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Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

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

Dear Ms. Brown:

Wisconsin Central, Ltd. (“CN”) and Soo Line Railroad Company (“CPKC”) notify the Board that they are withdrawing the confidentiality designations for certain materials that they designated Confidential or Highly Confidential in their prior filings in this docket. These materials are being included in the joint appendix for CN’s petition for review of the Board’s January 29, 2024 decision in this proceeding, which is pending before the U.S. Court of Appeals for the Seventh Circuit. *See Wisconsin Central Ltd. v. Surface Transportation Board*, No. 24-1484.

CN is withdrawing confidentiality designations for (1) its February 2, 2022 Post-Remand Brief, except for Exhibit B, which remains highly confidential, and (2) its May 11, 2023 Post-Comments Reply Brief.

CPKC is withdrawing confidentiality designations for its March 21, 2022 Reply to CN’s Post-Remand Brief, except for the Verified Statement of Will Wangerin, which remains Highly Confidential.

Aside from the Verified Statement of Will Wangerin and Exhibit B to CN’s Post-Remand Brief, the Highly Confidential versions of the above-referenced filings may be entered on the Board’s public docket. To simplify the process of replacing the filings in the docket, versions of the above-referenced filings with all redactions removed are attached to this letter.

SIDLEY

Cynthia T. Brown

June 17, 2024

Page 2

Respectfully submitted,

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Attachment 1

**February 2, 2022 CN Post-Remand Brief
(Confidentiality Designations Removed,
Except Exhibit B)**

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

STB FINANCE DOCKET NO. 36397

POST-REMAND BRIEF

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Dated: February 2, 2022

CONTENTS

I.	INTRODUCTION	1
II.	BACKGROUND	4
III.	STANDARD ON REMAND	10
IV.	ARGUMENT	10
	A. The BRC Operating Agreement requires each co-owner to pay the BRC's fees for the traffic it delivers to Clearing.....	11
	B. Even looking beyond the Operating Agreement, requiring each party to pay for the traffic it delivers is fair and consistent with industry practice and long-standing precedent.	16
V.	CONCLUSION	21

I. INTRODUCTION¹

CN respectfully submits this post-remand brief to address the sole question remaining in this case: Whether CP must pay the BRC's switching fees for the CN-bound interchange traffic that CP delivers to the BRC's Clearing Yard, just as CN pays those fees for CP-bound traffic delivered to the same yard. The answer is yes. CN and CP so agreed in the BRC Operating Agreement as co-owners of the BRC, and no grounds exist to override this voluntary contractual arrangement. But even if the Board looked beyond the Operating Agreement, industry custom and basic fairness would dictate the same result.

CN's April 2020 petition for a declaratory order asked the Board to resolve two questions: (1) Whether CN can designate the BRC's Clearing Yard to receive Chicago-area interchange traffic from CP, and if so, (2) whether each railroad must bear its own costs for those interchanges, including the BRC's switching fees.² The Board's October 2020 decision purported to answer only the first question, concluding "that CN cannot unilaterally designate Clearing Yard as the interchange point," in part because, by "forcing [CP] to pay [the BRC's] switching fee, CN would itself be 'providing' nothing" under the interchange statute.³ But the Seventh Circuit vacated this decision, holding that a receiving carrier can "designate a willing third party to receive traffic" and that the Board "erred" by "making an

¹ Defined terms have the same meaning here as in CN's earlier briefs.

² See CN's Petition for Declaratory Order at 1, FD No. 36397 (April 14, 2020) ("CN Pet.").

³ *Wisc. Cent., Ltd.—Pet. for Decl. Order—Interchange with Soo Line R.R.*, No. FD 36397, slip op. 1, 7 (STB served Oct. 30, 2020) ("2020 Board Decision").

assumption about expense” to reject CN’s designation.⁴ The court thus held that Clearing Yard is within CN’s “power to provide” for interchange and remanded the matter, noting that “the Board did not resolve” the question of “who should bear the cost of Belt Railway’s services.”⁵

The Board should now resolve this remaining question by applying a principle it has repeatedly emphasized: An interchange arrangement—including “the payment scheme” for the “use of an intermediate switching carrier”—is typically “a matter for mutual consultation and agreement.”⁶ Here, the parties have already agreed on who should pay for traffic interchanged at Clearing Yard: The delivering carrier. The BRC Operating Agreement for the Class I co-owners of the BRC imposes “a charge for the transfer of cars,” including a switching fee for “traffic delivered” to Clearing Yard “by an inbound line haul carrier for an outbound line haul carrier.”⁷ No grounds exist to override this voluntary contractual arrangement from 1990. The Board should thus hold that the BRC Operating Agreement controls here, requiring each carrier to bear its own costs for interchanging this traffic.

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

⁵ *See id.* at 294, 295.

⁶ Joint Brief of Respondents 11 n.4, *Wisc. Cent. Ltd. v. STB*, 20 F.4th 292 (7th Cir. 2021) (No. 20-3507), 2021 WL 1584008, at 10 n.4 (“STB Br.”); *see* 2020 Board Decision at 5.

⁷ Exhibit A, BRC Operating Agreement § 1(a); Exhibit B, BRC Rate Sheet. Indeed, the BRC Operating Agreement also resolved many other commercial terms, including car hire.

But even if the Board looked beyond the parties’ controlling contractual arrangement as co-owners of the BRC, the result would not change. The BRC Operating Agreement simply mirrors the long industry custom that delivering carriers must “make delivery on the rails of their connections, either direct *or by bearing the charges of the intermediate switching line.*”⁸ The Board’s prior decision held that this custom was overridden by “the separate obligations that apply when there is a physical intersection between two carriers.”⁹ However, the Seventh Circuit held that no such obligations exist—“the statute does not contain” a physical-connection requirement.¹⁰ There is thus no reason to treat this case differently from the usual rule that each carrier bears the costs of the traffic it delivers.

The usual rule is also the fair rule. Interchange is a mutual statutory obligation under 49 U.S.C. § 10742 that imposes duties on both forwarding carriers and receiving carriers. Requiring each carrier to pay the fees for traffic it delivers ensures a fair division of costs; any imbalance simply reflects the differing flows of traffic. By contrast, it would make no sense for the Board to impose under § 10742 all the costs for interchanging in *both* directions on just one carrier. And this case is no exception. Between adoption of the Interim Agreement in August 2019 and November 30, 2021, CN has paid a total of {{ \$3,317,380.84 }} in switch fees to the BRC for traffic being delivered to CP, plus {{ \$2,036,479.65 }} in reimbursements to

⁸ *Kan. City S. Ry. v. La. & Ark. Ry.*, 213 I.C.C. 351, 356 (1935) (emphasis added).

⁹ 2020 Board Decision at 7.

¹⁰ *Wisc. Cent.*, 20 F.4th at 294.

CP for the BRC switch fees for traffic that CP delivers to CN. Permanently requiring that CN pay all switch fees in both directions would be plainly unfair, would contradict industry practice and the BRC Operating Agreement, and would effectively require CN's customers to subsidize CP's operations.

II. BACKGROUND

Because the Board is familiar with this dispute's history, CN provides only an overview of the developments relevant to the issue on remand.¹¹

From 2010 to 2019, CN and CP mainly interchanged Chicago-area traffic at Spaulding, near the Village of Bartlett, Illinois, with some traffic (especially TIH traffic) moving by the parties to Clearing Yard for interchange. But Spaulding grew unworkable—both for CN and for the surrounding communities. Because of the tracks' layout, interchanging traffic at Spaulding is impossible without repeatedly blocking several local roads, often for extended periods.¹² These operations also blocked CN's single-track main line nearly every day, sometimes for hours at a time.¹³

CN thus sought to move the Spaulding interchange traffic elsewhere. CN first designated Kirk Yard in Gary, Indiana, but CP objected and sought relief from the Board. CN also formally designated Clearing Yard as a second location to receive interchange traffic from CP. Pending the Board's decision, the parties

¹¹ For a full description of the background, see CN's April 2020 petition at 4–14.

¹² Verified Statement of William Albritton at 4–6, 9–11 (“Albritton V.S.”) (filed as an attachment to CN Pet.).

¹³ *See id.* at 4–8.

signed the Interim Agreement in August 2019. The Interim Agreement moved the Spaulding interchange traffic to Clearing, with CN temporarily reimbursing CP for the BRC's switching fees for this traffic until a final decision from the Board.

Moving this traffic to Clearing greatly reduced the blocked crossings around Spaulding. Before the move, each month saw an average of almost 80 blocked crossings longer than ten minutes; after, that number dropped to around 18.¹⁴ Indeed, the Village of Bartlett sent several letters to the Board expressing “unequivocally . . . that the change has improved the daily life and overall public safety in the community.”¹⁵ “While train traffic has continued unabated, the reduction in the train stoppages has greatly improved traffic flow with a domino effect throughout the community.”¹⁶

In November 2019, the Board held that CN could not designate Kirk Yard for interchange because it was unreasonably far from CP's lines.¹⁷ The 2019 decision did not address whether Clearing was a reasonable interchange location.¹⁸

CN thus filed a new petition in April 2020, asking the Board to decide that (1) CN can designate Clearing Yard to receive interchange traffic from CP, and (2) each railroad must bear its own costs for those interchanges, including the BRC's

¹⁴ Albritton V.S. at 12–13.

¹⁵ Letter from Kevin Wallace, Village President, to Cynthia T. Brown, Chief, Section of Administration Office of Proceedings (entered July 10, 2020).

¹⁶ Letter from Kevin Wallace, Village President, to Cynthia T. Brown, Chief, Section of Administration Office of Proceedings (entered Oct. 7, 2020).

¹⁷ *See Soo Line R.R. Co.—Pet. for Decl. Order and Prelim. Inj.—Interchange with Canadian National*, STB Fin. Docket No. 36299 (served Nov. 29, 2019).

¹⁸ *Id.* at 4.

switching fees.¹⁹ CN also explained that “Clearing is a reasonable interchange location for CP to deliver[] CN’s interchange traffic” because interchanging at Clearing “does not ‘impose unusual, unreasonable, or impossible operating hazards’ on” CP.²⁰

In response, CP argued that “CN must designate a reasonable location on its own line where it will receive interchange traffic and must provide CP a free route over its line to the location,” and that, if the parties interchange at Clearing, requiring CN to pay *all* the costs of doing so “properly reflects the interests of each party.”²¹ CP did not contend that interchanging at Clearing impose unusual, unreasonable, or impossible operating hazards. On the contrary, CP has “re-iterate[d] [its] willingness” to interchange at Clearing, disputing only whether it should have to pay the BRC’s fees.²²

This is unsurprising, since the BRC exists mainly to facilitate this kind of interchange among its co-owner railroads. And the BRC has ample capacity for these operations. The BRC is “the largest intermediate switching terminal railroad in the United States,” “with more than 300 miles of switching tracks.”²³ As the

¹⁹ CN Pet. 1.

²⁰ *Id.* at 14, 22.

²¹ CP’s Reply to Petition for Declaratory Order at 1–2, FD No. 36397 (May 29, 2020) (“CP Reply”).

²² Exhibit 7 to CN Pet. (April 18, 2019 Letter from R. Johnson to M. Cory at 1); *see also* Exhibit 6 to CN Pet. (April 3, 2019 Letter from R. Johnson to M. Cory at 2) (“With respect to CN traffic moving from CP to CN, we are willing to take it from Bensenville to . . . Clearing Yard . . . if CN pays the per car cost to BRC required under the CP/BRC trackage rights agreement.”).

²³ BRC, *About*, <https://www2.beltrailway.com/about-2/>.

Seventh Circuit observed, the BRC “dispatches more than 8,000 cars a day, enough to make up 40 to 50 miles of train.”²⁴ Nor is there any serious argument that interchanging at Clearing “require[s] the delivering carrier to do work which properly belongs to the receiving carrier.”²⁵ In fact, the BRC performs work the delivering carrier would otherwise have to do—which is why each delivering carrier is properly responsible for the BRC’s fees for that work.

The Board ruled for CP. It held that the interchange statute, 49 U.S.C. § 10742, does not apply at all unless two railroads share a direct, physical connection.²⁶ It also held that “[w]hen two carriers physically intersect, the receiving carrier is required to designate a point on its own line where it will receive traffic and to provide a free route over its tracks to that point.”²⁷ In so holding, the Board rejected CN’s argument that Clearing Yard is within its “power to provide” under § 10742, asserting that, if the parties interchanged at Clearing and CP had to pay the BRC’s switching fees, then CN “would itself be ‘providing’ nothing.”²⁸ The Board thus held that CN “cannot unilaterally designate Clearing Yard as an interchange point,” and concluded that it “need not decide” who should pay the BRC’s switching fees.²⁹

²⁴ *Wisc. Cent.*, 20 F.4th at 293; BRC, *About*, <https://www2.beltrailway.com/about-2/>.

²⁵ *See Kan. City S.*, 213 I.C.C. at 358–59.

²⁶ 2020 Board Decision at 9.

²⁷ *Id.* at 5.

²⁸ *Id.* at 7.

²⁹ *Id.* at 10.

The Seventh Circuit vacated the Board’s decision. To start, the court explained, the “exchange of rail traffic is governed by statute, not by regulation or common law,” and a “rail carrier can have the ‘power to provide’ facilities”—as § 10742 requires—“as a result of contract.”³⁰ Likewise, § 10742 “does not contain” any requirement that “the two railroads have physically intersecting lines”; instead, “‘connecting line’ can include connection through an intermediary.”³¹

The court also rejected the Board’s reliance on “what amounts to a common-law tradition”—the supposed rule that a receiving carrier with a physical connection must provide free passage to an interchange point on its own line.³² “Whether [CP] can be required to tender its traffic [at Clearing] rather than at the Spaulding yard depends on the language of the statute, not on extra-statutory doctrines.”³³ And the court explained that an interchange dispute can involve “three distinct questions”: (1) whether a “receiving carrier [can] ever designate a willing third party to receive traffic on its behalf,” (2) whether the location is reasonable, and (3) “who pays the third party.”³⁴ “By mixing these up, and smuggling an assumption about the answer to Question 3 into its decision about Question 1, the Board erred.”³⁵ The court thus “remanded for further proceedings

³⁰ *Wisc. Cent.*, 20 F.4th at 294.

³¹ *Id.* (citing *Atchison, Topeka & Santa Fe Ry. v. Chicago*, 240 F.2d 930, 936–37 & n.17 (7th Cir. 1957), *aff’d*, 357 U.S. 77 (1958)).

³² *Id.*

³³ *Id.* at 295.

³⁴ *Id.* at 294–95.

