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THOMAS F. MCFARLAND

December 4, 2003



By UPS overnight mail

Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Unit, Suite 713
1925 K Street, N.W.
Washington, DC 20423-0001

Re: Docket No. 42080, *Minnesota Northern Railroad, Inc. v. Canadian National Railway Company*

Dear Mr. Williams:

Enclosed please find an original and 10 copies of Complainant's Rebuttal Statement, for filing with the Board in the above referenced matter.

Kindly acknowledge receipt by date stamping the enclosed duplicate copy of this letter and return in the self-addressed stamped envelope.

Very truly yours,

Tom McFarland

Thomas F. McFarland
Attorney for Minnesota Northern
Railroad, Inc.

TMcf:kl:enc:wp11\952\ltrstb5

ENTERED
Office of Proceedings

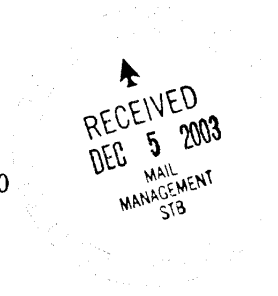
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Part of
Public Record

209545
ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

MINNESOTA NORTHERN RAILROAD,	)	
INC.,	)	
	)	
<u>Complainant,</u>	)	
v.	)	Docket No. 42080
	)	
CANADIAN NATIONAL RAILWAY	)	
COMPANY,	)	
	)	
<u>Defendant.</u>	)	
	)	



COMPLAINANT'S REBUTTAL STATEMENT

MINNESOTA NORTHERN RAILROAD, INC.
P.O. Box 705
Crookston, MN 56716

Complainant

ENTERED
Office of Proceedings

DEC - 5 2003

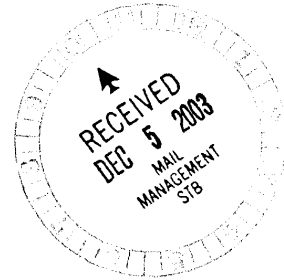
Part of
Public Record

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(312) 236-0204

Attorney for Complainant

DATE FILED: December 5, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD



MINNESOTA NORTHERN RAILROAD,	)	
INC.,	)	
<u>Complainant,</u>	)	
v.	)	Docket No. 42080
	)	
CANADIAN NATIONAL RAILWAY	)	
COMPANY,	)	
<u>Defendant.</u>	)	
	)	

COMPLAINANT'S REBUTTAL STATEMENT

Pursuant to the procedural decision served July 25, 2003, as amended by decision served November 19, 2003, MINNESOTA NORTHERN RAILROAD, INC. (MNN) hereby submits the following as its Rebuttal Statement.

Tab No. 1 - Reply Verified Statement of George LaPray

Tab No. 2 - Reply Argument

REPLY VERIFIED STATEMENT OF GEORGE LAPRAY

My name is George LaPray. I am General Manager of Minnesota Northern Railroad, Inc. (MNN). I submitted a verified statement in this proceeding that was part of MNN's Opening Statement filed October 3, 2003. My background and qualifications were described in that statement.

At pages 11 and 12 of his verified statement, CN Witness Romano states that it was misleading for MNN to allege that CN holds itself out to interchange with MNN at Warroad inasmuch as the railroad industry publications cited by MNN list an obsolete CN-BN interchange at Warroad, not a CN-MNN interchange. It is Mr. Romano and CN that are being misleading.^{1/} Attached to this Statement as Reply Appendix GL-1 is a copy of a facsimile message and attached completed and signed Junction Interchange Update Form that I sent to Mr. Greg Cooke of CN and to RAILINC on June 18, 2001. The Junction Interchange Update Form substituted MNN for BNSF as CN's connecting interchange carrier at Warroad. MNN thereupon listed CN as its connecting carrier at Warroad in the Official Railway Guide. My facsimile message to Mr. Cooke made it clear that interchange activity at Warroad was anticipated because BN had removed restrictions that formerly precluded MNN from interchanging with CN at Warroad. CN's retention of Warroad as a published interchange point after receipt of that message and the completed Junction Interchange Update Form constituted a holding out to interchange traffic with MNN at Warroad.

^{1/} Mr. Romano claims that the tariff publications cited by MNN show an outdated "BN" interchange, but my exhibits clearly show BNSF as CN's connection at Warroad (VS LaPray, Appdx. GL-3, p.2; Appdx. GL-4, p.2).

