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SERVICE DATE – JANUARY 29, 2024

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36397

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

Digest:[1] In this decision, the Board finds that Wisconsin Central, Ltd.'s proposal to unilaterally designate the Belt Railway of Chicago's Clearing Yard as the location where it will receive traffic in interchange from Soo Line Railroad Company is not consistent with the reasonableness requirement of 49 U.S.C. § 10742.

Decided: January 29, 2024

On April 14, 2020, Wisconsin Central, Ltd. (CN) filed a petition for declaratory order regarding its proposal to designate Clearing Yard (Clearing), owned by the Belt Railway of Chicago (BRC), as the location for the interchange of traffic from Soo Line Railroad Company (CP)[2] to CN in the Chicago, Ill., area. Under CN's proposal, CP would be required to pay all of its own costs to reach Clearing for interchange with CN, including the switching fees due to BRC for service on BRC's line.[3] On October 30, 2020, the Board held that CN could not unilaterally designate Clearing as the location where it will receive traffic in interchange from CP. Wis. Cent. 2020, FD 36397, slip op. at 10. CN sought judicial review, and in 2021 the United States Court of Appeals for the Seventh Circuit (the court) vacated the Board's decision and remanded the matter to the Board for further consideration. Wis. Cent. v. STB, 20 F.4th 292 (7th Cir. 2021). For the reasons explained below, on remand, the Board holds that CN's

[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

[2] The Board recently approved CP's acquisition of control of Kansas City Southern Railway Company, resulting in a newly merged entity, Canadian Pacific Kansas City Limited, or CPKC. See Canadian Pac. Ry.—Control—Kan. City S., FD 36500 et al. (STB served Mar. 15, 2023). Because this proceeding began before the change in control, the decision will continue to refer to Canadian Pacific/Soo Line as CP.

[3] CN, CP, and the other Class I railroads are co-owners of BRC. Wis. Cent.—Pet. for Declaratory Ord.—Interchange with Soo Line R.R. (Wis. Cent. 2020), FD 36397, slip op. at 1 n.2 (STB served Oct. 30, 2020). The Class I railroads have entered an agreement (BRC Operating Agreement) governing their use of BRC. (CN Pet. 18, Ex. 9.)

proposed interchange arrangement for receiving traffic from CP at Clearing is inconsistent with the reasonableness requirements of 49 U.S.C. § 10742.[4]

BACKGROUND

From 2010 to 2019, CP and CN mainly interchanged Chicago-area traffic at Spaulding,[5] near Bartlett, Ill.[6] Soo Line R.R.—Pet. for Declaratory Ord. & Prelim. Inj.—Interchange with Canadian Nat'l, FD 36299, slip op. at 1-2 (STB served Nov. 29, 2019). In 2019, CN sought to move the Spaulding interchange traffic elsewhere. Id. at 1-2. CN first designated Kirk Yard in Gary, Ind., but CP objected and filed a petition for declaratory order requesting that the Board order CN to continue to receive CP cars at Spaulding unless a replacement location was agreed upon or the Board prescribed a replacement location. Id. at 2. Pending the Board's decision regarding Kirk Yard, the parties signed an interim agreement in August 2019 (Interim Agreement) in which they agreed to move the Spaulding interchange traffic to Clearing, with CN paying the BRC's fees. CP Joint Notice of Interim Agreement 1, Aug. 21, 2019, Soo Line R.R., FD 36299. Subsequently, the Board concluded that CN could not designate Kirk Yard for interchange with CP because it was not a reasonable interchange location under § 10742. The Board declined to address the reasonableness of interchange at Clearing because CP's petition did not seek a determination and because it was not clear at that point whether CN had designated Clearing as the interchange point. Soo Line R.R., FD 36299, slip op at 3-4, 7.

On April 14, 2020, CN filed a petition for a declaratory order seeking a ruling that pursuant to § 10742, CN may designate Clearing to receive interchange traffic from CP, and that CP must, as the delivering carrier, bear the cost of BRC's switching fees. (Pet. 1, 3-4.) On October 30, 2020, the Board held that under § 10742, where there is a physical connection between the lines of two carriers, the receiving carrier must designate a location on its own line and provide the delivering carrier a free route to that location, but where there is no physical connection, the rights and obligations of § 10742 do not apply. Wis. Cent. 2020, FD 36397, slip op. at 5. The Board further concluded that § 10742 requires a receiving carrier to "provide" interchange facilities and that CN would not be providing anything by designating a third-party's facilities as the interchange point and requiring CP to pay that party's switching fees. Id. at 7.

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[4] Section 10742 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 . . . ."

[5] Spaulding is located on the lines of the former Elgin, Joliet & Eastern Railway Company (EJ&E). (CN Post-Comment Reply 4-5.) CN acquired all of the EJ&E's assets west of Gary, Ind. in 2008. Can. Nat'l Ry.—Control—EJ&E W. Co., FD 35087, slip op. at 9 (STB served Dec. 24, 2008).

[6] CN states that during that time, some traffic, especially toxic-by-inhalation hazardous materials, was interchanged at Clearing. (CN Post-Remand Brief 1, 4.)

Accordingly, the Board concluded that § 10742 does not permit CN to unilaterally designate BRC's facilities at Clearing as the point of interchange. Id. at 10.

On judicial review, the court vacated the Board's decision and remanded the matter to the Board. Wis. Cent. Ltd., 20 F.4th at 295. The court held that the Board erred by concluding that carriers only have the "power to provide" facilities that they own and that § 10742 only applies if two carriers physically intersect. Further, the court said that the Board had conflated an assumption about who pays the fees of a third-party carrier with the question of "whether a receiving carrier [can] ever designate a willing third party to receive traffic on its behalf." Id. at 294-95.

