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Office of Proceedings
April 3, 2017
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April 3, 2017

VIA E-FILING

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

Re: FD 36107, Soo Line Railroad Company - Petition for Declaratory Order

Dear Ms. Brown:

Enclosed is Norfolk Southern Railway Company's Reply to the Soo Line Railroad Company's Petition for Declaratory Order filed on March 13, 2017. If there are any questions about this matter, please contact me directly, either by telephone: (202) 663-7823 or by e-mail: wmullins@bakerandmiller.com.

Sincerely,



William A. Mullins

cc: Parties of Record
Randal S. Noe
Greg E. Summy
Garrett D. Urban

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 36107

SOO LINE RAILROAD COMPANY – PETITION FOR DECLARATORY ORDER

**NORFOLK SOUTHERN RAILWAY COMPANY’S REPLY TO
SOO LINE RAILROAD COMPANY PETITION FOR DECLARATORY ORDER**

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**Counsel for Norfolk Southern Railway
Company**

Dated: April 3, 2017

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SURFACE TRANSPORTATION BOARD**

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SUMMARY OF ARGUMENT

Norfolk Southern Railway Company (“NS”) hereby replies to the Petition for Declaratory Order (“Petition”) filed on March 13, 2017, by Soo Line Railroad Company d/b/a Canadian Pacific (“CP”), requesting a declaratory order that termination of the Interchange Agreement (“IHBIA”) dated July 15, 2005, among NS, CP, the Indiana Harbor Belt Railway Company (“IHB”), and Consolidated Rail Corporation (“Conrail”) requires authorization from the Surface Transportation Board (“Board” or “STB”). The STB should deny the Petition. The IHBIA has never been submitted to the Board for approval, was not part of any previously approved trackage rights agreement, and consists of operating rights for interchange purposes only for which Board approval is not needed to terminate. As such, whether it can be cancelled is a matter of contract law, not Board involvement. Furthermore, until such time as the court has ruled on the NS’s contractual right to terminate, Board involvement is premature.

It is regrettable that CP has chosen to attempt to drag the Board into the middle of a contractual dispute in a transparent move to cloud and delay an existing federal court litigation concerning the IHBIA. Recognizing that CP would contest NS’s exercise of its right to terminate, NS took measured and narrow action to obtain judicial confirmation of its contractual

ability to terminate the IHBIA prior to enforcing termination. In response, CP has blanketed the Northern District of Indiana and the Board with a scattershot of erroneous and contradicting arguments. At times, CP improperly conflates the contractual operating rights actually provided for in the IHBIA with CP's unfulfilled desire to obtain Board-approved trackage rights over this line. At others, CP argues that the rights granted by the IHBIA are instead somehow included within the separate Michigan Trackage Rights Agreement ("MTRA"), despite the fact that the MTRA applies to a different line, involves different parties, and was approved by the Board *before* the IHBIA even came in to existence. Unable to support either assertion, CP's fills most of the nearly forty circuitous pages of its Petition and verified statements with irrelevant and inaccurate speculation about the possible operational effects of termination of the IHBIA.

Fortunately, well-established precedent dictates a quick and simple dismissal of the Petition. The Board has no authority over the termination of a contractual agreement to provide operating rights for the purposes of interchange. Although CP attempts to blur the fundamental distinction between trackage rights and operating/interchange rights (as well as between the IHBIA and MTRA), the rights granted to CP under the IHBIA were never submitted to the Board and were not part of the approved MTRA rights. Indeed, Section 1 of the IHBIA plainly states that the agreement grants "operating rights *and not trackage rights*" (emphasis added). As such, the IHBIA is not subject to the protections found in Thompson v. Texas Mexican Ry., 328 U.S. 134, 145 (1946) ("Tex Mex"). The Board should reaffirm its longstanding distinction between Board-approved trackage rights and contractual operating rights for the purpose of interchange and dismiss the Petition.

The Petition should also be dismissed because the distinct question of a party's right to terminate a private agreement as a matter of contract law is entirely appropriate for judicial

determination. Until that decision is made by the court, there is no case or controversy for the Board to resolve – even if the rights somehow could constitute trackage rights subject to Tex Mex protection. The Board has no reason to involve itself in this dispute prior to judicial confirmation of NS's contractual right to terminate the IHBIA.

