50439 SERVICE DATE – OCTOBER 30, 2020
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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 issues a declaratory order finding that Wisconsin Central, Ltd., cannot 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.

Decided: October 29, 2020

On April 14, 2020, Wisconsin Central, Ltd., d/b/a Canadian National (CN) filed a petition for declaratory order arising from a disagreement with Soo Line Railroad Company d/b/a Canadian Pacific (CP) concerning interchange operations in the Chicago area between the two carriers. CN asks the Board to decide whether CN has the right to designate Clearing Yard, which is owned by the Belt Railway of Chicago (BRC),[2] as the point at which CN will receive interchange traffic from CP. CN also asks whether each railroad must bear its own costs for the interchange of that traffic, including BRC's fees for switching services. CN urges that the Board should answer "yes" to both inquiries.

Pursuant to 5 U.S.C. § 554(e), the Board will issue a declaratory order. As discussed further below, the Board concludes that CN cannot unilaterally designate Clearing Yard as the interchange point for inbound CP traffic and that, as a result, the Board need not decide whether CN and CP must bear their own costs for interchange there.

BACKGROUND

From 2010 until 2019, CN and CP agreed to interchange most freight cars in the Chicago area at Spaulding, which is located near Bartlett, Ill. In 2019, CN notified CP that CN would be

[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 Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

[2] CN, CP, and four other Class I railroads co-own BRC. (CP Reply, V.S. Hubbard 4, May 29, 2020.) CP holds an 8.33% ownership share of BRC, and CN owns 16.66%. (Id.) The co-owners' rights and privileges with respect to BRC are defined in the Belt Railway Company of Chicago Operating Agreement (BRC Operating Agreement). (See CN Pet., Ex. 9.)

terminating the agreement and designating its Kirk Yard in Gary, Ind., as the new location where it would receive interchange traffic from CP. CP objected to CN's designation of Kirk Yard and filed a petition in Soo Line Railroad Co.—Petition for Declaratory Order & Preliminary Injunction—Interchange with Canadian National, Docket No. FD 36299, asking the Board to declare Kirk Yard an unreasonable interchange point. During the course of CN and CP's negotiations and the related litigation, CN and CP discussed interchanging at Clearing Yard but could not agree on which party would pay switching fees to BRC. Despite this disagreement over switching fees, beginning in August 2019, CP began to deliver cars to Clearing Yard for interchange with CN under an interim agreement.

After holding an oral argument on August 6, 2019, the Board found, on November 29, 2019, that Kirk Yard was an unreasonable interchange location. See Soo Line R.R.—Pet. for Declaratory Order & Prelim. Inj.—Interchange with Canadian Nat'l (CN-CP Interchange I), FD 36299 (STB served Nov. 29, 2019). The Board declined to address whether CN could designate Clearing Yard as an interchange point, noting that, although CP and CN had raised arguments on that issue, CP's petition for declaratory order did not seek such a determination, it was unclear whether Clearing Yard had actually been so designated, and at least one party believed the issue had not been fully briefed. See id. at 3-4.

On April 14, 2020, CN filed this petition for declaratory order, asking the Board to determine, first, whether CN has the right to designate BRC's Clearing Yard as an interchange point for receiving CP traffic, and, second, whether each railroad must bear its own costs for those interchanges, including fees for BRC's switching services. (CN Pet. 1.) CN argues that it can designate Clearing Yard, and that CP, as the delivering carrier, must pay BRC's fees to switch the cars at Clearing Yard. (Id. at 3-4.) CN argues that a receiving carrier has a right to designate a reasonable location to receive interchange traffic. In particular, CN argues that the agency has explained that "a 'receiving carrier necessarily has the right to designate where it will accept cars in interchange from its connections, provided, in making such designation, the receiving carrier does not impose unusual, unreasonable, or impossible operating hazards or require the delivering carrier to do work which properly belongs to the receiving carrier,'" (id. at 15 (quoting N.Y., Chi. & St. Louis R.R. v. N.Y. Cent. R.R., 314 I.C.C. 344, 345 (1961))), and that delivering carriers must "abide by a receiving carrier's reasonable designation of an interchange point and must bear their own costs for intermediate switching services," (id. at 17 (citing N.Y., Chi. & St. Louis R.R., 314 I.C.C. at 345)). CN also argues that 49 U.S.C. § 10742 does not require a receiving carrier to own the interchange facilities but only that it designate facilities that are "within its power to provide." (CN Pet. 17-19.) According to CN, it can designate BRC's Clearing Yard as the interchange point because it has the "power to provide" such facilities under the BRC Operating Agreement. (Id. at 19-20.)[3]

