Circuit held, § 10742 imposes no such limitation.

Second, CP invokes a “rule that ‘the exercise of trackage rights remains permissive with their holder,’” which in CP’s view means CP “cannot be compelled to exercise its operating rights over the BRC to access Clearing.”⁴⁸ But even setting aside CP’s error in attributing this rule to the Supreme Court,⁴⁹ CP errs again in claiming the Seventh Circuit left this supposed norm untouched.⁵⁰ While CP claims

⁴⁸ CP Post-Comment Br. 10 (quoting *Burlington N.*, 731 F.2d at 39).

⁴⁹ *See id.* at 4; CN Post-Comment Br. 13 (explaining that the cited Supreme Court case merely interpreted a specific contract and did not involve the interchange statute).

⁵⁰ CP Post-Comment Br. 29–30.

the court merely distinguished this norm as involving receiving carriers' rights instead of delivering carriers', the court actually said it was "far from clear that § 10742 supports" this concept at all, emphasizing that "[w]hether [CP] can be required to tender its traffic [at Clearing] rather than at the Spaulding yard depends on the language of the statute, not on extra-statutory doctrines."⁵¹ And nothing in the statutory language suggests that, if a delivering carrier already possesses the right to reach a designated third-party interchange facility, it can simply refuse. Indeed, accepting that idea would all but defeat the Seventh Circuit's holding that a receiving carrier can designate third-party facilities like the BRC's, since a delivering carrier could always refuse to "use its own contractual rights to use the BRC's facilities."⁵²

* * *

In sum, the Seventh Circuit held that CN can designate Clearing to receive interchange traffic from CP because it has the power to do so by contract, and the BRC "is willing to accept that traffic."⁵³ But even if CP were right that the court did not decide that ultimate issue, it would make no difference. As just explained, the court rejected all the arguments CP now offers against CN's right to designate Clearing. So either way, adopting CP's position would invite another vacatur on the same grounds.

⁵¹ *Wis. Cent.*, 20 F.4th at 295.

⁵² CP Post-Comment Br. 30.

⁵³ *Wis. Cent.*, 20 F.4th at 295.

B. CP misstates CN's position.

Having tried to whittle the court's decision down to nothing, CP turns around and accuses CN of using it to blow up interchange law. CP lists four "sweeping," "revolution[ary]" rules that CN "wrongly" attributes to the Seventh Circuit.⁵⁴ But all four are either explicit in the court's decision or mere restatements of existing law.

The first two deal with the free-transit and permissive-trackage-rights concepts just discussed.⁵⁵ As explained, the Seventh Circuit rejected CP's claims about those supposed rules, even though CP made these same arguments on appeal. In doing so, the court effected no fundamental change to interchange law—it was simply rejecting CP's attempts to craft new rules that justified its position.

The third supposedly mistaken rule is that "in determining reasonableness, the Board must consider the new location in a vacuum rather than relative to where the interchange would otherwise occur."⁵⁶ But while this *is* a correct statement of the law, as explained below, CN does not attribute it to the Seventh Circuit. Courts and the Board have long applied this exact rule, and (as CP elsewhere concedes) the Seventh Circuit did not disturb those decisions.⁵⁷

⁵⁴ CP Post-Comment Br. 4.

⁵⁵ *See id.*

⁵⁶ *Id.*

⁵⁷ *See infra* § II.C.1; Decision, *Norfolk S. Ry.—Pet. for Decl. Order—Interchange with Reading Blue Mountain & N. R.R.*, NOR 42078, 2003 WL 1963547, at *4 (STB served Apr. 29, 2003) ("when a carrier has the power to provide two or more options for interchanging traffic, each of which is independently reasonable, proper, and

Finally, CP disputes that the court recognized “a unilateral right to compel a change in interchange location.”⁵⁸ Indeed, CP accuses CN of arguing that “the receiving carrier could seemingly pick anywhere regardless of the burdens imposed on the delivering carrier.”⁵⁹ This is plainly untrue. CN’s position has always been that—as the agency has long held and other commenters agree—“the receiving carrier necessarily has the right to designate where it will accept cars in interchange,” provided it “does not impose unusual, unreasonable, or impossible operating hazards or require the delivering carrier to do work which properly belongs to the receiving carrier.”⁶⁰ As BNSF puts it, “a receiving carrier has a right to designate the facilities used for interchange, so long as the designation is not unreasonable.”⁶¹ CP itself recognizes this right elsewhere, asserting that CP can “designate its preferred interchange . . . for receipt of cars from CN.”⁶²

Thus, CN does not contend that the “burdens imposed on the delivering carrier” are irrelevant. The problem for CP is that these burdens are properly part of the *reasonableness* analysis—which CP forfeited.⁶³ That CP made the tactical

equal, it need not provide all such options to connecting lines but may instead offer only that option which best serves its own business interests”).

⁵⁸ CP Post-Comment Br. 4.

⁵⁹ *Id.* at 7.

⁶⁰ See *Kan. City S. Ry. v. La. & Ark. Ry.*, 213 I.C.C. 351, 359 (1935); CN Reply Comment 6–7 (collecting comments embracing this standard); CN Post-Comment Brief 19.

⁶¹ BNSF Comment 2.

⁶² CP Post-Comment Br. 31–32.

⁶³ See *infra* § II.B.

choice to bypass that issue in this proceeding does not mean other delivering carriers cannot raise it in the future.

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

A. CP's contradictory statements in the merger proceeding bar it from challenging Clearing's reasonableness here.

As CN has explained, the operating plan that CP presented for the critical Chicago terminal in the recently approved CPKC merger proposed that CP would continue to use BRC's Clearing Yard to interchange traffic with several Class I railroads, including CN. This reliance on Clearing to interchange with CN was proposed in CP's original October 2021 operating plan and reaffirmed in its May 2022 revised operating plan—both of which were verified by senior CP and KCS operating officers. Neither version of the operating plan suggested that CP might instead interchange with CN at Spaulding or provided any analysis of the impact of such a shift on Chicago operations or merger implementation. And as the Board knows, Chicago was a central focus of the merger proceeding, featuring extensive participation by Metra and a variety of Chicago-area stakeholders concerned about the impact of the merger on the Chicago area. But not once did CP indicate in that proceeding that it was planning or seeking future interchanges at Spaulding, let alone explain how the impact of adding a new interchange onto a Metra line in the Village of Bartlett would impact merger implementation.

