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

Re: **STB Finance Docket 36299**
Soo Line Railroad Company Petition for Declaratory Order and Preliminary Injunction - Interchange with Canadian National
Response to CN's July 12, 2019 Letters

Dear Ms. Brown:

This letter is in response to two separate letters filed by Canadian National ("CN") on July 12, 2019 in the above docket.

Preliminary Matters

Both of CN's July 12, 2019 letters are part of an effort to obtain preliminary injunctive relief. However, CN has filed no formal motion for such relief and the parties have not briefed the issue as provided for under the Board's rules. CN's informal letter writing campaign sidesteps the Board's formal procedural rules and safeguards and results in a piecemeal and unregulated process. The Board should reject CN's submissions as unauthorized filings. However, if the Board accepts CN's letters, Soo Line Railroad Company d/b/a Canadian Pacific ("CP"),¹ respectfully requests that, in the interests of a full and complete record, the Board also accept this letter, which addresses new arguments, allegations, and misstatements by CN.

CP and CN Have Not Agreed to Interchange at Clearing

Contrary to CN's suggestion, there is no agreement between CP and CN as to interchange at Clearing either on an interim or on a long-term basis. It is true that CP

¹ Canadian Pacific is a trade name under which Canadian Pacific Railway Company and its United States subsidiaries, Soo Line Railroad Company, Dakota, Minnesota and Eastern Railroad Corporation, and Delaware and Hudson Railway Company, Inc. operate.

took the position that it could deliver CN's interchange traffic to the Belt Railway of Chicago's ("BRC") Clearing Yard if CN paid all the BRC's charges to CP incident thereto. No agreement was reached however because essential terms to such an arrangement were never accepted or agreed to. For example, any such agreement would need to address term and termination, including protection of Spaulding as an available interchange location in the event the agreement was terminated (or a return to Spaulding was needed to relieve congestion pressure in the Chicago Terminal). And/or the agreement would need to preserve the economics of the deal either at Clearing (if CN terminates the agreement but wants to continue interchange at Clearing) or at some other interchange location (if Spaulding were not available). There is no agreement on these essential terms. The most that can be said for the position CP took is it was the starting point for negotiations — negotiations that produced no agreement before the commencement of this proceeding, nor any agreement during a month of Board sponsored mediation. For CN to suggest otherwise is wrong. The Board should reject CN's ploy.

Designating an Intermediate Switch Carrier Does Not Satisfy CN's Statutory Obligation

As to CN's contention that it is free to designate an intermediate switch carrier for CP to deliver CN interchange traffic (BRC at Clearing Yard in this instance), that contention is incorrect. While CP could voluntarily agree to interchange at Clearing, it cannot be compelled to do so. The law is clear that where two roads have a physical connection, as CP and CN do, the delivering carrier cannot be compelled to absorb the cost of conducting interchange operations through the services of an intermediate switching carrier for the benefit of another railroad.² See e.g., *Burlington Northern Railroad Co. v. United States*, 731 F.2d 33, 39 (D.C. Cir. 1984).³ Nor can the receiving railroad satisfy its

² CN accuses CP of being misleading in its labeling of the charge that CP must pay BRC as a trackage rights fee rather than as switching fees, but CN does not explain how the labeling is misleading. Nor is CP's description of the fees misleading. CP cannot take CN's cars to Clearing as proposed without incurring per car fee(s) under the CP/BRC agreement and without traveling on 10 miles of BRC owned track. By contrast, CP has a direct connection to CN at Spaulding and makes no payment to another railroad to get there.

³ *BN* involved two railroads that were non-contiguous in Chicago. Because they were non-contiguous, BN delivered cars to B&O via an intermediate terminal switch carrier (B&OCT) and paid the B&OCT a per car fee. In an effort to avoid the per car fee, BN sought to establish that a direct physical connection existed between it and B&O. According to BN, because B&O wholly owned B&OCT, BN's direct connection to the B&OCT constituted a direct physical connection between BN and B&O. BN contended alternatively that the B&O's trackage rights over B&OCT constituted a de facto direct physical connection to BN. The Court of Appeals for the D.C. Circuit disagreed, affirming the ICC's holding that neither B&O's ownership of B&OCT nor its trackage rights over B&OCT established a direct physical connection between BN and B&O. However, had there been a direct physical connection, then B&O would have been required to designate an interchange location on its own line and provide a free route to get there. In other words, if there were a direct connection, B&O could not have required that BN interchange via the

obligation under 49 U.S.C. 10742 to provide “reasonable” and “proper” interchange facilities by designating a terminal switching carrier for interchange when there is a direct physical connection. *See e.g., id.* at 38 (noting that “the receiving railroad in a direct physical interchange [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 for the delivering carrier”). Although CN argues that *BN* holds otherwise, CN is mistaken.

According to CN, *BN* held that a receiving carrier could designate an intermediate switch carrier under all circumstances. CN, perhaps inadvertently, overlooks the fact that the DC Circuit’s holding in *BN* that a receiving carrier may designate a terminal switch carrier for interchange applies only to “*noncontiguous railroads*,” (emphasis added) *i.e.*, railroads that do not have a direct physical connection. *Id.* at 39 (explaining that utilizing a terminal switching carrier is “one permissible way for two noncontiguous railroads to interchange traffic, even though one of them has sole ownership⁴ of the intervening switching carrier”). Here, CP and CN are contiguous.