[3] CN makes additional arguments regarding the reasonableness of Clearing Yard as an interchange location, whether CN and CP directly connect at Spaulding, and the propriety of CP

In its reply, filed on May 29, 2020, CP argues that the Board should not initiate a declaratory order proceeding because there is no threatened disruption to rail operations, the parties agreed to interchange at Clearing Yard on a temporary basis, and this matter is a business dispute between CN and CP that does not require the Board's involvement. (CP Reply 6-7, May 29, 2020.) On the merits, CP argues that when two carriers are in direct physical interchange, the receiving carrier must designate a point on its own line for interchange and provide a free route to that point. (Id. at 8 (quoting Burlington N. R.R. v. United States, 731 F.2d 33, 38 (D.C. Cir. 1984)).) According to CP, because BRC is a separate corporate entity distinct from CN, Clearing Yard is not on CN's line, even though CN is a co-owner of BRC (along with CP and four other Class I railroads). (Id. at 14-15 (citing Burlington N., 731 F.2d at 38-40).) CP also argues that 49 U.S.C. § 10742 requires CN to "provide" an interchange facility, and "[b]y designating Clearing, a facility owned and operated by BRC, and insisting that CP pay BRC's fees to utilize Clearing, CN is not 'providing' an interchange facility." (Id. at 15.) CP requests that if the Board chooses to initiate a proceeding, the Board should allow 120 days for discovery regarding several factual issues. (Id. at 24-25.)

On June 18, 2020, CN filed a motion for leave to file a reply to CP's reply to "complete and correct the record." (CN Mot. 1, June 18, 2020.) In its reply to CP's reply, CN argues that there is no basis in § 10742 to require that an interchange point be on a receiving carrier's own line when two carriers have a direct physical connection. (CN Reply 6-8, June 18, 2020.) According to CN, the language of § 10742 "requires a railroad to provide interchange facilities that are merely 'within its power to provide'—not facilities that it owns." (Id. at 8 (quoting 49 U.S.C. § 10742).) CN argues that, had Congress wanted to put an ownership limitation in § 10742, it could have done so, similar to 49 U.S.C. § 11102(a), which "explicitly applies to terminal facilities 'owned by a rail carrier.'" (CN Reply 9, June 18, 2020.) CN further asserts that a requirement that a railroad only provide interchange facilities on tracks that railroad owns "makes no sense, and would discourage efficient arrangements where a railroad chooses to provide interchange facilities through a terminal railroad, a contract with a short line, or via leased track." (Id.) CN asserts that language that CP relies on from prior cases is dicta and does not support CP's "extreme proposition" that a carrier must provide a facility "on its own line." (Id. at 10.) Regarding procedural matters, CN opposes CP's request for discovery but argues that, if discovery were permitted, 60 days would be a more appropriate discovery period. (Id. at 20-23, 23 n.51.) CN also suggests that the Board should consider an oral argument if it wants to develop the record further. (Id. at 24.)