Even apart from the Junction Interchange Update Form, there unquestionably was a holding out by CN to interchange traffic with BNSF at Warroad (VS LaPray, Appdx. GL-3, p.2; GL-4, p.2). When MNN acquired rail lines from BNSF, MNN succeeded to BNSF's right to interchange with CN at Warroad. MNN functions as an agent for BNSF in many interchange scenarios. For example, MNN acts as agent of BNSF in interchanging with CPRS at Thief River Falls, MN. MNN does not have an interchange agreement in its own name with CPRS at that location, yet MNN and CPRS consistently interchange significant volumes of traffic at that junction. In view of the agency arrangement between BNSF and MNN, CN's holding out in public tariffs to interchange traffic with BNSF at Warroad was a holding out to interchange traffic with MNN at Warroad.

It is significant that CN itself treated MNN as its connecting carrier at Warroad. When CN decided to remove their switches at Warroad, it notified MNN of that impending action, not BNSF.

My Reply Appendix GL-1 also serves to rebut Mr. Romano's testimony at page 4 that CN did not know whether a "paper barrier" in the BN-MNN line sale agreement precluded MNN from interchanging with CN at Warroad. Mr. Cooke of CN was notified specifically on June 18, 2001 that BN had removed that paper barrier, and that interchange activity at Warroad was anticipated in light of such removal. (Reply Appdx. GL-1, p.1).

Mr. Romano acknowledges at page 12 of his statement that on two recent occasions CN marketing employees contacted me about new traffic via a CN-MNN Warroad routing, but he states that my representations to the CN caller regarding Warroad caused "confusion". Mr.

Romano does not specify what representations I allegedly made, nor how such representations caused confusion. As my prior testimony makes clear, it was the CN personnel who contacted me initially about the new traffic, not vice versa (VS LaPray, Appdx. GL-17, GL-18). It was the CN personnel who asked for MNN's revenue requirements via Warroad. I merely provided the requested information. I did not represent to the callers that the Warroad interchange was available or not. I do not know how they could have been confused by the information that I provided to them.

At page 2 of its Reply Statement, CN states that it takes its statutory interchange obligations seriously. I note that CN did not take that interchange obligation seriously enough to accept a car that was specifically tendered to it for interchange by RAILINC in behalf of MNN at Warroad on or about June 14, 2001 (VS LaPray, pp.5-6; Appdx. GL-11, GL-12).

It is not correct that MNN has asked the Board to impose all of the expenses associated with the Warroad interchange solely on CN, as alleged at page 1 of CN's Reply Statement. MNN has offered to rehabilitate and maintain the CN transfer track to FRA Class I safety standards (VS LaPray, p.10). Indeed, CN has acknowledged that MNN has offered to pay 15 percent of the cost of restoring the west switch at Warroad, even though MNN contends that it has no legal obligation to do so (VS Romano, Ex.20).

At pages 3-4 of his statement, Mr. Romano refers to the refusal of Rail America, the prior owner of MNN, to make a contribution to the cost of an interchange switch connection at Warroad. However, Mr. Romano does not identify the extent of the cost contribution at issue at that time. During my discussions with Mr. Romano in 2001, he advised me that CN had required

Rail America to rehabilitate and maintain the transfer track as a condition to a CN-MNN interchange at Warroad. No CN-MNN interchange occurred at that time because Rail America refused to do so. Rail America was not asked to bear any of the cost required for restoration, rehabilitation or maintenance of the switches between the CN main track and transfer track. Under current MNN ownership, MNN has agreed to rehabilitation and maintenance of the transfer track that Rail America refused, yet CN remains unwilling to interchange with MNN. Instead, CN has added conditions not required of Rail America. In my opinion, it is not reasonable for CN to have done so.

Mr. Romano has stated that Warroad has not served as an interchange point in the modern memory of anyone at CN involved in this matter. However, other CN personnel have knowledge of use of the interchange. On September 11, 2003, MNN Roadmaster Liden went to Warroad to view the transfer track and switches. At that time, CN field personnel in the area stated to Mr. Liden that BNSF and CN interchanged traffic at Warroad as recently as 1995. Mr. Liden related that statement to me.

VERIFICATION

STATE OF MINNESOTA)
) SS:
COUNTY OF POLK)

GEORGE LAPRAY, being duly sworn on oath, deposes and states that he has read the foregoing reply statement, that he knows the contents thereof, and that the facts therein stated are true and correct.