³⁵ *Id.*

consistent with this opinion.”³⁶ The court also noted that “the Board did not resolve” “who should bear the cost of [the BRC’s] services.”³⁷

The Seventh Circuit thus resolved the first question it noted: CN can designate Clearing Yard because CN, “the receiving line, is willing to accept traffic through the Belt Railway, and Belt Railway is willing to accept that traffic.”³⁸ The second question, whether Clearing is reasonable, was not disputed in this proceeding. Nor could it be: As the Seventh Circuit noted, the BRC is the nation’s “largest switching and terminal railroad,” dispatching “more than 8,000 cars a day.”³⁹ That traffic includes the TIH traffic CN and CP have interchanged at Clearing for years, and all the traffic they have successfully interchanged there under the Interim Agreement since 2019. But the third question—“who should bear the cost of Belt Railway’s services”—remains undecided.⁴⁰

The answer to this last question matters. It will govern the parties’ obligations going forward under the circumstances in this case for interchange at Clearing. And, under the Interim Agreement, CN has reimbursed CP’s switching-fee payments to the BRC since August 2019—subject to CP’s obligation to repay those amounts if the Board rules that each carrier must bear its own costs for interchanging at Clearing. Thus, for the reasons below, the Board should enter a

³⁶ *Id.* at 295.

³⁷ *Id.* at 294.

³⁸ *Id.* at 295.

³⁹ *Id.* at 294.

⁴⁰ *Id.*; *see* 2020 Board Decision at 10.

declaratory order confirming that CN can designate Clearing for interchange and that CP must pay the BRC's fees for traffic CP delivers there, including reimbursing CN for the fees it has paid on CP's behalf since August 2019.

III. STANDARD ON REMAND

The mandate rule requires “an administrative tribunal” to “adhere to the commands of a higher court on remand.” *Delgado v. U.S. Dep’t of Justice*, 979 F.3d 550, 557 (7th Cir. 2020). The Seventh Circuit has explained that post-remand proceedings may address only (i) specifically remanded issues, (ii) “issues arising for the first time on remand,” and (iii) issues “timely raised” in prior proceedings that “remain undecided.” *See United States v. Morris*, 259 F.3d 894, 898 (7th Cir. 2001); *see also New Eng. Cent. R.R.—Trackage Rights Order—Pan Am S. LLC*, No. FD 35842, 2018 WL 1989070, at *4 (Apr. 24, 2018) (noting in the reconsideration context that “the Board will not consider arguments or evidence that should have been submitted at an earlier stage”).

IV. ARGUMENT

CP should pay the BRC's switching fees for CN-bound traffic it delivers to Clearing. Before explaining why that is so, we note two broader points.

First, the BRC's fees are not some burdensome toll. They are reimbursement for the valuable services the BRC provides to its Class I co-owners, like blocking cars and assembling trains. CP crews operating CP's daily trains to Clearing, which include cars to be interchanged with multiple Class I railroads, can essentially drop off trains there, letting BRC personnel break them up into blocks that will be assembled into outgoing trains for the various railroads CP

interchanges with. Thus, ruling for CN here will simply require CP to pay for services it already receives.

Second, the real question here is whether the parties' payment obligations should be proportionate. CN recognizes that it is responsible, as the delivering carrier, for the costs of CP-bound interchange traffic CN delivers to Clearing, including the BRC's switching fees. So the question is whether CP must likewise pay the BRC's switching fees for the traffic it delivers, or whether the Board will conclude that—despite the BRC Owner's Agreement and industry practice—CN alone must pay for *all* of the interchange traffic in *both* directions. For the reasons below, CP should pay its fair share.

A. The BRC Operating Agreement requires each co-owner to pay the BRC's fees for the traffic it delivers to Clearing.

As CN's April 2020 petition explained, the BRC Operating Agreement that CP signed in 1990 makes CP responsible for the switching charges on traffic it delivers to Clearing.⁴¹ The parties are thus bound by a voluntary contractual arrangement, which there is no basis for the Board to disturb. The Board should therefore conclude this proceeding because the Operating Agreement requires each delivering carrier to pay its own fees.

1. The BRC Operating Agreement establishes CP's responsibility for the switching fees. As the Board knows, "CN, CP, and four other Class I railroads co-own" the Belt, and the "co-owners' rights and privileges with respect to [the Belt]

⁴¹ See CN Pet. at 26.

are defined in the [BRC] Operating Agreement.”⁴² And under the Operating Agreement, each co-owner has agreed to pay the BRC a charge for transferring cars: “Each of the Railway Companies shall pay to the Belt Company a charge for the transfer of cars between any of the Railway Companies through the facilities of the Belt Company.”⁴³

The Operating Agreement thus requires the BRC to “establish the charge or charges to cover services provided each Railway Company or Companies.”⁴⁴ And the BRC has done so, making the delivering carrier responsible for interchange transfer charges. The current BRC rate sheet sets forth “Intermediate Switch Rates” for “traffic delivered to the BRC at Clearing Yard by an inbound line haul carrier for an outbound line haul carrier.”⁴⁵ Consistent with the Agreement and rate sheet, the BRC bills switching charges to the delivering carrier. Indeed, the BRC has for years billed CP for the CN-bound TIH cars that CP delivers to Clearing. Likewise, the BRC has been billing CP directly for all CP-to-CN cars interchanged at Clearing under the Interim Agreement (with CN reimbursing CP while this case is pending).

Thus, the parties, as co-owners of the BRC, have already resolved the question presented here by contract. Interchange traffic that CP delivers for CN at Clearing is “traffic delivered . . . at Clearing Yard by an inbound line haul carrier

⁴² 2020 Board Decision at 1 n.2; *see also id.* at 10 (“the rights of the co-owner railroads are determined by the BRC Operating Agreement”).

⁴³ Exhibit A, BRC Operating Agreement § 1(a).

⁴⁴ *Id.*

⁴⁵ Exhibit B, BRC Rate Sheet.

for an outbound line haul carrier.”⁴⁶ CP has contractually agreed to “pay to the Belt Company a charge for” this traffic; the Belt has set a fee schedule for these services and billed CP directly for those fees; and CP has paid the Belt. This existing contractual arrangement thus answers the payment question CN originally asked the Board to resolve: “Whether each railroad is required to bear its own costs for those interchanges, including fees for the BRC’s switching services.”⁴⁷ The answer is yes: CP must pay for the traffic it delivers for CN, just as CN must pay for the CP-bound traffic it delivers. CP should not be permitted to override this voluntary contractual arrangement.

2. The Board should thus hold that the Operating Agreement controls this issue. Respecting the parties’ contractual arrangement tracks the Board’s consistent approach to both interchange issues and railroads’ voluntary contractual agreements. It also obeys the Seventh Circuit’s instruction that interchange arrangements can properly be created “as a result of contract.”⁴⁸

First, the Board has often said that interchange arrangements should be set by mutual agreement. In this very case, the Board repeatedly emphasized its “longstanding preference” that interchange arrangements “be determined by agreement between the carriers, rather than by agency intervention.”⁴⁹ That

⁴⁶ *Id.*

⁴⁷ CN Pet. at 1; *see id.* at 26.

⁴⁸ *Wisc. Cent.*, 20 F.4th at 294.

⁴⁹ STB Br. 45; *see id.* (emphasizing the Board’s “clear preference for private resolution over agency involvement”); 2020 Board Decision at 5 (similar); *N.Y., Chi. & St. Louis R.R. v. N.Y. Cent. R.R.*, 314 I.C.C. 344, 346 (1961) (similar).

includes not just location, but also payment. As the Board told the Seventh Circuit, “the payment scheme” for an interchange through “an intermediate switching carrier . . . is a matter for mutual consultation and agreement.”⁵⁰ Indeed, the Board “encourage[d]” the parties to agree on “financial terms” to “use BRC’s Clearing Yard to conduct interchange,”⁵¹ “preferably with the involvement of the Belt Railway.”⁵² In fact, CP and CN have already agreed—with the Belt’s participation in 1990—on how to pay for any interchanges at Clearing: The BRC Operating Agreement sets the financial terms for any interchanges conducted there. Respecting that contractual arrangement thus follows the Board’s oft-stated policy.

Second, the Board has held in the preemption context that “voluntary agreements must be seen as reflecting the carrier’s own determination and admission that the agreements would not unreasonably interfere with interstate commerce.”⁵³ Courts agree.⁵⁴ The same reasoning applies here. The BRC’s Operating Agreement was “freely negotiated between sophisticated business parties.”⁵⁵ Because “market actors have incentives to enter into efficient arrangements,” the Operating Agreement must therefore “reflect a market calculation that the benefits of [interchanging at Clearing] would be worth the cost

⁵⁰ STB Br. 11 at n.4.

⁵¹ 2020 Board Decision at 10–11.

⁵² STB Br. at 47.

⁵³ *E.g.*, *Joint Pet. for Decl. Order—Bos. & Maine Corp. & Town of Ayer*, 5 S.T.B. 500 (2001) (quoting *Twp. of Woodbridge v. Consol. Rail Corp.*, STB Docket No. 42053, slip op. at 5 (STB served Dec. 1, 2000)).

⁵⁴ *E.g.*, *PCS Phosphate Co. v. Norfolk S. Corp.*, 559 F.3d 212, 221 (4th Cir. 2009).

⁵⁵ *Id.*

of paying” the Belt’s fees for those services.⁵⁶ This calculation—which, after all, tracks the ordinary industry practice—neither interferes with interstate commerce nor conflicts with any part of the Interstate Commerce Act. The Board should thus respect the parties’ own determination of who should pay the Belt for its switching services.

Third, the Seventh Circuit vacated the Board’s prior decision in part because the Board failed to give effect to the BRC Operating Agreement. As the court explained, the Board’s holding that CN must designate an interchange point on its own line rather than on the BRC’s line was erroneous because a “rail carrier can have the ‘power to provide’ facilities *as a result of contract*, just as it can have that power by ownership.”⁵⁷ And the contract in question—which establishes that Clearing “is within [CN’s] ‘power to provide,’” and under which the “Belt Railway is willing to accept [this] traffic”—is the BRC Operating Agreement.⁵⁸ Refusing to apply (or overriding) the Operating Agreement’s payment provisions would thus conflict with the Seventh Circuit’s focus on “contractual right[s]” in place of those “norm[s]” on which the Board mistakenly relied before.⁵⁹

The Board should thus hold that the parties’ contractual arrangement in the BRC Operating Agreement controls, so that each railroad is responsible for its own costs to interchange at Clearing Yard under § 10742. To be sure, the Board’s prior

⁵⁶ *Id.*

⁵⁷ *Wisc. Cent.*, 20 F.4th at 294 (emphasis added).

⁵⁸ *Id.* at 295.

⁵⁹ *See id.*

decision noted that “[i]f there is disagreement about what the BRC Operating Agreement requires, such a dispute would be properly resolved by a court, not the Board.”⁶⁰ But no such disagreement exists here: CP agrees that “CP must pay the BRC a fee to use BRC’s facilities and services,” and “that the BRC Operating Agreement requires that the delivering carrier pay BRC’s fees.”⁶¹

Instead of disputing these points, CP simply argued that “nothing in the carriers’ agreements with BRC prohibits CN and CP from entering into a separate agreement that requires CN to reimburse CP for some or all of such fees.”⁶² That is true, but the only such agreement between CN and CP is the Interim Agreement, which is merely a stopgap to maintain the status quo pending resolution of this dispute—and which requires CP to repay CN if CN ultimately prevails on this issue. The only contract between these parties that actually reflects a voluntary, market-based calculation about these payments—and the only one that will outlive this litigation—is the BRC Operating Agreement from 1990, which requires CP to pay its fair share. The Board should hold that this contractual commitment controls here.

B. Even looking beyond the Operating Agreement, requiring each party to pay for the traffic it delivers is fair and consistent with industry practice and long-standing precedent.

Because the BRC Operating Agreement answers the question presented here, there is no basis for the Board to look beyond this voluntary contractual

⁶⁰ 2020 Board Decision at 11 n.11.

⁶¹ CP Reply at 15 n.12, 16.

⁶² CP Reply at 16.

arrangement between CP, CN, BRC, and the other co-owners. But even if the Board adopted a broader inquiry, the proper result would not change: Requiring each delivering carrier to pay its own fees tracks industry custom and basic fairness.

First, the courts and the agency have long recognized that industry custom requires the delivering carrier to cover the costs of interchange, including third-party switching fees. 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.”⁶³ The ICC similarly recognized that forwarding carriers must “make delivery on the rails of their connections, either direct *or by bearing the charges of the intermediate switching line*, and this is the general practice of railroads throughout the country.”⁶⁴ Thus, switching charges should be “absor[bed] . . . by the line that delivers the traffic.”⁶⁵ And the D.C. Circuit has acknowledged the “longstanding Chicago custom” that “the intermediate switching charges involved in [interchange] deliveries are normally borne by the forwarding carrier.”⁶⁶

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

⁶³ *Baltimore & Ohio R.R. Co. v. United States*, 277 U.S. 291, 301 (1928).

⁶⁴ *Kan. City S.*, 213 I.C.C. at 356 (emphasis added).

⁶⁵ *Rates, Regs., & Practices of Peoria & Pekin Union Ry.*, 93 I.C.C. 3, 22 (1924).

⁶⁶ *Burlington N. R. Co. v. United States*, 731 F.2d 33, 35 (D.C. Cir. 1984).

with CN through the BRC.⁶⁷ And, of course, CN paid the fees for the traffic it delivered. Adhering to that historical practice would thus comport with industry custom.

The Board’s prior decision rejected CN’s reliance on this custom, asserting that the cases describing this practice do not “address[] or nullify[] the separate obligations that apply when there is a physical intersection between two carriers.”⁶⁸ But it is now clear that no such “separate obligations” exist. The Seventh Circuit held that the interchange statute “does not contain” a physical-connection requirement; instead, a “connecting line” under § 10742 “can include connection through an intermediary.”⁶⁹ The Board’s prior reason for failing to follow these precedents is thus unsound.⁷⁰

Second, requiring each party to pay for the traffic it delivers is fair, while requiring CN to pay for *all* traffic interchanged at Clearing Yard under § 10742 in both directions creates an unfair imbalance. Interchange is a mutual statutory obligation that imposes duties on both forwarding carriers and receiving carriers.⁷¹ Because interchanging “will benefit two carriers, not just one,” a railroad cannot reasonably expect another railroad to bear all the costs of interchanging in both

⁶⁷ See *Albritton V.S.* at 1–2, 3, 21.

⁶⁸ 2020 Board Decision at 7.

⁶⁹ *Wisc. Cent.*, 20 F.4th at 294 (citing *Atchison*, 240 F.2d at 936–37 & n.17).

⁷⁰ The Board also said the Supreme Court “disagreed with” the ICC’s description of this custom in *Chicago, Rock Island*, see 2020 Board Decision at 7, but the ICC later noted that this aspect of its decision “was not criticized by the Supreme Court” and relied on it again, see *Kan. City S.*, 213 I.C.C. at 359.