Following the remand, the Board solicited input from stakeholders and other interested persons regarding the issues presented by the court's decision. Wis. Cent.—Pet. for Declaratory Ord.—Interchange with Soo Line R.R. (Wis. Cent. 2022), FD 36397, slip op. at 4-5. The Board stated that, "[i]nput from a wider variety of industry participants will give the Board a better sense of the potential impacts of different approaches and enable it to make a more informed decision." Id. at 4. The Board received comments from CN, CP, BNSF Railway Company (BNSF), Norfolk Southern Railway Company (NSR), the Freight Rail Customer Alliance (FRCA), and the American Short Line and Regional Railroad Association (ASLRRA). CP, BNSF, and NSR all argued that the court's decision was a narrow one that held only that a receiving carrier's duty to provide interchange facilities under § 10742 can be satisfied under some circumstances by designating the facilities of a willing third party for interchange. (CP Comments 3; BNSF Comments 2-3; NSR Comments 4.) These parties, as well as ASLRRA, further asserted that: (1) in determining whether an interchange location is "reasonable," it is relevant to consider the associated costs to the delivering carrier; and (2) a receiving carrier generally should not be permitted to unilaterally designate an interchange location on a third party's line and require the delivering carrier to bear the associated costs. (CP Comments 5-6, 9-10; NSR Comments 8-10; BNSF Comments 3; ASLRR Comments 5-6.) After reviewing the comments, the Board provided CN and CP the opportunity to file post-comment initial briefs and replies. Wis. Cent., Pet. for Declaratory Ord.—Interchange with Soo Line R.R., FD36397 (STB served Mar. 22, 2023). Both CN and CP did so.[7]

CN argues that the court determined that § 10742 allows CN to designate a willing third party, such as BRC, to receive interchange traffic on its behalf and that CP waived the question of whether Clearing is a "reasonable" interchange location because it failed to raise that issue during the Board proceedings prior to remand. (CN Post-Comment Brief 2-3.) Therefore, according to CN, the only issue to be decided on remand is whether CP must pay BRC's

[7] Both CN and CP filed post-remand briefs before the Board solicited public comments, but these briefs advance arguments very similar to those in the post-comment briefs and need not be summarized here.

switching fees.[8] (Id. at 3.) CN claims that the question of who pays such fees is resolved by the BRC Operating Agreement, which, it says, obligates CP, as the delivering carrier, to pay the fees for "every interchange" between the parties at Clearing. (Id. at 3.) CN further argues that requiring CP to pay BRC's switching fees is consistent with industry practice and basic fairness. (Id. at 4.) In addition, CN argues that switching at Spaulding required it to bear an unfair share of the costs of interchange because CN had to block and switch Spaulding interchange traffic at its closest classification yard, Kirk Yard, located 80 miles from Spaulding. (CN Pet. 2; CN Post-Comment Brief 5.)

CP argues that the court's decision was narrow and held only that a receiving carrier can have the "power to provide" interchange facilities via a contractual arrangement with a third party. (CP Post-Comment Brief 5-7.) CP claims that the court did not address whether CN's proposal to designate Clearing as the interchange location and to require CP to pay BRC's switching fees would be consistent with the requirement under § 10742 to "provide" interchange facilities. (Id. at 11.) According to CP, CN's proposal would not "provide" interchange facilities to CP because it would require CP to exercise (against its will) its own contractual rights to use BRC's facilities and would require CP to pay for its use of those facilities. (Id. at 9-11.) CP further argues that it did not waive the issue of whether Clearing is "reasonable" as that issue has long been before the Board, and that both the court and the Board have already held that "reasonableness" is one of the key issues in this dispute, with the Board specifically requesting comment on it post-remand. (Id. at 13-16.) CP claims that Clearing is not reasonable relative to Spaulding because it presents significant operational problems that do not arise when interchanging at Spaulding and because it imposes significant costs on CP compared to interchanging at Spaulding. (Id. at 17-21.) CP argues that if the Board does find that it is reasonable for CN to designate Clearing as the interchange location, it should require CN to pay BRC's switching fees and that the BRC Operating Agreement does not mandate that CP bear those costs. (Id. at 26-28.)

In reply, CN argues that, if CP did not waive the reasonableness issue, the Board should find that neither precedent nor the statute contemplates a comparative reasonableness analysis and that the court's decision makes clear that the question of who pays BRC's fees should be addressed separately and only after the question of reasonableness. (CN Post-Comment Reply 26-27.) CN claims that, under the correct reasonableness analysis, Clearing is a reasonable interchange point. (Id. at 29.)

CP replies that congestion at Clearing recently increased significantly, causing congestion at other yards and forcing CP to impose costly countermeasures. (CP Post-Comment Reply 1, 7-8, Nicholas Walker Suppl. V.S. 2-3.) CP also notes that CN's argument that the BRC Operating Agreement always controls has "no limiting principle," as every Class I railroad is a signatory, and similar agreements exist at terminals across the rail network. CP argues that if

[8] CN also argues that if the Board does consider arguments regarding the reasonableness of Clearing, it should find that Clearing is reasonable. (CN Pet. 29-31.) According to CN, CP has conceded that Clearing is operationally reasonable. (Id. at 22.)

such third-party agreements controlled who pays in all instances, receiving carriers "would have an unfettered right and a clear economic incentive to designate the third party's facilities at the delivering carrier's cost," even when alternatives exist that are both free to the delivering carrier and more efficient, upsetting existing bargaining powers and causing "chaos" to the industry as a whole. (Id. at 1, 10 (citing NSR Comments 8-9).)

PRELIMINARY MATTERS

Because the parties dispute the scope of the issues before the Board for resolution, the Board must first address those questions. As a threshold matter, the issue of whether Clearing is a reasonable interchange location was not decided by the court. The court held that, for the purposes of § 10742, a receiving carrier can have the "power to provide" interchange facilities of a willing third party via contract. Wis. Cent., 20 F.4th at 294. The court, however, did not address whether CN's designation of Clearing for interchange otherwise satisfies the requirements of the statute. Specifically, the court did not opine on whether the facilities at Clearing constitute "reasonable" interchange facilities under § 10742 for the interchange of traffic from CP to CN. See id. at 294-95.