Finally, CP's remaining arguments, including those about operational impacts, are both irrelevant and flawed. CP's hyperbolic claims that termination would impact congestion in Chicago are untrue. CP has many alternative options for its traffic that it employs voluntarily today. For its part, NS is more than willing to negotiate a new agreement to continue the current routing for CP traffic that actually requires classification in IHB's Gibson Yard. CP is merely attempting to distract the Board from CP's maneuver to entrench itself permanently on NS's line free of any charge.

In sum, the Board has no authority over the termination of a contractual agreement to provide operating rights for the purpose of interchange. The Board should dismiss CP's Petition and permit the federal court to carry out its duty by interpreting the contractual provisions of the IHBIA and confirming NS's right to terminate the agreement.

FACTUAL BACKGROUND

In June of 2005, NS and CP entered into the MTRA, which allows CP to operate its own trains over NS's main lines between Chicago and Detroit via overhead trackage rights.¹ The MTRA includes many restrictions that define the limits of CP's trackage rights, including, but not limited to, prohibiting local freight service, MTRA § 3(c); prohibiting interchange with other carriers at any point on the line, MTRA § 3(d); prohibiting movement of certain finished

¹ The STB served and published its notice of exemption regarding these trackage rights on June 24, 2005. See Soo Line Railroad Company – Trackage Rights Exemption – Norfolk Southern Railway Company, STB Docket No. FD 34709 (STB served June 24, 2005).

automotive traffic, MTRA § 3(i); limiting train length, MTRA § 3(l); and limiting train frequency, MTRA § 3(m).

The MTRA provides CP with two potential entry and exit points around Chicago on NS's Chicago Line: Control Point 502 or Control Point 509. MTRA § 2(c). However, an endpoint may only be utilized if CP's trackage rights trains have "both a prior and subsequent movement on CPR lines (including trackage rights held by CPR over other carriers)." MTRA § 2(e)(i). This commercial restriction limited CP's use of the MTRA to traffic that bridged between lines in both Chicago and Detroit over which CP owned or obtained separate rights.

As CP necessarily admits, see Petition at 7, CP had no rights to operate west of CP-502 when the MTRA was signed. Nor did CP have any rights to operate west of CP-502 when CP filed its notice of exemption with the Board, or when the STB served and published its notice on June 24, 2005. In contrast, CP had trackage rights over the Belt Railway of Chicago ("BRC") when it entered and exited NS at Control Point 509. In short, when signed and approved, the MTRA gave CP the ability to enter and exit NS's line at Control Point 509, but CP had no ability to meet the contractual restrictions necessary to enter or exit at Control Point 502.

At the time of signing of the MTRA, NS understood that CP was pursuing additional rights. CP approached the IHB about obtaining trackage rights so that CP's trains could enter/exit at Control Point 502 and continue around Chicago. However, IHB is not the owner of several sections of the lines it operates around Chicago; various portions are owned by NS, CSX Transportation, Inc. ("CSXT"), and Conrail. Pursuant to IHB's agreements with those owning carriers, IHB has no ability to grant access to a third party – the owning road retains control over access. CP ultimately was unsuccessful in obtaining any trackage rights over IHB's lines.

Rather, IHB proposed, and CP agreed, to an entirely different arrangement. Rather than having CP trackage rights trains run over the length of the IHB, IHB proposed that CP obtain operating rights over the roughly four miles between Control Point 502 and IHB's Gibson Yard so that CP could interchange traffic with IHB in Gibson Yard. This arrangement would allow CP to interchange automotive traffic to the IHB that otherwise was moving via haulage over CSXT into Gibson Yard. The parties understood that these would be operating rights for the purpose of facilitating interchange and would not be submitted to the Board. IHB drafted an interchange agreement that became the IHBIA to memorialize CP's access between Control Point 502 and Gibson Yard.