On July 8, 2020, CP opposed CN's motion for leave to file, arguing that CN's reply ignores precedent, distorts facts, and largely repeats arguments. (CP Reply 1, July 8, 2020.) The Board also received letters from the Village of Bartlett, Ill., pertaining to challenges that were presented when the rail carriers interchanged at Spaulding and the effect of moving the

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paying its own fees for switching at Clearing Yard. (See CN Pet. 20-29.) As discussed below, this decision need not address these arguments.

interchange to Clearing Yard, and a notice of intent to participate from the Commuter Rail Division of the Regional Transportation Authority d/b/a Metra (Metra). Metra states that it does not intend to comment on the merits or broaden the issues of the proceeding but reserves the right to submit comments if proposals or developments in this proceeding "will have further impact on tracks Metra owns or uses for its commuter rail operations." (Metra Notice 1.)

PRELIMINARY MATTERS

Motion for Leave to File Reply to Reply. Under 49 C.F.R. § 1104.13(c), a reply to a reply is not permitted. However, in the interest of a more complete record, the Board will grant CN's motion and accept its reply into the record. See City of Alexandria, Va.—Pet. for Declaratory Order, FD 35157, slip op. at 2 (STB served Nov. 6, 2008) (allowing a reply to a reply "[i]n the interest of compiling a full record").

Requests for Discovery and Oral Argument. CP requests discovery to probe factual allegations and conclusions made by CN, including the impact on the Village of Bartlett of moving the interchange from Spaulding to Clearing Yard and the economic benefits to CN of moving the interchange. (CP Reply 24-25, May 29, 2020.) CN opposes the request for discovery and suggests an oral argument instead if the Board wants to further develop the record. (CN Reply 23-24, June 18, 2020.) The request for discovery will be denied, and the Board will decline to schedule an oral argument, as both are unnecessary to decide the legal question in this case.

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. The Board has broad discretion in determining whether to issue a declaratory order. See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C.2d 675, 675 (1989). Because a controversy exists and there is uncertainty regarding whether CN can designate BRC's Clearing Yard as an interchange point, the Board finds it appropriate to issue a declaratory order.

CN asks the Board to address two questions: (1) whether CN has the right to designate Clearing Yard as the point where it will receive interchange traffic from CP; and (2) whether CN and CP are required to bear their own costs for that interchange, including BRC's switching fees. (CN Pet. 1.) As explained further below, the Board finds that CN cannot unilaterally designate Clearing Yard as the interchange point, and therefore the Board need not reach the issue of whether CN and CP must bear their own costs.

Under 49 U.S.C. § 10742, a rail carrier must "provide reasonable, proper, and equal facilities that are within its power to provide for the interchange of traffic between . . . its respective line and a connecting line of another rail carrier." The Board and its predecessor

agency, the Interstate Commerce Commission (ICC), have long recognized that "[w]hile the preferred point of interchange normally is the intersection of the two carriers' lines, practical considerations may dictate otherwise." Black v. ICC, 837 F.2d 1175, 1178 (D.C. Cir. 1988) (citing N.Y., Chi. & St. Louis, 314 I.C.C. at 346). Although "the determination of a point or points of interchange is a matter of mutual consultation and agreement," N.Y., Chi. & St. Louis, 314 I.C.C. at 346, the receiving carrier "necessarily has the right to designate where it will accept cars in interchange from its connections, provided, in making such designation, the receiving carrier does not impose unusual, unreasonable, or impossible operating hazards or require the delivering carrier to do work which properly belongs to the receiving carrier," id. at 345 (quoting Kan. City S. Ry. v. La. & Ark. Ry., 213 I.C.C. 351, 359 (1935)). Although the tracks of CN and CP intersect elsewhere, it is this "right to designate where it will accept cars in interchange" that CN invokes to support designating Clearing Yard as the interchange point.[4]