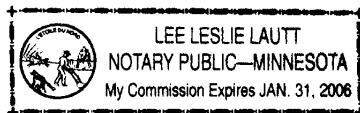


GEORGE LAPRAY

SUBSCRIBED AND SWORN to
before me this 26th day
of NOVEMBER, 2003.


Notary Public

My Commission Expires:





PO Box 705
Crookston, MN 56716
Phone: 218.281.4704
FAX: 218.281.4705

RVS George LaPray
Appendix GL-1
(7 pages)

FAX

TO: Greg Cooke

DATE: 18 June 2001

PHONE: 514.399.0161

FAX: 514.399.0575

COMPANY: Canadian National

FROM: George LaPray, Gen Mgr. MNN

NUMBER OF PAGES INCLUDING THIS COVER SHEET: 2

MESSAGE:

Page 2 is Junction Interchange update form covering interchange at Warroad, MN.

This was formerly (still so shown by AAR/RAILINC) CN - BNSF interchange. Minnesota Northern (MNN) has operated this line since 1997. BN has removed restrictions formerly imposed on MNN regarding interchange traffic to CN at this location - so in anticipation of activity over this interchange we need to update AAR/RAILINC records.

Any questions please call.

FAX COPY SENT TO: RAILINC at 919.651.5143

HAVE A SAFE DAY

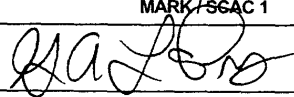
JUNCTION INTERCHANGE UPDATE FORM

Junction Industry Reference File

FAX completed form to the
RAILINC at (919) 651-5143**JUNCTION** - unique identification of the LOCATION of an INTERCHANGEJUNCTION ABBREVIATION: WARRDSTANDARD POINT LOCATION CODE (SPLC): 503017 (_ _ _ _)JUNCTION LOCATION NAME: WARROADJUNCTION STATE / PROVINCE: MN**INTERCHANGE** - description of ACTIVITIES between two transportation entities at a JUNCTIONACTION REQUESTED: A (A = add, C = change, E = expire)INTERCHANGE TYPE: N

	INTERCHANGING CARRIER	REPORTING CARRIER	CSM STATION FSAC (when required)
MARK / SCAC 1	<u>MNN</u>	<u>MNN</u>	<u>55315</u>
MARK / SCAC 2	<u>CN</u>		

DELIVERY ONLY FLAG: N (Y = yes, N = no)INHIBIT JUNCTION ADVICES: N (Y = yes, N = no) 06 19EFFECTIVE DATE OF ACTION: 2001-05-07 (CCYY-MM-DD)**AGREEMENT** - signatures of transportation entity representatives (as required by Interchange TYPE)

	MARK / SCAC 1	MARK / SCAC 2
SIGNATURE		
CONDITIONAL AGREEMENT?	Y = yes N = no ; If yes, form MUST be accompanied by _____ a complete description of the conditions of agreement	Y = yes, N = no ; If yes, form MUST be accompanied by _____ a complete description of the conditions of agreement
NAME (please print)	<u>George A. LaPray</u>	
COMPANY	<u>Minnesota Northern RR</u>	
PHONE NUMBER	<u>218 281 4704</u>	
FAX NUMBER	<u>218 281 4705</u>	

SUBMISSION – FAX completed form to RAILINC at (919) 651-5413 (or mail to address in the instructions)

Last modified: Mar. 1, 2001

Junction Interchange Update Form -- INSTRUCTION GUIDE

To ADD, CHANGE or EXPIRE an INTERCHANGE in the Junction Interchange (JUNC) Industry Reference File (IRF), it is required that a **JUNCTION INTERCHANGE UPDATE FORM** be submitted to RAILINC with the required information and signature(s). This **INSTRUCTION GUIDE** is intended to answer any questions you may have while completing the form. Should you have any additional questions and/or require assistance when completing the form, please call the Senior Customer Service Representative at RAILINC at (919) 651-5043.

The **JUNCTION INTERCHANGE UPDATE FORM** is divided into three sections; JUNCTION, INTERCHANGE and AGREEMENT. The **INSTRUCTION GUIDE** is likewise divided into these three sections.