IHB, however, lacked control over such access and needed NS's and Conrail's consent because NS is the owner of the North-South Line between Control Point 502 and Gibson Crossing and Conrail owns the short segment of rail at Gibson Crossing necessary to access Gibson Yard. CP and IHB approached NS and Conrail and each was agreeable to granting CP operating rights for interchange over its lines. In this way, NS and Conrail came to be parties to the IHBIA.

The parties did not submit the IHBIA to the STB for review or approval because it involved only limited operating rights for the purpose of interchange. IHB, CP, NS, and Conrail could not have been clearer in evidencing such intent. Section 1, titled "Grant of Operating Rights," states that "[s]aid grant shall be considered a grant of operating rights *and not trackage rights*." IHBIA § 1 (emphasis added). The agreement goes on to state that "[r]ights granted to CPR by this Interchange Agreement are for the sole purpose of interchanging traffic between CPR and IHB at Gibson Yard." IHBIA § 10. Equally instructive is what is lacking from the formation of the IHBIA. The agreement does not require CP to pay any trackage fee to NS or

Conrail for CP's use of the joint facility trackage between Control Point 502 and Gibson Yard. IHBIA § 9. Nothing in the IHBIA contemplates regulatory approval. See, e.g., IHBIA § 11. ("Term").

Fast forward to 2014, when a dispute arose between CP and NS about what traffic CP could interchange with IHB under the terms of the IHBIA and MTRA. Back in 2005, CP had only used the IHBIA to interchange westbound automotive traffic that was actually classified by IHB in Gibson Yard. Years later, CP began on occasion to interchange mixed manifest traffic destined for CP's Bensenville Yard that IHB crews operated over IHB's lines and then interchanged back to CP. In 2013 (without NS's knowledge), CP began receiving eastbound crude oil unit trains that BNSF interchanged to IHB at McCook and then IHB interchanged to CP on track around (but seldom in) Gibson Yard. NS and CP arbitrated whether such traffic was permissible under the MTRA and IHBIA, and the arbitrators held that the agreements did not limit CP's ability to use its operating rights under the IHBIA to any particular commodity, train type, or direction.

Due in large part to the changes in the character of CP's use since the IHBIA and changes in the traffic flows and marketplace, it is no longer in NS's commercial interest to allow CP to exit Control Point 502 and use NS owned and controlled track to interchange with IHB at Gibson Yard for free without any limitations. Recognizing that CP would contest any termination, NS filed for a declaratory order in the United States District Court for the Northern District of Indiana confirming its right to terminate the IHBIA under Indiana law. See Norfolk Southern Railway Company v. Soo Line Railroad Company d/b/a Canadian Pacific Railway et al., No. 2:17-cv-00015-PPS-PRC (N.D. Ind. Jan. 12, 2017).

In response, CP filed its Petition, requesting “that the Board issue an order declaring that termination of the IHBIA requires NS to seek and obtain prior Board authorization.” Petition at 22. Concurrently, CP filed a Motion to Dismiss in the underlying litigation asserting, among other arguments, that the court should dismiss the case because the dispute falls within the primary jurisdiction of the Board. NS subsequently has issued notice to each of the other parties to the IHBIA that NS will terminate the IHBIA on the later of ninety days or judicial confirmation of its right to terminate the IHBIA. See Amended Complaint, No. 2:17-cv-00015-PPS-PRC (Mar. 31, 2017).

ARGUMENT

I. THE IHBIA IS AN INTERCHANGE AGREEMENT, NOT A TRACKAGE RIGHTS AGREEMENT, AND THEREFORE IT CAN BE TERMINATED AS A MATTER OF CONTRACT WITHOUT ANY BOARD AUTHORIZATION

On its face, the IHBIA is quite clear that it was entered into for the sole purpose of facilitating interchange between CP and IHB. It was not submitted to the Board for approval. It was not part of the MTRA. Indeed, it had not even been negotiated at the time the MTRA was authorized by this Board. Section 1, titled “Grant of Operating Rights,” could not be clearer: “[s]aid grant shall be considered a grant of operating rights *and not trackage rights*.” IHBIA § 1 (emphasis added). Unlike trackage rights authorized by the Board so as to provide Tex Mex protection, agency precedent is quite clear that operating rights for purposes of interchange can be terminated (both as a matter of contract and with respect to any continuing operations) without any Board involvement.²