The agency has also long recognized that the right and obligation of the receiving carrier to designate an interchange point depends on whether it and the delivering carrier physically intersect. When two carriers physically intersect, the receiving carrier is required to designate a point on its own line where it will receive traffic and to provide a free route over its tracks to that point. When the carriers do not physically intersect, however, the receiving carrier has neither the right nor the obligation to designate an interchange point. These principles are reflected most clearly in Burlington Northern, Inc. v. Baltimore & Ohio Railroad (BN v. B&O), NOR 37515 (ICC served July 12, 1982), aff'd, Burlington Northern, 731 F.2d 33, which involved a situation where Burlington Northern, Inc. (BN), and Baltimore and Ohio Railroad Company (B&O) interchanged via an intermediate switching carrier wholly owned by B&O, Baltimore and Ohio Chicago Terminal Railroad Company (B&OCT). BN v. B&O, NOR 37515, slip op. at 1, 4. BN argued that B&O had the legal capacity to direct interchange on the lines of B&OCT, and accordingly, it was required to provide a free route to BN to the interchange point. Id. at 4. The ICC found, however, that neither B&O's ownership of B&OCT nor its trackage rights over B&OCT sufficed to establish a connection that required B&O to provide a free route to BN over B&OCT. BN v. B&O, NOR 37515, slip op. at 4-6 (affirming the administrative law judge's holding that "substantial intermingling" of B&O and B&OCT affairs and operations did not

[4] The Board has also discussed interchange in the context of 49 U.S.C. §§ 10703 and 10705. See Cent. Power & Light Co. v. S. Pac. Transp. Co., 2 S.T.B. 235, 243-44 (1997), clarifying 1 S.T.B. 1059 (1996), aff'd sub nom. MidAmerican Energy Co. v. STB, 169 F.3d 1099 (8th Cir. 1999); Canexus Chems. Can. L.P. v. BNSF Ry., NOR 42131, slip op. at 9 & n.48 (STB served Feb. 8, 2012) (discussing interaction between §§ 10742 and 10705); Norfolk S. Ry.—Pet. for Declaratory Order—Interchange with Reading Blue Mountain & N. R.R. (Reading Blue Mountain), NOR 42078, slip op. at 6-7 (STB served Apr. 29, 2003) (discussing Central Power & Light). CN's request for declaratory order and the parties' corresponding arguments do not discuss these statutory sections and instead focus on what is required by § 10742. Because the Board finds that CN cannot designate Clearing Yard as an interchange point under § 10742, the Board does not address the other statutory provisions.

"amount to a de facto merger" and finding that ICC orders authorizing B&O to acquire trackage rights over B&OCT did not require B&O to exercise those trackage rights). On appeal, the D.C. Circuit accepted, as the ICC had, that "long-standing custom requires the receiving railroad in a direct physical interchange to designate a point on its own line where it will receive traffic and to provide a free route over its tracks to that point for the delivering carrier." Burlington N., 731 F.2d at 38. The D.C. Circuit affirmed the ICC, holding that B&O was not required to exercise its trackage rights to establish a direct interchange because "[a]bsent contrary stipulation in the lease or in the required ICC authorization, the exercise of trackage rights remains permissive with their holder." Burlington N., 731 F.2d at 39.

More recently, in Toledo, Peoria & Western Railway—Petition for Declaratory Order (Toledo, Peoria & Western), FD 35404 et al. (STB served Apr. 26, 2011), the Board stated that § 10742 itself requires the receiving carrier to provide a free route to an interchange point on its own line. See Toledo, Peoria & W., FD 35404 et al., slip op. at 10 (citing Reading Blue Mountain, NOR 42078, slip op. at 4).[5] In that case, Toledo, Peoria & Western Railway Corp. (TP&W) had a physical connection until 1970 with BN, predecessor of BNSF Railway Company (BNSF), when a bridge owned by TP&W was destroyed, severing that physical connection. Id. at 2, 10. At the time of the Board's decision, TP&W delivered cars to BNSF by using an intermediate switching carrier, Tazewell & Peoria Railroad, Inc. (TZPR). Id. at 2-3. TP&W argued that BNSF was required to provide a free route over its tracks to a designated interchange point for receiving TP&W's westbound traffic. Id. at 10. The Board stated that when the bridge was intact, there was a direct physical connection between BN and TP&W, and "BN was obligated to provide TP&W with free, direct interchange via that route." Id. at 10. After the bridge was destroyed, however, TP&W was only connected to BN/BNSF via trackage rights arrangements over a third party railroad's line, and the Board held that "[§] 10742 does not require receiving railroads to provide free interchange facilities via trackage rights over the rail lines of third parties." Id. (citing Burlington N., 731 F.2d at 38-39).