JUNCTION - unique identification of the LOCATION of an INTERCHANGE

The information requested in this section of the form is used to uniquely identify the specific location of the INTERCHANGE. These unique locations are called JUNCTIONS. Each JUNCTION is identified by a three, four or five character JUNCTION ABBREVIATION (i.e. - CHGO for Chicago, IL).

Before an INTERCHANGE can be ADDED, CHANGED or EXPIRED, it is ESSENTIAL that the correct LOCATION of this INTERCHANGE be identified. While JUNCTION ABBREVIATION alone uniquely identifies the location of an INTERCHANGE, the other information is requested to verify that there is no misunderstanding between the parties involved (the two carriers and the RAILINC).

Should you have any additional questions and/or require assistance when completing the form, please call the Senior Customer Service Representative at RAILINC at (919) 651-5043.

- **JUNCTION ABBREVIATION** -- A unique 3 to 5 character alphabetic code assigned to a location by RAILINC. This information is required on all forms. If the JUNCTION ABBREVIATION is not known, please contact the Senior Customer Service Representative at RAILINC at (919) 651-5043 for assistance.
- **STANDARD POINT LOCATION CODE (SPLC)** -- The six (or nine) numeric digit code used to identify geographic places. The SPLCs are assigned by the National Motor Freight Traffic Association (NMFTA) for points in the United States and Mexico, and by the National Transportation Agency (NTA) for points in Canada. The SPLC is not required on the form, but is requested to verify that there is no misunderstanding between the parties involved (the two carriers and RAILINC). If the SPLC is not known, please contact the Senior Customer Service Representative at RAILINC at (919) 651-5043 for assistance.
- **JUNCTION LOCATION NAME** -- The city or common name for the location. The JUNCTION LOCATION NAME is not required on the form, but is requested to verify that there is no misunderstanding between the parties involved (the two carriers and RAILINC).
- **JUNCTION STATE / PROVINCE** -- The US or Mexican STATE or the Canadian PROVINCE in which this location can be found. The JUNCTION STATE / PROVINCE is not required on the form, but is requested to verify that there is no misunderstanding between the parties involved (the two carriers and RAILINC).

INTERCHANGE - description of ACTIVITIES between two transportation entities at a JUNCTION

The INTERCHANGE is the means of describing the activities that will take place between the two transportation entities at the JUNCTION location described above. Please refer to the **SUMMARY OF INTERCHANGE TYPES** for more detailed information regarding the various types of INTERCHANGES that can exist.

Should you have any questions and/or require assistance when completing the form, please call the Senior Customer Service Representative at RAILINC at (919) 651-5043.

- **ACTION REQUESTED** -- A single character code used to indicate the type of update that is being requested to the INTERCHANGE file. This information is required on all forms. The acceptable codes are:

A -- ADD a new INTERCHANGE to the file. This action is used when no INTERCHANGE currently exists

--

Last modified: March 1, 2001
2

Page

between these two transportation entities at the JUNCTION LOCATION described.

- C -- CHANGE an existing INTERCHANGE on the file. This action is used when some aspect of the INTERCHANGE between these two transportation entities at the JUNCTION LOCATION described is being changed.

This action is NOT used to change one of the transportation entities involved in the INTERCHANGE or to change the JUNCTION LOCATION for the INTERCHANGE, both of which would require an EXPIRE of the existing INTERCHANGE and an ADD of the new INTERCHANGE.

- E -- EXPIRE an existing INTERCHANGE on the file. This action is used when an existing INTERCHANGE between these two transportation entities at the JUNCTION LOCATION described is no longer needed.

Before an INTERCHANGE can be EXPIRED, all Routes utilizing this INTERCHANGE must be EXPIRED.

- **INTERCHANGE TYPE** -- A single character code used to identify the activity that can take place between the two transportation entities involved in this INTERCHANGE beginning on the EFFECTIVE DATE OF ACTION (see below). Two entities can only have ONE type of INTERCHANGE between them at each JUNCTION location. The **SUMMARY OF INTERCHANGE TYPES** is the official source for information on the various types of INTERCHANGES that can exist.