CN argues that the Board should not consider the issue of "reasonableness" now because CP failed to raise it before the agency prior to the court's remand. (CN Post-Comment Brief 2.) The Board disagrees. In its initial reply brief, CP analyzed several factors with respect to the "fairness" of CN's proposal to interchange at Clearing and require CP to pay the switching fees. (CP Reply 22-24.) Fairness can be an essential component of reasonableness,[9] and the factors CP analyzed—specifically the "operational issues, costs, and risks" associated with a Clearing interchange, (CP Post-Comment Brief 13; see also CP Reply to Pet. 22-24)—are relevant to determining reasonableness, as discussed further below. In addition, the court stated that in situations where the parties cannot agree on an interchange location, one of the questions that could require resolution is whether "the proposed location for interchange [is] "reasonable" . . . compared with the place where switching otherwise would occur." Wis. Cent., 20 F.4th at 294. The court noted that "reasonable" is "an important word in the statute" that "gives the Board interpretive leeway." Id. at 294-95. Thus, the court recognized that reasonableness is an issue that the Board may need to address on remand. Moreover, in declaratory order proceedings, the Board may consider issues not raised by the parties. See Wilson v. A.H. Belo Corp., 87 F.3d 393, 398 (9th Cir. 1996) (holding that, under 49 U.S.C. § 554(e), an agency "may issue a declaratory ruling *sua sponte*—even in the absence of any parties before it—to terminate a controversy or remove uncertainty"). Here, the Board itself raised the issue of reasonableness in

[9] "Reasonable" is defined to mean "fair," "sensible," "logical," "ordinary or usual," and "not too expensive." *Reasonable*, Black's Law Dictionary, 2nd Ed., available at https://thelawdictionary.org/reasonable/; *Reasonable*, Merriam-Webster Dictionary, *available at* https://www.merriam-webster.com/dictionary/reasonable; *Reasonable*, Cambridge Dictionary, *available at* https://dictionary.cambridge.org/us/dictionary/english/reasonable; *Reasonable*, Britannica Dictionary, *available at* https://www.britannica.com/dictionary/reasonable.

seeking post-remand public comments on the issue. See Wis Cent. 2022, FD 36397, slip op. at 4.

CN also argues that the issue of whether CP is required to pay the BRC fees is settled by the BRC Operating Agreement, which requires the delivering carrier to pay those fees in all instances. (CN Post-Comment Brief 3.) However, that is an issue of contract interpretation, and a court is typically the more appropriate forum for interpreting an operating agreement or other contract. See, e.g., Ballard Term. R.R. Co.—Pet. for Declaratory Order, FD 36261, slip op. at 4 (STB served June 27, 2019). The only question addressed by this decision is whether CN's proposed designation of interchange facilities, which includes a requirement that CP pay all the BRC fees for delivery, is consistent with the requirements of § 10742. (CN Pet. 4.)

DISCUSSION AND CONCLUSIONS

Section 10742 requires CN to "provide reasonable . . . facilities that are within its power to provide for the interchange of traffic." The term "reasonable," in this context, is neither defined by the statute nor unambiguously and directly explained elsewhere by Congress. Indeed, as the court acknowledged, "[t]he statutory word 'reasonable' gives the Board interpretive leeway[.]" 20 F.4th at 295. At the outset, the Board is guided by the ordinary meaning of the term. Taniguchi v. Kan Pacific Saipan, Ltd., 566 U.S. 560, 566 (2012) ("When a term goes undefined in a statute, we give the term its ordinary meaning.") (citing Asgrow Seed Co. v. Winterboer, 513 U.S. 179, 187 (1995)). In addition, determining what is reasonable, in the specific context of railroad interchanges, involves the Board's unique technical and policy expertise in this area. The Board's interpretation of the term "reasonable" is also informed by the comments received by stakeholders and other interested industry participants in this proceeding.

An ordinary definition of "reasonable" includes "fair," "sensible," "logical," "ordinary or usual," and "not too expensive." See supra n. 9. Considering these terms, whether railroad interchange facilities are "reasonable" necessarily depends on the totality of the facts and circumstances of each particular case.[10] In the Board's view, factors that will typically be relevant include local operational concerns, the costs imposed on the parties, the parties' past actions and representations, industry practice, and implications for the functioning of the national rail network. More specifically, interchange facilities that present significant operational

[10] See Granite State Concrete Co. v. STB, 417 F.3d 85, 92 (1st Cir. 2005) ("The STB has been given broad discretion to conduct case-by-case fact-specific inquiries to give meaning to [the statutory terms "on reasonable request" and "reasonable rules and practices"], which are not self-defining, in the wide variety of factual circumstances encountered."); Sherwin Alumina Co. v. Union Pac. R.R., NOR 42143, slip op. at 5-6 (STB served Sept. 29, 2015) ("What constitutes a reasonable request for service is not statutorily defined but depends upon all the relevant facts and circumstances."); (NSR Comments 4, 11-14 (in determining reasonableness, the board considers many factors, at its discretion, on a case-by-case basis); BNSF Comments 3 (same)).

problems may not be the "logical" or "ordinary" choice for the situation at hand.[11] In addition, the costs imposed on the parties, particularly where a change in interchange location is made unilaterally and results in significantly increased costs to the other party, are relevant to whether the interchange facilities provided are "fair" and whether they are "too expensive" to be reasonable.[12] Moreover, industry practice,[13] as well as the parties' past practice and representations,[14] can relate to considerations of what is "fair" and "ordinary or usual" in a particular case. Finally, a particular type of interchange arrangement is likely not "logical" or "sensible" if it could result in significant disruptions across the national network.[15] The Board

[11] See Kan. City S. Ry. v. La. & Ark. Ry., 213 I.C.C. 351, 359 (1935) (stating that designation of an interchange point may not "impose unusual, unreasonable, or impossible operating hazards"); Black v. ICC, 837 F.2d 1175, 1177 (D.C. Cir.1988) (affirming agency's determination that an interchange point was reasonable based on circumstances such as lack of facilities, necessity to block crossings, a steep incline, and other operational difficulties); (NSR Comments 4, 8-10); see also Canexus Chem. Can. v. BNSF Ry., NOR 42131, slip op. at 13 (STB served Feb. 8, 2012) (finding a proposed interchange location unreasonable, in a dispute involving the agency's related through-routing statute, in part because of operational concerns).

[12] See Soo Line R.R.—Pet. for Declaratory Ord. & Preliminary Injunction—Interchange with Can. Nat'l, FD 36299, slip op. at 5 (STB served Nov. 29, 2019) ("[R]equiring 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."); Minn. N. R.R. v. Can. Nat'l Ry., NOR 42080, slip op. at 5 (STB served Mar. 18, 2005) ("We are unconvinced that requiring . . . CN to pay the full cost of restoring this switch without a guarantee that it will receive any traffic can be considered reasonable."); (NSR Comments 4, 8-10 (any interpretation precluding the Board from considering costs in a "reasonableness" determination could have widespread negative industry consequences); BNSF Comments 3 ("[A]s a general matter it would not be reasonable for a receiving carrier to unilaterally designate an interchange location that would require the delivering carrier to incur costs associated with using or accessing any third-party facilities . . . .").