Burlington Northern and Toledo, Peoria & Western reflect the fundamental understanding by the agency that receiving carriers must provide free routes to an interchange point on their own line to physically intersecting carriers. That is why BN and TP&W wanted to establish direct physical intersections—to gain the benefit of the free route, rather than pay a switching fee to a third party. Accordingly, consistent with the Board's precedent, if CN and CP are physically intersecting carriers, then CN, as the receiving carrier, is required to designate a

[5] In Reading Blue Mountain, the Board cited Burlington Northern in laying out the legal standard for interchange, stating that "[c]ustom requires the receiving railroad in a direct physical interchange to designate a point on its own line where it will receive traffic and to provide a free route over its tracks to that point for the delivering carrier." Reading Blue Mountain, NOR 42078, slip op. at 4 (citing Burlington N., 731 F.2d at 38).

point on its own line where it will receive cars in interchange from CP and provide a free route for CP to travel to that point.

Nonetheless, CN asserts that it need not designate a point on its own line and may instead require CP to deliver rail traffic to BRC at Clearing Yard and pay the associated BRC switching fee, even if CP physically intersects with CN. (CN Pet. 16-17.) In support, CN specifically notes the ICC's statement in Chicago, Rock Island & Pacific Railway v. Baltimore & Ohio Railroad, 113 I.C.C. 681 (1926), rev'd, Baltimore & Ohio R.R. v. United States, 277 U.S. 291 (1928), that "forwarding carriers are obligated 'to make delivery on the rails of their connections, either direct or *by bearing the charges of the intermediate switching line*.'" (CN Pet. 17 (quoting Chi., Rock Island & Pac., 113 I.C.C. at 690) (emphasis added by CN).) The Supreme Court disagreed with the ICC on that point, stating that the ordinary practice of a delivering carrier bearing the cost of switching when interchange is effected by means of an intermediate carrier "does not tend to prove that it is unjust or unreasonable for [the receiving carrier], in order to meet competition of other . . . lines, to bear the cost of transfer in both directions." Balt. & Ohio R.R., 277 U.S. at 301. Furthermore, Chicago, Rock Island & Pacific, which addressed joint rates and divisions under a tariff and rate equalization regime that no longer exists, has no application here. Importantly, that case did not and could not address the same type of interchange rights and obligations at issue here because the railroads in question could only transfer traffic across the river at St. Louis using a terminal railroad; neither the railroads on the east side of the river nor the railroads on the west side of the river had their own rails across the river. See Chi., Rock Island & Pac., 113 I.C.C. at 682. The quoted language constitutes, at most, a general description of the options that may be available both to carriers with a physical intersection and to those that connect in other ways when establishing a through route. Rather than addressing or nullifying the separate obligations that apply when there is a physical intersection between two carriers, which have been further explained in later agency decisions, the statement simply recognizes that a delivering carrier that does not physically intersect must necessarily use an intermediate switching line to achieve delivery to the receiving carrier.[6]

CN also argues that the statutory language of § 10742 supports its position, because Clearing Yard is within CN's "power to provide" because of CN's status as a co-owner of the BRC. (CN Pet. 18-20.) As CP correctly notes, however, § 10742 does not allow carriers to simply designate a location they have the power to provide—it also requires the receiving carrier to actually "provide" interchange facilities to delivering carriers. (CP Reply 6, July 8, 2020.) By designating a third-party's rail line as the interchange point and forcing a physically intersecting carrier (CP) to pay a switching fee, CN would itself be "providing" nothing. Indeed, in insisting that CP pay any BRC switching fees, CN would explicitly leave CP to its own devices to reach

[6] Two carriers that physically intersect may nevertheless mutually agree to interchange rail cars through an intermediate switching line. See Carload Traffic Between Indus. in the Chi. Dist., 174 I.C.C. 111, 115 (1931) (rejecting argument that carriers in direct connection must directly interchange rather than using an intermediate belt line for interchange).