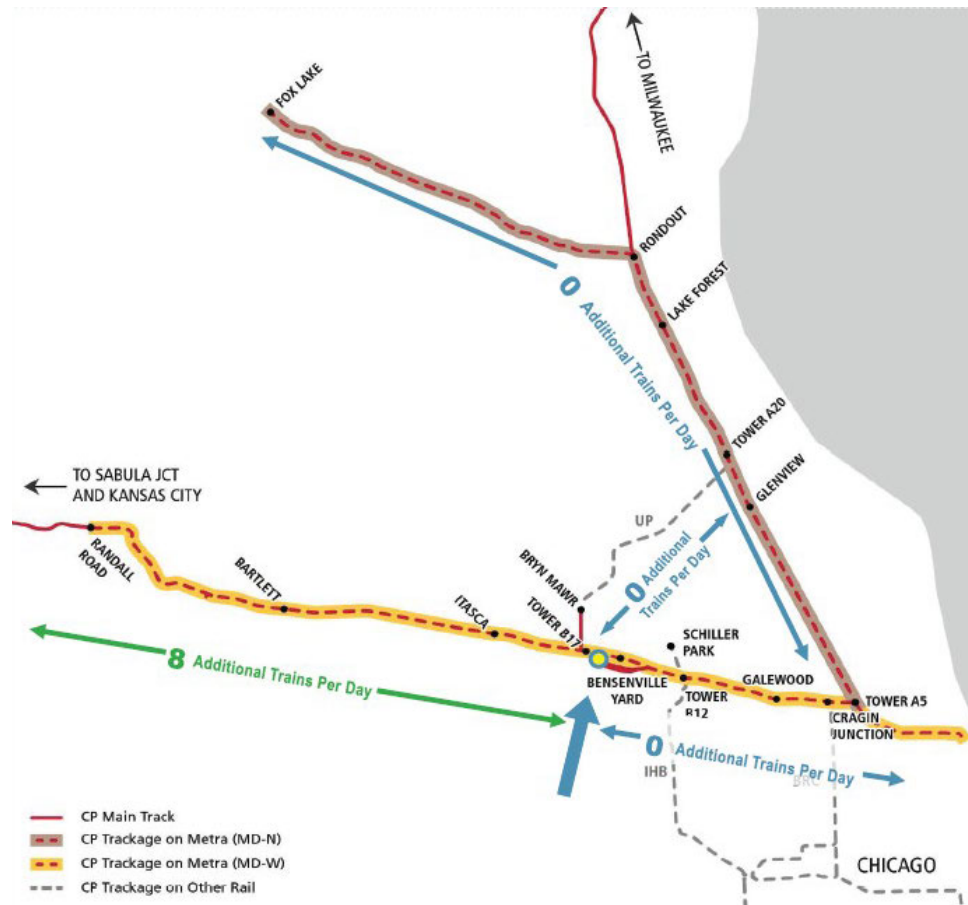
CP's only explanation for its about-face is a footnote claiming that its operating plan statements were unimportant because they just described current operations. But of course the operating plan also described plans for *future*

operations—both immediately post-closing and for the next three years. As CP testified, “[t]he operating plan is built to be the plan we use.”⁶⁴ CP did not hint in its operating plan that it was contemplating an interchange-point change in Chicago, let alone explain how moving CP-CN interchanges to a point on a Metra line that was a central focus of the merger proceeding might affect the impacts of the merger on that line. And CP’s footnote does not even try to explain away the extensive representations CP made about Chicago operations outside of the operating plan. For example, CP’s rebuttal evidence reiterated that “transfers to or from other railroads” would have “no impact on Metra’s operations whatsoever” because such interchange traffic would move on existing trains “to the BRC and NS” and not traverse Metra’s MD-W Line west of Bensenville.⁶⁵ Similarly, at the public hearing, CP insisted that the only new trains it would be adding in the Chicago terminal would be the eight freight trains of north-south traffic that it asserts the transaction would generate.⁶⁶ For example, its graphic depictions of “Chicago Area Capacity and Operations” depicted no changes to traffic on the Metra line through Spaulding except for eight through trains of merger-related growth traffic:

⁶⁴ Merger Hearing Transcript at 122:4–5 (testimony of R. Elphick); *see also id.* at 126:6 (testimony of K. Creel) (“We have a plan.”).

⁶⁵ *See* Applicants’ Response to Comments, *Can. Pac. Ry. Ltd.—Control—Kan. City S.*, Docket No. FD 36500 (filed July 29, 2022) (Applicants’ July 2022 Response), Reply Verified Statement of Raymond Elphick, ¶ 10 & n.6 (“Elphick V.S.”).

⁶⁶ Transcript of Hearing on the Proposed CP/KCS Merger, *Can. Pac. Rwy. Ltd.—Control—Kan. City S.*, Docket No. FD 36500, at 1663–64 (Oct. 6, 2022).

Figure 1: CP-KCS Hearing Map Illustrating Chicago Operations ⁶⁷

No mention was made at the hearing or anywhere in CP’s merger filings of the potential for CP to add a new daily roundtrip interchange train between Bensenville and Spaulding, which has not operated since August 2019. Nor was such an interchange train presented in the stringline plots CP presented in its

⁶⁷ Applicants’ Opening Presentation Slides at 37, Docket No. FD 36500 (filed Oct. 5, 2022); *see also id.* at 38 (stringline depiction of “CURRENT Plus transaction related increase in trains” showing no interchange trains to and from Spaulding); *cf.* Merger Hearing Transcript at 119:7–10 (describing Slide 38 as follows: “There are eleven freight trains depicted on the chart, three trains which exist today, and an additional eight trains anticipated from the merger”).

evidence or the RTC simulation that it performed purporting to show that its plan for Chicago was adequate.⁶⁸

The Board specifically relied on CP's representations about how it planned to operate in Chicago as grounds to reject a variety of conditions proposed by Chicago stakeholders.⁶⁹ CP should be held to those representations, including its operating plan representation that it would be conducting CN-CP interchanges at Clearing.⁷⁰ Indeed, CP's reversal here, after using those representations to successfully secure merger approval, is a textbook case for estoppel.⁷¹

B. By waiting years to challenge Clearing's reasonableness, CP forfeited the issue.

Three years ago, CN asked the Board to declare that it can designate Clearing to receive interchange traffic from CP, explaining specifically that "Clearing is a reasonable interchange location."⁷² From that moment in April 2020 until months after the Seventh Circuit's January 2022 remand, CP never disputed

⁶⁸ See, e.g., Applicants' July 2022 Response, Elphick V.S. ¶¶ 18–24 & Figures 5 & 6.

⁶⁹ See, e.g., Decision No. 35 at 115, *Can. Pac. Ry. Ltd.—Control—Kan. City S.*, Docket No. FD 36500 ("CPKC Approval Decision") (accepting CP-KCS "projection that the Transaction will add eight freight trains to the western segment of MD-W" and finding that this increase was unlikely to worsen Metra delays); *id.* at 169 (finding that OEA reasonably "relied on data provided by Applicants" in assessing environmental mitigation conditions requested by Chicago communities).

⁷⁰ See *id.* at 143 ("Given the scope of this merger and the fact that Applicants' many representations underlie critical Board findings regarding the Transaction's impact on service, competition, and the public interest, and the fact that the Board has relied on the entirety of the record in reaching its ultimate decision on the Application, the Board will impose a condition requiring Applicants to adhere to all representations made on the record in this proceeding.").

⁷¹ See CN Post-Comment Br. 17.

⁷² CN Pet. 4, 22.

that Clearing is reasonable. CP thus forfeited the issue under both the Board’s usual procedures and the appellate mandate rule.

CP responds that it “raised the issue of reasonableness throughout these proceedings.”⁷³ But if it had, it could easily cite the language doing so. It cannot, because it did not. CP says its May 2020 reply quoted “the reasonableness provision,”⁷⁴ but the interchange statute has just one sentence, and CP merely quoted it to lay out the “statutory requirement to provide interchange facilities.”⁷⁵ CP also says it argued that “Clearing imposes operational issues, costs and risks,”⁷⁶ but all those arguments appear in a section disputing whether CP should “be forced *to pay* for Clearing” as a matter of “fairness”—not whether the traffic should go there at all.⁷⁷ CP’s reply disputed whether *Spaulding* had “become an unreasonable interchange location,”⁷⁸ but arguing that Spaulding is reasonable is not the same as arguing that Clearing is not.