⁷¹ See *Kan. City S.*, 213 I.C.C. at 356.

directions.⁷² That does not mean the two railroads must evenly split the switching fees for these interchanges; one may deliver more traffic (or different kinds of traffic) than the other, in which case it will pay more. But it does mean that CP cannot impair CN's exercise of its right to designate a reasonable interchange location by insisting that CN absorb all of these BRC switch costs.

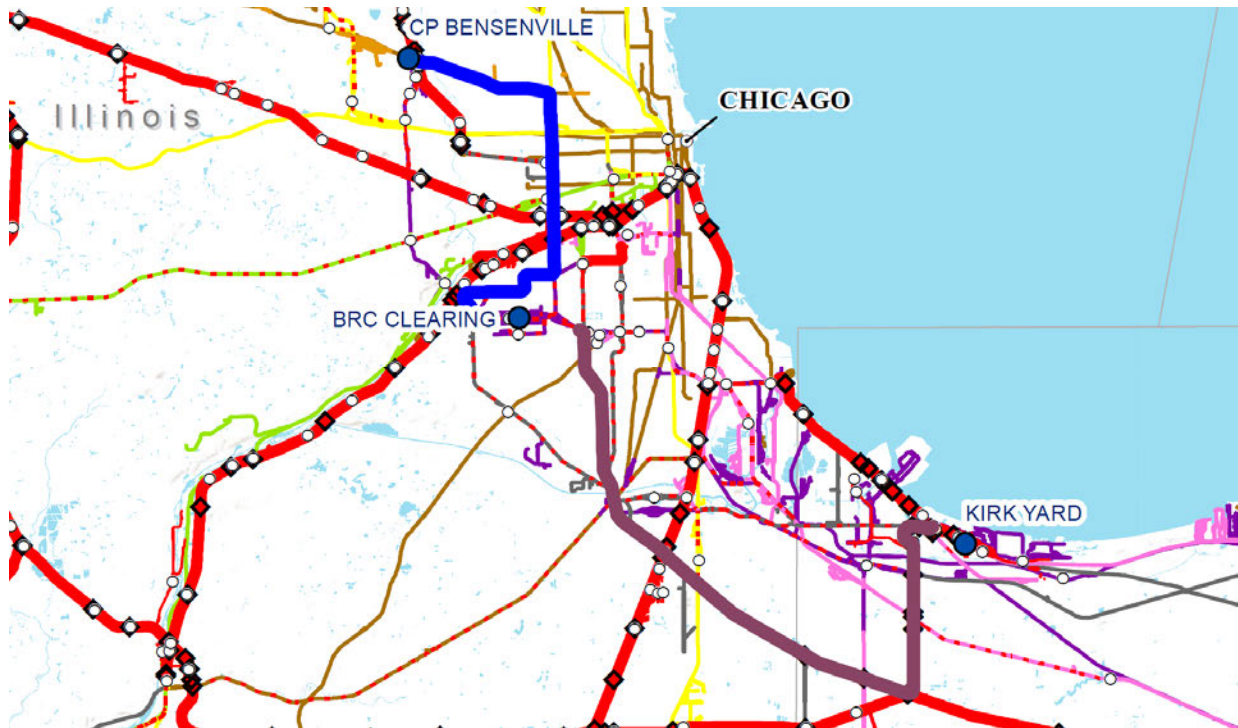
The parties' experience at Clearing confirms that requiring each railroad to pay for the traffic it delivers produces fair results. Since the parties signed the Interim Agreement in 2019, CN has reimbursed CP {{\$2,036,479.65}} for the BRC's switching fees for traffic CP has delivered to Clearing under the Agreement.⁷³ During that same period, CN has paid the BRC {{\$3,317,380.84}} in switching fees for CP-bound traffic that CN has delivered to Clearing.⁷⁴ CP can hardly claim that these figures suggest an unfair burden on CP.

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

⁷² See *Minnesota N. R.R., Inc. v Canadian Nat'l Ry. Co.*, STB Docket No. 42080, slip op. at 6 (STB served Mar. 18, 2005) (one railroad could not expect another to pay all capital costs for establishing a new interchange connection).

⁷³ See Exhibit C, Verified Statement of Michael Matteucci ("Matteucci V.S.").

⁷⁴ *Id.*



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

To reach Clearing Yard from its Kirk Yard in Gary, Indiana, CN must travel over the Elsdon line operated by CSXT, paying a per-car trackage rights fee to do so.⁷⁵ This is total distance of 39 miles, roughly 17 of which are on CSXT's track.⁷⁶ By contrast, to reach Clearing from its Bensenville Yard—a total distance of 17 miles⁷⁷—CP travels roughly 7 miles over Metra's West Line to Cragin, which connects to the BRC's line to Clearing.⁷⁸ And CP does not pay a per-car trackage

⁷⁵ See Exhibit C, *Matteucci V.S.*

⁷⁶ See *Albritton V.S.* at 22.

⁷⁷ *Id.*

⁷⁸ Verified Statement of Charles E. Hubbard ¶ 7 (filed as an exhibit to CP Reply). CP is the freight rail common carrier operating over Metra's line, and CP even dispatches Metra's line. See *Can. Pac. Ry. Co.—Control—Dakota, Minnesota & E. R.R. Corp.*, Docket No. FD 35081 (STB served Sep. 30, 2008), slip op. at 34 (referring to CP as “dispatcher of the West Line” and explaining that “CPRC has the

rights fee to Metra to do so.⁷⁹ So, to interchange at Clearing, CN must travel further and pay for doing so—in addition to paying the BRC’s switching fees for the traffic CN delivers there.

Thus, even if the Board looks beyond the BRC Operating Agreement, it should make clear that each party must pay its own share of the BRC’s switching fees.

V. CONCLUSION

For these reasons, the Board should grant CN’s petition and declare that each carrier must bear its own costs for interchanging traffic at Clearing Yard, and that CP must reimburse CN for the fees it has paid on CP’s behalf since August 2019.

Respectfully submitted,

/s/ Matthew J. Warren
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Counsel to Wisconsin Central, Ltd.

February 2, 2022

right to dispatch the West Line and North Line by virtue of a 1985 trackage rights agreement with the Trustee of the Milwaukee Road.”).

⁷⁹ CP Reply at 13.

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February 2022, I caused a copy of the foregoing document to be served by U.S. Postal Service or more expeditious means upon the service list to Finance Docket No. 36397.

/s/ Matthew J. Warren
Matthew J. Warren

Exhibit A

BRC Operating Agreement

6000794

THE BELT RAILWAY COMPANY OF CHICAGO

OPERATING AGREEMENT

THIS AGREEMENT, made by and between THE BELT RAILWAY COMPANY OF CHICAGO (hereinafter called the Belt Company), party of the first part; and

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY
BURLINGTON NORTHERN RAILROAD COMPANY
CSX TRANSPORTATION, INC.
CONSOLIDATED RAIL CORPORATION
GRAND TRUNK WESTERN RAILROAD COMPANY
ILLINOIS CENTRAL RAILROAD COMPANY
MISSOURI PACIFIC RAILROAD COMPANY
NORFOLK AND WESTERN RAILWAY COMPANY
SOO LINE RAILROAD COMPANY

(hereinafter collectively called Railway Companies, and singly called Railway Company), party or parties of the second part.

Made for full term of at least 5 years, running to April 1, 1995, and to continue in effect thereafter, until amended by agreement of the parties hereto.

WITNESSETH THAT:

WHEREAS, the Belt Company is the owner of the properties hereinafter referred to as "Belt Railway"; and

Whereas, each of the Railway Companies now is the owner of at least 2600 shares, of the par value of \$100 each, of the capital stock of the Belt Company and each of the Railway Companies has agreed to execute this Agreement; and

Whereas, at rates agreed upon between the Railway Company and the Belt Company, each of the Railway Companies desires to avail itself of the services of the Belt Company and of the use and enjoyment of the rights, privileges, property and facilities of the Belt Company, upon the terms and conditions in this Agreement stated.

ARTICLE ONE.

Grants.

Now, THEREFORE, in consideration of the premises, and of the sums to be paid by the Railway Companies, respectively, and subject to the terms and conditions of this Agreement, the Belt Company grants to each of the Railway Companies, to the extent that the Belt Company has the right and ability to do so, the right and privilege of running and operating the freight trains, locomotives and cars of such Railway Company over and upon, or to use and enjoy, for the purposes of freight traffic, in common with the Belt Company and with the other Railway Companies and with such other companies as hereafter may receive from the Belt Company grants of similar or other rights of use, the following described premises, rights and privileges (herein referred to as "Belt Railway"):

(1) The line of railway of the Belt Company situated in the County of Cook, in the State of Illinois, as shown on File No. 114.12-89 dated January, 24, 1990, marked Exhibit "A", attached to and made a part hereof, which line of railway, together with all rights, privileges, powers, estates and licenses thereto pertaining, is more fully described in that certain deed dated September 1, 1962 (as modified by subsequent Belt Company transactions), wherein Chicago and Western Indiana Railroad Company is Grantor and Belt Company is Grantee, and by this reference is made a part hereof.

(2) The right of way, tracks, bridges, switches and

turnouts, yards, lands, shops, engine house, turntables, structures of every kind, machinery, tools and all other property and appurtenances upon the real estate now owned or as may hereafter be acquired or constructed by Belt Company.

(3) Together with all the franchises, ordinance rights, licenses and other rights and privileges, at any time possessed by the Belt Company, in anywise belonging or appertaining to said property and facilities, or any enlargements thereof or additions thereto.

(4) Also the right and privilege of using the communication facilities owned or leased by Belt Company, subject, however, to the rights and conditions set out in any contracts with parties other than the parties to this Agreement.

(5) The Railway Companies may use the Belt Railway as a bridge for through movement of cars between portions of their own Railroad or between their yards and connections with other Railway Companies and any other railroads not party to this Agreement.

TO HAVE AND TO HOLD the said rights and privileges unto each of the Railway Companies, its successors and assigns, from the effective date of this Agreement, for and during the full term of at least 5 years, running to the first day of April, 1995, and to continue in effect thereafter until amended by the parties, as provided herein, each such Railway Company, its successors and assigns, yielding and paying, therefore, unto The Belt Company, its successors and assigns, or to or for its or their use, the payments established pursuant to this Agreement, and keeping and performing all and singular the covenants and agreements hereinafter set forth, to be by the Railway Companies severally kept and performed;

PROVIDED, that the Belt Company expressly reserves to itself, its successors and assigns, all its corporate franchises and powers in its own behalf to use and to operate, and to grant to other railroad companies the right to use and to operate the same, consistent with the rights and privileges by this Agreement granted to the Railway Companies, respectively; and,

PROVIDED further that, except with the written permission of the Belt Company and in accordance with its rules and regulations from time to time prescribed, the rights and privileges hereby granted shall not include the right to make up or break up trains or do

switching upon the Belt Railway otherwise than through the agency of the Belt Company; and PROVIDED further, that said rights and privileges of using the Belt Railway shall be exercised in common with the Belt Company, and with each of the Railway Companies, and with such other companies as may obtain from the Belt Company similar or other rights of user; and nothing herein shall abridge the corporate powers of the Belt Company to operate the Belt Railway on its own behalf, and to grant to other companies similar rights, consistent with privileges by this Agreement granted to the Railway Companies, respectively, and,

PROVIDED, Further that, notwithstanding any provision or language contained in this Agreement to the contrary, it is hereby expressly agreed that the Belt Company shall have the right to enter into separate agreements with one or more of the Railway Companies, or other companies not party to this Agreement, providing for, but not limited to, lease of tracks, servicing of locomotives and cabooses, repair of cars, switching services on and/or off Belt Railway, and use of office space. Such separate agreements shall not, at the time entered into, materially infringe the rights granted herein to Railway Companies.

And it is hereby expressly covenanted and agreed that the said rights and privileges hereby granted to the Railway Companies respectively, shall be held, used and enjoyed by each of the Railway Companies, subject to the following further covenants, conditions and provisions, and the Belt Company and each of the Railway Companies hereby covenant and agree to and with each other as follows to-wit:

ARTICLE TWO.

Covenants Of Belt Company.

Section 1. The Belt Company will pay all taxes, assessments and governmental charges imposed upon the Belt Railway, subject to reasonable contests as to the validity thereof.

Section 2. The Belt Company will pay or cause to be paid all rentals payable by it under leases covering any part of the Belt Railway, and will faithfully perform all of its obligations under such leases, and will not do or omit to do any act the doing or omission of which will cause any of the rights of the Belt Company under such leases to be forfeited.

Section 3. The Belt Company will pay or cause to be paid all interest on its debt, funded or otherwise, and interest at six per cent, or at such other rate as the Belt Company Board of Directors shall from time to time determine shall be paid to the Railway Companies on their respective advances.

Section 4. The Belt Company will pay or cause to be paid principal payments on its debt, equipment obligations and the cost of capital improvements.

Section 5. The Belt Company will not do or omit to do any act the doing or omission of which will operate, directly or indirectly, to forfeit any of the rights, privileges and franchises acquired under its charter, or howsoever acquired, or which will in any manner impair the value of any of the privileges, rights or property the right to use which is hereby granted to the Railway Companies, or impair its power or ability to perform all of its obligations under this Agreement; and it will, at the expiration of the present term of its corporate existence, cause the same to be renewed and extended in manner and form as may be provided by law, and will cause similar renewals and extensions to be made from time to time as the same shall be necessary to maintain during the full term of this Agreement the existence and powers with which it is now vested.

Section 6. The Belt Company will at all times, and from time to time during said term, when requested by the Railway Companies or any of them, put forth and exercise each and every corporate power, and do each and every corporate act which the Belt Company might now or may at any time hereafter lawfully put in force or exercise, to enable the Railway Companies and each of them to enjoy and avail themselves of and exercise every right, franchise and privilege hereby granted, in the proper management and operation of the Belt Railway, according to the terms of this Agreement.

ARTICLE THREE.

Mutual Covenants.

Section 1.

(a) Each of the Railway Companies shall pay to the Belt Company a charge for the transfer of cars between any of the Railway Companies through the facilities of the Belt Company. The Belt Company shall establish the charge or charges to cover services provided each Railway Company or Companies.

(b) The Belt Company shall establish contract charges and tariff rates for each and all of its services. Such charges and tariff rates shall, in total, be at least sufficient to cover all its expenses.

(c) For each calendar year that the Belt Company's accounts reflect net revenues from operations, such revenues shall be applied as directed by any mortgage or mortgages of the Belt Company then in effect. If the amount deposited pursuant to the provisions of the then existing mortgage or mortgages may be drawn down, or if there be no mortgage or mortgages, then such amounts available to Belt Company, subject to the affirmative vote of not less than two-thirds of the Belt Company Board of Directors, to be expressed by resolution, shall be distributed to the Railway Companies as a reduction of advances in the same manner and in the same order of time as advances were made unless otherwise provided by special agreements in effect at the time. If at any time there shall be no advances outstanding as provided by special agreement or agreements, such funds available, if distributed, shall be distributed in the form of repayment of Belt Company Account 795 - Other Capital balances by the affirmative vote of not less than two-thirds of the Belt Company Board of Directors. If at any time there shall be no balances outstanding in Belt Company Account 795, such funds available, if distributed, shall be distributed as directed by the affirmative vote of not less than two-thirds of the Belt Company Board of Directors.