² CP’s Petition conflates different uses of the word “termination.” The Board does not determine whether, as a matter of contract, a party has the right to terminate an agreement, even if that agreement is Board approved trackage rights. Those matters have always been left up to the courts as a matter of contract law and interpretation. The Board does have the authority to determine whether, in the event Board approved trackage rights have been terminated as a matter of contract, Board jurisdiction over those operations should remain or be removed so as to allow

The seminal case is Indiana Rail Road Co. – Exemption – Acquisition & Operation, ICC Docket No. FD 30789 (ICC served Oct. 10, 1986), *reconsideration denied* (ICC served Apr. 16, 1987), *aff'd sub nom. Black v. ICC*, 837 F.2d 1175 (D.C. Cir. 1988) ("Black"). There, the contested movements involved Indiana Rail Road Company's operation onto the tracks of Illinois Central Gulf Railroad solely for interchange. Representatives of rail labor contested the fact that two railroads had entered into such an operating agreement without seeking Board authorization, which, if Board authorization had been required, would have contained labor protective conditions. As the appellate court recounted, the ICC held that:

The principle that allows a carrier to operate over the tracks of another carrier under an interchange agreement, and without Commission approval, is applicable to the 13-mile operation here. Thus, this is a reasonable interchange arrangement requiring no Section 10901 (or 11343) approval. Accordingly, the arrangement does not require any exercise of our exemptive authority.

Black, 837 F.2d at 1177. The Board continues to cite Black with approval:

In this regard, we note NSR's claim that it does not now have the physical ability to reach Penobscot for purposes of interchange, because its trackage rights are overhead, not local. However, RBMN has offered to allow NSR to use its tracks for this purpose, and no further Board authority is needed for one carrier to use another carrier's track solely in connection with interchange. See Black v. ICC, 837 F.2d 1175, 1178 (D.C. Cir. 1988).

Norfolk Southern Ry. Co. – Petition for Declaratory Order – Interchange with Reading Blue Mountain & Northern Ry. Co., STB Docket No. 42078, slip op. at 4 (STB served April 29, 2003).

In contrast, Board approval is affirmatively required with respect to trackage rights. CP is of course correct that termination of a trackage rights agreement as a matter of contract does

the contractual termination to take effect and the tenant railroad evicted. Thus, even if CP is right and the IHBIA constitutes common carrier trackage rights subject to Tex Mex protection that does not prevent the court from ruling on NS's rights as a matter of contract law. On these issues, CP's Petition is unclear and inconsistent, perhaps in an attempt to confuse the court and avoid the resolution of the contractual issues.

not terminate the underlying right of movement absent discontinuance authority from the Board. See, e.g., Fillmore & Western Freight Serv., LLC – Emergency Pet. for Declaratory Order, FD 35813, slip op. at 3 (STB served Mar. 12, 2015) ("Fillmore & Western") (“[A]ny party seeking the abandonment of a rail line, or discontinuance of rail service, must first obtain appropriate authority from the Board . . . notwithstanding any contractual arrangement (or the termination thereof) between parties regarding cessation of rail service or use of a rail line.”). This principle is known colloquially as the Tex Mex doctrine, in which the Supreme Court held that even if a contract for trackage rights is lawfully terminated as a matter of contract law, a rail carrier’s operations cannot be terminated and the tenant carrier evicted without agency authorization terminating those trackage rights. Tex Mex, 328 U.S. at 145. Tellingly, CP does not even cite Tex Mex in its Petition.

