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SERVICE DATE – FEBRUARY 8, 2012

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42131

CANEXUS CHEMICALS CANADA L.P.

v.

BNSF RAILWAY COMPANY

Digest:<sup>1</sup> The Surface Transportation Board orders Union Pacific Railroad and BNSF Railway to establish through routes to haul chlorine from Vancouver, British Columbia, with an interchange in Portland, Oregon. It also orders the carriers to establish through routes to haul chlorine from Marshall, Washington, with an interchange in Kansas City, Missouri.

Decided: February 7, 2012

BACKGROUND

On May 25, 2011, Canexus Chemicals Canada L.P. (Canexus) filed a complaint asking the Board to issue an order compelling BNSF Railway Company (BNSF) to establish common carrier rates and service terms between North Vancouver, B.C., and Kansas City, Mo., and between Marshall, Wash., and Kansas City, Mo.

Canexus manufactures chlorine at its main production facility in North Vancouver. There, Canexus tenders its railcars to Canadian National Railway (CN), which interchanges the cars with BNSF at Brownsville Junction, B.C. BNSF absorbs the reciprocal switch charges assessed by CN and bills Canexus for the combined CN/BNSF transportation.<sup>2</sup> Canexus also maintains a railcar storage facility in Belmont, Wash. That facility connects to the Washington and Idaho Railway, Inc., which in turn connects to BNSF at Marshall.

Prior to 2011, BNSF maintained a schedule of “group-to-group” common carrier rates applicable to this and other traffic. These rates would “provide service for any shipper to destinations or interchange locations within broad geographical regions . . . .”<sup>3</sup> Although it has

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<sup>1</sup> 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. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> Canexus Complaint 4 n.3.

<sup>3</sup> BNSF Legal Position, June 15, 2011, Garin V.S. at 5.

shipped chlorine to various points using BNSF and UP, before 2011 Canexus did not use these group-to-group rates for the movements and routings at issue here. In the Fall of 2010, BNSF indicated to Canexus that, beginning on January 1, 2011, it planned to replace its schedule of group-to-group rates with a new “point-to-point” pricing structure, which would allow BNSF to establish rates and services for movements to particular freight stations, taking into consideration the specific details of those movements, including the destinations or specific interchange points. BNSF states that it adopted the new system to apply to TIH/PIH (toxic inhalant and poison inhalant) traffic “in response to the increasing operational complexity associated with transportation of TIH/PIH commodities.”<sup>4</sup>

BNSF put the new point-to-point pricing system into effect on March 15, 2011. Between January 1, 2011 and March 15, 2011, Canexus shipped 18 carloads of chlorine from North Vancouver to Arkansas under the existing BNSF group-to-group rates, using BNSF at origin and UP at destination, with interchange at Kansas City. On March 2, 2011, Canexus submitted to BNSF a written request for the establishment of common carrier rates and service terms for the rail transportation of chlorine from North Vancouver and Marshall to Kansas City for interchange with UP for service to destinations in Texas, Illinois, and Arkansas. BNSF responded by quoting rates from those originating points to interchange points with UP at Portland (for traffic originating at North Vancouver) and at Spokane (for traffic originating at Marshall).<sup>5</sup>

On March 3, 2011, Canexus reached an “agreement in principle” with UP for contract rates from Kansas City to Texas, Illinois and Arkansas, to be used in connection with BNSF rates on movements from North Vancouver and Marshall. Canexus states that BNSF was informed of its pending contract with UP.<sup>6</sup> On April 8, 2011, BNSF postponed the application of the new point-to-point pricing system until June 30, 2011, to “provide Canexus additional time to negotiate a solution with UP” that would require UP to agree that “any chlorine shipments moving on BNSF from N[orth] Vancouver or Marshall to final destinations located on UP must be interchanged at Portland or Spokane.”<sup>7</sup> On May 24, 2011, UP and Canexus finalized a transportation contract governing rates and services for movements from North Vancouver and Marshall through the Kansas City Interchange to UP-served destinations in Texas, Illinois, and Arkansas. Canexus filed its complaint on May 25, 2011.