[13] See Norfolk S. Ry.—Pet. for Declaratory Ord.—Interchange with Reading Blue Mountain & N. R.R., FD 42078, slip op. at 4 (STB served Apr. 29, 2003) (explaining in the context of a reasonableness determination that the receiving carrier had designated a point on its own line to receive traffic, which was consistent with industry custom); (NSR Comments 4, 13-14 (advocating for consideration of "long-standing practice" and "the business justification for deviating from industry custom")).

[14] See Canexus Chem. Can., NOR 42131, slip op. at 13 (finding the proposed location unreasonable, in part because the carriers had no prior history of interchanging chlorine at that location); Norfolk S. Ry., FD 42078, slip op. at 5 (finding that the delivering carrier had not met its burden to show a proposed interchange location was unreasonable because, among other things, the delivering carrier had previously proposed interchanging there); (NSR Comments 13-14).

[15] See Mid Atlantic R.R. v. Horry Cnty. S.C., NOR 32142, 10 I.C.C.2d 211, 226 (1994) ("Among the purposes of [§ 10742] is to promote safe, adequate, economical, and efficient

acknowledges that there may be some overlap in these proposed factors. Cf. Decatur Cnty. Comm'rs v. STB, 308 F.3d 710, 715-16 (7th Cir. 2002) (noting that costs to a carrier are relevant to multiple factors for assessing the reasonableness of a rail embargo). Moreover, as with any flexible, case-by-case analysis, this list of reasonableness factors is not necessarily exhaustive, nor will any single factor be dispositive.

When conducting a reasonableness determination under § 10742, the Board will, where relevant, analyze the reasonableness of a proposed interchange location relative to where traffic would otherwise be interchanged. See, e.g., Atl. Coast Line R.R. v. Seaboard Airline R.R., 286 I.C.C. 669, 669, 672, 674-676 (1952) (assessing the reasonableness of new interchange facilities relative to the parties' preexisting interchange location). For example, a given interchange location may present significant operational problems, but these problems would not necessarily support a finding of unreasonableness if the alternative presents similar or greater problems. The court indicated that such a relative approach is appropriate by concluding that, when parties cannot agree on an interchange location, one question to answer is whether "the proposed location for interchange [is] 'reasonable' . . . *compared with* the place where switching otherwise would occur." Wis. Cent., 20 F.4th at 294 (emphasis added).

In this case, the Board finds that the totality of the facts and circumstances show that interchanging traffic at Clearing under the conditions proposed by CN would not be consistent with the reasonableness requirement of § 10742.

Local Operational Concerns. CP claims that interchanging traffic at Clearing rather than Spaulding creates operational disadvantages for it. Specifically, CP argues that interchanging at Spaulding helps keep its Bensenville Yard fluid and allows it to maintain fluidity on its mainline during the day because, at Spaulding, it can set the time for the interchange assignment at night. (CP Reply 23-24; CP Post-Comment Brief 17-18.) CP states that, in the weeks prior to the filing of its April 21, 2023 post-comment brief, Clearing repeatedly experienced congestion, requiring CP to take mitigation measures, such as operating additional trains to Clearing, blocking CSXT-bound cars for direct delivery to CSXT, and building and staging Clearing-bound trains in Milwaukee. (CP Post-Comment Brief 18-20.)

CN responds that CP's claims regarding the benefits to CP of interchanging at Spaulding rather than Clearing ignore the even greater disadvantages of doing so for CN and its customers, Metra, and the surrounding community. (CN Post-Comment Reply 31.) CN states that interchanging traffic at Spaulding disrupts operations on its mainline, blocks Metra and Amtrak lines at several locations, and harms the surrounding community by blocking grade crossings. (Id. at 31-32.) CN states that for the past three-and-a-half years, it and CP have successfully interchanged at Clearing the traffic that previously moved through Spaulding and that Clearing

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transportation and sound economic conditions among carriers." (internal quotation marks omitted)); see also 49 U.S.C. § 10101(3), (4), (8), & (9) (setting forth numerous "[r]ail transportation policy" goals aimed at encouraging the development of a safe, efficient, and honestly managed system of rail transportation, which promotes effective competition and meets the needs of the public and the national defense); (NSR Comments 7-11).

has many advantages over Spaulding, including a hump yard, more space, and more resources to classify and switch the cars CP delivers to CN. (Id.)

The Board finds that operational concerns raised by CP with respect to Clearing do not weigh in favor of a finding of unreasonableness. The record indicates that there are operational advantages and disadvantages to interchanging at both Spaulding and Clearing. For example, interchanging at Clearing helps alleviate blockages on CN's main line and at grade crossings near Spaulding, (id. at 31), but interchanging at Spaulding helps ensure fluidity in CP's Bensenville Yard, (CP Reply 23-24; CP Post-Comment Brief 18-20) and at Clearing and the Chicago area more generally. Indeed, in Canadian National Railway—the proceeding in which CN took over the EJ&E, thereby bringing substantial amounts of traffic onto its system—the Board stated that moving classification and switching operations from Clearing to yards on the EJ&E line was expected to improve fluidity at Clearing and in the Chicago area, allowing for improved service. See Can. Nat'l Ry., FD 35087, slip op. at 4-5, 9-10, 15, 38 (STB served Dec. 24, 2008); see also, e.g., Can. Nat'l Ry., FD 35087 (Sub-No. 8), slip op. at 3-4, 7 (STB served May 15, 2015). Nevertheless, CP has conceded that Clearing is reasonable from a purely operational perspective. In a letter to CN dated April 18, 2019, CP stated that it is willing to interchange at Clearing if CN pays BRC's switching fees. (CP Pet. 10, Ex. 7.) Although CP's conditional agreement implies that interchange operations at Clearing would be more costly, it does not indicate that they would involve any "unusual, unreasonable, or impossible operating hazards." Kan. City S. Ry. Co., 213 I.C.C. at 359.[16]

Costs Imposed on the Parties. CN argues that the reasonableness analysis should not include any consideration of who pays the BRC switching fees. (CN Post-Comment Reply 26-27.) According to CN, the only costs that should be considered as part of the reasonableness analysis are "operating costs" such as "the costs of allocating crews and locomotives or the costs of network congestion from additional interchange trains and interchange operations." (Id. at 28.) It is not clear, however, why "operational costs" (however those may be differentiated) should be relevant to whether an interchange is reasonable, while other costs should not be. In any event, the BRC fees include compensation for the costs of BRC's operations, as CN itself notes. (Id. at 34 ("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.").)