This information is required on all forms. In summary, the ten INTERCHANGE TYPES acceptable today are:

C	Haulage	Indirect Revenue & Operating	Rail-to-or-from-Rail
E	End-of-Train Device	Direct Operating Only	Rail-to-or-from-Other (non-rail)
			Transportation Mode
I	Joint Motor-Rail	Direct Revenue Only	Joint Motor-Rail Movements
N	Normal	Direct Revenue & Operating	Rail-to-or-from-Rail
O	Operating Only	Direct Operating Only	Rail-to-or-from-Rail
P	Per Diem Relief	Direct Revenue & Operating	Rail-to-or-from-Intermodal Storage
R	Rubber	Indirect Revenue & Operating	Rail-to-or-from-Rail via Drayman -or-
			Rail-to-or-from-Owner
S	Shop	Direct Revenue & Operating	Rail-to-or-from-SHOP -or-
			TTX-to-or-from-SHOP
V	Revenue Only	Direct Revenue Only	Rail-to-or-from-Rail
W	Water	Direct Revenue & Operating	Rail-to-or-from-Water Carrier

Should you have any additional questions and/or require assistance when completing the form, please call the Senior Customer Service Representative at RAILINC at (919) 651-5043.

- **INTERCHANGING CARRIER** -- The two to four character MARK or SCAC (Standard Carrier Alpha Code) that uniquely identifies the transportation entity involved in this INTERCHANGE. This information is required on all forms for both MARK / SCAC 1 and 2.

There is no significance to the designation of 1 or 2; all INTERCHANGES are considered to be bi-directional and will be stored in the central files in MARK/SCAC alphabetical order. For example, an INTERCHANGE of any type between the MARKS XYZ and ABC will be stored in the central files with ABC as MARK/SCAC 1 and XYZ as MARK/SCAC 2.

Should you have any additional questions and/or require assistance when completing the form, please call the Senior Customer Service Representative at RAILINC at (919) 651-5043.

- **REPORTING CARRIER** -- The two to four character MARK or SCAC that uniquely identifies the transportation entity that will report activity at this INTERCHANGE to TRAIN-II for either MARK/SCAC 1 or 2. This information is required on all forms for both MARK / SCAC 1 and 2.

When the same MARK/SCAC is used as the REPORTING CARRIER for both MARK/SCAC 1 and 2, this situation is commonly referred to as ONE ROAD REPORTING. When the INTERCHANGE TYPE is E, I, P, S or W, ONE ROAD REPORTING is REQUIRED. Please refer to the **SUMMARY OF INTERCHANGE TYPES** for more detailed information regarding the various requirements for TRAIN-II reporting with each of the INTERCHANGE TYPES.

Should you have any additional questions and/or require assistance when completing the form, please call the Senior Customer Service Representative at RAILINC at (919) 651-5043.

- **CSM STATION FSAC** -- The 5 digit numeric Freight Station Accounting Code (FSAC) from the Centralized Station Master (CSM) file that identifies a specific station that supports this INTERCHANGE. The CSM STATION FSAC is not required in all circumstances. Please refer to the **SUMMARY OF INTERCHANGE TYPES** for more detailed information regarding the various types of INTERCHANGES that can exist and their CSM STATION requirements.

In summary, the CSM STATION requirements for the ten INTERCHANGE TYPES acceptable today are:

C Haulage	Stations required for BOTH railroads - Station types must include R
E End-of-Train Device	Stations are NOT required
I Joint Motor-Rail	Stations required for BOTH railroads - Station types must include R Motor carrier involved in Interchange
N Normal	Stations required for BOTH railroads - Station types must include R&O or R & H
O Operating Only	Stations required for BOTH railroads - Station types must include O or H
P Per Diem Relief	Stations are NOT required
R Rubber	Stations are NOT required
S Shop	Station is required for railroad only - Station types must include O or H
V Revenue Only	Stations required for BOTH railroads - Station types must include R
W Water	Station is required for railroad only - Station types must include R

Besides the appropriate station type(s) as indicated above, the CSM stations also require that the same JUNCTION ABBREVIATION be included in the station record as is being used to uniquely identify this INTERCHANGE's location.

Should you have any additional questions and/or require assistance when completing the form, please call the Senior Customer Service Representative at RAILINC at (919) 651-5043.

- **DELIVERY ONLY FLAG** -- This special TRAIN-II code is used when the INTERCHANGE participants want to report on "delivery" only to TRAIN-II and any report of a "receipt" would be rejected by TRAIN-II.

The default value for this information is "N" (no). When the DELIVERY ONLY FLAG is set to "Y" (yes), then both REPORTING CARRIERS must be different; one-road reporting is not allowed.