(d) Proceeds from the sale or other disposition of property shall be applied as directed by any mortgage or mortgages of the Belt Company then in effect. If the amount deposited may be drawn down by Belt Company under said mortgage or mortgages, or if there be no mortgage requirements, then net proceeds of such sale or other disposition of property shall be distributed to the Railway Companies as a reduction of advances in the same manner and in the same order of time as advances were by them made. If at any time there shall be no advances outstanding as provided by special agreement or agreements, such proceeds, if distributed, shall be distributed in the form of repayment of Belt Company Account 795 - Other Capital balances by the affirmative vote of not less than two-thirds of the Belt Company Board of Directors. If at any time there shall be no balances outstanding in Belt Company Account 795, such proceeds, if distributed, shall be distributed as directed by the affirmative vote of not less than two-thirds of the Belt Company Board of Directors.

(e) Subject to the mutual agreement of the involved parties, interchange of cars between Railway Companies on the Belt Railway will be at Clearing Yard. Interchange of cars between the Belt Company and a Railway Company will be at Clearing Yard, unless other locations have been agreed to in writing by the parties.

Cars moving between Railway Companies via the Belt Company shall be taken into the car hire or mileage accounts of the Belt Company as follows:

- (i) Cars moving inbound to the Belt Company shall be taken into Belt Company Accounts at the time they are yarded on a designated delivery track and the engine of the delivering Railway Company is cut off from the train.
- (ii) Cars moving outbound to the Railway Companies shall be taken into the Railway Company accounts at the time the car is humped or placed on a designated classification track.
- (iii) Except as modified by this Agreement, the Rules of the Association of American Railroads regarding the interchange of cars between railroads shall govern.

Section 2. The several sums payable by each of the Railway Companies under the provisions of Section 1 of this Article, shall be payable to the Belt Company, or pursuant to its written order, at the office of the Belt Company at Chicago, Illinois, within ten days after a statement thereof shall have been mailed or delivered by the Belt Company to such Railway Company, stating the sum to be paid by it. At the expiration of said ten days the Belt Company is authorized to make sight drafts against any of the Railway Companies for any such sum. Any errors or omissions shall be adjusted in the statement for the month during which the error or omission shall have been located and agreed upon by the Belt Company and the other party or parties interested.

Section 3. Each of the Railway Companies, in respect of the exercise by it of the rights and privileges by this Agreement granted, shall do and perform to the public all the duties which now or hereafter, under the laws of the United States or of the State of Illinois, or under the ordinances of cities, towns or villages, or by other competent authority may be required of either of the parties hereto; and each of the Railway Companies shall and will indemnify and save harmless the Belt Company from any violation by such Railway Company of

any such law or ordinance.

Section 4. Outstanding capital stock of the Belt Company of 2,600 or more shares shall be held by each of the Railway Companies.

Section 5. The Board of Directors of the Belt Company shall always be composed of at least one nominee of each of the Railway Companies, and each Railway Company shall have one Director for each block of 2,600 shares of outstanding stock of Belt Company held by it.

Section 6. The President of the Belt Company shall be elected annually by the Board of Directors. When present, he shall preside at all meetings of the Board of Directors. He need not be a stockholder, and shall have no vote at meetings of the Board of Directors.

Section 7. The Belt Company shall have and exercise the exclusive management and control of the operation, maintenance, repair and renewal of the Belt Railway and every part thereof, and shall keep and maintain the Belt Railway at all times during said term in good order, condition and repair, and shall protect or cause the same to be protected by such insurance, if any, against loss or damage as, in the judgment of the Belt Company, may be necessary and adequate; and shall establish rules and regulations governing the operation of trains upon the Belt Railway, and the use and enjoyment thereof in all other respects; provided always, that such rules and regulations shall apply to all the Railway Companies. Train movements of the same class shall enter and exit Belt Railway on a first-come, first-serve basis, to the extent practicable. Belt Company shall not unduly restrict the length and speed of Railway Companies' trains. Each of the Railway Companies shall comply, and cause its employees to comply, with such rules, safety rules and special instructions. Should a dispute arise with or between any of the Railway Companies using the Belt Railway, as to the arrangement of trains, the use of the Belt Railway, or the time table or train schedule of such Railway Companies, the Belt Company expressly reserves the right and power to determine and enforce the arrangement and order of trains, the use of the Belt Railway and the arrangement of such train schedules or time tables, and to direct the adoption thereof.

Section 8. Except with the unanimous written consent of the parties hereto, no scheduled passenger train shall be regularly operated over any part of the Belt Railway by any of the Railway Companies.

Section 9. The plan, character and cost of any improvement, change or addition, to cost more than \$100,000, hereafter made to the Belt Railway, shall be determined by the affirmative vote of not less than two-thirds of the Board of Directors of the Belt Company.

Section 10. If any improvements or extensions of or additions to the Belt Railway, the expenditure for which has not received the affirmative vote required in Section 9 above, shall be desired by one or more of the Railway Companies, such Railway Company or Railway Companies, with the approval of a majority of the Board of Directors of the Belt Company to be expressed by resolution, may make or cause to be made such improvements, extensions or additions at its or their own expense, providing said Railway Company or Railway Companies shall pay rent to be fixed by the Board of Directors for Belt Company's property used for such improvements, extensions or additions. At any time during the term of this Agreement, the Belt Company may acquire the ownership of any such improvements, extensions or additions by payment to the Railway Company or Railway Companies which shall have constructed the same, at a price to be agreed upon by the owner or owners thereof and the Belt Company. Upon such acquisition thereof by the Belt Company, such improvements, extensions, or additions so acquired shall become parts of the Belt Railway. Until so acquired by the Belt Company, such Railway Company or Railway Companies shall have the exclusive use of such additions, extensions or improvements, and shall, at its or their own expense, maintain, repair, renew and operate the same and pay all taxes and assessments thereon and all expenses for demolition, removal, etc., whether caused by obsolescence or otherwise.

Section 11. For purposes of this Section 11, cars delivered to the Belt Company shall be deemed to be "in the possession" of the Belt Company after mechanical inspection has been completed and the cars have been accepted by the Belt Company. Cars delivered to a Railway Company by the Belt Company shall be deemed to be "in the possession" of the Railway Company after mechanical inspection has been successfully completed by the Belt Company. The responsibility of the parties as between themselves for injury to, or death of, any person or persons whomsoever, or for loss of, damage to, and destruction of any property whatsoever, resulting from, arising out of, incidental to, or occurring in connection with this Agreement shall be apportioned as follows:

(a) Whenever any loss of, damage to, or destruction of any property whatsoever, or injury to or death of any person or persons whomsoever, occurs with any of the trains, locomotives, cars or other equipment of, or in the possession of, either the Belt Company or a Railway Company only being involved, the party hereto whose equipment is so involved shall defend and assume all liability therefore and all cost and expenses in connection therewith, regardless of considerations of fault or negligence.

(b) Whenever any loss of, damage to, or destruction of any property whatsoever, or injury to or death of any person or persons whomsoever, occurs with any of the trains, locomotives, cars or other equipment of or in the possession of the Belt Company and a Railway Company or more than one Railway Company being involved, the parties hereto whose equipment is so involved agree to separately assume all liability for loss or damage to said trains, locomotives, cars (including without limitation lading), and equipment operated by or in the possession of each of them and for injury to or death of each of their sole employees and persons in each of their care and custody, and the Belt Company and the Railway Company or Railway Companies whose equipment is so involved further agree that injury to or death of any other person or persons whomsoever, and loss, damage or destruction of all other property (including without limitation the Belt Company trackage) so occurring, shall be borne equally by them, regardless of considerations of fault or negligence.

(c) Whenever any loss of, damage to, or destruction of any property whatsoever, or injury to or death of any person or persons whomsoever, occurs with any of the trains, locomotives, cars or other equipment of, or in the possession of, two or more parties to this Agreement (excluding the Belt Company), the parties hereto whose equipment is so involved agree to separately assume all liability for loss or damage to said trains, locomotives, cars (including without limitation lading), and equipment operated by or in the possession of each of them and for injury or death of each of their sole employees and persons in each of their care and custody, and each party whose equipment is so involved further agrees that injury or death of any other person or persons whomsoever, and loss, damage or destruction of all other property (including without limitation the Belt Company trackage) so occurring, shall be borne equally by them, regardless of consideration of fault or negligence.

(d) Whenever any loss of, damage to, or destruction of any property whatsoever, or injury to or death of any person or persons whomsoever, occurs with any of the trains, locomotives, cars or other equipment of, or in the possession of a Railway Company or Railway Companies, and any other user of the Belt Company trackage (other than the Belt Company and another Railway Company) being involved, then any such other user shall be considered as the Belt Company for the purpose of determining between the parties to this Agreement the Belt Company's assumption and apportionment of liability, cost and expense under subparagraph (b) above.

(e) Whenever any loss of, damage to, or destruction of any property whatsoever, or injury to or death of any person or persons whomsoever, occurs with any of the trains, locomotives, cars or other equipment of, or in the possession of, a Railway Company or Railway Companies, and the Belt Company and any other user of the Belt Company trackage being involved, then the Belt Company and any such other user shall be considered as the Belt Company for the purpose of determining between the parties to this Agreement the Belt Company's assumption and apportionment of liability, cost and expense, pursuant to subparagraph (b) above, and the Belt Company's share shall then be a two-thirds portion.

Section 12. Each party to this Agreement shall pay for all loss, damage and expenses, both as to person and property, the risk of which it has assumed under Section 11 of this ARTICLE THREE, and shall forever indemnify and save harmless the other parties hereto and each of them, and the successors and assigns of each, from and against all liabilities, claims and judgments therefor or by reason thereof, and each such party shall pay, satisfy and discharge all costs, charges, attorneys' fees and other expenses incidental thereto, including the expenses of investigating both valid and invalid claims, and all judgments which may be entered or rendered by reason thereof.

In case a claim or suit or suits shall be commenced against any party to this agreement for or on account of damage or injury for which any other party hereto is liable under Section 11 of this ARTICLE THREE, the party against whom the claim or suit is brought shall give to such other party reasonable notice in writing of the pendency of such claim or suit, and thereupon such other party shall assume the defense of such claim or suit, and shall save and hold harmless the party against whom

the claim is brought or the suit is instituted, from all loss, cost, expense and liability by reason thereof. If the party so notified shall fail to assume the defense of such claim or suit, such party so notified shall be concluded by the settlement or judgment as to all matters which could have been compromised or litigated in such settlement negotiations or suit.

It is recognized that for purposes of provisions under Section 11 of this ARTICLE THREE, pilots furnished by the Belt Company for a Railway Company shall be considered the employee of the Railway Company from such time as the pilot starts his tour of duty until he concludes his tour of duty at the Belt Company's designated point of starting and concluding such tour of duty.

Section 13. The Belt Company and each of the Railway Companies agree that incidents have occurred whereby sums will be payable by the parties hereto at a future date as a result of the application of the liability clauses in the Amended Operating Agreement made as of September 1, 1962, effective January 1, 1967, and as amended by Agreement dated as of October 1, 1966, and supplemented by the Agreement dated as of November 1, 1977.

The apportionment to be used in the settlement of these liabilities between the parties will be the working expense ratios, as defined in aforesaid Amended Operating Agreement, as of the date the incident occurred.

Section 14. By the affirmative vote of two-thirds of the Board of Directors of the Belt Company, any other railroad company (not named herein as one of the Railway Companies) owning, leasing or controlling any railroad which connects with the Belt Railway, by direct connection or under lease or trackage rights over other lines, may become a party of the second part to this Agreement, on the following conditions, viz.:

- (1) That such company shall acquire or purchase not less than the required number of par value shares of the capital stock of the Belt Company; and payment of a proportionate amount of other contribution of capital at such date of acquisition.
- (2) That such company shall execute this Agreement or a counterpart thereof, or supplement thereto, or such other agreements as may be specified by the Board of Directors of the Belt Company, as one of the Railway Companies, parties of the second part; and

- (3) That there shall be obtained the authorization or approval of the appropriate governmental regulatory body or bodies before such company's becoming a party to such agreement or agreements or counterparts thereof if such authorization or approval is required by law.

Section 15. All covenants of the Railway Companies under this Agreement are several and not joint, and in no event shall any of the Railway Companies be liable for any default under this Agreement of any other of the Railway Companies.

Section 16. Except as provided in Article Seven hereof, this Agreement shall not be altered or amended except by the consent of all of the parties hereto, to be expressed in writing.

Section 17. The by-laws of the Belt Company shall be so amended as to make them consistent with the provisions of this Agreement.

ARTICLE FOUR.

Rights and Remedies in Case of Default.

Section 1. If any of the Railway Companies shall fail to pay any sum by it payable under this Agreement, on or before the date when the same shall become due, or shall fail to perform and comply with any other covenant or condition by it to be performed or complied with under this Agreement, and such default shall continue for a period of sixty days after written demand for such payment, performance or compliance shall have been made upon such Railway Company by the Belt Company, or if at any time during the term of this Agreement, any of the Railway Companies in any manner shall cease to be beneficial owner of at least 2600 shares of the capital stock of the Belt Company, then and in any such case the Belt Company shall have and is hereby given the right, at its election, to exclude such Railway Company from the use of the Belt Railway, and upon giving notice in writing to such Railway Company of such election, all rights of such Railway Company to use the Belt Railway or any part thereof, and all other rights of such Railway Company under this Agreement shall then and there by such notice be terminated, and the Belt Company may wholly exclude such Railway Company from the Belt Railway; but such termination shall not relieve such

Railway Company from any liability which may have accrued prior, or shall accrue subsequent, to the date of such termination, or deprive the Belt Company of the right to enforce such liability. Nevertheless, if such Railway Company, within sixty days after receipt of any statement rendered to it under this Agreement by the Belt Company, shall give notice in writing to the Belt Company that it contests the correctness of any specified item or items in such statement, and shall pay to the Belt Company all sums then due to the Belt Company, other than the item or items so specified, and also, if demanded by the Belt Company, shall furnish adequate security for the contested item or items, then, so long as such Railway Company in good faith shall contest the correctness of the item or items specified in such notice, the right of such Railway Company to use and enjoy the Belt Railway shall not be terminated under this Section by reason of the failure of such Railway Company to pay in full such item or items so contested. But no such notice, exclusion or termination shall relieve such Railway Company from the payments to be made by it as in ARTICLE THREE of this Agreement provided; it being understood and agreed, as a part of the consideration for this Agreement, that each of the Railway Companies binds itself to make such payments absolutely and at all events.