CN further argues that the court's decision forecloses the Board's consideration of who pays the BRC fees. (Id. at 26-27.) The court stated that there are three questions that "could require resolution" when parties cannot agree on an interchange location: "(1) may the receiving carrier ever designate a willing third party to receive traffic on its behalf?; (2) if yes, is the proposed location for interchange 'reasonable' . . . compared with the place where switching

[16] CN argues that CP is estopped from arguing that Clearing is operationally unreasonable because in the proceeding in which CP sought (and obtained) authority to merge with Kansas City Southern Railway Company, CP stated that it would continue to deliver all interchange traffic to CN at Clearing. (CN Post-Comment Brief, Apr. 21, 2023 (citing Can. Pac. Rwy. Ltd.—Control—Kan. City S., FD 36500, slip op. at 66-67 (STB served Mar. 15, 2023)).) Because the Board finds that CP has conceded that Clearing is operationally reasonable, this argument is moot.

otherwise would occur?; (3) if yes to both of these questions, who pays the third party?" Wis. Cent., 20 F.4th at 294-95. It concluded that the Board erred by "smuggling an assumption" about the answer to the third question into its decision on the first. Id. at 295. CN argues that if the Board considers CP's proposed payment of fees in its reasonableness analysis, it will be committing a similar error. (CN Post-Comment Reply 27.)

The Board disagrees with CN's interpretation of the court's decision. As discussed above, the court stated that the term "reasonable" gives the Board interpretive leeway. Wis. Cent., 20 F.4th at 295. Further, although the court delineated three distinct questions to resolve, it did not suggest that there may *never* be any overlap in the *factors* relevant to resolving each question.[17] Nothing in the court's order undermines the conclusion—supported by common sense, industry stakeholders, and relevant case law—that costs may well be part of a reasonableness determination in interchange disputes.

Indeed, as noted above, "reasonable" in ordinary parlance can mean, among other things, "not too expensive." It also can mean "fair," and where one party provides a good or service to another—or, as in this case, shifts costs from itself to another—the costs of that good or service are relevant to whether the transaction is "fair."[18] Moreover, as pointed out by NSR—a carrier without a direct interest in this proceeding—"costs are usually the reason carriers seek to change an interchange point" and are "a prime factor in the negotiation of interchange agreements, where parties look to strike an agreement that recognizes their mutual benefit." (NSR Comments 7.) In other words, when railroads are attempting to agree privately on an interchange facility or location, cost is an essential consideration. See N.Y., Chi. & St. Louis R.R. v. N.Y. Cent. R.R., 314 I.C.C. 344, 345 (1961). It is therefore not surprising that, with the exception of CN, all parties that submitted comments in this proceeding uniformly stated that, when railroads cannot agree, cost is a central factor for the Board to consider under § 10742. (See NSR Comments 4, 7-10; BNSF Comments 3; ASLRRA Comments 5-6; FRCA Comments 1.) It would be incongruous for the Board not to consider costs in a reasonableness determination when it is such a key consideration for carriers and other industry stakeholders.

The idea that reasonableness under § 10742 depends on costs is also reflected in agency precedent. Indeed, in many cases discussing the operational challenges posed by alternative interchange facilities (e.g., distance, complexity, hazards, crew requirements), costs are clearly implicated. For example, the Board found that Kirk Yard was an unreasonable interchange point

[17] Further, "who pays a third party" is only one possible aspect of the broader question of "costs"; other considerations may include what types of costs are included/excluded, whether to include any "non-monetary" costs that affect expenses (e.g., lost time and resources), the total amount, and how costs are paid (including, e.g., relative division among all parties, form of payment, etc.).

[18] See e.g., Decatur Cnty. Comm'rs v. STB, 308 F.3d at 715-16 (costs to a carrier are relevant to multiple reasonableness factors when assessing a rail embargo); Oconomowoc Residential Programs v. City of Milwaukee, 300 F.3d 775, 784 (7th Cir. 2002) (in the context of the Americans with Disabilities Act, courts have concluded that an accommodation is "reasonable if it is both efficacious and proportional to the costs to implement it" and "unreasonable if it imposes undue financial or administrative burdens").

for CN to receive traffic from CP because it would require CP to travel 84 miles on CN's system past the point of physical connection and back, which "would likely cause CP crews' permissible hours of service to expire and would require a dedicated locomotive." Soo Line R.R., FD 36299, slip op at 5. The Board held that requiring CP to expend these additional resources—and, implicitly, their increased *costs*—would violate its previously stated prohibition on requiring the delivering carrier to do "work that properly belongs to the receiving carrier." Id. Put another way, the Board held that the proposed interchange arrangement was unreasonable because it sought to shift to the delivering carrier certain additional interchange costs that it would not otherwise be required to pay under the alternative arrangement.[19]

In the present case, CN is unilaterally attempting to shift significant interchange costs to CP. CN states that interchanging at Spaulding is costly because it requires CN to haul CP-to-CN interchange traffic from Spaulding to its closest classification yard, Kirk Yard, for blocking and switching. (CN Post-Comment Reply, V.S. Clark 5.) CN also states that interchanging at Spaulding results in the blocking of its main line. However, CN apparently concluded that this arrangement was reasonable despite these costs when it agreed to interchange at Spaulding in 2010 and when it continued with this arrangement until 2019. Now CN seeks to realize a larger benefit from interchange operations by shifting costs to CP and avoiding the costs associated with conducting interchange operations on its own facilities. (CN Pet. 18-19.) CN tried to accomplish this previously by designating Kirk Yard as the interchange point, but the Board found Kirk Yard was unreasonable because it required CP to expend significant additional resources and perform work that properly belongs to CN. Soo Line R.R., FD 36299, slip op. at 5. Here, the Board finds it similarly unreasonable for CN unilaterally to move operations to BRC's facilities and require CP to expend resources it would not otherwise be required to expend (namely, *all* of the BRC's switching fees) so CN can again avoid the costs of conducting interchange on its own facilities.