CN Is Not Entitled to Injunctive Relief

As noted above, CN’s request is in fact a request for preliminary injunctive relief. CN’s request is both procedurally and legally deficient. Procedurally, CN should have filed a motion for injunctive relief and supporting evidence so that the matter could be briefed properly, in compliance with Board rules.

Legally, CN has not met and cannot meet the standard for injunctive relief. For example, for the reasons discussed above, as well as those in CP’s Petition and in subsequent correspondence to the Board,⁵ CN is unlikely to succeed on the merits. Nor is CN suffering irreparable harm from continuing to interchange in Spaulding. CN and CP have interchanged as Spaulding for 8.5 years and continue to do so. Nothing has changed in terms of interchange volumes or otherwise that would render Spaulding unavailable or

intermediate switch carrier and pay the fee. *BN*, 731 F.2d at 38-40. Here, there is no question that CP and CN have a direct physical connection in Chicago. In fact, they have two.

⁴ CN’s assertion that the BRC is “hardly a third party railroad,” overlooks another aspect of *BN*. Namely, that the terminal switching carrier, the B&OCT was deemed a third party railroad, notwithstanding that it was solely owned by B&O. *See BN*, 731 F.2d at 39. *See also Burlington Northern, Inc. v. Baltimore and Ohio RR Co.*, I.C.C. Docket No. 37515, slip op. at 5 (Served July 12, 1982) (finding that despite “substantial intermingling of the affairs and operations of B&O and B&OCT ... B&OCT is a common carrier separate from B&O”). Here, CP’s relationship with the BRC is far more attenuated than B&O and B&OCT’s relationship. CP and the other five Class I’s that interchange in Chicago own the BRC in varying shares. CP is a minority shareholder and holds a smaller ownership interest than does CN.

⁵ *See* CP Letters Filed June 18, 2019 and July 3, 2019.

unreasonable.⁶ Importantly, by continuing to interchange at Spaulding, CN is continuing to comply with its statutory obligation to provide reasonable and proper interchange facilities.⁷ Any costs to CN of meeting its statutory obligation to provide reasonable and proper interchange facilities are costs that Congress, as well as the STB and the courts, have determined are properly borne by receiving carriers and cannot be the basis for finding irreparable harm.

CN Seeks to Remove Spaulding as an Interchange Option

There is another important problem with the relief that CN seeks. Namely, CP has serious concerns that CN intends to make immediate changes at Spaulding in an effort to render Spaulding effectively unavailable for future interchange. Such an effort by CN to change the *status quo* would undermine the integrity of the STB process. Further, in the event that CN terminated an agreement to interchange at Clearing at CN's cost, it could leave CP without a mechanism to preserve the economics of the agreement. It would also leave the parties without an alternative interchange location in the event that interchange at Clearing becomes impractical, *e.g.*, due to congestion in the Chicago Terminal.

Importantly, once Spaulding ceases to be an option interchange will have to take place within the Chicago Terminal. As the Board well knows, Chicago is fragile. While the current interchange traffic volumes would appear to be incremental, if the Terminal is congested even a modest amount of traffic may have a substantial impact. There is no doubt that what CN is asking the Board to compel will leave the Chicago Terminal less resilient. As we noted in our letter of July 3, 2019, is seeking Board approval of its acquisition of the EJ&E, CN represented that the transaction would allow it to take cars out of the Chicago Terminal area, not force cars in.⁸

Blocked Crossings at Bartlett

Although CN contends that moving the interchange will reduce blocked crossings in Bartlett, CN offers no current blocked crossing data to either support its arguments or rebut CP's analysis of the data reported in the EJ&E acquisition oversight proceeding. The reported data show that many of the daytime extended blockages were due to CN

⁶ While CN is concerned about increasing capacity on its main line, there are steps that CN could take including reconfiguring its tracks at Spaulding that would substantially mitigate the impact on main line operations. There are also changes to its operating practices that CN could take to mitigate the impact on Bartlett of blocked crossings.

⁷ See 49 USC 10742.

⁸ See CP's Letter filed Jul 3, 2019.

main line traffic including traffic waiting to cross Metra's main line.^{9,10} Nor does CN explain why it conducts its interchange switching during the daytime. Instead, CN wrongly accuses CP of misrepresenting the comments submitted by the Bartlett community. CP stands by its representations regarding those comments. It is telling that CN relies on the community comments rather than actual current blocked crossing data, but even those comments are generally unhelpful to CN.

Proposed Procedural Schedule

CP agrees that the Board should establish a procedural schedule but disagrees with the specifics of CN's proposal. In light of CN's representations regarding the impact of interchange on Bartlett, CP is seeking limited discovery on the issue. To accommodate the limited discovery, CP proposes the following procedural schedule:

- 0 days – Board issues procedural schedule
- +90 days -- Discovery closes
- +120 days -- Supplemental opening briefing
- +140 days -- Supplemental reply briefing

Respectfully Submitted,

/s/ David F. Rifkind

Counsel for Soo Line Railroad Company

cc: Parties of Record

⁹ See CP's Letter filed June 18, 2019.

¹⁰ CN implies that CP is somehow responsible for CN's crossing blockages because CP dispatches the Metra main line. This is a distraction. No matter who dispatches Metra, Metra has priority. As a result, CN's conflicting traffic has to wait. Where CN's trains wait on CN's main line is up to CN.