CP did not even challenge Clearing’s reasonableness in its first filing after the court’s remand. In response to CN’s explanation that only the who-pays question remains in the case, CP identified two other issues that supposedly

⁷³ CP Post-Comment Br. 13.

⁷⁴ *Id.*

⁷⁵ CP May 2020 Reply 7, 8.

⁷⁶ CP Post-Comment Br. 13–14.

⁷⁷ *See* CP May 2020 Reply 22–24 (emphasis added). The heading of this supposed reasonableness argument is this: “Under the guise of fairness, CN seeks to force CP to pay for the benefits of Clearing for CN to the detriment of CP.” *Id.* at 22 (initial capitals omitted).

⁷⁸ *Id.* at 16–17.

“precede” that question—neither of which was reasonableness.⁷⁹ If CP had always disputed reasonableness, it would be strange to omit that point in explaining “what issues should be addressed” on remand.⁸⁰

CP did not try to raise reasonableness until its March 2022 reply—months after the remand and almost two full years after CN’s original petition.⁸¹ That is far too late to dispute an issue that has been in the case since day one. Again, “the Board will not consider arguments or evidence that should have been submitted at an earlier stage.”⁸²

CP rejoins that new arguments are barred only on reconsideration.⁸³ CP apparently believes that, until a final decision, litigants before the Board are free to raise whatever issues they want, whenever they want, for any or no reason. That is wrong. “An argument not forcefully raised in a timely manner is generally waived.”⁸⁴ That does not mean the Board is a “prisoner of the part[ies]’ submissions”⁸⁵; it means the agency fosters fair and efficient litigation by discouraging delay and sandbagging.

⁷⁹ CP Mot. to Strike 3.

⁸⁰ *See id.* at 4.

⁸¹ *See* CP Reply to CN Post-Remand Br. 13.

⁸² Decision, *New Eng. Cent. R.R.—Trackage Rights Order—Pan Am S. LLC*, Docket No. FD 35842, 2018 WL 1989070, at *4 (STB served Apr. 24, 2018).

⁸³ CP Post-Comment Br. 14.

⁸⁴ Decision, *Can. Nat’l Ry. & Grand Trunk Corp.—Control—EJ&E W. Co.*, Docket No. FD 35087, 2008 WL 8139694, at *26 & n.61 (STB served Dec. 24, 2008); Decision, *Request for Waybill Data*, Docket No. WB 21-53, 2023 WL 157145, at *8 (STB served Jan. 10, 2023).

⁸⁵ CP Post-Comment Br. 14.

Indeed, while CP essentially asks the Board to forgive its forfeiture of this issue,⁸⁶ it offers no *justification* to do so. CP is a sophisticated party with capable counsel. It does not try to explain why it failed to raise the issue earlier, and it does not claim that anything has changed to justify new arguments now. And CP’s claim that “no resources are wasted” by allowing new arguments three years into the litigation⁸⁷ is baffling; the parties and the Board should not have to expend resources now to litigate an issue CP could have raised in 2020.

In any event, CP’s tardy reasonableness claim is also improper for an independent reason: The appellate mandate rule requires that remand proceedings address only (1) issues remanded by the court, (2) new issues arising after remand, and (3) issues “timely raised” in prior proceedings that “remain undecided.”⁸⁸ Thus, “parties cannot use the accident of remand as an opportunity to reopen waived issues.”⁸⁹ These principles apply equally in remands to administrative agencies.⁹⁰

As just explained, whether Clearing is reasonable is neither a timely raised issue nor a newly arising one. And contrary to CP’s assertions, the Seventh Circuit did not remand this issue by holding “that ‘reasonableness’ is one of the key

⁸⁶ *Id.* at 14–15.

⁸⁷ *Id.* at 14.

⁸⁸ *See United States v. Morris*, 259 F.3d 894, 898 (7th Cir. 2001); CN Post-Comment Br. 15.

⁸⁹ *Morris*, 259 F.3d at 898; *see, e.g., Mirfasihi v. Fleet Mortg. Corp.*, 551 F.3d 682, 685 (7th Cir. 2008) (“[A]lthough the Act was mentioned in the complaint, the objectors first sought to apply it . . . after our first remand. That was too late.”)

⁹⁰ *See Wilder*, 153 F.3d at 803; *Mangum v. Hallembaek*, 910 F.3d 770, 776 & n.3 (4th Cir. 2018) (collecting cases).

questions in this dispute.”⁹¹ The court merely noted that reasonableness is one of “three distinct questions [that] *could* require resolution” in an interchange dispute.⁹² The court said nothing about whether the issue required resolution here, let alone whether CP had properly preserved it.

To be sure, these principles are not iron-clad. But again, CP has offered the Board no “compelling reason to depart” from them.⁹³ CP asserts no change in law, identifies no argument that was previously unavailable to it, and offers no excuse for its failure to raise the issue before. On this record, excusing CP’s forfeiture would be improper.⁹⁴

Finally, CP says the public comments mean the Board must consider whether Clearing is reasonable.⁹⁵ That makes no sense. The comments are not about whether Clearing is reasonable. Indeed, per the Board’s instruction that comments “should not address the specific facts of this case,”⁹⁶ the comments are not about “the immediate dispute between CN and CP” at all.⁹⁷ As to reasonableness, the comments address only the standard *in general* (the operational aspect of which

⁹¹ CP Post-Comment Br. 16.

⁹² *Wisc. Cent.*, 20 F.4th at 294 (emphasis added).

⁹³ *See Wilder*, 153 F.3d at 803.

⁹⁴ The rule that the Board may “receive new evidence and argument on remand,” CP Post-Comment Br. 15, is irrelevant. The Board is free to accept new arguments *on the issues that remain open on remand*—not to rule on issues beyond the remand’s scope.

⁹⁵ *Id.*

⁹⁶ October 2022 Order Soliciting Public Comments 5 n.4.

⁹⁷ *See* NSRC Opening Comment 3 n.1; BNSF Comment 1 (“BNSF takes no position on the merits of the dispute between CP and CN”).

they all agree on⁹⁸). No commenter suggested that Clearing is unreasonable as between CN and CP, that the Board must decide that question to resolve this dispute, or that CP preserved the issue by raising it earlier.

Thus, refusing to excuse CP's forfeiture does not mean "ignor[ing] public comments"⁹⁹; it means recognizing that not every abstract legal issue discussed in the comments needs to be decided in order to resolve the remaining question in this adjudication on remand.¹⁰⁰ Even in a rulemaking, an agency may disregard comments that go "beyond the scope of" the proceeding.¹⁰¹ Likewise, an agency need not address comments that go beyond the issues necessary to resolve an adjudication.¹⁰² Just as "*amici* are powerless to revive an argument the parties failed to preserve,"¹⁰³ the happenstance of the public comments is not grounds to relieve CP of the consequences of its own tactical choices in this adjudication.