Please be advised that setting the DELIVERY ONLY FLAG to "Y" (yes) carries significant implications and should not be used unless you fully understand these implications. A full description of those implications is beyond the scope of this document; please contact the TRAIN-II Project Leader at RAILINC at (919) 651-5036 with any questions you have regarding the implications of this flag in TRAIN-II.

- **INHIBIT JUNCTION ADVICES** -- This special TRAIN-II code is used when the INTERCHANGE participants want TRAIN-II

to NOT send notice of an INTERCHANGE when it is requested by an equipment owner for INTERCHANGES that occur between these two carriers at this JUNCTION location.

The default value for this information is "N" (no).

Please be advised that setting the INHIBIT JUNCTION ADVICES flag to "Y" (yes) carries significant implications and should not be used unless you fully understand these implications. A full description of those implications is beyond the scope of this document; please contact the TRAIN-II Project Leader at RAILINC at (919) 651-5036 with any questions you have regarding the implications of this flag in TRAIN-II.

- **EFFECTIVE DATE OF ACTION** – The date on which the ACTION REQUESTED (as described above) is to become effective. This is NOT (necessarily) the date the form is being signed as INTERCHANGES can be added, changed and expired with future effective dates.

The date is required on all forms and the proper format must be used; CCYY-MM-DD where C is century, Y is year, M is month and D is day. For example, July 23, 1996 would be written 1996-07-23.

The rules governing when an INTERCHANGE can and cannot be added, changed or expired in the past are complex and are beyond the scope of this document. Should you have any additional questions and/or require assistance when completing the form, please call the Senior Customer Service Representative at RAILINC at (919) 651-5043.

AGREEMENT - signatures of transportation entity representatives (as required by Interchange TYPE)

Bilateral concurrence is not required for all types of interchanges. Please refer to the **SUMMARY OF INTERCHANGE TYPES** for more detailed information regarding the various types of INTERCHANGES that can exist and their signature requirements.

In summary, the signature requirements for the ten INTERCHANGE TYPES acceptable today are:

	bilateral agreement	2 signatures
C Haulage		
E End-of-Train Device	signature required from railroad only	1 signature
I Joint Motor-Rail	no agreement required	1 signature
N Normal	bilateral agreement	2 signatures
O Operating Only	bilateral agreement	2 signatures
P Per Diem Relief	no agreement required	1 signature
R Rubber	signatures required from all railroads (only) involved	1 or 2 signatures
S Shop	no agreement required	1 signature
V Revenue Only	bilateral agreement	2 signatures
W Water	no agreement required	1 signature

At each major carrier and many of the shortline carriers, only one person (or sometimes a small group) is authorized to sign INTERCHANGE AGREEMENTS. If you are initiating an update to the JUNC IRF using this form, you will need to identify who on the other road needs to sign the form before it can be updated into the central file.

Should you need to know who the authorized contact person is at a specific railroad or if you have any additional questions and/or require assistance when completing the form, please call the Senior Customer Service Representative at RAILINC at (919) 651-5043.

- **SIGNATURE** -- Signature of the/an authorized person at the carrier(s) as described above.
- **CONDITIONAL AGREEMENT?** -- The default value for this information is "N" (no). When the CONDITIONAL AGREEMENT? field is set to "Y" (yes) by either or both MARK/SCACs, they are indicating that they agree to this Interchange update ONLY when some condition is met. That condition must accompany the form in writing and be signed and must make clear all special conditions for agreement to this Interchange update.

An example of a common condition for Interchange agreement is the need for another Interchange to be ADDED.

CHANGED or EXPIRED simultaneously.

- **NAME** -- The name of the person signing the form. Please print for clarity.
- **COMPANY** -- The name of the railroad or company for which the signatory works.
- **PHONE NUMBER** -- The full (including area code) phone number of the signatory for use in case of questions by the AAR staff or the other Interchange participant.
- **FAX NUMBER** -- The full (including area code) facsimile (fax) number of the signatory.