Here, CP’s rights under the IHBIA are expressly *not* trackage rights entitled to Tex Mex protection. Quite extraordinarily, the agreement itself states so expressly. IHBIA § 1 (“Said grant shall be considered a grant of operating rights *and not trackage rights*.”)(emphasis added). Rather, the rights are for the “sole purpose of interchanging traffic between CPR and IHB at Gibson Yard.” IHBIA §10. The IHBIA also lacks other provisions present in trackage rights agreements, including some fee for use of the rights, consideration of the need for regulatory approval, provisions for abandonment or discontinuance of the line, etc. The rights were not even submitted to the Board for approval, yet alone approved by the Board. Yet, to invoke the Tex Mex doctrine, trackage rights must first be authorized by the agency. See Illinois Central Gulf Railroad Company – Trackage Rights Exemption – Between Coulter and Sparta, IL, ICC Docket No. FD 30646 (ICC served May 6, 1985) (“Under 49 U.S.C. 11343, the acquisition of trackage rights requires the prior approval and authorization of the Commission.”); Chicago and

North Western Transportation Company v. Peoria and Pekin Union Railway Company, 360

I.C.C. 168, 180 (1979) (noting that trackage rights, even if agreed to and informal in nature, require ICC approval). CP simply has no credible argument that these rights are trackage rights subject to Tex Mex protection.

No doubt recognizing this deficiency, CP also seeks to characterize termination of the IHBIA as “effectively terminat[ing] CP trackage rights between Detroit and Chicago via [Control Point] 502.” Petition at 18. While CP may be correct that terminating the interchange agreement would prevent CP from using Control Point 502 without a subsequent new agreement with Conrail, IHB, and NS, termination of the IHBIA does not, and would not, terminate CP’s trackage rights between Detroit and Chicago. Those rights are contained in the MTRA and would continue to govern CP’s rights between Detroit and Chicago until terminated by the Board.

CP’s own Petition recognizes that if the IHBIA is terminated, its trackage rights would remain. Instead, CP would simply be in the exact same position it was when it received Board authorization for the MTRA in 2005 in the first instance. *Id.* at 7 (“At the time the MTRA was executed, CP did not have a route west of CP-502 and therefore no way to enter or exit the NS trackage at that control point.”). Indeed, it is impossible to see how termination of the IHBIA, signed *after* Board authorization of the MTRA, could “effectively” terminate the MTRA when the MTRA was in no way conditioned on whether any subsequent agreement was entered. After termination of the IHBIA, CP still will have the same ability to operate over NS between Chicago and Detroit pursuant to the unaltered terms and restrictions of the MTRA. Such rights include entry and exit to CP’s trackage rights on the BRC at Control Point 509 and entry and exit

to any CP line (including trackage rights over other carriers) it is able to obtain west of Control Point 502.

Of course, what CP is really seeking is for the Board to convert its operating rights into trackage rights – something it could not and did not get in 2005. The IHBIA is a separate agreement from the MTRA, as confirmed by integration clauses in both agreements. See MTRA § 22(b); IHBIA § 10. Each agreement is among different parties and confers different rights over different segments of track. See IHBIA § 1 (stating expressly that the IHBIA is *not* a grant of trackage rights). Each agreement is governed by different regulatory treatment and subject to different protections. CP would have this Board ignore those differences and hold that just because two different sets of rights apply to lines that connect with each other means they are irrevocably dependent on one another.³

Holding that the IHBIA deserves Tex Mex protection simply because it applies to a line that connects to trackage rights lines not only flies in the face of longstanding precedent, but it represents bad policy as well. Such a holding would mean that rail carriers will be less likely to consider any future grants of operating rights, especially to trackage rights tenants, in fear that they may have to defend a regulatory action should they ever attempt to terminate the contract. The industry is full of interchange agreements cancellable on thirty to ninety days' notice. The Board's precedent has kept any disputes regarding termination of such agreements properly in the private sphere. Granting CP's Petition would not only be unfounded and unprecedented, but

³ Crediting CP's argument would lead to absurd results. CP's argument would mean that neither IHB nor Conrail could terminate the IHBIA without Board approval until such time as the MTRA was also terminated, even though IHB and Conrail were not even parties to the MTRA. Furthermore, one could envision CP using the same logic to argue that a customer requires Board approval to cancel a transportation contract because losing the business would impact the use of CP's trackage rights approved by the Board.

it would upset this longstanding established industry practice and bring hordes of cases for resolution by the Board.