⁹⁸ See BNSF Comment 2 ("In making the [interchange] designation, the receiving carrier must 'not impose unusual, unreasonable, or impossible operating hazards or require the delivering carrier to do work which properly belongs to the receiving carrier.'"); ASLRRA Comment 6 (same); NSRC Opening Comment 11 n.9 (same); CN Opening Comment 5 (same); CP Opening Comment 8 (same).

⁹⁹ CP Post-Comment Br. 15.

¹⁰⁰ See CN Opening Comment 4–6.

¹⁰¹ See *NTCH, Inc. v. FCC*, 950 F.3d 871, 881 (D.C. Cir. 2020).

¹⁰² CP cites no authority suggesting that an agency adjudication must reach and decide every issue that a commenter happens to mention. See CP Post-Comment Br. 15 (CP "is aware of no doctrine" on this question).

¹⁰³ *Food & Water Watch v. FERC*, 28 F.4th 277, 290 (D.C. Cir. 2022) (emphasis added).

Nor does the Board’s order soliciting the comments purport to revive this issue.¹⁰⁴ That the Board sought input on “the potential impacts of different approaches” does not mean all eight of the questions the Board listed necessarily need to be resolved to decide this case.¹⁰⁵ For example, the Board also asked about “other statutory provisions” like 49 U.S.C. § 10705(a)(2).¹⁰⁶ No one thinks that means the Board must address § 10705 now.

The Board should thus confirm that CP forfeited this issue. Whatever power the Board enjoys to excuse forfeitures or go beyond the parties’ arguments,¹⁰⁷ CP has offered no reason to do so here.

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

Even setting aside CP’s contradictory sworn statements and forfeitures, Clearing is a reasonable interchange point.¹⁰⁸ As the delivering carrier, CP bears “the burden . . . to show that [this] point is ‘unusual, unreasonable, or impossible.’”¹⁰⁹ But it never acknowledges that burden, and its arguments on this issue are legally and factually wrong.

¹⁰⁴ See CP Post-Comment Br. 14.

¹⁰⁵ October 2022 Order Soliciting Public Comments 4.

¹⁰⁶ *Id.* at 5.

¹⁰⁷ See *id.* at 14.

¹⁰⁸ CN Post-Comment Br. 19–21; CN Opening Comment 8–11.

¹⁰⁹ *Reading Blue Mountain*, 2003 WL 1963547, at *4; see also NSRC Opening Comment 14 (delivering carrier “retains the burden of demonstrating the choice is unreasonable”).

1. CP misstates the law governing reasonableness.

On the law, CP makes four errors. *First*, CP says reasonableness requires a comparative analysis—is “Clearing [] unreasonable as compared to Spaulding”?¹¹⁰ But CP can’t get its story straight. It says this comparative analysis is part of the “Seventh Circuit’s framework for reasonableness.”¹¹¹ But it elsewhere concedes that the court “in no way constrained the reasonableness determination” and “did not offer any guide to ‘reasonableness[,]’ so prior precedent is undisturbed.”¹¹² That concession is correct. Precisely because CP did not dispute reasonableness until after remand, that issue was not presented on appeal and the court had no reason to opine on the correct standard, let alone to reject long-standing precedents.

And those undisturbed precedents rebut CP’s claim. As the D.C. Circuit explained in *Burlington Northern*, “courts have long recognized that when a carrier has the power to provide two or more options for interchanging traffic, each of which is *independently* reasonable, proper, and equal, it need not provide all such options to connecting lines but may instead offer only that option which best serves its own business interests.”¹¹³ And the Board has recited and applied the same standard multiple times,¹¹⁴ including in the prior proceeding between CN and CP about the

¹¹⁰ See CP Post-Comment Br. 5.

¹¹¹ *Id.* at 16.

¹¹² *Id.* at 12, 21; see also CP Reply Comment 4 (noting that the court “offered no guidance” on “whether particular facilities are reasonable” “on the facts of this case or otherwise”).

¹¹³ *Burlington N. R.R.*, 731 F.2d at 40 (emphasis added).

¹¹⁴ See *Reading Blue Mountain*, 2003 WL 1963547, at *4.

Chicago interchange location. In holding Kirk Yard unreasonable, the Board rejected a comparison to Spaulding—exactly what CP urges here—explaining: “[I]n general, the reasonableness of a given interchange point is determined by its own characteristics. A railroad may, therefore, have more than one reasonable interchange point.”¹¹⁵

Nor does the statutory text, which CP never addresses, contemplate a comparative analysis. Interchange facilities need only be “reasonable, proper, and equal”—not “more reasonable” or “most reasonable” or “best.”¹¹⁶ And CP is wrong to claim that every other commenter endorses its comparative approach.¹¹⁷ As BNSF explained: “The fact that interchange can be accomplished at one interchange point does not mean that the receiving carrier cannot select another reasonable interchange point.”¹¹⁸ CN’s position on this issue is “unique”¹¹⁹ only if one ignores court rulings, agency decisions, public comments, and the statute itself.

Second, CP says the reasonableness analysis “must include” whether CP “will be required to pay a third party to use Clearing.”¹²⁰ That is, CP again urges the Board to repeat the same error the Seventh Circuit already identified: Smuggling

¹¹⁵ Decision, *Soo Line R.R.—Pet. for Decl. Order & Prelim. Inj.—Interchange with Can. Nat’l Ry.*, No. FD 36299, 2019 WL 7484084, at *4 (STB served Nov. 29, 2019).

¹¹⁶ 49 U.S.C. § 10742.

¹¹⁷ CP Post-Comment Br. 16.

¹¹⁸ BNSF Opening Comments 2.

¹¹⁹ CP Post-Comment Br. 16.

¹²⁰ *Id.* at 2; *see id.* at 21 (arguing that “if CP[] must pay the BRC in order to deliver cars at Clearing, Clearing is not reasonable”).

the answer to the who-pays question into the analysis of a logically antecedent question about where interchange will occur. As already explained, the Seventh Circuit made clear that the question of “who pays the third party” arises only “if [the answer is] yes to both” of the prior questions (right to designate and reasonableness).¹²¹ And that makes sense. Because a Board ruling that an interchange point is unreasonable prevents the receiving carrier from designating it, CP’s approach would prevent a receiving carrier from choosing an otherwise reasonable interchange point *even if* it were willing to pay the third-party costs involved.

CP responds that the Seventh Circuit cannot have mandated analyzing these questions separately because the court did not “constrain[] the reasonableness determination.”¹²² That is only half right. True, the court did not consider how the Board should determine whether a location is reasonable—which is precisely why CP is wrong to claim the court required a comparative approach to that question. But the court explicitly held that reasonableness and “who pays the third party” are separate questions, and that “the Board erred” by conflating them.¹²³ So again, CP’s argument amounts to an invitation to make the same error twice.

¹²¹ *Wisc. Cent.*, 20 F.4th at 294–95.

¹²² CP Post-Comment Br. 21.

¹²³ *Wisc. Cent.*, 20 F.4th at 294–95.

