BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. FD 36397

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

COMMENTS OF THE
AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION

Introduction

ASLRRA is a non-profit trade association representing approximately 600 Class II and Class III railroads (Short Lines) in legislative and regulatory matters. Short Lines operate 50,000 miles of track in 49 states, or approximately 30% of the national freight network, connecting manufacturers, businesses and farmers in communities and small towns to larger markets, urban centers, and ports. Short Lines play a vital role in maintaining rail service over thousands of miles of light density lines throughout the country that in many cases were candidates for abandonment by their former Class I owners. These small railroads have short lengths of haul, high fixed costs, and large capital needs for infrastructure investment, including the task of upgrading bridges and track to handle heavier freight cars. They also face pervasive competition from trucks, barges, and transloading operations for freight traffic.

On October 19, 2022, the Surface Transportation Board (STB or Board) issued the captioned decision, soliciting public comments regarding the legal issues presented in this proceeding. The instant proceeding arose from an April 14, 2020, petition for declaratory order filed by Wisconsin Central, Ltd. (CN) regarding the interchange of traffic from Soo Line

Railroad Company (CP) to CN in the Chicago, Illinois area. Given that the Board's determination in this docket could have wide-reaching consequences for the rail industry by altering precedent and practices regarding the interchange of traffic, ASLRRA is providing the perspective of Short Lines.

Background

From 2010 to 2019, CP and CN interchanged Chicago-area traffic at Spaulding, Illinois. In 2019, CN unilaterally sought to move the Spaulding interchange to Kirk Yard in Gary, Indiana. CP objected to this unilateral move and asked the Board to order CN to continue to receive CP cars at Spaulding unless the two railroads agreed to an alternative replacement location, or the Board prescribed one. *See,* Soo Line R.R. – Pet. For Declaratory Ord. & Prelim. Inj. – Interchange with Canadian National, FD 36299, slip. op. (STB served Nov. 29, 2019). In that proceeding, the Board stated that CN could not designate Kirk Yard for interchange with CP because it was not a reasonable interchange location and declined to address the reasonableness of the interchange at Clearing Yard owned by the BRC.

On April 14, 2020, CN filed a petition for a declaratory order, asking the Board to declare that pursuant to 49 U.S.C. § 10742, it could designate Clearing to receive interchange freight from CP and that each railroad had to bear its own costs for the interchanges, including BRC's switching fees. On October 30, 2020, the Board served a decision denying the relief sought by CN in its petition. Wis. Cent. Ltd. – Pet. For Declaratory Ord. – Interchange with Soo Line R.R., FD 36397, slip op. (STB served Oct. 30, 2020). It held that CN could not unilaterally designate Clearing. Id. at 4. The Board stated that, according to its precedent, "… when two carriers physically intersect, the receiving carrier is required to designate a point on its own line where it will receive traffic and provide a free route over its tracks to that point but that when two carriers

do not physically intersect, the receiving carrier has neither the right nor the obligation to designate an interchange point." Id. at 5.

In this decision, the Board rejected CN's argument that since both it and CP were co-owners of BRC then § 10742 permitted it to designate Clearing as an interchange since the lines of the two carriers intersected there. The STB said CN and BRC were distinct entities and by designating a third carrier's [BRC] rail line as the interchange point and requiring CP to pay a switch fee, CN would not be providing CP interchange facilities within its power to provide them as required by § 10742. Id. at 7-8, 10.

CN appealed the STB's decision to the United States Court of Appeals for the Seventh Circuit (Seventh Circuit), which vacated the Board's October 30, 2022 decision and remanded the matter to the Board. Wis. Cent. Ltd. v. STB, 20 F.4th 292 (2021). The Court held that the Board had erred in interpreting § 10742 by concluding that carriers only have the power to provide facilities that they own; by finding that § 10742 only applies if two carriers physically intersect; conflating an assumption about who pays fees of a third-party whether a receiving carrier can ever designate a willing third party carrier with the question of whether a receiving carrier can ever designate a willing third party to receive traffic on its behalf; and relying on a common-law norm that a delivering railroad cannot compel a receiving railroad to exercise a voluntary contractual right to receive traffic on the line of a third party carrier. Id. At 294-95. Given these points from the Seventh Circuit, the Board invited interested parties to provide input regarding the potential impacts on different approaches to enable it to make an informed decision on interchange rules.

The Board invited interested parties to comment on the broader legal issues presented by this declaratory order proceeding and provided a list of eight issues.