Section 2. In case any of the Railway Companies shall be excluded from the use of the Belt Railway under Section 1 of this Article, such Railway Company shall be entitled, at any time within the period of one year thereafter but no longer, to be reinstated in its rights and privileges under this Agreement, upon payment to the Belt Company within such period of all sums then in arrears with interest thereon from the respective dates when the same became due, at the rate of six per cent per annum, payable semi-annually, and upon compliance with such other conditions as the Board of Directors of the Belt Company may impose.

ARTICLE FIVE.

Successors and Assigns.

Section 1. The rights by this Agreement granted to each of the Railway Companies shall extend to and inure to the benefit of and may be enforced by any railroad company whose railway at the time shall be leased, operated or controlled by such Railway Company or its successors, and any railroad company which shall lease or purchase all, or substantially all, of the properties of a Railway Company, and any railroad company which at the time shall own a majority of the capital stock of

such Railway Company, and any railroad company a majority of whose capital stock at the time shall be owned by such Railway Company, and any railroad company a majority of whose capital stock at the time shall be owned by any company which shall then own a majority of the capital stock of such Railway Company.

Section 2. The covenants of this Agreement are made for the exclusive benefit of the Belt Company and the Railway Companies, their successors and assigns, and no other party shall be entitled to enforce any of the said covenants. Said covenants shall be binding upon the successors, and assigns of the respective parties hereto, but no such assignment shall release the assigning company from its obligations under this Agreement. If any of the Railway Companies shall be consolidated with other companies, the company formed by such consolidation shall be entitled to all the rights and privileges under this Agreement of any of its constituent companies and shall be liable for all payments obligatory thereunder upon any of its constituent companies.

ARTICLE SIX.

Assignment.

The Belt Company may assign this Agreement to the trustee or trustees in any mortgage or mortgages of the Belt Company which, at the time of such assignment, shall be existing liens upon the Belt Railway, or any part thereof, as and for further security for the payment of the obligations secured by any such mortgage or mortgages. Any such trustee or trustees to which the Belt Company may assign this Agreement shall have the right to enforce every provision of this Agreement which might be enforceable by the Belt Company.

In consideration of such assignment of this Agreement, each of the Railway Companies, so long as it shall not be in default under this Agreement and shall faithfully perform all its obligations under said Agreement, shall be entitled to all of the protection afforded to it under the provisions of this Agreement, in respect of the quiet and peaceable possession and enjoyment of the rights herein granted to each of the Railway Companies, notwithstanding any default of the Belt Company or any Railway Company or Railway Companies, or any sale of the property of the Belt Company under any such mortgages or otherwise.

ARTICLE SEVEN.

Alteration or Amendment.

Section 1. This Agreement shall not be altered or amended during the initial term hereinafter specified in Article Eight, except by the consent of all parties hereto.

Section 2. Any party to this Agreement wishing to alter or amend any of its provisions after April 1, 1995 may serve all other parties hereto with written notice of such desire, setting out in specific detail what alterations or amendments it seeks. Within thirty days of the date of such notice, the parties hereto shall meet for the purpose of reviewing the proposed amendments and shall negotiate, in good faith, to resolve any issues which those proposals create.

Section 3. If the parties are unable to resolve the issues raised by said proposed amendments within one year from the date of the written notice referred to in Section 2 of this Article Seven, the parties hereby agree that the unresolved issues will be submitted to binding arbitration, upon written demand by any party to this Agreement.

Section 4. All unresolved issues shall be settled through binding arbitration by a sole, disinterested arbitrator to be selected jointly by the parties. However, if they fail to select such arbitrator within thirty days after demand for arbitration is made by any party hereto, then they shall jointly submit the matter to binding arbitration under the Commercial Arbitration Rules of the American Arbitration Association. The decision of the arbitrator so selected or appointed shall be final and conclusive upon the parties. Each party to the arbitration shall pay the compensation, costs, fees, and expenses of its own witnesses, exhibits, and counsel. The compensation and expenses of the arbitrator, if any, shall be borne equally by the parties.

ARTICLE EIGHT.

Term and Execution.

Section 1. This Agreement shall be for a full term of at least five (5) years commencing upon the unanimous acceptance and execution of the Railway Companies, and upon the date chosen for execution and implementation by the Belt Company, which date shall be no later than April 1, 1990, and running to April 1, 1995. This Agreement shall thereafter continue in full force and effect until altered or amended as provided above in Section 2 of Article Seven.

Section 2. After this Agreement has been executed by all the shareholder Railway Companies and prior to Belt Company execution and implementation, the Belt Company shall have full authority to solicit new business and to enter into any new agreements, as if this Agreement were in full force and effect.

Section 3. Except as specifically provided herein, this Agreement amends, cancels, and supercedes the existing Belt Company Amended Operating Agreement dated September 1, 1962 and all supplements thereto.

This Agreement may be executed in any number of counterparts, all of which, collectively, shall be held to constitute one instrument.

In Witness Whereof, the parties hereto have caused these presents to be signed by their respective Presidents or Vice-Presidents, and their respective corporate seals to be hereunto affixed and to be attested by their respective Secretaries or Assistant Secretaries.

THE BELT RAILWAY COMPANY OF CHICAGO,

BY (signed) James E. Martin

President

DATE: March 30, 1990

(Corporate Seal)

Attest:

(signed) Ruth A. Taylor

Secretary

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY,

BY (signed) A. W. Rees

Vice President - Operations

DATE: March 12, 1990

(Corporate Seal)

Attest:

(signed) Michael W. Blaszak
Assistant Secretary

BURLINGTON NORTHERN RAILROAD
COMPANY,

BY (signed) W. W. Francis

DATE: March 17, 1990

(Corporate Seal)

Attest:

(signed) Victoria Hanel

CSX TRANSPORTATION, INC.,

BY (signed) J. R. Davis

DATE: February 22, 1990

(Corporate Seal)

Attest:

(signed) David M. Yearwood
Assistant Secretary

CONSOLIDATED RAIL CORPORATION,

BY (signed) H. W. Brown

DATE: February 26, 1990

(Corporate Seal)

Attest:

(signed) Allan Schimmel

THE BELT RAILWAY COMPANY OF CHICAGO
OPERATING AGREEMENT

GRAND TRUNK WESTERN RAILROAD
COMPANY,

BY (signed) G. L. Maas
President

DATE: February 26, 1990

(Corporate Seal)

Attest:

(signed) W. J. McKnight

ILLINOIS CENTRAL RAILROAD COMPANY,

BY (signed) E. H. Harrison

DATE: March 5, 1990

(Corporate Seal)

Attest:

(signed) P. F. Healy, Jr.
Assistant Secretary

MISSOURI PACIFIC RAILROAD COMPANY,

BY (signed) R. K. Davidson

DATE: February 27, 1990

(Corporate Seal)

Attest:

(signed) C. W. Saylors

NORFOLK AND WESTERN RAILWAY
COMPANY,

BY (signed) C. M. Irvin

DATE: February 26, 1990

(Corporate Seal)

Attest:

(signed) Dezora M. Martin
Assistant Secretary

THE BELT RAILWAY COMPANY OF CHICAGO
OPERATING AGREEMENT

SOO LINE RAILROAD COMPANY,

BY (signed) E. V. Dodge

DATE: March 30, 1990

(Corporate Seal)

Attest:

(signed) Teresa M. Keener

Assistant Secretary

THE BELT RAILWAY COMPANY OF CHICAGO
OPERATING AGREEMENT

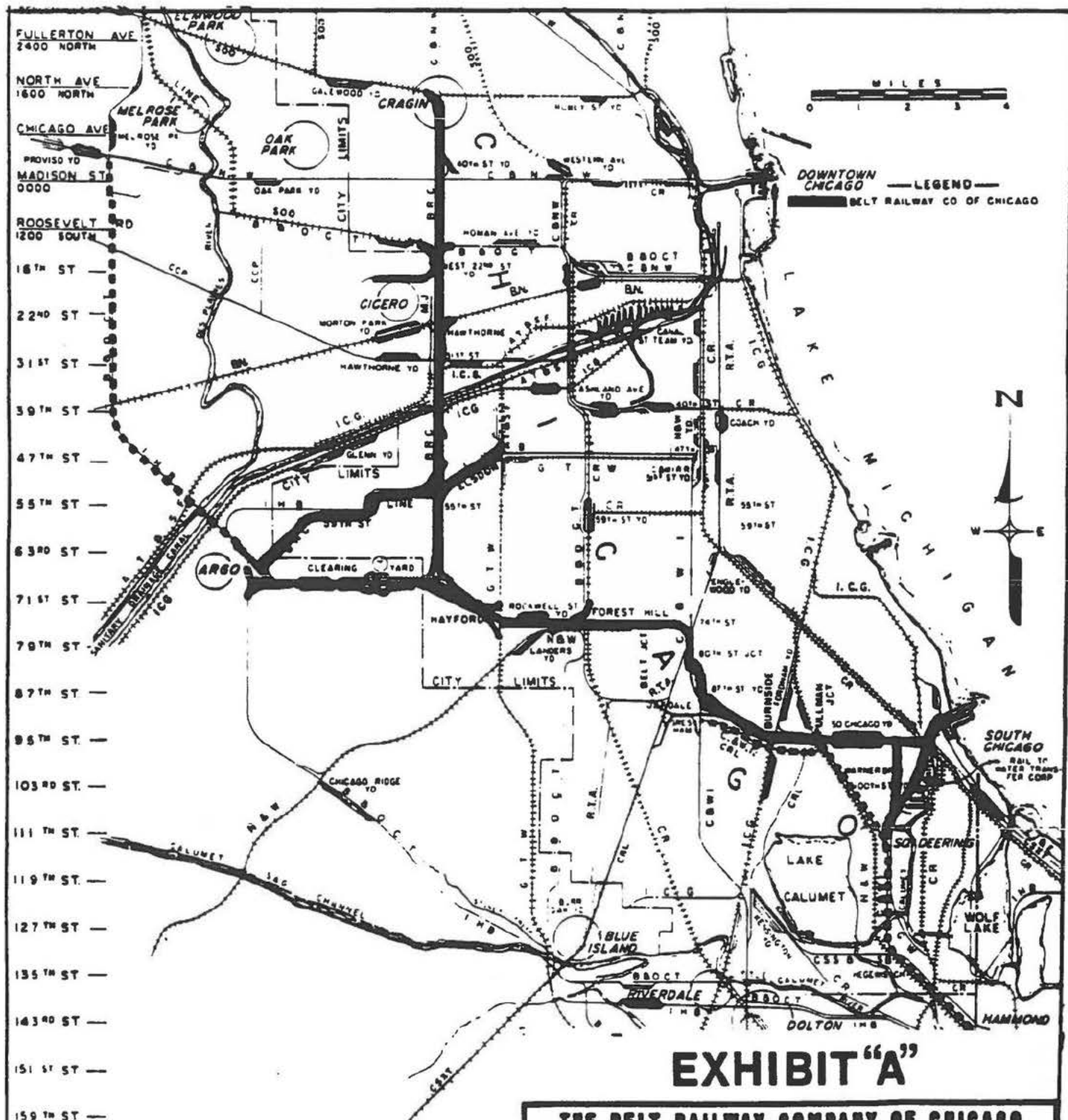


EXHIBIT "A" THE BELT RAILWAY COMPANY OF CHICAGO OFFICE OF THE CHIEF ENGINEER		
MAP OF THE BELT RAILWAY COMPANY OF CHICAGO		
DRAWN TRACED CHECKED SCALE	WGT FILE NO. 114.12-89	APPROVED: DATE 1-24-90

Exhibit B

BRC Rate Sheet

Contains Highly Confidential Information
Completely Redacted

REDACTED

Exhibit C

Verified Statement of
Michael Matteucci

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

STB FINANCE DOCKET NO. 36397

VERIFIED STATEMENT OF MICHAEL MATTEUCCI

My name is Michael Matteucci, and I am Director, Region Contracts and Administration at CN. I joined CN in 2010.

1. Based on a review of CN's records, I can confirm that, since CN and CP signed the Interim Agreement in 2019, CN has reimbursed CP {{\$2,036,479.65}} for the BRC's switching fees for traffic CP has delivered to Clearing under the Agreement, and CN has paid the BRC {{\$3,317,380.84}} in switching fees for CP-bound traffic that CN has delivered to Clearing during that same period.

2. To reach Clearing Yard from its Kirk Yard in Gary, Indiana, CN must travel over the Elsdon line operated by CSXT, paying a per-car trackage rights fee to do so.

VERIFICATION

I, Michael Matteucci, 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 2nd day of February, 2022.

A handwritten signature in blue ink, appearing to read "Michael Matteucci", is written over a horizontal line.