II. THE BOARD SHOULD DISMISS CP'S REQUEST BECAUSE THE PROPER FORUM TO ADDRESS NS'S RIGHT TO TERMINATE THE IHBIA IS IN THE COURTS

Given the undisputed factual nature of the IHBIA and the Board's precedent that operating rights for interchange purposes can be entered into and terminated without Board authorization, the Board is more than justified in outright dismissing CP's Petition without the need for any further proceedings, discovery, and argument. However, even if CP's argument raised some uncertainty – which it does not – the Board still should dismiss the Petition because the question of whether NS has the contractual right to terminate the IHBIA is entirely appropriate for judicial determination. And that contractual question is the only true issue in dispute at this time.

The Board has repeatedly and unwaveringly held that contractual disputes are best addressed in federal and state courts. Indeed, just last month, in a matter involving the exact same parties, the Board noted: “Indeed, *as CP points out*, the Board has consistently stated that contractual disputes are properly for courts to decide.” Indiana Harbor Belt Railroad Company – Trackage Rights – Consolidated Rail Corporation, CSX Transportation, Inc., and Norfolk Southern Railway Company, STB Docket No. FD 36099, at 5 (STB served Mar. 14, 2017) (emphasis added). This general principle is found over and over again in Board decisions. See, e.g., Canadian Pacific Railway Company, et al. – Control – Dakota, Minnesota & Eastern Railroad Corp., et al., STB Docket No. 35081, slip op. at 7 (STB served May 7, 2009) (“The Board's policy is to refrain from interpreting or enforcing private contracts, leaving such issues to be resolved by the parties to the contract or in court.”); City of Peoria and the Village of Peoria

Heights, Il – Adverse Discontinuance – Pioneer Industrial Railway Company, STB Docket No. AB-878, slip op. at 6 (STB served Aug. 10, 2005) ("City of Peoria") (noting in part that “the Board does not undertake to interpret or enforce operating agreements or contracts. . .”).

Such pronouncements extend specifically to matters involving agreements for rights of access, *even when* such agreements are trackage rights agreements authorized by the Board. See, e.g., BNSF Railway Company – Trackage Rights Exemption – Union Pacific Railroad Company, STB Docket No. FD 35601, slip op. at 5-6 (STB served Sept. 11, 2013) (“As the Board has made clear repeatedly, however, including in its June 19 Decision, the authorization granted through an exemption is permissive, and the Board does not typically resolve disputes over the meaning of the underlying contracts. To the extent LDRR has concerns arising under contract law, it may seek to obtain relief in another forum.”); U S Rail Corporation--Lease and Operation Exemption--Winamac Southern Railway Company and Kokomo Grain Co., Inc., FD 35205 (STB served Mar. 11, 2013) (rejecting a notice of exemption filing in reliance on a decision in the U.S. District Court for the Northern District of Indiana determining that Winamac Southern Railway’s trackage rights agreement did not permit Winamac Southern Railway to assign its trackage rights over a segment of track covered by the agreement); Indiana Northeastern Railroad Company – Change in Operators – Branch and St. Joseph Counties Rail Users Association, Inc. in Branch County, Michigan, STB Docket No. FD 33760, slip op. at 4 (STB served Sept. 1, 1999) (“MSO is asking us to interpret its agreement with RUA. The interpretation of contracts lies within the purview of the courts, not with us.”); Iowa Interstate Railroad, LTD. – Lease and Operate – Exemption, ICC Docket No. FD 30554, 1984 ICC Lexis 240, at *12 (ICC served Sept. 28, 1984) (“The Commission cannot conclude whether the reservation of overhead operating rights is a sufficient contractual right to permit operations on the lines by Interstate without an additional

agreement. The courts and not the Commission, provide the appropriate forum for resolving this question because it involves issues of contract law and contractual interpretation.”). And those pronouncements extend to questions about the expiration or termination of such agreements. See City of Peoria at 6-7 (STB served Nov. 19, 2007) (“The issue of whether PIRY's contract with the Cities has expired remains pending in state court, which is the proper forum to adjudicate that claim.”) (internal references omitted).