SUBMISSION - FAX completed form to RAILINC at (919) 651-5143 (or mail to address in the instructions)
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For INTERCHANGE TYPES that require bilateral agreement and 2 signatures (as described above), the typical form creation - submission path is as follows:

- MARK / SCAC 1 initiates the update by completing a form.
- MARK / SCAC 1 faxes the form to MARK / SCAC 2 as well as the AAR.
- If the type of Interchange requires only one signature (as described above), the AAR keys the update into the central system.
- If MARK / SCAC 2 signature is required for the type of interchange, the AAR will hold the form awaiting MARK / SCAC 2's reply for 5 business days.
- If after five business days there is no reply, the AAR will fax the form to MARK/SCAC 2 with a cover note asking for a response. The AAR will follow-up in a proactive manner as required.
- When a fax is received from MARK/SCAC 2, the form is keyed and the update becomes part of the central file.

Should you need to know who the authorized contact person is at a specific railroad or if you have any additional questions and/or require assistance when completing the form, please call the Senior Customer Service Representative at RAILINC at (919) 651-5043.

If you wish to send a form to the RAILINC via mail, the address is:

Senior Customer Service Representative
Business Services Division
RAILINC
7001 Weston Parkway - Suite 200
Cary, NC 27513

REPLY ARGUMENT

PRELIMINARY STATEMENT

MNN was dismayed at CN's public disclosure of correspondence by MNN in negotiation for settlement of the complaint (CN Reply Statement, VS Romano, Ex. 20). MNN understood that settlement negotiations are private unless the parties agree to make them public. MNN expressed no such agreement. It should go without saying that MNN's offer to bear a percentage of the cost to restore the west switch at Warroad as part of a private settlement agreement is not an admission that the law requires MNN to bear a portion of that cost.

CN's public disclosure of the settlement negotiations does serve the salutary purpose of emphasizing the efforts of the parties to reach a private-sector solution in this matter in lieu of litigation. Despite the parties' good faith efforts to settle the dispute both before and during the litigation, Board intervention is required to resolve a fundamental disagreement over the applicable law in the circumstances of this case.

ARGUMENT

CN can prevail in defense of the complaint only if it is found that interchange facilities at Warroad are being requested for the first time. In that circumstance, the Board can allocate the cost of the facilities between the carriers who will use the interchange.^{1/} Consequently, CN's Reply Statement emphasizes that CN and MNN have not interchanged traffic at Warroad previously, so that MNN's request allegedly involves the creation or establishment of new interchange facilities at Warroad (e.g., ". . . creating an interchange between the carriers at

^{1/} The Board has the broader power to deny the request altogether, but here CN has agreed to provide the facilities if MNN bears a portion of their cost.

Warroad would have required a significant investment in a new switch connection” [at 2, emphasis added]).

In contrast, if Warroad is found to be an existing point of interchange, CN’s Reply Statement has not refuted the propositions that (1) as a common carrier, CN is compelled by 49 U.S.C. § 10742 to provide reasonable and proper facilities for interchange of traffic at Warroad; and (2) CN cannot lawfully condition the provision of such facilities on the agreement of MNN to pay for all or part of their cost, nor on MNN’s guarantee of a minimum volume of traffic to be interchanged.

Whether Warroad is an existing or a new point of interchange for CN and MNN turns on whether those parties hold themselves out to interchange traffic with each other at Warroad, as a matter of fact and law.

In its Opening Statement, MNN provided extensive evidence of CN’s holding out to interchange traffic at Warroad --- in the Official Railroad Station List, commonly known as the Open and Prepay Tariff (VS LaPray, Appdx. GL-3), in the Official Railway Equipment Register (*id.*, Appdx. GL-4), and in CN’s own listing of interchange points in the Official Railway Guide (VS LaPray at 6).

In an effort to avoid the legal effect of that evidence, CN Witness Romano points out that the rail carriers listed for that interchange are CN and BN,^{2/} not CN and MNN. CN argues that such listing is obsolete -- that CN merely neglected to revise its interchange listings to eliminate Warroad (CN Reply Statement at 10).

^{2/} Appendices GL-3 and GL-4 refer to Burlington Northern Santa Fe (BNSF) as CN’s interchange connection at Warroad, not BN.