The Board ordered BNSF to reply to the complaint by June 15, 2011. The Board also ordered BNSF to submit its argument as to whether it had a legal obligation to provide the specific service Canexus had requested, and required UP to submit a pleading addressing its legal obligation, if any, to interchange with BNSF at Portland and Spokane. The Board

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<sup>4</sup> Id.

<sup>5</sup> BNSF Legal Position, June 15, 2011, at 8; Canexus Complaint 5-6.

<sup>6</sup> Canexus Complaint 5-6.

<sup>7</sup> Id., Attach. 3, BNSF’s Apr. 8, 2011 letter.

scheduled an oral argument for June 23, 2011.<sup>8</sup>

BNSF and UP filed their pleadings as directed on June 15, 2011. In addition, BNSF requested Board-supervised mediation. By decision served June 21, 2011, the Board postponed the oral argument and called for mediation among the three parties.<sup>9</sup> After mediation took place, Canexus filed a letter on September 14, 2011, stating that mediation had been unsuccessful and asking the Board to issue a decision compelling BNSF to provide the sought rates and service before the railroad's prior rates expired.

Because BNSF indicated that its tariff, which had been extended since April 8, would expire on October 15, 2011, in a decision served on October 14, the Board found that there was insufficient time to review the facts and arguments submitted by the parties.<sup>10</sup> We concluded that, given the incompatible positions of BNSF and UP, the only existing and readily available service for Canexus was the BNSF interchange with UP at Kansas City. BNSF had argued that Canadian Pacific Railway (CP) was a readily available option, but based on CP's statement that it did not have a published tariff ready for use, we stated that "we cannot find on this record that CP provides Canexus with an alternative routing to Kansas City from North Vancouver."<sup>11</sup> To preserve rail service, the Board issued an emergency service order pursuant to 49 U.S.C. § 11123, directing BNSF and UP to continue service to Canexus for 30 days via the existing interchange arrangement. In that same decision, the Board issued a procedural schedule for opening statements, replies, and rebuttals.

After the Board issued the emergency service order, BNSF offered to reinstate service until January 31, 2012. The Board then issued a decision finding that, with BNSF service in place during this proceeding, the emergency service order could be terminated.<sup>12</sup> The emergency service order was terminated on November 4, 2011. BNSF has continued to haul Canexus' shipments from North Vancouver and Marshall to Kansas City, where it interchanges with UP. UP then hauls those shipments to their final destinations in Illinois, Arkansas, Texas, Missouri, and Louisiana.<sup>13</sup>

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<sup>8</sup> The complaint was originally filed under a "FD" docket number, but complaint cases should be filed under a "NOR" prefix. This case was properly docketed (with the above "NOR" prefix) after the notice of oral argument was issued; therefore, the notice of oral argument was served under Canexus Chemicals Canada L.P. v. BNSF Ry., FD 35524 (STB served June 16, 2011).

<sup>9</sup> Canexus Chemicals Canada L.P. v. BNSF Ry., FD 35524 (STB served June 21, 2011).

<sup>10</sup> Canexus Chemicals L.P. v. BNSF Ry.—Emergency Serv. Order, FD 35524 et al. (STB served Oct. 14, 2011).

<sup>11</sup> Id., slip op. at 4.

<sup>12</sup> Canexus Chemicals L.P. v. BNSF Ry.—Emergency Serv. Order, FD 35524 et al. (STB served Nov. 1, 2011).

<sup>13</sup> In its opening statement filed on November 3, 2011, Canexus notes that since the filing of its May 25, 2011 complaint, its contract with UP has been amended to add two

(continued . . .)