Third, CP notes that the agency “has long considered costs to the delivering carrier” in applying the interchange statute.¹²⁴ But CN does not contend that the reasonableness analysis excludes all cost considerations. The issue here is narrower: As the court said, the question is when to address “who pays the third party,” and the court’s answer was clear: After deciding the other issues.¹²⁵ The court did not address *operational* costs—like the costs of allocating crews and locomotives or the costs of network congestion from additional interchange trains and interchange operations—which are part and parcel of the reasonableness analysis.

Fourth, CP points to the “free-transit rule” again.¹²⁶ It is unclear why CP now tries to shoehorn this point into the reasonableness analysis. Until now—and even elsewhere in the same brief—CP has framed the “free-transit rule” as affecting whether CN has a right to designate Clearing in the first place, not whether Clearing is reasonable.¹²⁷ Indeed, this was the crux of CP’s earlier arguments and the Board’s now-vacated decision about the limited “right and obligation of the receiving carrier to designate an interchange point.”¹²⁸ Perhaps CP is trying to resurrect a rule the Seventh Circuit specifically rejected by smuggling it into a

¹²⁴ CP Post-Comment Br. 20 (citing *N.Y., Chi., & St. Louis R.R. v. N.Y. Cent. R.R.*, 314 I.C.C. 344, 345–46 (1961)).

¹²⁵ *Wisc. Cent.*, 20 F.4th at 295.

¹²⁶ CP Post-Comment Br. 21–22.

¹²⁷ *See, e.g.*, CP May 2020 Reply 1; CP Post-Comment Br. 9–10.

¹²⁸ *See* 2020 Board Decision 5–9; CP May 2020 Reply 1.

different prong of the analysis. Regardless, as explained above, the court did reject this rule.¹²⁹

In sum—and if the issue is not foreclosed already—CN is entitled to choose the interchange point that “best serves its own business interests,” and CP bears the burden to show that Clearing is not “independently reasonable, proper, and equal.”¹³⁰

2. Under the correct analysis, Clearing is a reasonable interchange point.

On the facts, CP’s arguments are no stronger. *First*, CP says interchanging with CN at Clearing “[d]isadvantages” CP.¹³¹ This claim should be received with extreme skepticism. In the first place, CP’s merger operating plan contemplates future interchanges at Clearing—strong evidence that CP does not believe that it is operationally disadvantaged. Moreover, the Board can exercise its common sense to recognize the clear advantage to CP of interchanging traffic with CN by placing that traffic on the trains that CP is already running to Clearing, as opposed to dedicating a separate daily train start for Spaulding interchanges, as CP did until August 2019. CP’s suggestion that it derives no benefit from canceling the Spaulding train starts is nonsense—CP plainly benefits from repurposing the crew and power that otherwise would be used for Spaulding interchanges to other assignments.

¹²⁹ See *supra* § I.A.3.

¹³⁰ *Burlington N. R.R.*, 731 F.2d at 40.

¹³¹ CP Post-Comment Br. 17.

Even assuming CP suffers some “[d]isadvantage[]” from interchanging at Clearing, a mere disadvantage compared to another interchange point is not legally relevant. Indeed, one carrier’s preferred interchange point as the receiving carrier may very well *not* be the preferred interchange point for the delivering carrier. Section 10742 addresses this tension by giving the receiving carrier the right to make the call, within reason. CP enjoys this same right for traffic it receives.

By contrast, CP’s “reasonableness” argument turns on its *preference* to interchange traffic with CN at Spaulding because allegedly that would be best for *CP’s business* (e.g., it may lower CP’s costs or increase “fluidity at Bensenville Yard” to CP’s benefit).¹³² But again, CP has no right to *deliver* traffic at its preferred interchange point—it is the *receiving carrier*, CN, that can choose its preferred interchange location.

In fact, CP’s argument proves that its view of reasonableness is upside down. CP says CN should not be allowed to “(1) put [CP’s] own operational fluidity at risk and (2) . . . foist the costs of providing an interchange on to [CP],” but the *exact same thing* would occur in reverse if the parties created a new interchange at

¹³² *Id.*; see *id.* at 18, n.3 (explaining that CP “has never contended that Clearing Yard is physically impossible” but “the interchange at Spaulding ... is free and better protects fluidity of operations in CPKC’s Bensenville Yard”). The interchange at Spaulding is not “free” for CP, however; it requires CP to use its own crews (at its own cost) to switch the cars at Bensenville Yard; at Clearing, the BRC would conduct the switching instead, saving CP the cost of its own labor in exchange for the BRC switching fee. Either way, the delivering carrier (CP) is obligated to cover the cost of the interchange, whether it is its own crews doing the switching or a third party—just as CN pays for the CP-bound traffic it delivers to Clearing. See CN Post-Remand Reply to Reply 9.

Spaulding—it would “put [CN’s] own operational fluidity at risk” and “subsidize [CP’s] operations by allowing [CP] to foist the costs of providing an interchange on to [CN].”¹³³

Moreover, CP’s description of the purported benefits of interchanging at Spaulding does not account for the even greater disadvantages and unfair costs of doing so for CN and its customers, Metra, and the surrounding communities. As CN has explained in this proceeding and in Finance Docket No. 36299, receiving CP traffic at Spaulding caused significant operational problems on CN’s mainline (e.g., blocking CN’s single-track mainline, which slowed or stopped traffic on CN’s line in the busy Chicago area). It also led to significant grade blockages at three crossings that dramatically impacted the surrounding communities. And it resulted in CN unfairly bearing the lion’s share of the work and the costs of the interchange, because CN had to travel 80 miles between Spaulding and Kirk Yard twice for each interchange because CN classifies the interchange traffic at Kirk Yard.¹³⁴

Because the facilities at Spaulding are inadequate, CN’s main line would be blocked several times during every interchange event with CP traffic, including for safety-critical activities like air brake tests required by Federal Railroad

¹³³ CP Post-Comment Br. 25; see Exhibit 1, Verified Statement of Nicholas Clark, at 3–5 (“Clark V.S.”).

¹³⁴ See CN’s Reply to Petition for Declaratory Order, *Soo Line R.R.—Petition for Declaratory Order & Preliminary Injunction—Interchange with Can. Nat’l*, Docket No. FD 36299, at 13–16 (filed May 20, 2019); CN Pet., Verified Statement of William Albritton; Clark V.S. at 5.

Administration regulations.¹³⁵ The timing and length of these blockages were not consistent or predictable. This disrupted the operations on CN’s single-track mainline, which is crossed at interlockings by Metra and Amtrak at several locations.¹³⁶ And the resulting blocked grade crossings so harmed the surrounding the community that local leaders from the Village of Bartlett begged that the Board “**NOT** require the railroads to continue interchanging at Spaulding.”¹³⁷ Since interchange operations have moved to Clearing, the communities have experienced a “noticeable decrease” in blocked crossing complaints, and the benefits of interchanging at Clearing have been echoed by other constituents, as well—Metra, municipal governments, fire departments, and business leaders all have urged the Board to keep the interchange activity out of Spaulding.¹³⁸

Moving the interchange to Clearing has proven to be operationally successful and a solution to the problems occurring at Spaulding.¹³⁹ In particular, CN and CP

¹³⁵ See Clark V.S. at 5.

¹³⁶ See CN Petition for Declaratory Order, Docket No. FD 36397, at 5–9 (filed May 14, 2020); Clark V.S. at 4.