ASLRRA's Preliminary Response

In the experience of Short Lines, most conversations involving one party wishing to alter an interchange point are resolved through informal negotiation. It is quite rare for one carrier to try to unilaterally force a change to the interchange point. On these infrequent occasions where the carriers cannot reach agreement on the new interchange location, the interchange partners typically refer the matter to mediation before STB's Office of Public Assistance, Governmental Affairs and Compliance (OPAGAC). If, however, the Board determines that new procedures are needed to handle disputes of the nature of the CN/CP disagreement that is the subject of this proceeding, ASLRRA suggests that as a first step, the Board should direct the parties to meet to resolve the issues privately. If the parties cannot reach a resolution, then the next step should be mediation before OPAGAC. Only if those steps do not bear fruit should the parties resort to litigation before the Board. The idea is that private solutions should continue to be the norm, particularly in light of the rarity of disputes between Short Lines and their partners.

Responses to Enumerated Issues

1. How a carrier's obligations under 10742 to "provide reasonable, proper, and equal facilities that are within its power to provide" should be understood in light of the decision of the 7th Circuit and the impact of the decision on Board precedent and current carrier practices.

ASRRA Response: The railroad proposing the interchange location should not be able to propose one that would impose unusual, unreasonable or impossible operating hazards or require the delivering carrier to do work that properly belongs to the receiving carrier. For example, if the Class I railroad is the receiving railroad, and the Short Line has traditionally been

interchanging at a point on the Class I but the Short Line decides because of a new PTC requirement to discontinue that arrangement, the original interchange point is not a reasonable facility due to the cost the Short Line has to incur in order to comply with the Class I PTC demand. In that example, the Class I should agree to interchanging on the Short Line's property so that the Short Line does not have to incur substantial PTC costs that it otherwise would not need to incur. In fact, that type arrangement has been agreed to multiple times through private negotiations.

This type of arrangement would allow the railroads to fulfill their common carrier obligations, provide reasonable, proper and equal facilities, maintain the obligation of the delivering carrier to do the work belonging to it, leaving the receiving carrier to do what properly belongs to it. Moreover, this approach follows the views expressed by the 7th Circuit.

2. Whether the Board can consider the costs to each railroad of using a particular interchange location designated by one carrier in determining whether the interchange facilities are reasonable and, if so, whether the Board can allocate such costs between the railroads. If commenters say the Board can, they should address how the Board should consider costs and/or the allocation of costs.

ASLRRA Response: Cost should always be a part of the consideration. Situations arise where changing the interchange point is not convenient for a Short Line and will impose additional costs. The additional costs should be covered by the carrier asking for a change from the interchange agreement (which should be governed by the text in the interchange agreement). If the costs are unreasonable to the railroad being forced to make the change to a new interchange point, and the railroad proposing the new interchange point is unwilling to agree to a

reasonable cost, then the Board should either refuse to impose the proposed new interchange point or should be prepared to intervene and allocate the costs.

4. How the term "reasonable" should be interpreted.

ASLRRA Response: Beyond the economic impact to the railroad, reasonableness for the customer should also be considered. It should be fair and right, making the disadvantaged party whole. Additionally, it would be unreasonable if the proposed new interchange point imposed unusual, unreasonable or impossible operating hazards or required the delivering carrier to do work that properly belongs to the receiving carrier or the receiving carrier to do work that properly belongs to the delivering carrier.

5. How the interests of the delivering and receiving carriers should be balanced in the selection of an interchange location.

ASLRRA Response: This issue appears to be intertwined with the reasonableness issue. The party seeking to unilaterally impose a new interchange point should have the burden of making everyone whole. Neither party should have imposed on it anything that is unusual, unreasonable, impossible to utilize, or will cause unsafe operating conditions.

6. How a carrier's "power to provide" facilities relates to the other carrier's ability or rights to reach those facilities.

Response: This issue also seems to be intertwined with the reasonableness issue. The party seeking to unilaterally impose a new interchange point should have the burden of making everyone whole and ensuring what is proposed is not unusual, unreasonable, impossible to utilize, or will cause unsafe operating conditions.

7. <u>What procedures and factors should apply when railroads cannot agree on an interchange location or when one carrier unilaterally seeks to move an existing interchange location.</u>

Response: ASLRRA suggests that as a first step, the Board should direct the parties to meet to resolve the issues privately. If the parties cannot reach a resolution, then the next step should be mediation before OPAGAC. Only if those steps do not bear fruit, should the parties resort to litigation before the Board. The idea is that private solutions should continue to be the norm, particularly with the rarity of disputes between Short Lines and their partners.

Respectfully submitted,

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