CN claims the BRC fees simply cover the costs of the switching work that CP crews otherwise would have to do at CP's cost, even if interchange occurred at Spaulding. (CN Post-Comment Reply 30 n.132.) However, the BRC fees are not limited to the cost of switching operations. In addition to covering the costs specific to each switching operation (e.g., the cost of fuel used), BRC's fees must also cover all BRC's other costs, such as the cost of acquiring/constructing and maintaining interchange facilities, employee salaries other than hourly wages of those conducting interchange operations, employee benefits, interest expenses, depreciation, rent, insurance, etc. It is contrary to notions of basic fairness for CN—the party under § 10742 obligated to provide interchange facilities and the party that seeks to move the interchange to third-party facilities for its own benefit—to require CP to bear all the third party's costs of financing, maintaining, and operating the facilities subsumed in the third-party fees. If CN wishes to reduce its costs of interchange as a receiving carrier, it can invest in upgrading its Spaulding facilities so that interchange can be conducted more efficiently there. CN may also

[19] See also Atl. Coast Line, 286 I.C.C. at 669, 672, 674-676 (considering, in assessing the reasonableness of alternative interchange facilities, the delivering carrier's potential need for additional trains and crews and the associated increased cost); N.Y., Chi. & St. Louis, 314 I.C.C. at 344-46 (discussing steep grade and added distance from intersection point as imposing additional expenses, when compared with existing interchanges at points of intersection).

seek to interchange via third-party facilities, but if it unilaterally seeks to impose that option, reasonableness requires that it bear at least some of the costs using of those third-party facilities.

CN argues that when interchange occurs at Spaulding, the cost of hauling traffic to and from Kirk Yard for switching and blocking results in CN paying a higher percentage of the overall interchange costs and that its proposal to switch at Clearing and have CP pay the fees more equally distributes interchange costs. (Pet. 18-19, 27-28.) However, CN has not identified any change in circumstances since the time when it voluntarily assumed these costs for nearly a decade and presumably found the arrangement to be fair. In addition, CN made the same argument when it sought to designate Kirk Yard as the interchange location, and the Board rejected it. Soo Line R.R., FD 36299, slip op. at 6 (no requirement that interchanging carriers must "perform the same amount of work or that interchange operations performed at one location must precisely balance those that occur at another"). The fact that interchanging on CN's facilities imposes somewhat more costs on CN than on CP does not give CN license to unilaterally shift costs of interchange to CP that would otherwise belong to CN.[20] Id.

CN also argues that the BRC fees would be largely, if not entirely, offset by the money CP saves by not having to run a daily train to Spaulding and being able to include CN-bound traffic on the two daily trains it already runs to Clearing. (CN Pet. 28.) As CP notes, however, interchanging at Clearing has not led to the elimination of any employees or locomotives, (CP Reply 22-23), and when volumes are high, it must run an additional daily train to Clearing, which offsets any benefit from eliminating the daily train to Spaulding. (CP Post-Comment Brief 22.) In addition, Clearing poses various costs to CP (and the Chicago area generally) that cannot be easily reduced to dollars and cents. For example, Clearing is regularly prone to congestion—which, according to CP, has been particularly bad since January 2023—that has disrupted the fluidity of operations at CP's Bensenville and Milwaukee yards, as well as the yards of other carriers.[21] (CP Post-Comment Reply 7-8, Nicholas Walker Suppl. V.S. 2-3.) CP

[20] CN argues that CP is the party that should be responsible for paying the BRC fees because it is industry custom for the delivering carrier to pay third-party interchange fees. (CN Post-Comment Brief 4.) As explained further below, that practice applies in a different context that is not relevant here. In addition, CN states that it delivers CP-bound interchange traffic to Clearing and pays the associated BRC fees for that traffic and it would be unfair for CN to have to pay BRC fees for traffic in both directions. (CN Post-Comment Brief 25.) However, CP notes that it was CN that asked CP to accept CP-bound traffic at Clearing at CN's cost. (CP Post-Comment Brief 30-31.) The fact that CN asked CP for this arrangement demonstrates that CN benefits from it, despite the fees. Both parties' voluntary choice to pursue this arrangement for CP-bound traffic does not require that CP be subject to a similar arrangement for CN-bound traffic that would benefit CN while potentially harming CP.

[21] CN counters that the recent congestion at Clearing is temporary and is the result of derailments on BRC lines and congestion issues on other Class I railroads that have spilled over onto the BRC. (CN Post-Comment Reply 33.) While the current congestion issue at Clearing may be temporary as CN suggests, congestion in and around Clearing has been a persistent problem for many years. See, e.g., U.S. Rail Serv.—Performance Data Reporting, EP 724 (Sub-No. 4), slip op. at 6 (STB served Dec. 30, 2014); Canadian Nat'l. Ry., FD 35087, slip op. at 5,

also states that interchanging at Spaulding results in more predictable and reliable operations. (CP Reply 24.) Predictability is valuable in that it allows for better planning on how to most efficiently allocate resources. In short, the Board is not convinced that the benefits to CP of interchanging at Clearing outweigh the BRC fees and other costs that CN's proposal would impose. If there were a clear net benefit to CP, it seems likely the parties would have reached a mutual agreement by now. Overall, the Board finds that the cost factor weighs against the reasonableness of CN's current interchange proposal.