¹³⁷ *Id.* at 6 (quoting Letter from K. Wallace to C. Brown, Docket No. FD 36299, at 1 (filed May 17, 2019)) (detailing the challenges of blocked crossings in the Village and the history of complaints regarding blockages at West Bartlett, Stearns, and Spaulding Roads); see also Letter of Hanover Township, Docket No. FD 36397 (filed Feb. 23, 2022) (“Keeping the interchange out of Bartlett, would continue to improve traffic flow, and it would increase the safety of our residents west of the track, giving them better access to police, fire and ambulance services. Since the interchange has been moved our constituents and emergency services have noticed a significant difference.”).

¹³⁸ *Id.* at 9; CN Post-Comment Br. 21.

¹³⁹ Clark V.S. at 5–6.

have successfully interchanged the traffic that previously moved through Spaulding at Clearing for the past three-and-a-half years. This is no surprise, as Clearing has served as an interchange point between CP and CN for years and has many advantages to Spaulding, with a hump yard, more space, and more resources to easily classify and switch the cars CP delivers to CN.¹⁴⁰

Second, CP suggests that recent congestion at Clearing makes Spaulding more attractive. But as CN's Nicholas Clark, Assistant Vice President, Southern Region, explains in his attached Verified Statement, the recent congestion and increase in volumes at Clearing is a temporary issue that resulted from a series of unexpected and unfortunate events—including two major derailments, a third smaller derailment, and a serious injury to a BRC employee—and some spillover congestion from other parts of the network in Chicago.¹⁴¹ This rare, temporary congestion has not materially affected CN's and CP's ability to interchange effectively at Clearing.

CP does not claim that the BRC has not been effectively interchanging CP-CN traffic at Clearing, or that CP-CN interchanges have any material impact on overall BRC congestion. They plainly do not—the total CP-CN interchange volume at Clearing is about } of Clearing's total average volume.¹⁴² CP simply says that it “prefers” Spaulding with its “idiosyncrasies” to BRC, because Spaulding

¹⁴⁰ *See id.* at 7–8.

¹⁴¹ *Id.* at 2.

¹⁴² *Id.* at 3.

interchanges allegedly make it easier to alleviate backups in Bensenville.¹⁴³ But CP's preference does not limit CN's ability to select an "independently reasonable" location to receive interchange traffic.¹⁴⁴ And what CP euphemistically describes as "idiosyncrasies" of Spaulding interchanges are significant, demonstrated congestion to CN's single-track main line; substantial grade crossing blockages in local communities; and interference that Metra has decried.¹⁴⁵ CP may well see these harms to CN, the communities, and Metra as irrelevant to its interests. But they are ample reason for CN to have exercised its statutory right as receiving carrier to select Clearing as a reasonable interchange point.

Third, CP argues that Clearing is unreasonable because interchanging there requires it to pay the BRC's switching fees, which it would not have to pay at Spaulding. But even setting aside that this argument improperly conflates separate issues, as explained above, it relies on a false comparison. The switching fees charged by the BRC cover the costs of the switching work that CP crews otherwise would have to do at CP's cost. CP would still have to cover these costs if the parties interchanged at Spaulding; it would just do so using its own crews, locomotive, and yard resources instead of the BRC's. CP says it "*prefers* to use its own crews and

¹⁴³ CP Post-Comment Br., Verified Statement of John Kay ¶ 8.

¹⁴⁴ *Reading Blue Mountain*, 2003 WL 1963547, at *4 (quoting *Burlington N.*, 731 F.2d at 40).

¹⁴⁵ See CN Post-Remand Reply to Reply 9–11; Metra April 2022 Comment 2–6.

equipment,” but again, that kind of preference does not carry CP’s burden to show that interchanging at Clearing is unusual, unreasonable, or impossible.¹⁴⁶

III. Under the BRC Operating Agreement, precedent, and industry custom, CP should pay its fair share of the BRC’s fees.

On the final question remaining in this case—who pays the BRC’s fees?—the BRC Operating Agreement, industry practice and precedent, and basic fairness all point to the same answer: CP should pay for the traffic it delivers, just as CN pays for the traffic it delivers.¹⁴⁷ CP’s contrary arguments lack merit.

First, CP disputes that “the BRC Operating Agreement ties the Board’s hands such that it must require CP to bear” the BRC’s switching fees.¹⁴⁸ But CN’s position is simply that the Board should adhere to its longstanding practice of respecting voluntary agreements among carriers governing interchange arrangements, and the BRC Operating Agreement is such a contract.¹⁴⁹

CP also says the Operating Agreement only addresses “who gets billed and cuts the check in the first instance, not how those burdens get allocated among the carriers involved.”¹⁵⁰ That is not a real distinction. If Party A signs a contract

¹⁴⁶ CP Post-Comment Br. 22 (emphasis added). Moreover, this alleged “preference” is at odds with CP’s statements in the merger proceeding that its plan was to use the BRC not only for CN interchanges but also for all interchange traffic with CSX and BNSF. CP Am. Operating Plan ¶ 27 (“From Bensenville, CP operates two interchange trains daily in and out of the BRC’s Clearing Yard via BRC’s Kenton Line Subdivision. These trains include all of CP’s traffic going to and from CN, BNSF, and CSX.”).

¹⁴⁷ See CN Post-Comment Br. 21–27.

¹⁴⁸ CP Post-Comment Br. 26.

¹⁴⁹ See CN Post-Comment Br. 22.

¹⁵⁰ CP Post-Comment Br. 27.

saying Party B will bill Party A for a service, and Party A is responsible for paying those bills—and the contract says nothing else on the subject—Party A has agreed to be responsible for those costs. Likewise, while CP claims the Operating Agreement does not mean it has “accepted interchange along with those costs,”¹⁵¹ nothing in the Agreement’s language distinguishes among traffic delivered to Clearing by agreement and traffic delivered pursuant to the receiving carrier’s statutory designation. Either way, the traffic is “delivered to the BRC at Clearing Yard by an inbound line haul carrier for an outbound line haul carrier.”¹⁵²

In the same vein, CP insists that “nothing in the BRC Operating Agreement prohibits carriers from entering into a reimbursement agreement.”¹⁵³ That is true, but irrelevant—aside from the Interim Agreement, which merely maintains the *status quo* during this litigation, no such separate contract exists.¹⁵⁴ Whatever the parties might decide in the future about “how th[e] burdens get allocated among the carriers involved,” the BRC Operating Agreement currently has the bill going to CP.

CP also deems it “[n]otabl[e]” that no public comments “support CN’s argument that the BRC Agreement decides CN[s] claims.”¹⁵⁵ But as CP well

¹⁵¹ *Id.* at 26.

¹⁵² *See* CN Post-Comment Br. 22.

¹⁵³ CP Post-Comment Br. 27.

¹⁵⁴ CP says the Seventh Circuit “instructed” the Board to “address itself the cost allocation issue,” CP Post-Comment Br. 26, but the court said nothing that would prevent the Board from deciding that issue based on the parties’ contractual arrangement—indeed, the court emphasized the importance of contracts in this area.

¹⁵⁵ *Id.* at 28.

knows, the Board instructed the commenters not to address this specific dispute, and they respected that instruction. Since the comments don't address this issue *at all*, their silence is hardly noteworthy.