Clearly, the question of whether or not NS possesses the contractual right to terminate the IHBIA is a matter for the courts, not the Board. As such, the Board can and should expeditiously dismiss the Petition so as to inform the court that it should move forward with a determination of NS's contractual rights and need not refer the issue of NS's contractual rights to the Board.

III. DISMISSAL IS ALSO WARRANTED BECAUSE UNTIL SUCH TIME AS THE COURT HAS RULED UPON NS'S CONTRACTUAL RIGHT TO TERMINATE, ANY BOARD ACTION IS PREMATURE

For the Board to institute a declaratory order proceeding, there must be a “controversy” requiring Board resolution. See 5 U.S.C. 554(e). The only “controversy” at this time is whether or not NS has the right to terminate, as a matter of contract, the IHBIA. This is clearly a matter for the court to decide, not the Board. Furthermore, simply because CP claims an agreement constitutes trackage rights and not interchange rights should not constitute sufficient legal justification to begin a declaratory order proceeding – especially when the agreement CP points to specifically states that it is not granting trackage rights. IHBIA § 1; see e.g., Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984) (upholding ICC's determination not to

institute a declaratory order due to limited resources and ICC policy limiting issuance of declaratory orders to issues of industry-wide significance).⁴

Only if CP had raised sufficient doubt as the nature of the IHBIA would further Board action be potentially required. But even then, action at this time (other than outright dismissal) would be premature until the contractual dispute is resolved in federal court. The Board's recent decision in Fillmore & Western illustrates this point.⁵ In that case, "F&W argue[d] that 49 U.S.C. § 10501(b) preempts VCTC's attempt to terminate F&W's rights under the series of agreements at issue in the two state court cases." Id. slip op. at 2. In reply, Ventura County Transportation Commission argued "in part that the Board should decline to initiate a proceeding because the issues raised by F&W are state law contract issues that should be resolved by the state court." Id. The Board denied the petition and discontinued the proceeding:

Given the procedural posture of the state court proceedings, the Board declines to issue a declaratory order at this time. It is not necessary, nor would it be appropriate, for the Board to attempt to interpret the leases governing use of the Line or to attempt to resolve whether termination of the leases was lawful. Those issues are best left to the state courts, and can proceed independently, without the need for a declaratory order from the Board.

Id. at 3.

The Board did note that termination of Board-authorized operations, in contrast to termination of the contractual rights, would require Board approval under the Tex Mex doctrine, but the Board concluded:

⁴ There is no need to task the Board's resources at this time when this narrow dispute may in fact never need Board involvement at all, especially if the Board were to affirm NS's position that the IHBIA is an interchange agreement that can be cancelled without Board involvement.

⁵ Fillmore & Western is not directly applicable here, of course, because it deals with a lease agreement actually authorized by the Board, rather than private operating rights that require no Board approval to terminate.

There is no need for the Board to issue additional guidance through a declaratory order proceeding at this juncture. Our action here is not intended to prejudge any particular controversy over particular issues in this or any other matter. If necessary, after the state court proceedings have concluded, the parties are free to return to the Board if further clarification on this matter is needed.”

Id. The same principle applies here.⁶

IV. CP’S REMAINING ARGUMENTS ARE IRRELEVANT AND FLAWED

Based on the foregoing, the Board should not hesitate to dismiss this Petition. As a result, NS addresses some of CP’s remaining arguments only briefly.

CP spends most of its Petition, and the accompanying two verified statements, making speculative assertions about possible operational impacts of termination of the IHBIA. As a preliminary matter, operational impacts are irrelevant to the question of whether Board approval is required for termination of CP’s contractual rights.

Nonetheless, if the Board is concerned that termination of the IHBIA could result in service disruptions, it need not be. As NS has already recounted, termination of the IHBIA would merely return CP to the actual status quo at the time CP signed the MTRA in 2005. CP has several alternative operations and routings for portions of the affected traffic, and it frequently utilizes these alternatives today. It could continue to do so if the IHBIA is cancelled. Use of these options will not have significant consequences for operations or congestion in Chicago.