Attachment 2

**May 11, 2023 CN Post-Comments Reply Brief
(Confidentiality Designations Removed)**

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

STB FINANCE DOCKET NO. 36397

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Dated: May 11, 2023

CONTENTS

INTRODUCTION	1
ARGUMENT	4
I. CP cannot relitigate the Seventh Circuit’s holding that CN can designate Clearing.	4
A. CP is wrong to claim that the Seventh Circuit decided nothing.	5
1. Courts can and do decide issues in agency appeals.	5
2. By conflating cost and location, CP invites the same error that led to vacatur.	6
3. CP’s common-law arguments conflict with the court’s decision.	9
B. CP misstates CN’s position.	13
II. CP’s tardy reasonableness challenge is forfeited and meritless.	15
A. CP’s contradictory statements in the merger proceeding bar it from challenging Clearing’s reasonableness here.	15
B. By waiting years to challenge Clearing’s reasonableness, CP forfeited the issue.	18
C. Even if CP could raise the issue now, Clearing is a reasonable interchange location.	24
1. CP misstates the law governing reasonableness.	25
2. Under the correct analysis, Clearing is a reasonable interchange point.	29
III. Under the BRC Operating Agreement, precedent, and industry custom, CP should pay its fair share of the BRC’s fees.	35
CONCLUSION	39

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*

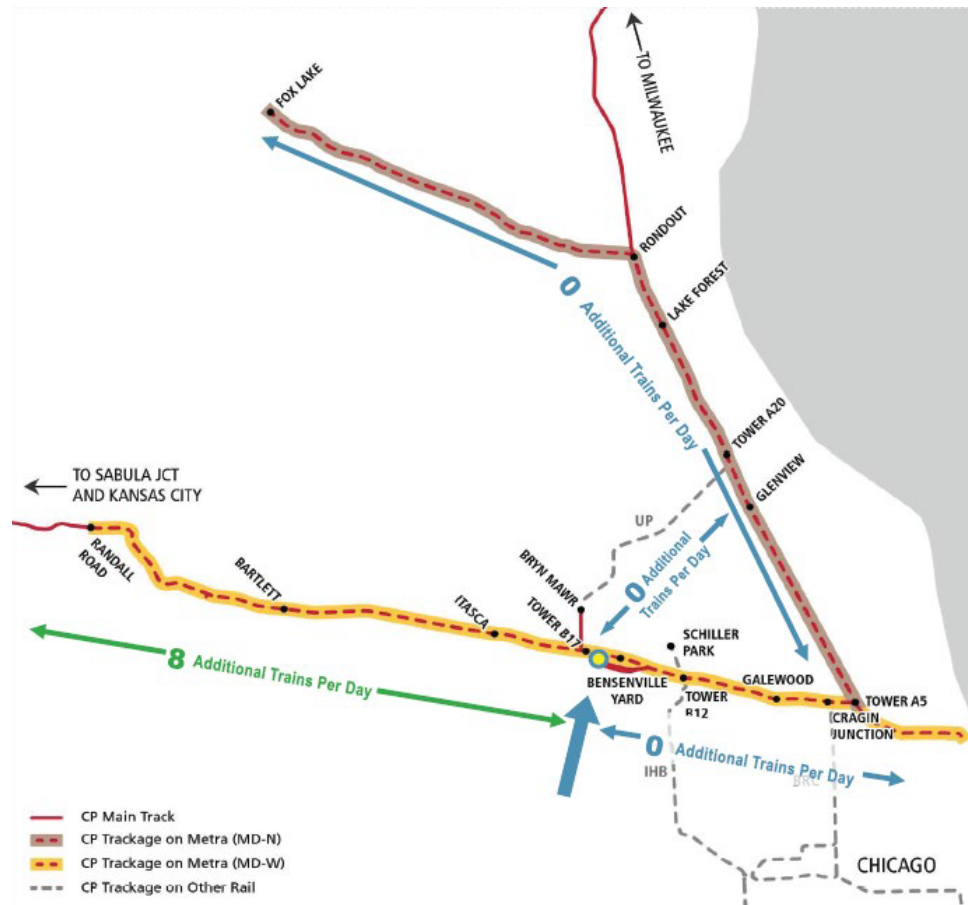
operations—both immediately post-closing and for the next three years. As CP testified, “[t]he operating plan is built to be the plan we use.”⁶⁴ CP did not hint in its operating plan that it was contemplating an interchange-point change in Chicago, let alone explain how moving CP-CN interchanges to a 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 {1%} 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.

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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 {30} cars per day} with CN at Clearing, and {those volumes} have remained steady over time. That is a mere {1%} 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 {30} 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

broad 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 {with CN reimbursing CP on an interim basis for 100% of the switching fees CP pays to the Belt Railway for Clearing interchange traffic that was formerly interchanged at Spaulding, pending a final Board decision as to who was responsible for those costs.} From January 2020 through February 2023, CN has {reimbursed CP a total of \$2,824,975.78 for these fees.} These {fees would otherwise be paid by CP} 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

{ \$4,426,768.22 } 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 { \$2,824,975.78 } 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 { a low volume of cars } to CN per day at Clearing (approximately { 30 cars per day }) 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

Attachment 3

**March 21, 2022 CP Reply to CN Post-Remand Brief
(Confidentiality Designations Removed, Except Verified
Statement of Will Wangerin)**

VIA ELECTRONIC FILING

304156

March 21, 2022

ENTERED

Office of Proceedings

March 21, 2022

Part of

Public Record

The Honorable 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 Soo Line Railroad Company d/b/a Canadian Pacific ("CP")'s Reply to Wisconsin Central, Ltd. ("CN")'s Post-Remand Brief.

CP's filing includes both a Public Version and a Highly Confidential Version.

Please do not hesitate to contact me with any questions.

Sincerely,

Stinson LLP

/s/ David F. Rifkind

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

CP'S REPLY TO CN'S POST-REMAND BRIEF

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Dated: March 21, 2022

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	BACKGROUND	3
III.	REMAND STANDARDS	8
IV.	ARGUMENT	9
A.	The BRC Operating Agreement does not provide for BRC to receive cars on CN's behalf at Clearing.	10
B.	Clearing is not a reasonable interchange location for the issue traffic relative to Spaulding.	13
C.	The obligation "to provide" requires that CN pay fees associated with use of its designated interchange facilities.	16
1.	Section 10742 requires CN to pay BRC fees as part of its obligation "to provide."	16
2.	Requiring CN to pay BRC fees is consistent with industry practice.....	18
3.	Allowing a receiving carrier to evade its statutory burden to provide interchange facilities would be highly disruptive to interchange arrangements.	19
D.	The BRC Operating Agreement does not control who pays.....	19
1.	Railroads can and do enter into separate reimbursement agreements.	20
2.	CN's argument misconstrues the Court's Opinion which focused on statutory rights and obligations and makes no mention of the BRC Operating Agreement.	22
E.	CN's purported "fairness" argument ignores that the move to Clearing is at CN's insistence for CN's benefit.....	23
V.	CONCLUSION.....	25

Soo Line Railroad Company d/b/a Canadian Pacific (“CP”) respectfully submits this Reply to the Post-Remand Brief filed by Wisconsin Central Ltd. d/b/a Canadian National (“CN”) (“CN’s Brief”).

I. INTRODUCTION

CN’s Post-Remand Brief vastly overstates the breadth and import of the Seventh Circuit’s opinion (the “Opinion”), asserting that but a “sole question remain[s] in this case: Whether CP must pay the [Belt Railway of Chicago (“BRC”)]’s switching fees for the CN-bound interchange traffic that CP delivers to the BRC’s Clearing Yard” CN’s Brief at 1. This assertion ignores the Court’s stated framework for analysis for interchange disputes. According to the Court, “three distinct questions could require resolution: (1) may the receiving carrier ever designate a willing third party to receive the traffic on its behalf?; (2) if yes, is the proposed location for interchange ‘reasonable’ (another important word in § 10742) compared with the place where switching otherwise would occur?; (3) if yes to both of these questions, who pays the third party?” *Wisc. Cent. Ltd. v. STB*, 20 F.4th 292, 294-95 (7th Cir. 2021).

The Seventh Circuit addressed only the first question and only generally, *i.e.*, that CN theoretically could contract with the BRC to act on its behalf—not that CN had contracted with BRC to act on its behalf. Holding that the Board is entitled to deference with respect to reasonableness, it left to the Board to resolve the next threshold question: Whether Clearing—CN’s unilaterally-chosen location for its benefit—is reasonable relative to Spaulding—where CN and CP’s lines intersect and

the parties interchanged traffic for nearly a decade? Only if the Board answers that question affirmatively, does it consider the issue of who pays for interchange at Clearing.

Here, the question of reasonableness of Clearing relative to Spaulding must take into account the fact that interchange at Spaulding ensures CP is able to keep its Bensenville Yard clear of CN interchange traffic when Clearing is struggling. Keeping cars out of Clearing and Chicago helps protect CP's and the terminal's fluidity. As CN itself represented to the Board as a prime public interest justifying its acquisition of the EJ&E, the acquisition would allow CN to keep traffic out of the Chicago terminal area—and Clearing in particular—to the benefit all stakeholders.

Further, the Board should take into account third party costs in its reasonableness determination. Spaulding is free to CP to interchange whereas, according to CN, CP must pay to deliver cars to interchange at Clearing even though the switch to Clearing is entirely for CN's benefit. So, if CP must pay BRC fees as CN contends, this would be an additional basis for determining that Clearing is not reasonable for traffic that could be interchanged at Spaulding for free.

As to the question of who pays the BRC fees for the traffic at issue, the statute unequivocally requires CN to “provide” the interchange facilities to receive traffic. 49 U.S.C. § 10742. As the Board already observed, if CP pays, CN would be “providing” nothing.” *Wisc. Cent., Ltd.—Pet. for Decl. Order—Interchange with Soo Line R.R. Co.*, FD 36397, 2020 WL 6380328, slip op. at 7 (STB served Oct. 30, 2020) (the “2020

Board Decision”). Thus Section 10742 plainly requires that CN pay for Clearing as to the traffic that it seeks to compel CP to interchange at Clearing.

This is consistent with the Court’s holding that the statute allows CN to contract with a third party to receive traffic on CN’s “behalf,” *Wisc. Cent. Ltd.*, 20 F.4th at 294, *i.e.*, CN can contract with the BRC to step into its shoes of CN for purposes of receiving the issue traffic. Since CN cannot charge CP for the use of CN’s own interchange facilities, it inexorably follows that the BRC, when it is acting on CN’s “behalf,” cannot charge CP for use of its interchange facilities.

CN’s argument that the BRC Operating Agreement overrides CN’s statutory obligation “to provide” is fundamentally flawed. The BRC Operating Agreement, which was intended to address interchange traffic that the carriers voluntarily interchanged at Clearing, does not prohibit carriers from entering into separate reimbursement as carriers have done for more than a century. Nor does the BRC Operating Agreement itself directly address who pays in the first place.

Lastly, CN’s argument that fairness requires that CP pays its share ignores the fact that the move to Clearing for traffic interchanged in both directions is entirely for CN’s benefit.

II. BACKGROUND

For nearly a decade, CP and CN interchanged freight rail cars at Spaulding, one of two locations in the Chicago area where CN’s and CP’s lines intersect. *Soo Line R.R. Co.—Pet. for Decl. Order and Prelim. Inj.—Interchange with Canadian Nat’l*, FD 36299, 2019 WL 7484084, slip op. at 1 (STB served Nov. 29, 2019) (“2019 Board

Decision”). The interchange at Spaulding not only worked well, but also kept traffic out of the often congested Chicago Terminal area. CP’s Reply to Petition for Declaratory Order, FD No. 36397 at 3 (May 29, 2020) (“CP’s Reply”), Walker Verified Statement (“Walker V.S.”) at ¶¶ 4-5, 16. It also promoted fluid and efficient yard operations by ensuring that CN’s cars would be cleared from CP’s Bensenville Yard daily, kept CP’s mainline (which it shares with Metra) fluid during the day and was more economical than paying a third party terminal switch carrier. Walker V.S. at ¶¶ 16, 17.

When CN’s forecast of traffic volumes over the mainline through Spaulding grew, CN sought to eliminate interchange at Spaulding as a way to free up capacity on its mainline.¹ *Id.* at ¶ 15. In March 2019, CN first unilaterally designated its Kirk Yard (“Kirk”) in Gary, Indiana as the new interchange location for CP to deliver CN. *Id.* at ¶¶ 10-11. Kirk is located on the other side of the Chicago Terminal from CP’s

¹ CN continues to claim that moving interchange from Spaulding to Clearing Yard also benefits Bartlett by reducing blocked crossings frequency. CN’s Brief at 5. The Board and the Seventh Circuit have already found these allegations of no, or little, moment to the statutory interpretation at issue. In addition, as a factual matter, the reduction in blocked crossings at Bartlett is explained by many factors other than the shift in interchange location, including reductions in train volumes and changes in CN’s operational practices. Notably, CN continues to hide the data that would shed insight on this issue. Further, although the outcome of this proceeding is unlikely to change where the parties interchange traffic in light of the terms of the parties’ Interim Agreement, even if interchange did revert to Spaulding, reasonable actions could again be undertaken to minimize any alleged impact on the community, including by CN itself whose increased mainline traffic appears to be a primary source of the alleged impact. For example, CP previously shifted interchange operations to the middle of the night and will act to clear grade crossings for emergency vehicles. Walker V.S. at ¶ 9. CN could easily choose to do the same.

Bensenville Yard and to reach Kirk and then return to Bensenville Yard, CP would have had to operate from Bensenville Yard to the connection to CN's rail line at Spaulding, and then operate around Chicago to Kirk and back again—a distance of more than 200 miles, including 168 miles on CN's rail line. *Id.* at ¶ 11; 2019 Board Decision at 5-6. On that roundabout journey, CP would have incurred substantial crew, crew transport, fuel and equipment costs as compared to interchange at Spaulding, which is immediately adjacent to CP's main line and is only 17 miles from Bensenville Yard. *Id.* Therefore, on April 30, 2019, CP asked the Board to declare that Kirk is not a reasonable interchange location, which would potentially include the exercise of trackage rights over Norfolk Southern. *Id.* at 1-6.

Following briefing and oral argument, by Decision served November 29, 2019, the Board declared that Kirk is not a reasonable interchange location and that CN could not unilaterally designate Kirk to receive cars in interchange from CP. *Id.* at 1, 8.² In so ruling, the Board made clear that “CP cannot be forced by CN to exercise its trackage rights in order to reach Kirk Yard” as “trackage rights are permissive with their holder.” *Id.* at 6-7. CN did not appeal that decision.

Undeterred—and seeking to foist the cost of its preferred interchange location onto CP—CN instead petitioned the Board on April 14, 2020 to declare that (1) CN

² During the pendency of FD 36299, CN and CP entered into an agreement to interchange CN-bound traffic at Clearing (the “Interim Agreement”). *See* Ex. 8 to CN's Petition. Under the Interim Agreement, CN pays 100% of the BRC's fees for cars that would otherwise have been interchanged at Spaulding pending a “final Board decision.” *Id.* at 1. The Interim Agreement specifies that “[t]he parties will conclude a permanent agreement regarding interchange at Chicago upon the final Board decision (or appeal), informed by the decision.” *Id.* at 2.

had the right to designate the BRC's Clearing Yard as the interchange location in Chicago for receiving cars from CP and (2) that CN may require that CP bear the associated BRC fees. CN's Petition for Declaratory Order, FD No. 36397 (April 14, 2020) ("CN's Petition") at 1. The BRC is a terminal switching carrier in the Chicago Terminal owned by six Class I railroads that operate in Chicago. 2020 Board Decision at 1 n. 2. Although CP holds an 8.33% interest and CN a 16.66% interest in the BRC, the BRC is a separate and distinct legal entity that is controlled by neither CP nor CN. CP's Reply, Hubbard Verified Statement ("Hubbard V.S.") at ¶ 13; 2020 Board Decision at 1 n.2. To avoid the BRC becoming entangled in payment disputes between carriers, the BRC Operating Agreement provides an administratively workable rule which contemplates that the delivering carrier pay BRC's fees for cars interchanged using Clearing. Hubbard V.S. at ¶ 15. Nothing in the carriers' agreements with BRC prohibits CN and CP from entering into a separate agreement that requires CN to reimburse CP for some or all of such fees. *Id.*

To utilize the BRC's services and facilities to deliver cars to CN, CP must pay a per car fee. Hubbard V.S. at ¶ 14; *see also* BRC Operating Agreement (attached as Ex. A to CN's Brief).³ Thus, the route to Clearing Yard is not freely-available to CP simply because CP holds a minority interest in the BRC. Not only is the route not free, CP must also exercise permissive trackage rights over the BRC lines to reach CN's proffered chosen interchange point of Clearing Yard. Hubbard V.S. at ¶ 14. As

³ CP would also have to operate east on its mainline from its Bensenville Yard to reach the BRC's rail lines and then operate south on the BRC's line to Clearing to make interchange deliveries for CN. Walker V.S. at ¶ 13.

an owner, under the BRC Operating Agreement, CP has the right but not the obligation to interchange traffic utilizing the BRC. *Id.*

By Decision served October 30, 2020, the Board, applying the plain language of 49 U.S.C. § 10742 and longstanding precedent, declared that CN cannot unilaterally designate the BRC's Clearing Yard as the location where it will receive traffic in interchange from CP. 2020 Board Decision at 1. And it made clear that by forcing CP to pay a fee to reach CN's chosen interchange location of the BRC's Clearing Yard, "CN would itself be 'providing' nothing." *Id.* at 7.