Clearing Yard. On the contrary, as recently as last year, CN recognized that if it designates a point on its own line, it must provide a free route to that point. See CP Pet. Ex. F, at 2, Apr. 30, 2019, CN-CP Interchange I, FD 36299 (Letter from CN Executive VP and COO Mike Cory stating that "CN's only legal responsibility is to provide reasonable facilities for interchange and a free route over its tracks to that interchange point" and that "CN[] is fulfilling this responsibility through this exercise of its rights as a receiving carrier to specify an interchange point on CN's lines").[7] Requiring CP, a physically intersecting carrier, to not only travel to a third party's line for interchange but also pay for the privilege of doing so would violate CN's statutory obligation under § 10742 to "provide" CP with reasonable interchange facilities. Moreover, it would erase the benefit to CP of the carriers' physical intersection because CP would be in the same situation as if it did not physically intersect with CN: paying a switching fee to an intermediate carrier to complete delivery to CN.

CN focuses its arguments on its contention that it has the "power to provide" facilities at Clearing Yard through its minority ownership interest in BRC but ignores the remainder of the language of § 10742. The provision refers to facilities for interchange "between . . . its respective line and a connecting line of another rail carrier." The receiving carrier's statutory obligation to provide interchange facilities is only triggered when there is a physical intersection between the lines of the railroads, see infra pp. 9, so the natural reading of this language is that the facilities for interchange should be located on the lines of the interconnecting railroads near where the intersection occurs.[8] Indeed, there is nothing in the statute or in the case law that supports CN's contrary contention that the presence of a physical intersection between CN and CP tracks at one location enables CN to force CP to interchange at an entirely different location on the lines of a third-party railroad. Taken to its logical extreme, such an argument would support attempts by receiving carriers to designate interchange points largely untethered from the physical intersection with the delivering carrier.

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[7] See also CN Reply 10-11, May 20, 2019, CN-CP Interchange I, FD 36299 (stating that "the receiving railroad has the authority to designate a point on *its lines* where it wishes to receive interchange traffic" (emphasis added)); id. at 2 ("CP's Petition also misunderstands the law, which gives CN the prerogative as receiving carrier to designate a point on *its lines* to receive interchange traffic . . . ." (emphasis added)).

[8] The Board's reading of § 10742 is consistent with precedent in which the Board has considered the proximity of an interchange point to the physical intersection of carriers' lines when determining whether such interchange point is "reasonable." See CN-CP Interchange I, FD 36299, slip op at 5 (finding that an interchange point 84 miles from the physical intersection was not reasonable); Reading Blue Mountain, NOR 42078, slip op. at 5, 6 n.6 (finding that an interchange point 30 miles from the physical intersection was reasonable); see also Black v. ICC, 837 F.2d at 1178 ("While the preferred point of interchange normally is the intersection of the two carriers' lines, practical considerations may dictate otherwise." (citing N.Y., Chi. & St. Louis, 314 I.C.C. at 346)).

CN makes two alternative arguments. First, CN argues that it and CP are not physically intersecting carriers because CP must use trackage rights over a Metra line to reach both Clearing Yard and Spaulding, making this case analogous to Burlington Northern, in which the delivering and receiving railroads did not physically intersect. (See CN Pet. 21-22.)[9] But if CN's factual argument is correct, which the Board does not decide, this case would be moot. As discussed below, absent a physical intersection between CN and CP, the rights and obligations imposed by § 10742 would not be triggered.