Second, CP invokes the statutory word “provide.”¹⁵⁶ But here again, CP conflates the discrete issues the Seventh Circuit said must be kept separate. CP says that *if* “the BRC Operating Agreement requires [CP] to bear the cost of CN’s designation of Clearing, then CN has [not] met its statutory obligation to ‘provide’ interchange facilities.”¹⁵⁷ That is just another spin on CP’s argument that the Board should decide the right-to-designate question based on the who-pays question. The Seventh Circuit’s decision prohibits that approach.

For that matter, the interchange statute has always required the receiving carrier to “provide” (or, originally, “afford”) interchange facilities. Yet the Supreme Court long ago noted that “usually when interchange is effected by means of an intermediate carrier, the delivering carrier bears the cost of switching.”¹⁵⁸ That is, the “general practice” was long that delivering carriers “make delivery on the rails of their connections, either direct or by bearing the charges of the intermediate switching line.”¹⁵⁹ It is hard to understand how that could be the case if CP’s statutory reading were correct. CP has previously argued that these authorities

¹⁵⁶ *Id.* at 26.

¹⁵⁷ *Id.*

¹⁵⁸ *Baltimore & Ohio R.R. v. United States*, 277 U.S. 291, 301 (1928).

¹⁵⁹ *Kan. City S.*, 213 I.C.C. at 356; *see also* CN Post-Comment Br. 24 (collecting cases).

address carriers without direct physical connections, but as the Seventh Circuit explained, the statute recognizes no such distinction—the text is the same for every kind of connection.

Third, CP invokes the free-transit and permissive-trackage-rights concepts discussed above. Those arguments fail for the reasons already discussed.¹⁶⁰

Fourth, CP’s fairness arguments essentially repeat its claims about reasonableness: Since CN benefits from the move to Clearing, CN should have to bear the costs. But again, a receiving carrier has the *right* to choose an otherwise-reasonable interchange point that best serves its own business interests, including a third party’s facilities. That right would be insubstantial if it always came with a price tag. CP also says CN should have to pay for the traffic CP delivers because, while CN also pays for the CP-bound traffic it delivers to Clearing, CP only agreed to accept that traffic there as a “compromise.”¹⁶¹ But CP still *agreed*—it could “insist on receiving cars at Spaulding” if it wanted to.¹⁶² Having agreed to accept traffic from CN at Clearing, at CN’s expense, CP cannot fairly contend that CN must pay for the traffic CP delivers there too.

Finally, CP’s policy arguments are baseless. CP paints a dramatic picture of a rogue receiving carrier imposing “disadvantageous switching fee[s] and then forc[ing] the delivering carrier to pay [them],” after which other carriers follow suit

¹⁶⁰ *Supra* § I.A.3.

¹⁶¹ CP Post-Comment Br. 31.

¹⁶² *Id.*

and “‘chaos’ and ‘havoc’ ... ensue.”¹⁶³ While exciting, this depiction overlooks that interchange between carriers is almost always characterized by mutual agreement and exchange. If a receiving carrier arbitrarily designated an interchange location with unjustifiable costs, the delivering carrier could do the same for traffic moving in the other direction. This dynamic naturally constrains each carrier’s behavior.

For that matter, CN does not contend that every delivering carrier must always bear any third-party costs, no matter how burdensome—only that, consistent with industry practice, CP has agreed in the BRC Operating Agreement to pay the BRC’s reasonable and appropriate switching fees in this case. No matter how many times CP uses the word “unilateral,”¹⁶⁴ the fact remains that it voluntarily entered into the BRC Operating Agreement, which covers these fees.

CONCLUSION

The Board should hold that CP is responsible for paying the agreed fees under the BRC Operating Agreement for CP-CN interchange traffic that CP delivers to Clearing, including the past fees that CN paid under the Interim Agreement.

Alternatively, the Board should implement the Court’s ruling by recognizing CN’s power to designate Clearing Yard for interchange and let the parties address any contractual cost-allocation issues elsewhere.

¹⁶³ *Id.* at 32–33.

¹⁶⁴ *Id.* at 33.

Respectfully submitted,

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May 11, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of May 2023, I caused a copy of the foregoing document to be served by U.S. Postal Service or more expeditious means upon the service list for Finance Docket No. 36397.

/s/ Matthew J. Warren
Matthew J. Warren

EXHIBIT 1

Verified Statement of Nicholas Clark

**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 NICHOLAS CLARK

My name is Nicholas Clark, and I am Assistant Vice President, Southern Region, at CN. I joined CN in 2012 as a supervisor railroader, eventually becoming a trainmaster, and then moving into senior management roles in 2014, serving as Assistant Superintendent, Executive Transportation Office, Superintendent, Director of Strategy, and General Manager for the Central Division prior to stepping into my current appointment in April 2023. I am responsible for overseeing all CN rail operations in the United States. I am familiar with CN's former interchange operations with Canadian Pacific ("CP") at Spaulding and the Belt Railway's Clearing ("BRC") Yard, as well as CN's negotiations with CP regarding the location of the CN-CP interchange in the Chicago area.

In this Verified Statement, I explain why the recent and temporary congestion issues at Clearing raised by CP are unrelated to CP-CN interchange volumes and do not make Clearing an unreasonable interchange point; I contrast the excessive and unfair costs, as well as the operational and competitive disadvantages, imposed on CN to previously interchange CP's traffic at Spaulding,

with the reasonable and fair costs required of both railroads to interchange its traffic at Clearing; and I confirm that Clearing continues to be a reasonable interchange point for CN's receipt of CP traffic.

A. The Recent and Temporary Congestion Issues at Clearing Are Not Related to CP-CN Interchange Volumes and Do Not Make Clearing an Unreasonable Interchange Point.

I understand that CP's recent filing with the STB argued that recent congestion and increases in volumes at Clearing indicate that Spaulding would be a better interchange point for CP and CN to use in Chicago. I do not agree. It is true that in recent months BRC has seen increased volumes and congestion. But that congestion is temporary, has clear and addressable causes, and has not changed the fact that Clearing is a reasonable location for CN-CP interchanges.

Recent congestion at Clearing is the confluence of multiple factors. First, BRC has experienced several recent adverse operating events, including two major derailments on BRC lines, a third smaller derailment on BRC lines, and a serious injury to a BRC employee. Second, BRC has also been impacted somewhat by congestion issues on other Class I railroads that have spilled over onto the BRC. This confluence of events has caused some disruptions to the BRC's operations, and a ripple effect of delays and congestion for traffic moving through the BRC.

Despite these challenges, BRC continues to effectively interchange CP-CN traffic. We have seen some occasional delays, but they are understandable in light of the challenges that BRC is working through. I would note that we have seen very few service issues with the BRC during the last four years we have been interchanging CP traffic with the BRC at Clearing.

I understand that the BRC is working to recover from the situation and return to its usual fluidity. Any interchange point would experience similar unexpected problems at certain times, but such temporary problems do not mean the interchange point suddenly becomes unreasonable, much less permanently unreasonable.

In discussing Clearing, it is worth noting that CN-CP interchange traffic is a tiny fraction of what BRC handles. CP interchanges only an average of

{ } with CN at Clearing, and { } have remained steady over time.