Moreover, termination of the IHBIA would not foreclose the parties from negotiating a new agreement with respect to use of the line between Control Point 502 and Gibson Yard. CP’s

⁶ Accord Dyno Nobel, Inc. and Dyno Nobel Louisiana Ammonia, LLC v. Nustar Pipeline Operating Partnership, L.P., STB Docket No. NOR 42147, slip op. at 4 (STB served Mar. 24, 2017) (refusing to advance a petition for a declaratory order because “the Board finds that there are questions of contract formation and potential voidability under Louisiana state law that should first be addressed, as they would have bearing on Dyno’s regulatory claim”).

operational hyperbole focuses nearly exclusively on hypothetical rerouting of traffic that would continue to be classified within IHB's Gibson Yard. This traffic constitutes the overwhelming majority of CP traffic entering and exiting at Control Point 502. Yet, CP knows full well that NS does not oppose the movement of such traffic on commercially acceptable terms. Indeed, NS is ready and willing to negotiate a new agreement that would continue the current routing of traffic that requires classification in IHB's Gibson Yard over Control Point 502.⁷

In contrast to NS's willingness to negotiate a new agreement, CP seems much more interested in misusing the Board's regulatory powers in an attempt to transform its operating rights into the trackage rights it did not obtain in 2005. The Board should not permit CP to use these claims to distract from its attempts to permanently install itself on Norfolk Southern's rail line free of charge rather than seeking a solution in the marketplace.

The other arguments CP makes completely gloss over the distinction between voluntary operating rights granted by private contract and other rights or regulations properly within the Board's authority. CP's discussion of longer routes in the context of rate reasonableness cases and abandonments, for example, provides no insight or bearing on whether NS has a contractual right to terminate the IHBIA or on the narrow question of whether or not the IHBIA is entitled to Tex Mex treatment.

Finally, CP's attempt to use the arbitration decision to bolster its claims about the IHBIA is self-defeating. To be sure, the arbitrators held in part that as a matter of contractual interpretation, the operating rights granted by the IHBIA satisfied the "prior and subsequent move restriction" found in the MTRA to the same degree that trackage rights would have. That

⁷ The fact that NS and Conrail were willing to even enter into the IHBIA in the first place evidences NS's and Conrail's willingness to consider negotiated, contractual solutions to operational issues.

contractual determination, however, has no direct bearing on the question of contractual termination of the IHBIA, nor does such a holding magically transform interchange rights into trackage rights. In fact, that same arbitration panel highlighted that the “*significant difference between the IHBIA ‘operating rights’ and formal ‘trackage rights’ is that some form of STB authority is necessary to implement or discontinue ‘trackage rights.’*” Arbitration Decision at 15-16 (emphasis added). That, of course, is precisely the point – all of the parties understood that the IHBIA did not require STB approval and was not to be given the same regulatory treatment as trackage rights.⁸

CONCLUSION

For the reasons stated herein, NS requests that the Board dismiss CP’s Petition and confirm that no Board authority is required to terminate contractual operating rights for the purpose of interchange that have never been authorized by the Board. Additionally, NS asks that the Board act expeditiously on this matter because CP has moved the U.S District Court for the Northern District of Indiana to stay its litigation pending resolution of this matter. Although such a stay is neither necessary nor proper, a point that NS will reiterate to the court, an expeditious resolution of this proceeding may assist the court in its deliberation.

⁸ NS is not implying that the panel’s observation carries any independent authority in this proceeding. Rather, NS merely points out that even CP’s citation of this supposedly favorable decision reflects NS’s position that the IHBIA was not the same as trackage rights.

Respectfully submitted,



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April 3, 2017

VERIFICATION

I, Jeff A. Harris, verify under penalty of perjury that I am Assistant Vice President – Operations Planning of Norfolk Southern Railway Company, that I have read the foregoing document and know its contents, and that the same is true and correct to the best of my knowledge and belief.

Executed on 03/30/2017



Jeff A. Harris

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Reply to the Soo Line Railroad Company's Petition for Declaratory Order, by mailing copies of the Reply via prepaid first class mail to all parties of record in this proceeding or by more expeditious means of delivery.

Dated at Washington, D.C. on this 3rd day of April, 2017.



William A. Mullins
Norfolk Southern Railway Company