Parties' Past Practices and Representations. As noted above, CN obtained approval to acquire EJ&E based, in part, on its representation that the transaction would alleviate congestion in the Chicago area by moving interchange operations *away from* Clearing and to facilities on EJ&E (like Spaulding). See Can. Nat'l. Ry, FD 35087, slip op. at 4-5, 9-10, 15 (STB served Dec. 24, 2008). In 2010, after CN acquired EJ&E, CN and CP mutually agreed to consolidate at Spaulding the interchange operations that previously occurred at multiple locations in the Chicago area, including at Clearing. (CN Pet. 5.) This agreement provided CP free passage to CN's Spaulding interchange facilities.[22] (CP Post-Comment Brief 12.) CN and CP continued to interchange traffic at Spaulding until 2019, when CN decided to terminate the Spaulding interchange agreement. (CP Reply 3.) When doing so, CN did not identify any changed circumstances that caused it to seek a departure from the interchange location that had been used for nearly a decade.[23] Rather, CN stated that the issues justifying its decision to cease interchanging at Spaulding were due to the pre-existing physical geography of the facilities, and it asserted that no change in circumstances was needed to justify its decision. See Soo Line R.R., FD 36299, slip op. at 16. CN has proposed moving from the free interchange at Spaulding because CN believes it will benefit from avoiding the costs associated with interchanging at Spaulding and from being able to route more of its own traffic over its mainline near Spaulding. (CN Pet., V.S. William Albritton 8-9; CN Post-Comment Reply 31.) This divergence from CN's longstanding practice and previous representations amplifies the unfairness of its proposal to

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10. The Board has no reason to conclude that congestion will cease to be a problem at Clearing going forward.

[22] In addition, as CP notes, CN negotiated in 2012 with the town of Bartlett, where Spaulding is located, and paid the town money to address concerns related to CP-CN interchange and to remove the town's ongoing opposition to the EJ&E acquisition. (See CP Post-Comment Reply 11 (citing June 18, 2019 Letter from CP to the Board, FD 36299, at 4 & Ex. 1 (Dec. 2012 Memorandum of Understanding between Bartlett and CN)).)

[23] Indeed, the converse of CN's representations during the EJ&E acquisition proceeding, see Canadian Nat'l. Ry., FD 35087, slip op. at 5, 9-10, 15, is that moving interchange traffic from yards on the EJ&E lines back to Clearing, as CN seeks to do here, would reduce fluidity and harm service to customers in the Chicago area. The Board recognizes that the EJ&E acquisition was approved in December 2008 and that circumstances may have changed since then, but CN has not explained how its current desire to move interchange traffic to Clearing is consistent with its prior representations that moving traffic away from Clearing would provide benefits to it, its customers, and the rail network generally.

unilaterally change the interchange location and force CP to pay all the associated fees.[24] Thus, on balance, the parties' practices and representations weigh against a finding that this proposal is reasonable.

Industry Practice. The ordinary practice in the rail industry is for carriers to reach mutual agreement on an interchange location, and the agency has long encouraged this. See N.Y., Chi. & St. Louis R.R. Co. v. N.Y. Cent. R.R. Co., 314 I.C.C. 344, 345-46 (1961); Kan. City S., 213 I.C.C. at 355. In addition, pursuant to industry custom, a receiving carrier in direct physical connection with its delivering carrier designates an interchange location on the receiving carrier's own line, at or near the point of physical intersection,[25] and provides free passage over its line to the point of interchange. Norfolk S. Ry.—Pet. for Declaratory Ord.—Interchange with Reading Blue Mtn. & N. R.R., FD 42078, slip op. at 4 (STB served Apr. 29, 2003) (citing Burlington N. R.R. v. U.S., 731 F.2d 33, 38 (D.C. Cir. 1984)); see also Toledo, Peoria & W. Ry.—Pet. for Declaratory Order, FD 35404 et al., slip op. at 10 (STB served Apr. 26, 2011). Here, the Board finds that CN and CP are in direct physical connection in the Chicago area (at Spaulding) for purposes of the reasonableness analysis, and thus, the custom of free passage—which the parties followed from 2010 to 2019—is relevant.[26]

No party in this proceeding has pointed to, and the Board is not aware of, any prior instance of a receiving carrier unilaterally designating an interchange point on a third-party's line and requiring the delivering carrier to exercise trackage rights and pay third-party fees where

[24] CN points to another aspect of the parties' past practices—the BRC Operating Agreement—and asserts that it requires a delivering carrier like CP to pay BRC's switching fees any time the parties interchange at Clearing. As noted above, the Board declines to interpret this private contract. We note, however, that the main dispute here appears to concern *not* what rights or obligations the contractual language imparts, but whether, under § 10742, CN may unilaterally *require* CP to exercise those contractual rights (and incur the attendant obligations).

[25] See, e.g., Black, 837 F.2d at 1178 ("[T]he preferred point of interchange normally is the intersection of the two carriers' lines . . . ."); see also N.Y., Chi. & St. Louis, 314 I.C.C. at 346; Rates, Regulations, and Practices of Peoria & Pekin Union Ry. at Peoria, Ill., 93 I.C.C. 3, 9 (1924). This industry custom does not mean a receiving carrier is prohibited from designating a willing third party to receive traffic on its behalf. See Wis. Cent., 20 F.4th at 294. But it is one factor that may be considered in determining whether the proposed location for interchange is reasonable compared to the place where switching would otherwise occur. See id.

[26] CN argues that its line does not physically connect to CP's line because CP reaches Spaulding via trackage rights over Metra's line, not over lines that CP owns. (CP Pet. 20-21.) However, although Metra owns the underlying property, CP's interest in the portion of the line that connects to CN goes well beyond trackage rights. (CP Reply 11-12.) As CP explains, CP is the exclusive holder of the freight common carrier obligation on the line, controls and dispatches the line, pays its share of expenses for the line, and is not limited by the type or volume of traffic that it can transport on the line. (Id.) Given the degree of control CP has over the line and its operations on it, the Board finds the section of track that connects with CN's line at Spaulding to be part of CP's system for purposes of determining the reasonableness of a proposed interchange.

there is a viable free alternative available for direct interchange. Indeed, other Class I railroads indicate that CN's proposed interchange arrangement is contrary to industry expectations regarding what qualifies as reasonable. (BNSF Comments 3 ("[A]s a general matter it would not be reasonable for a receiving carrier to unilaterally designate an interchange location that would require the delivering carrier to incur costs associated with using or accessing any third-party facilities absent agreement from the receiving carrier to reimburse the delivering carrier for such costs."); NSR Comments 7 ("[P]rovid[ing] a receiving carrier free [rein] to move interchange points at the delivering carrier's expense . . . would wreak havoc and upend railroad operations and economics.").) Thus, the interchange arrangement, as currently proposed by CN, diverges from longstanding industry practice.