That is a mere { } of the total average volume that moves through Clearing on a daily basis. CN-CP interchange volumes do not cause congestion at Clearing.

B. Interchanging at Spaulding Required CN to Bear Extra Costs and Operational and Competitive Disadvantages, Whereas Interchanging at Clearing Simply Requires Both Railroads to Pay Their Fair Share.

The same cannot be said for the impact of those { } interchange cars at Spaulding, where interchanges historically interfered with CN single-track main line operations, local grade crossings, and Metra commuter operations. As my colleague William Albritton explained in his April 2020 Verified Statement in this proceeding, interchanging CP's traffic at Spaulding required CN to bear unfair extra costs and imposed operational and competitive disadvantages on CN as the receiving carrier. In particular, interchanging CP traffic at Spaulding frequently blocked CN's single-track main line in order to place or pull interchange traffic for extended periods of time. The nearly daily blocking of CN's single-track main line caused congestion problems by deteriorating fluidity on CN's network and on the

broader rail network in Chicago and beyond. This interchange activity also resulted in frequent and frustrating blocked at-grade crossings in the surrounding communities.

In the busy Chicago area, capacity on CN's former EJ&E single-track main line is in high demand. This busy single track mainline is crossed at interlockings by Metra and Amtrak at several locations. There are increased Metra commuter trains during morning and evening rush hour, which mean that fewer freight trains are able to operate during those times. CN's single-track main line also crosses the lines of other Chicago railroads. Because of various interlocking agreements,¹ CN's operating windows are already time-constrained in order to facilitate timely Metra and Amtrak operations. The Spaulding interchange operations further limited the number of runs CN could complete in a day because of the interference it caused on CN's single-track main line and thus further impaired the fluidity of CN's network in the Chicago area.

The nature of CN's largely single-line system also means that there are days on which CN could not allow interchange operations to occur at Spaulding, because of the priority that must be given to trains moving over the system. On other occasions, CN had to limit the amount of time CP could spend on the line conducting operations, which could result in CP only being able to pull a portion of

¹ An interlocking system is a set of signals that prevents trains from conflicting movements through an arrangement of tracks, such as junctions or crossings, allowing trains to receive authority to proceed when routes have been detected to be safe. In the Chicago region, railroads have interlocking agreements that govern when a railroad may cross the tracks of another railroad.

the traffic slated for interchange on that day. This caused delays for the interchanged traffic.

As was explained in prior filings in this proceeding, the limited interchange facilities at Spaulding meant that interchanges there necessarily blocked CN's main line and local at-grade crossings. Specifically, CN only has siding tracks on each side of its single-line main where it delivered to CP, and CP only has a small-sized yard of four tracks where CP delivered to CN. When the railroads doubled up to perform the air brake test required by Federal Railroad Administration regulations, up to three at-grade crossings were occupied. Needless to say, no blocking or switching activity could be done at Spaulding by either railroad given the limited facilities at that location. This means that, to facilitate interchange at Spaulding, CN had to block and switch Spaulding interchange traffic at its closest classification yard, which is Kirk Yard. Kirk Yard is 80 miles from Spaulding, on the east side of Chicago. This resulted in CN having to haul both CN-to-CP interchange traffic and CP-to-CN interchange traffic across Chicago, to and from Kirk Yard, for blocking and switching.

By contrast, interchanging at Clearing more equally and fairly distributes the burden of interchange between the two carriers. CN would still be completing the bulk of the work—for example, under the Interim Agreement, CN still switches CP-bound traffic at Kirk and hauls that traffic to the BRC for interchange with CP. However, receiving CP's traffic at Clearing avoids the many significant problems (and related expenses) for CN's network and its customers, Metra, and the adjacent

communities caused by interchanging that traffic at Spaulding. By moving the interchange point to Clearing in August 2019, significant improvement in network fluidity has been gained. Particularly in the busy Chicago area where resiliency and improved fluidity are critical, it is important for each receiving carrier to alleviate such chokepoints where feasible.

The BRC is one of the best ways to do that. While the BRC charges fees to facilitate Chicago interchanges among the Class I railroad co-owners, those costs are offset not only by the work the delivering carrier does not have to do, but also by the significant costs that would otherwise be incurred due to delays and congestion that the BRC helps railroads avoid in the Chicago area.

Since August 2019, CN and CP have been operating under an Interim Agreement, under which CP delivers its interchange traffic to CN at the BRC's Clearing Yard {

} From January 2020 through February 2023, CN has

} These

} to the BRC under the BRC Operating Agreement, which requires each carrier to pay for the traffic it delivers to Clearing. That voluntary contractual requirement is consistent with industry custom.

CN follows this custom and pays for the cost of interchanging the traffic it delivers to CP. For example, from January 2020 through February 2023, CN paid

} for its own BRC intermediate switch fees. It would not be consistent with industry custom or the terms of the BRC Operating Agreement to require CN to pay, *on top of its own fees to the BRC*, CP's intermediate switch fees (which totaled { } for that same period).

C. Clearing Continues to Be a Reasonable Interchange Point for CN to Receive CP Traffic.

Since August 2019, CN and CP have interchanged traffic subject to the Interim Agreement at Clearing successfully (and for years prior to that, CN and CP have interchanged and continue to interchange TIH traffic and other cars at Clearing). CN has been able to consistently interchange CP traffic at Clearing with no issues beyond the to-be-expected operational hiccups due to mechanical, safety, or weather-related problems that inevitably occur in railroading. As noted above, the recent problems with congestion at Clearing are temporary and not caused by the traffic CP delivers to CN at Clearing.

Operationally, Clearing continues to be a reasonable and workable solution. Clearing has served as an existing interchange between CP and CN for years and has many advantages to Spaulding. This work is literally what the BRC exists to do, interchange and switch traffic between Class I carriers. Clearing Yard is a hump yard, which is ideal for classifying the various traffic delivered there. CP does not even need to block the traffic—the BRC will hump the cars and classify them upon delivery at Clearing Yard. In addition, as noted above, CP delivers

} to CN per day at Clearing (approximately { }) such that CN believes that CP has been able to include the cars destined for CN on one or both of

its regularly scheduled trains that already go to Clearing. I believe CP is actually saving resources and costs since the interchange moved to Clearing in August 2019. CP's claims of congestion being a permanent impediment to Clearing as a reasonable interchange point are incorrect.

Clearing Yard is also an equitable choice. Both railroads operate daily at Clearing already and interchange traffic there with other rail carriers. Under the Interim Agreement, CP's workload has been alleviated because BRC classifies the cars—work that CN would otherwise have to do to receive CP cars at Spaulding (via an 80-mile trip back and forth from Kirk, CN's nearest classification yard). Tendering traffic at Clearing also minimizes the distance that CP has to travel to interchange with CN. While CN still has to traverse more of the Chicago area than CP (CN has a 39-mile-trip to Clearing from Kirk Yard versus CP's 17-mile trip from Bensenville to Clearing), the burdens are shared more equitably now.

VERIFICATION

I, Nicholas Clark, verify under penalty of perjury that the foregoing Verified Statement is true and correct. Further, I certify that I am qualified and authorized to sponsor this Verified Statement.

Executed on this 11th day of May 2023.

/s/ Nicholas Clark

Nicholas Clark