Following an appeal by CN of the Board's Decision, the U.S. Court of Appeals for the Seventh Circuit issued a decision on December 8, 2021 which remanded this matter to the Board "for further proceedings consistent with [the Court's] [O]pinion." *Wisc. Cent. Ltd.*, 20 F.4th at 295. As explained in more detail below, while the Seventh Circuit's Opinion held that the statutory language "power to provide" allows CN to enter into a contract with a willing third party to receive its traffic "on its behalf," *id.* at 294-95, the Opinion did not address whether the BRC Operating Agreement was a sufficient contractual basis for CN to designate Clearing, nor did it reach the issues of (1) the reasonableness of CN's unilaterally-chosen interchange location, or (2) who pays if Clearing is determined to be reasonable relative to Spaulding.

On February 2, 2022, without any Board directive concerning post-remand briefing and unaccompanied by any request for leave to file, or for the Board to reopen the record on remand, CN unilaterally filed its "Post-Remand Brief." On February

14, 2022, CP filed a letter motion requesting that the Board strike CN's unauthorized and improper filing; determine whether and, if so, on what issues, further briefing should address in this matter; or, in the alternative, if the Board determines to accept CN's brief, that CP be granted until March 21, 2022 to file its Reply to CN's Post-Remand Brief. On February 22, 2022, CN filed a letter opposing CP's February 14, 2022 letter motion ("CN's February 22, 2022 Letter Reply").

III. REMAND STANDARDS

The Seventh Circuit's Opinion made no specific command to the Board on remand, simply stating that it was remanding this matter to the Board "for further proceedings consistent with [the Court's] opinion." *Wisc. Cent. Ltd.*, 20 F.4th at 295. And while it is true that "[w]hen the [agency] addresses a case on remand, the 'law of the case' generally requires it to confine its discussion to the issues remanded[,] [t]he law of the case doctrine, however, applies only to issues that have been resolved, *generally leaving [the Board] free to address issues that the appellate court left undecided.*" *United States v. Morris*, 259 F.3d 894, 898 (7th Cir. 2001) (emphasis added) (internal citations omitted). Thus, the law of the case doctrine has no application at all to issues left unaddressed by the Seventh Circuit.

Likewise, CN's assertion that the law of the case doctrine somehow could preclude the Board from addressing issues which, while not actually decided were, according to CN, "impliedly" decided,⁴ puts the cart before the horse. If the issue were

⁴ CN's February 22, 2022 Letter Reply at 5 (citing *Delgado v. U.S. Dep't of Justice*, 979 F.3d 550, 557 ("[T]he law of the case [doctrine], . . . 'prohibits a lower court from

left undecided—and many were—then the law of the case doctrine has no application in the first place. Moreover, “[t]he law of the case doctrine applies only to issues actually decided, and not to dicta.” *Abbott Labs. v. Torpharm, Inc.*, No. 97 C 7515, 2003 U.S. Dist. LEXIS 19294, at *8 (N.D. Ill. Oct. 28, 2003) (citing *Geldermann, Inc. v. Fin. Mgmt. Consultants, Inc.*, 27 F.3d 307, 312 (7th Cir. 1994)).

Therefore, on remand, in addition to “the issues remanded” and “issues arising for the first time on remand,” the Board may also address issues timely raised “*but which remain undecided.*” *Morris*, 259 F.3d at 898 (emphasis added). As explained herein, the Court’s short Opinion left unaddressed several issues which precede any determination of who must pay for access to Clearing Yard.⁵

IV. ARGUMENT

Under the Court’s decisional framework, there are three questions that could require answering. The Court answered only the first question: whether CN may “ever” designate a willing third party to act on its “behalf” to receive traffic from CP. *Wisc. Cent. Ltd.*, 20 F.4th at 294. The Court ruled that CN could contract with BRC as a willing third party to act on its behalf. But in doing so, the Court did not address whether the BRC Operating Agreement standing alone provided for BRC to receive traffic on CN’s behalf. It does not.

reconsidering on remand an issue expressly or impliedly decided by a higher court absent certain circumstances.”) (emphasis added).

⁵ Furthermore, the “usual rule [is] that a reviewing court should leave the agency free on remand to determine whether supplemental fact-gathering is necessary.” *See, e.g., Sierra Club v. EPA*, 325 F.3d 374, 382 (D.C. Cir. 2003) (citing *Nat’l Grain & Feed Ass’n v. OSHA*, 903 F.2d 308, 310-11 (5th Cir. 1990)).

Additionally, the Court left for the Board to address the questions of whether Clearing is reasonable relative to Spaulding, and if, yes, who must pay for the interchange. The Board is afforded deference with respect to issues of reasonableness. *Wisc. Cent. Ltd.*, 20 F.4th at 295. Because Clearing increases risks to CP, the terminal, and the rail network if CP must pay to use Clearing when Spaulding is free to it, then Clearing is not reasonable. And, as to who must pay, the statute speaks directly to that issue and clearly requires that CN, as part and parcel of its obligation to provide interchange facilities, pay the BRC's fees. Otherwise, CN would be providing nothing.

A. The BRC Operating Agreement does not provide for BRC to receive cars on CN's behalf at Clearing.

The only issue addressed by the Seventh Circuit was whether a receiving carrier may “ever” designate interchange facilities on a third party's line. The Seventh Circuit ruled that a carrier can have the “power to provide” interchange facilities “as a result of a contract, just as it can have that power by ownership.” *Wisc. Cent. Ltd.*, 20 F.4th at 294. Thus, a receiving carrier may contract with a willing third party to receive cars on its behalf.

CN contends, however, that the Court went a step further and held that the BRC Operating Agreement gives CN the power to provide Clearing, *i.e.*, it is a contract for BRC to receive cars on its behalf. CN is incorrect for several reasons.

First, the Opinion never even mentions the BRC Operating Agreement, let alone decided that it has any effect on the parties' obligations. It refers only to the fact that BRC is “willing” to receive cars on CN's behalf. But that reference merely

accepts as true CN's representation that BRC is willing to accept cars on its behalf. It says nothing about the rights and obligations under the BRC Operating Agreement, an agreement that the Seventh Circuit declined to discuss and is therefore left for the Board to address. *See Morris*, 259 F.3d at 898 (explaining that on remand an agency is "free to address issues that the appellate court left undecided").

Second, the Opinion effectively concludes that a third party may by contract act on the receiving carrier's "behalf", that is, as the receiving carrier's agent for purposes of receiving cars. The BRC Operating Agreement, however, does not establish such an agency relationship. In fact, the ICC, in approving the 1965 BRC Operating Agreement expressly rejected an agency relationship between BRC and its owners as incompatible with the agreement and the BRC's role as a neutral switch carrier. *See Belt Ry. Co. of Chi., et al.—Operation*, 324 I.C.C. 597, 605, 610-11 (1965). Thus, the BRC Operating Agreement by itself is insufficient to satisfy CN's obligations to contract with BRC to act on its behalf.

Third, CN's reliance on the BRC Operating Agreement and its interpretation of that agreement as requiring CP to exercise its rights under that agreement to deliver CN-bound cars to Clearing for CN's benefit cannot be reconciled with the Supreme Court-based holding that "the exercise of trackage rights remains permissive with their holder," *Burlington N. R.R. v. United States*, 731 F.2d 33, 39 (D.C. Cir. 1984) (citing *Chi., Rock Island & Pac. Ry. v. Denver & Rio Grande R.R.*, 143 U.S. 596, 609 (1892)), or the related rule that a carrier allow a delivering carrier

free interchange. *See Toledo, Peoria & W. Ry. Corp.—Pet. for Declaratory Order*, FD 35404 et al., 2011 WL 1564711, slip op. at 10 (STB served April 26, 2011) (“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.”). These precedents require that CN’s contract with BRC allow CP to reach Clearing without charge.

CN wrongly contends that the Seventh Circuit overruled both the rule that a carrier cannot be compelled to exercise permissive trackage rights for another carrier’s benefit and the “free-transit” rule. Neither contention is correct. The Opinion does not discuss the permissive trackage rights rule. The Seventh Circuit cannot reverse a rule rooted in Supreme Court precedent and certainly cannot do so *sub silentio* without so much as a reference to the rule or its underlying decision. In fact, this same principle was espoused in the 2019 Board Decision in FD 36299—a decision which CN did not appeal—wherein CN asserted that “that it would be willing to grant CP trackage rights from the NSR line to Kirk Yard,” CN’s attempted chosen interchange location. 2019 Board Decision at 6. But the Board made clear that “CP cannot be forced by CN to exercise its trackage rights in order to reach Kirk Yard” as “in general, trackage rights are permissive with their holder.” *Id.* at 6-7 (citing *Burlington Northern*, 731 F.2d at 39). Thus, the Board has already twice determined that CN cannot force CP to exercise trackage rights to reach CN’s chosen interchange location. And to the extent that CN is now suggesting that the 2020 Board Decision’s on that point was somehow “impliedly” reversed by the Seventh Circuit—which it

clearly was not since it was not even mentioned by the Court—CN conveniently ignores the fact that the issue was already decided by the Board in its 2019 Board Decision, a decision which CN failed to appeal.

As to the free-transit rule, the Opinion did not question the validity of the rule itself, but merely faults the Board for not explaining why designation of Clearing would “frustrate” the rule. *Wisc. Cent. Ltd.*, 20 F.4th at 294. This criticism merely goes back to the Seventh Circuit’s criticism of the Board for assuming the answer to question 3 (who must pay) in determining the answer to question 1 (whether CN may “ever” designate a third party to receive cars on its behalf). *Id.* at 294-95. The free-transit rule thus remains very much a valid and vital part of STB jurisprudence and simply reflects the statutory requirement that a receiving carrier “provide” interchange facilities to receive traffic.

B. Clearing is not a reasonable interchange location for the issue traffic relative to Spaulding.

Under Section 10742, CN’s statutory obligation is to “*provide* reasonable, proper, and equal facilities” for the interchange of traffic. 49 U.S.C. § 10742 (emphasis added). Section 10742 is clear on the parties’ respective interchange obligations. It states:

A rail carrier providing transportation subject to the jurisdiction of the Board under this part *shall provide* reasonable, proper, and equal facilities that are within its power to provide for the interchange of traffic between, and for the receiving, forwarding, and delivering of passengers and property to and from, its respective line and a connecting line of another rail carrier or of a water carrier providing transportation subject to chapter 137.

49 U.S.C. § 10742 (emphasis added). In determining reasonableness of interchange locations, the location must not impose undue operating hazards “or require the delivering carrier to do work which properly belongs to the receiving carrier.” *N.Y., Chi. & St. Louis R.R. Co. v. N.Y. Cent. R.R. Co.*, 314 I.C.C. 344, 345 (1961) (quoting *Kan. City S. Ry. Co. v. La. & Ark. Ry. Co.*, 213 I.C.C. 351, 359 (1935)). See also *Toledo*, slip op. at 10 (interpreting 49 U.S.C. § 10742); *Norfolk S. Ry.—Pet. for Declaratory Order—Interchange with Reading Blue Mountain & N. R.R.*, NOR 42078, 2003 WL 1963547, slip op. at 4-5 (same) (STB served April 29, 2003); 2019 Board Decision at 5 (“Here, requiring CP to travel 84 miles one way on CN’s system solely to effectuate interchange—a distance that would likely cause CP crews’ permissible hours of service to expire and would require a dedicated locomotive—would be unreasonable and is ‘work which properly belongs’ to CN.”).

Importantly, the question as formulated by the Seventh Circuit is not whether Clearing is a “reasonable” interchange point generally as CN appears to contend, but whether Clearing is reasonable “relative” to Spaulding. *Wisc. Cent. Ltd.*, 20 F.4th at 294 (“[I]s the proposed location for interchange ‘reasonable’ (another important word in § 10742) *compared with* the place where switching otherwise would occur?”) (emphasis added). The answer for the traffic at issue, is no.

In addition to third party costs, there are operational costs to CP associated with Clearing.⁶ Walker V.S. at ¶ 16. If Clearing is encountering fluidity issues as

⁶ CN has previously tried to argue that CP saves crew and equipment costs in not having to service Spaulding. However, as CP previously explained elimination of the assignment to Spaulding has not resulted in the reduction of its crew base or

has happened in the past, CN cars may congest CP's Bensenville Yard until Clearing can accept them. *Id.* Congestion at Bensenville could have serious consequences for the CP system. *Id.* Interchange at Spaulding ensures that CP can clear its Bensenville of CN interchange traffic daily, regardless of conditions elsewhere in the Chicago Terminal, helping to ensure that CP is master of its own destiny. *Id.*

Keeping cars out of Clearing and the Chicago terminal also benefits Chicago area stakeholders (including customers and other railroads) and the North American network. Indeed, in the EJ&E control proceeding, CN represented to the Board that the transaction would help to relieve congestion in the Chicago Terminal by enabling CN traffic to bypass Clearing Yard and the Chicago Terminal area. *See Canadian National Ry. Co. and Grand Trunk Corp.—Control—EJ&E West Co.*, FD No. 35087, 2008 WL 8139694, slip op. at 5 (“According to the applicants, acquiring the Kirk Yard and other yards on the EJ&E line . . . *would permit CN to use those yards instead of the congested BRC Clearing Yard* to classify and switch trains passing through the Chicago metropolitan area. Applicants expect this access to reduce the number of trains that, though bound for other destinations, would otherwise need to travel into Chicago.”), 10 (“Applicants maintain that this rerouting *would benefit CN-served customers in the Chicago area and customers served by other Class I railroads by reducing the demand on the capacity of BRC*, Indiana Harbor Belt Railroad (IHB),

equipment pool in Chicago. Walker V.S. at ¶ 17. Further, CP's ability to move CN bound cars on existing trains to Clearing is dependent on capacity and is likely temporary. *Id.* at ¶¶ 16-18. In the future, CP may need to add an additional train to Clearing in order to handle CN bound traffic from Bensenville. *Id.* at ¶ 18.

and other CN lines through the central Chicago terminal area.”) (STB served Dec. 24, 2008) (emphasis added). CN should be held to its prior representations to the Board on its intention of moving traffic away from the congested BRC, particularly where CN’s about face on this issue is based on its own self-interest and is in neither the public’s interest nor CP’s.