CN argues that CP should pay the BRC fees because industry practice dictates that where parties interchange via a third party, the delivering carrier pays the third-party fees. (CN Reply 7-8.) However, that practice takes place in the context of a mutual agreement and/or between parties without any physical intersection. See, e.g., Balt. & Ohio R.R. Co. v. United States, 277 U.S. 291, 301 (1928).[27] As noted above, the Board is not aware, and CN has not provided any evidence, of a single instance—let alone an industry practice—of a receiving carrier compelling a delivering carrier to pay third-party switching fees when a direct interchange is readily available. To the extent any carriers may have privately agreed to such a third-party interchange arrangement, despite the availability of an alternative free interchange at a physical connection, such agreements do not represent an apples-to-apples comparison to the present case or to industry practice. In that context, the delivering carrier would be deriving some benefit that exceeds the cost of the third-party fees.[28] That would not necessarily be the case where a delivering carrier lacks an accessible physical connection or is otherwise forced to interchange via a third-party and pay the associated fees. The Board does not find that a custom practiced in the context of voluntary agreements where both carriers benefit is especially relevant to situations where the receiving carrier has acted unilaterally in a manner that could impose significant harm on the delivering carrier. In sum, because the industry practice most relevant here would give CP free passage to an interchange point on CN's line, this factor weighs against the reasonableness of CN's proposal to shift substantial interchange costs to CP.

[27] Moreover, even in that limited context, the Supreme Court has acknowledged that this practice is not absolute. Id. at 301 (practice of having the delivering carrier pay third-party switching fees "does not tend to prove that it is unjust or unreasonable" for receiving carriers "to bear the cost of transfer in both directions").

[28] Until the court's recent decision, the Board's longstanding interpretation of the statute and industry custom indicated, that, absent mutual agreement, interchange had to occur on the receiving carrier's line at or near the point of physical connection, and that the receiving carrier had to provide free passage to the delivering carrier. See, e.g., Burlington N. R.R., 731 F.2d at 38; Toledo, Peoria & W. Ry., FD 35404 et al., slip op. at 10. In that context, if a delivering carrier did not believe that interchanging via a third-party and paying the fees would provide it with a net benefit relative to interchanging at a point of physical connection, it could have insisted that interchange take place at or near the physical connection or that the receiving carrier pay some of or all the third-party fees.

Implications for the National Network. Although the reciprocal nature of rail interchanges, on a system-wide basis, has generally incentivized carriers to cooperate with one another, an increase in disputes at individual points of interchange could threaten to destabilize the delicate balance and undermine the agency's longstanding goal of promoting collaboration and mutual agreement. If the Board were to find in CN's favor in this case, it would set a precedent allowing receiving carriers to unilaterally designate interchange points on third-party lines and require the delivering carriers to pay fees charged by the third parties for use of the interchange facilities. Such a precedent would allow receiving carriers to designate interchange points on third-party lines based on the benefit to the receiving carrier alone without regard to how the third-party fees affect the delivering carrier or the overall cost of the interchange operations. In those circumstances, the incentives to cooperate and find mutually beneficial solutions would be reduced, while the incentives to seek opportunistic, one-sided results would be increased. Such a holding could lead to widespread disruption of existing, mutually agreed interchange arrangements throughout the country if railroads took the decision as license to opportunistically shift costs to other railroads through unilateral interchange designations.

NSR also expresses concerns regarding the incentives that ruling in CN's favor would create and the potential impact on the national network. The Board shares these concerns. Specifically, NSR projects that if the Board does not consider the costs of interchanging via third parties in reasonableness determinations, receiving carriers will be incentivized to avoid building and owning infrastructure for interchange operations because they will be able to use third-party interchange facilities and push the costs of building and maintaining those facilities on to delivering carriers. (NSR Comments 8.) NSR expresses concern that this would lead terminal and intermediate carriers to become overwhelmed and exacerbate rail service challenges, creating "chaos" in the rail industry. (Id. at 8-9.) In addition, NSR worries that if receiving carriers can unilaterally designate interchange points and require delivering carriers to pay all third-party fees, receiving carriers could use this power to harm their competitors. (Id. at 10.) For example, NSR suggests that a "receiving carrier could arrange for interchange via a third party by agreeing to a disadvantageous switching fee and then force the delivering carrier to pay it" or "secure rights to cross third party tracks for miles beyond a closer point . . . at a prohibitive cost in power, labor, and time for the delivering carrier." (Id.) Other rail industry commenters also express concern regarding a general policy of allowing receiving carriers to unilaterally designate interchange points on third-party lines and require the delivering carrier to pay all the associated fees. (BNSF Comments 3; ASLRRA Comments 4-5.) In short, the Board's experience and the opinions of industry participants, suggest that granting CN's petition would create precedent that significantly alters incentives in a way that could be detrimental to the efficiency of the national network.

The Board strongly favors the mutual, private resolution of interchange arrangements that has characterized the rail industry for over a century. See Peoria & Pekin Ry., 93 I.C.C. at 16; Norfolk S. Ry., FD 42078, slip op. at 5. In numerous locations throughout the country, arrangements exist in which *all* parties *voluntarily* agree to interchange via third-party switching or terminal railroads under certain circumstances. But the Board is loath to suggest, as CN advocates here, that parties may invoke § 10742 to compel each other to use such third-party arrangements in all circumstances. And the Board is unwilling, on the facts of the instant case, to disturb the prevailing stable equilibrium by incentivizing, as CN demands, uncooperative,

unilateral conduct. Therefore, this factor weighs against a finding of reasonableness for CN's current interchange proposal.

Conclusion. In sum, a majority of the above factors weigh against the reasonableness of CN's proposal to require CP to interchange at Clearing under the conditions proposed by CN. CN's proposed designation would depart from the parties' own past practice, industry practice, and CN's prior claims regarding the benefits of removing traffic from Clearing. It also attempts unfairly to shift significant costs associated with interchange facilities—which, under § 10742, CN is obligated to provide—to obtain a benefit for CN, while also setting a precedent that is likely to have detrimental effects on the national network. For those reasons, the Board finds that CN's proposal, as currently presented, is inconsistent with the reasonableness requirement of § 10742. This decision, however, does not speak to the merits of any alternative arrangement for interchanging traffic at Clearing (e.g., one that involves a different percentage allocation of the BRC fees—a change that could affect the reasonableness of the proposed interchange location).

It is ordered:

1. A declaratory order is issued, as discussed above.

2. This decision is effective on its date of service.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.