Section 10742 imposes on a receiving carrier both the obligation to provide interchange facilities for the interchange of traffic and the right to designate a reasonable interchange location on its own line. Where two carriers do not physically intersect, however, the receiving carrier does not have the obligation under § 10742 to designate a point on its own line where it will receive cars from the noncontiguous carrier. Burlington Northern and Toledo, Peoria & Western demonstrate that these obligations depend on the presence of a physical intersection; in each of those cases, the receiving carrier was not required to designate a point on its own line, despite the objections of the noncontiguous delivering carrier. See Burlington N., 731 F.2d at 39-40; Toledo, Peoria & W., FD 35404 et al., slip op. at 10 ("Section 10742 does not require receiving railroads to provide free interchange facilities via trackage rights over the rail lines of third parties."). Accordingly, in the absence of a physical intersection, there is nothing for the Board to decide about how cars should be exchanged between CN and CP under § 10742. Because the receiving carrier does not have the obligation under § 10742 to provide interchange facilities in the absence of a physical intersection, it follows that there is no corresponding right to unilaterally designate *any* interchange location with non-intersecting carriers.[10]

CN's second alternative argument is that even if it is required to designate an interchange location on tracks it owns, it may designate BRC's Clearing Yard because, as part owner, "CN's designation of the BRC is thus on tracks that CN partially owns." (CN Reply 14, June 18, 2020.) CN's minority share of BRC does not operate to convert BRC's line into CN's line, and CN cites no authority that the Board should treat CN and BRC as interchangeable for the purposes of § 10742. Rather, in similar situations, the agency has determined that tracks of subsidiary carriers are not the same as tracks of parent carriers. In Grand Trunk Western Railroad v. Pere Marquette Railway, 174 I.C.C. 427 (1931), Grand Trunk Western Railroad (Grand Trunk) interchanged with Pere Marquette Railway (Marquette) through the Flint Belt Railway (the Belt),

[9] CN states that "[t]here is no meaningful factual distinction between the facts here and the facts in Burlington Northern." (CN Pet. 21.) Yet CN does not explain how it could require CP to use its trackage rights over Metra lines to reach Clearing Yard when "[a]bsent contrary stipulation in the lease or in the required ICC authorization, the exercise of trackage rights remains permissive with their holder." Burlington N., 731 F.2d at 39.

[10] While the interchange obligations imposed under § 10742 would not apply if CN and CP did not connect, they would still be obligated to create a through route under 49 U.S.C. § 10703.

which was owned by Marquette and provided intermediate switching. 174 I.C.C. at 427-28. Grand Trunk argued that Marquette and the Belt should be treated as one line and the switching charge should be found to be illegal because if Marquette and the Belt were "considered as constituting a single line then no intermediate switching service is rendered." Id. at 429-30. Even though Marquette owned the Belt and each line had the same officers and directors, the ICC found that Marquette and the Belt were separate corporations, and the Belt could continue to charge Grand Trunk for switching services. Id. at 431.

Similarly, in BN v. B&O, BN argued that B&O and B&OCT, B&O's wholly owned subsidiary, were the same corporation and that "the Commission should disregard the corporate fiction and find that delivery of BN line haul cars to the B&OCT must be considered tantamount to direct interchange with the B&O for which no charges may be assessed." BN v. B&O, NOR 37515, slip op. at 4. The ICC reviewed the "substantial intermingling" of the affairs of B&O and B&OCT, but ultimately found that "B&O cannot be compelled to designate a point on B&OCT's line as a point of interchange, unless it is obligated to do so by virtue of its trackage rights." Id. at 5.

The affairs of B&O and B&OCT were far more intermingled than the affairs of CN and BRC appear to be. B&OCT was wholly owned by B&O, and it appeared that B&O exercised substantial control over the actions of B&OCT. See id. at 5 (summarizing evidence of control, including that all B&OCT debt was guaranteed by B&O, B&OCT employees were paid by B&O, B&OCT leased all its locomotives from B&O, and all executives and supervisory officials were from B&O "and must be conclusively presumed to be operating in [B&O's] interest"). The ICC noted that B&OCT was recognized as a common carrier and "provided interchange and terminal services for railroads other than B&O at rates published in its tariffs and division sheet for many years," and found that B&OCT was a common carrier separate from B&O entitled to assess and collect charges for its services. Id.