The facts undermine CN's contention. On June 18, 2001, General Manager LaPray of MNN sent a facsimile message to Mr. Greg Cooke of CN and to RAILINC along with a completed and signed Junction Interchange Update Form (Reply VS LaPray at 1, Rep. Appdx. GL-1). The Junction Interchange Update Form formally substituted MNN for BNSF as CN's interchange rail carrier at Warroad (*id.*). MNN thereupon listed CN as its connecting rail carrier at Warroad in the Official Railway Guide. Mr. LaPray's facsimile message made it clear that interchange activity at Warroad was anticipated because BN had removed restrictions that formerly precluded MNN from interchanging with CN at Warroad (*id.*). CN's retention of Warroad as a published interchange junction after receipt of that message and completed Junction Interchange Update Form constituted a holding out to interchange traffic with MNN at Warroad (*id.*). That is to say that Warroad is an existing interchange point for CN and MNN as a matter of fact and law.

The status of Warroad as an existing interchange point is not affected by CN's removal of interchange facilities at that point. CN has alleged that the Warroad interchange was "closed" as a result of many years of nonuse by BN-BNSF and MNN under Rail America ownership.^{3/} (CN Reply Statement at 3, 9). On that basis, CN has argued that it was justified in dismantling the interchange facilities at Warroad (*id.* at 9-10). Inasmuch as the Warroad interchange facilities have been removed, CN contends that MNN seeks establishment of new interchange facilities there, not reinstallation of facilities at an existing interchange point (*id.*).

^{3/} While CN tries to make it appear that there has been no interchange activity at Warroad in modern times, CN local personnel have stated that traffic was interchanged there as recently as 1995. (Reply VS LaPray at 4).

The law refutes that argument. The duty to furnish reasonable and proper interchange facilities under 49 U.S.C. § 10742 is a common carrier service obligation. *Norfolk Southern Ry. Co. -- Pet. for Declar. Order -- Interchange with Reading, B.M.&N. R. Co.*, 2003 STB LEXIS 216 at *15-16 (STB Docket No. 42078, decision served April 29, 2003). Common carrier service obligations are not extinguished on a de facto basis as a result of nonuse. See *The Phillips Company -- Petition for Declaratory Order*, 1995 MCC LEXIS 26 at *8-9 (Finance Docket No. 32518, decision served April 18, 1995) (no de facto abandonment as a result of nonuse), *aff'd sub nom. The Phillips Company v. Southern Pacific R. Corp.*, 902 F.Supp. 1310 (D, Colo., 1995), 97 F.3d 1375 (10th Cir. 1996). It may have been lawful in the interest of safety for CN to have partially dismantled the interchange facilities at Warroad after an extended period of nonuse. However, in light of CN's continued holding out in official rail industry publications to interchange traffic at Warroad, CN had a common carrier duty to restore those interchange facilities upon renewed demand for interchange service at Warroad.

CN thus has a statutory and common law duty to reinstall reasonable and proper facilities for interchange of traffic with MNN at Warroad. Under *New York Central R. Co. v. The Talisman*, 288 U.S. 239, 242 (1933), CN cannot lawfully condition its performance of that duty on MNN's payment of all or part of the reinstallation cost, nor on MNN's guarantee of a minimum volume of traffic.

CONCLUSION AND REQUESTED RELIEF

Based on the foregoing, the Board should find as follows:

- (1) CN violated 49 U.S.C. § 10742 when it failed to accept traffic in interchange at Warroad in June, 2001;

- (2) CN's violation of that statute continued thereafter when instead of reinstalling interchange facilities at Warroad as requested by MNN to accommodate additional traffic that would have been tendered to it, CN completed total dismantling of those facilities; and
- (3) CN's violation of that statute will continue in the future because traffic that would be tendered to CN for interchange at Warroad will continue to be prevented from moving via that gateway as a result of CN's continuing refusal to reinstall the Warroad interchange facilities.

On the basis of those findings, the Board should order CN to reinstall reasonable and proper facilities for interchange of traffic at Warroad, and to accept traffic for interchange at that location in accordance with its holding out in official rail industry publications.^{4/}

Respectfully submitted,

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^{4/} MNN does not seek an award of damages, even though CN's violation of 49 U.S.C. § 10742 has harmed MNN by preventing it from participating in traffic that would have been transported via Warroad but for CN's violation.

CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2003, I served the foregoing document,
Complainant's Rebuttal Statement, on Theodore K. Kalick, Canadian National Railway
Company, 601 Pennsylvania Avenue, N.W., Suite 500 North Building, Washington, DC 20004
and Thomas J. Litwiler, Fletcher & Sippel LLC, 29 North Wacker Drive, Suite 920, Chicago, IL
60606-2875, by UPS overnight mail.

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