Spaulding is free to CP to deliver cars to CN. If CN is correct that CP must bear the BRC fees, Clearing obviously would not be free to CP. Instead, CP would be forced to pay a third party to use the interchange facilities at Clearing. This additional third party cost weighs heavily against the reasonableness of Clearing relative to Spaulding. Of course, if CN were to undertake to pay BRC’s fees, as it is currently doing under the Interim Agreement, or the Board were to hold that § 10742 requires CN to bear the cost to provide the interchange facilities, then this aspect of the cost factor would be neutral in the reasonableness determination.

C. The obligation “to provide” requires that CN pay fees associated with use of its designated interchange facilities.

1. Section 10742 requires CN to pay BRC fees as part of its obligation “to provide.”

The answer to the question of who pays the third party costs to provide the interchange facilities at Clearing “depends on the language of the statute.” *Wisc. Cent. Ltd.*, 20 F.4th at 295. And on this issue the statute is unambiguous. Section 10742 plainly states that a carrier “*shall provide* reasonable, proper, and equal facilities that are within its power to provide for the interchange of traffic.” 49 U.S.C. § 10742 (emphasis added). “Shall provide” cannot reasonably be treated as “shall provide for a fee.” Thus the Board has consistently construed Section 10742 to require

a receiving carrier to provide access to interchange facilities for “free.” *See* 2020 Board Decision at 6. Even CN has acknowledged its “legal responsibility” to provide CP interchange facilities at no cost to CP. *See id.* at 8 (citing to CN’s COO’s own letter⁷ which stated that “CN’s only legal responsibility is to provide reasonable facilities for interchange and a *free* route over its tracks to that interchange point”) (emphasis added). And in this proceeding, the Board properly held that if CP must pay BRC fees, then “CN would itself be ‘providing’ nothing.” *Id.* at 7.⁸

Likewise, courts have consistently held that an obligation to provide requires the obligator to bear the economic cost. *St. Louis Police Officers’ Ass’n v. Bd. of Police Comm’rs of City of St. Louis*, 259 S.W.3d 526, 529 n.4 (Mo. 2008) (“The phrase ‘shall provide’ is substantially different from the phrase ‘shall be made available for purchase’ and implies that the Board must provide to its retirees insurance coverage without the necessity of paying a premium.”). To “provide” means something more than simply allowing. *See Cent. Midwest Interstate Low-Level Radioactive Waste Comm’n v. Pena*, 113 F.3d 1468, 1473 (7th Cir. 1997) (“[T]he Commission must ‘provide for’ the disposal of the region’s waste before it is rewarded with an incentive payment. The Commission asserts . . . that it could ‘provide for’ disposal *by allowing* a third party to act The Secretary, on the other hand, interprets ‘provide for’ to

⁷ *See* FD 36299, CP’s Apr. 30, 2019 Petition for Declaratory Order. Ex. F, at 2 (Letter from CN Executive VP and COO Mike Cory).

⁸ Contrary to CN’s argument, the Court took no issue with the Board’s holding that CN would be providing nothing if CP must pay the BRC fees. Rather, the Court took issue with the Board’s reliance on an assumption that CP must pay the BRC fees in deciding whether CN could “ever” satisfy its obligation to “provide” by designating Clearing. The Court left it to the Board to decide who must pay.

mean *something more than simply allowing* waste to make its way out of the region. We believe the Secretary's position is correct.") (emphasis added). To "provide" does not necessarily involve a payment in return. *See, e.g., Gideon v. Wainwright*, 372 U.S. 335, 339-340 (1963) (requiring states to provide at no charge trial counsel for indigent defendant charged with felony).

2. Requiring CN to pay BRC fees is consistent with industry practice.

According to CN, industry custom and practice requires the delivering carrier to pay the intermediate switch fees. But this custom applies only where there is no direct physical connection. It reflects the fact that the delivering carrier bears the burden of delivering on the rails of the receiving carrier. So where there is no direct physical connection, the burden falls on the delivering carrier to employ an intermediary to bridge the gap. In those circumstances, because the intermediate carrier is acting on "behalf" of the delivering carrier, the delivering carrier typically pays the intermediate carrier's fees. Here, however, the intermediate carrier would be acting on the receiving carrier's "behalf," and therefore CN must be responsible for the fee.

Where there is a direct connection, industry custom and practice generally, and CP and CN's course of conduct here, properly reflect an understanding that the obligation to provide interchange facilities means for "free." Receiving railroads do not charge delivering railroads for use of the receiving railroads' interchange facilities in direct interchange.

This obligation to provide has the same meaning whether CN is providing the interchange facilities directly or has contracted with a third party to receive traffic “on its behalf.” Indeed, the Seventh Circuit’s choice of language here specifying that the third party would be acting “on [CN’s] behalf,” *Wisc. Cent. Ltd.*, 20 F.4th at 294, makes clear that the third party would be stepping into the shoes of CN in assuming CN’s obligations to provide interchange facilities to receive traffic. If CN is barred from charging CP directly for the use of its interchange facilities, *e.g.*, at Spaulding, it follows that BRC cannot charge CP when BRC acts on CN’s “behalf.”

3. Allowing a receiving carrier to evade its statutory burden to provide interchange facilities would be highly disruptive to interchange arrangements.

CN’s position—that CP can be compelled to pay for the interchange facilities that the statute requires CN to provide—would turn the statute on its head and upset the status quo in the industry by obliterating the shared understanding of interchange rights, obligations and customs. It would create an economic incentive for carriers to force interchange traffic over third parties by enabling receiving carriers that currently incur costs to provide and maintain interchange facilities to unburden themselves of those costs by designating a third party to receive the traffic at the delivering carrier’s expense.

D. The BRC Operating Agreement does not control who pays.

The BRC Operating Agreement governs cars that carriers have agreed to interchange via Clearing. It has no application to the cars at issue here, which are cars which CN seeks to compel CP to deliver via Clearing. As discussed in section (1) below, even for cars that the parties agree to interchange at Clearing, the BRC

Operating Agreement does not mandate that the delivering carrier bear the burden of the BRC fees. Rail carriers are free to enter into reimbursement agreements. As discussed in section (2) below, even if the BRC Operating Agreement purported to require CP to bear the BRC fees—it does not—that agreement would not help CN as the statute mandates that CN bear that burden.

1. Railroads can and do enter into separate reimbursement agreements.

According to CN, CP's operating agreement with the BRC, and not the statute, dictates who must pay the BRC's fees. But as the Board has long recognized, the agreements with intermediate switch carriers to bill the delivering carriers do not control who ultimately must bear the fees. *See, e.g., Kan. City S. Ry. Co.*, 213 I.C.C. at 355-56 (explaining that the practice of an intermediate carrier billing the delivering carrier for its services "is independent of any agreement between the delivering and receiving carriers for the absorption of certain intermediate switching charges").

The payment provisions in the BRC Operating Agreement are simply for administrative convenience to govern how the BRC bills the carriers utilizing its services without becoming entangled in payment disputes between carriers. *See, e.g.*, CP's Reply at 16; *Hubbard V.S.* at ¶ 15. However, nothing in the carriers' agreements with BRC prohibits CN and CP from entering into a separate agreement that requires CN to reimburse CP for some or all of such fees. *Id.* Separate reimbursement agreements have long been the practice in the industry. *See, e.g., Kan. City S. Ry. Co.*, 213 I.C.C. at 355-56. As Will Wangerin explains in the accompanying Verified

Statement, in addition to the Interim Agreement with CN, {{CP currently has a similar agreement with another receiving carrier for reimbursement of an intermediate carrier's (IHB's) switch fees.}} Wangerin V.S. at ¶¶ 2-3. Thus the BRC Operating Agreement has never been viewed as an agreement that the delivering carrier will always bear the BRC fees.

Notably, the BRC Operating Agreement itself is completely silent on the issue of who pays as between the delivering carrier and the receiving carrier. It only states that a charge shall be paid for the transfer of cars. {{The tariff rate sheet which is subject to change annually, contains an oblique reference to rates for “traffic delivered to the BRC at Clearing Yard.” *See* CN's Brief, Ex. B.}} This is hardly a sufficient basis on which to conclude that the parties to the BRC Operating Agreement intended to, and did in fact, bargain away substantive statutory rights and obligations, and certainly not with respect to traffic that was or could be interchanged elsewhere at a direct physical interchange for free.

At best, the BRC Operating Agreement addresses to whom the invoice for BRC's fees is sent—not who is ultimately responsible for paying the fees. But even on the question of who is billed, CN appears to acknowledge that the BRC Operating Agreement does not establish an absolute rule that BRC bills the delivering carrier. *See* CN's Petition at 26 (stating that it is only “ordinarily” the case that switch charges are billed to the delivering carrier).

Nothing in the carriers' agreements with BRC supersedes the Section 10742 obligation “to provide” interchange facilities. Certainly, the BRC Operating

Agreement cannot be used to unilaterally force one of the railroads to accept a new interchange location and to force the delivering railroad to provide, *i.e.*, pay, for the interchange facilities contrary to the statutory obligation.

Nor does the BRC Operating Agreement prohibit CN and CP from entering into a separate agreement that requires CN to be the ultimate payor of the BRC interchange fees, as is currently the case under the Interim Agreement.

2. CN's argument misconstrues the Court's Opinion which focused on statutory rights and obligations and makes no mention of the BRC Operating Agreement.

CN also argues that the Seventh Circuit Opinion's focus on "contractual right[s]" compels the Board to defer to the terms of the BRC Operating Agreement's payment provisions over the "norm[s]' on which the Board mistakenly relied before." CN's Brief at 15. There are three problems with CN's argument.

First, the choice is not between the terms of the BRC Operating Agreement and industry norms. Rather, the question that CN put to the Board is, what does Section 10742 require? If anything, the Court's Opinion stands for the proposition that the Board is bound by the unambiguous language of the statute. On the issue of who pays, the statute is unambiguous—CN must "provide" the interchange facilities.

Second, CN's argument is based on the unsupported and wrong assumption that the Seventh Circuit vacated the Board's prior decision in part because the Board failed to give effect to the BRC Operating Agreement. The Seventh Circuit, however, merely held that CN could contract with a willing third party to receive traffic on CN's behalf and that the BRC is a willing third party. But the Court neither explicitly

nor implicitly found that the BRC Operating Agreement was such a contract and the Opinion includes no mention of the BRC Operating Agreement. Indeed, if the BRC Operating Agreement requires, as CN asserts, that CP pay for the privilege of delivering cars to CN via the BRC, then the BRC Operating Agreement fails to satisfy the Seventh Circuit's most basic requirement as the BRC would be acting on CP's behalf, and not on CN's.

Third, CN is trying to recast this as a contractual dispute. But if this were merely a contractual dispute it would seem to be better addressed in a court. *See* 2020 Board Decision at 11 n.11 (“If there is disagreement about what the BRC Operating Agreement requires, such a dispute would be properly resolved by a court, not the Board.”). There would be no need for the Board to weigh in on a mere contractual dispute. Of course, this is not a contract dispute. It is a dispute about the respective substantive rights and obligations of receiving and delivering carriers in interchange as established by Congress.

E. CN's purported “fairness” argument ignores that the move to Clearing is at CN's insistence for CN's benefit.

Finally, CN attempts to pivot the issue of who pays away from the statutory obligation to one of fairness. According to CN, it is only fair that each carrier pay its own BRC switching fees, *i.e.*, CN pays for the CP-bound traffic it delivers via Clearing and CP pays for the CN-bound traffic it delivers via Clearing. CN's Brief at 18-19. The statute, however, is unambiguous and unqualified as to the obligation to provide interchange facilities. There is no “fairness” exception to that obligation.

Further, CN's argument conveniently ignores the fact that it voluntarily assumed the obligation to pay the BRC fees for CP-bound cars when CN asked CP to accept cars via the BRC rather than at CP's preferred interchange location of Spaulding. CP continues to make its facilities at Spaulding available to receive cars from CN for free as the statute requires. Also CN's argument ignores the fact that it is CN that is demanding that CP deliver cars to CN via BRC rather than delivering to CN's interchange facilities at Spaulding which are free to CP. And the change to Clearing in both directions is for CN's benefit.⁹

Not only is it CN's choice to utilize the BRC for CN's benefit, from an operations perspective the change to the Clearing Yard potentially adversely affects CP and the greater rail network. As noted above, the interchange at Spaulding not only worked well, but also kept traffic out of the often congested Chicago Terminal area. It also promoted fluid and efficient yard operations by ensuring that CN's cars would be cleared from CP's Bensenville Yard daily, kept CP's mainline fluid during the day and was more economical than paying a third party terminal switch carrier. Walker V.S. at ¶¶ 16-17. In effect, CN's demand that CP pay any BRC fees equates to a demand that CP subsidize CN's operational improvements to CP's detriment. Where's the fairness in that?

⁹ According to CN the Board should also consider the fact that CN incurs trackage rights to reach Clearing while CP does not have to pay trackage rights to operate west from Bensenville on the shared Metra main line. But this ignores the fact that it is entirely CN's choice to go to Clearing. CN would incur no fees, trackage or otherwise, to interchange at CP's preferred location of Spaulding.

CN also argues that BRC is performing work at Clearing that would otherwise be work that CP would need to perform, *i.e.*, blocking and classification of cars for CN. There are two problems with this argument. First, CP still has to classify the cars and build a train at Bensenville for interchange regardless of where the CN-bound cars are interchanged. Second, to the extent that the BRC is doing work that CP would otherwise have performed, CP can and prefers to do the work itself with its own crews and own equipment for free. It would clearly be unfair to compel CP to incur an unnecessary third party expense for CN's benefit.

V. CONCLUSION

For the foregoing reasons, the Board should deny the relief that CN has demanded and should confirm that Clearing is not reasonable relative to Spaulding for the traffic at issue, and that, if it is reasonable, CN must pay all associated BRC fees for CP's access to that interchange point.

Respectfully submitted,

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Dated: March 21, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March 2022, I caused a copy of the foregoing REPLY TO CN'S POST-REMAND BRIEF to be served by email and first-class mail upon the following parties of record:

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 36397

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

VERIFIED STATEMENT OF WILL WANGERIN

1. My name is Will Wangerin. Since December 1, 2021, I have been employed as Director Interline and Passenger South by Soo Line Railroad Company, which, together with affiliated operating rail companies in the United States and Canada, does business as Canadian Pacific (“CP”). I have been employed in other capacities with CP since 1998.

2. In my positions at CP, I have become familiar with CP’s rail networks, facilities and operations throughout North America. I am also familiar with various interchange agreements between CP and other rail carriers that are utilized to move traffic on CP’s network.

3. {{ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] }}

VERIFICATION

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

A handwritten signature in black ink, appearing to read 'Will Wangerin', is written over a horizontal line.

Will Wangerin
Director Interline and Passenger - South
Soo Line Railroad Company

Dated: March 21, 2022