Here, CN has pointed to no evidence beyond its minority ownership of BRC to support the contention that the Board should treat CN's line as coextensive with BRC's line. BRC is a distinct legal entity from CN, and the rights of the co-owner railroads are determined by the BRC Operating Agreement. Applying the reasoning in BN v. B&O, CN's partial ownership is clearly insufficient to allow the Board to find that CN's designation of BRC would be on CN's own line.

For the foregoing reasons, the Board concludes that CN cannot unilaterally designate Clearing Yard as an interchange point between itself and CP. Accordingly, the Board need not decide whether each railroad must bear its own costs for interchanging traffic there.

Notwithstanding the Board's determination here, however, nothing precludes CN and CP from agreeing to use BRC's Clearing Yard to conduct interchange, under financial terms CN and CP (and BRC, as necessary) may agree upon. See Carload Traffic, 174 I.C.C. at 115 (rejecting argument that carriers in direct connection must directly interchange rather than using an

intermediate belt line for interchange); Balt. & Ohio R.R., 277 U.S. at 300 (stating that the ordinary practice of a delivering carrier bearing the cost of switching "does not tend to prove that it is unjust or unreasonable for [the receiving carriers], in order to meet competition of other . . . lines, to bear the cost of transfer in both directions"). While § 10742 requires a receiving carrier to provide an interchange point on its own line to receive traffic from carriers with which it physically intersects, that requirement is mooted when railroads agree, as in Carload Traffic, to interchange via an alternative arrangement. Cf. Township of Woodbridge v. Consol. Rail Corp., NOR 42053, slip op. at 5 (STB served Dec. 1, 2000) ("[V]oluntary agreements must be seen as reflecting the carrier's own determination and admission that the agreements would not unreasonably interfere with interstate commerce.").[11]

The Board has long recognized the importance of the Chicago gateway to the Nation's rail network. See, e.g., Carload Traffic, 174 I.C.C. at 116 (noting in 1931 that "[t]he amount of tonnage moving to, from, and within the Chicago district is enormous"); U.S. Rail Serv. Issues—Performance Data Reporting, EP 724 (Sub-No. 4), slip op. at 6 (STB served Dec. 30, 2014) (noting the "longstanding importance of Chicago as a hub in national rail operations"). CN asserts that BRC "serves the[] co-owners, the shipping public, and the Chicago communities by switching and interchanging traffic at a highly efficient, central location." (CN Reply 15, June 18, 2020.) If switching at Clearing Yard benefits the movement of rail cars in the Chicago area, then the Board would encourage CN and CP to reach a mutually beneficial agreement to interchange there.[12]

[11] CN seems to argue that the Board should enforce the BRC Operating Agreement to allow CN to designate Clearing Yard under that agreement. (See CN Reply 16, June 18, 2020 ("The Board should not permit CP to turn its back on a joint facility agreement that has benefited the Chicago community for decades . . . .").) CP, on the other hand, argues that the BRC Operating Agreement does not require it to interchange at Clearing Yard. (CP Reply 5, July 8, 2020 (citing CP Reply 14-16, May 29, 2020).) If there is disagreement about what the BRC Operating Agreement requires, such a dispute would be properly resolved by a court, not the Board. See N.Y., Susquehanna & W. Ry.—Discontinuance of Serv. Exemption—in Broome & Chenango Cntys., N.Y., AB 286 (Sub-No. 5X), slip op. at 2 (STB served Sept. 30, 2008) ("[A] court of competent jurisdiction is the proper forum to resolve contractual disputes, not the Board.").

[12] CN and CP are reminded that the Board's Rail Customer and Public Assistance Program (202-245-0238; rcpa@stb.gov) is available to stakeholders to facilitate informal, private-sector resolution, without litigation, wherever possible.

It is ordered:

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

2. CN's motion to file a reply to a reply is granted.

3. This decision is effective on the date of service.

By the Board, Board Members Begeman, Fuchs, and Oberman.