On November 3, 2011, UP, CP,<sup>14</sup> and Canexus filed opening argument and evidence. BNSF filed a reply on November 23, 2011. UP and Canexus filed rebuttals on December 5, 2011. The Board held oral argument on January 17, 2012.<sup>15</sup>

### POSITIONS OF THE PARTIES

Canexus. In its complaint, Canexus alleges that BNSF's plans to interchange with UP at Spokane and Portland, rather than at Kansas City, is a violation of 49 U.S.C. §§ 11101(a), 11101(b), 49 C.F.R. pt. 1300, and Board precedent.<sup>16</sup> Canexus asks the Board to compel BNSF to establish common carrier rates for service between North Vancouver and Marshall to the Kansas City interchange point with UP.<sup>17</sup>

Canexus claims that BNSF is attempting to restrict its common carrier obligation to haul toxic inhalation hazard (TIH) material. Canexus argues that UP has no legal obligation to interchange with BNSF at Spokane or Portland "because of the presence of the [Canexus-]UP Contract and the fact that the Kansas City Interchange is an established, efficient interchange between UP and BNSF."<sup>18</sup>

Canexus asserts that BNSF is a bottleneck carrier<sup>19</sup> because there is "no viable alternative to BNSF for transportation of chlorine from North Vancouver and Marshall to the Kansas City Interchange."<sup>20</sup> As such, complainant relies on the Board's second "Bottleneck" case, Bottleneck II, 2 S.T.B. 235, for the proposition that the Board looks to shipper-carrier contracts as a factor in determining an interchange point.

Also, Canexus quotes FMC Wyoming Corp. v. Union Pacific Railroad, 2 S.T.B. 766, 770 (1997): "where a connecting carrier and shipper have entered into a transportation contract to

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( . . . continued)

additional end users located in Louisiana and Missouri. Canexus Opening Statement 2 n.2. Canexus submitted the specific destinations to the Board under seal.

<sup>14</sup> CP's filing can be found in Docket No. FD 35524. CP limited its participation to stating that it did not offer a rate to carry the traffic at issue here and that that Board may not enforce the common carrier obligation extraterritorially.

<sup>15</sup> CP chose not to participate in the oral argument.

<sup>16</sup> Canexus Complaint 1-2.

<sup>17</sup> Id.

<sup>18</sup> Canexus Opening Statement 10.

<sup>19</sup> A "bottleneck segment" is the portion of a rail movement for which no alternative rail route is available; a "bottleneck carrier" is the railroad operating the bottleneck segment. Cent. Power & Light Co. v. S. Pac. Transp. Co. (Bottleneck II), 2 S.T.B. 235 (1997).

<sup>20</sup> Canexus Opening Statement 10.

govern service over the non-bottleneck segment of an established through route, the bottleneck carrier can no longer insist on cooperative common carriage through rate agreements.”<sup>21</sup> Canexus frames the issue as BNSF attempting to negate the UP-Canexus contract and asserts that, under Bottleneck II and FMC Wyoming Corp., the Board cannot allow BNSF to thwart the contract.

Canexus disputes BNSF’s claim that 49 U.S.C. § 10705 gives preference in routing to an originating carrier. Further, Canexus asserts that BNSF has taken inconsistent positions on whether it is an “originating carrier” for the purposes of § 10705.<sup>22</sup>

Canexus contends that it is not asking to determine unilaterally the routing of this traffic through its contract, pointing out that UP also desires a Kansas City interchange.<sup>23</sup> Finally, Canexus argues that allowing BNSF to short-haul itself is contrary to one of the benefits projected by BNSF’s predecessors (Burlington Northern Railroad Company and Atchison Topeka and Santa Fe Railway Company) when they applied for permission to merge and form BNSF.<sup>24</sup> The applicants there contended that a merger would result in more efficient single-line service over a broader geographic area.

UP. UP asserts that it is not violating its common carrier obligation. UP states that Canexus has not requested service to Portland or Spokane, and that it has entered into a contract with Canexus for the service that Canexus has requested.<sup>25</sup>

UP argues that Bottleneck II stands for the proposition that the Board will determine an interchange point when carriers cannot agree on one. That determination is based on certain factors including the feasibility of interchange points, the existence of any shipper-carrier contracts, and efficiency.<sup>26</sup> UP agrees with BNSF that shippers are not vested with the power to make routing decisions.<sup>27</sup> Nonetheless, UP views this case as “BNSF’s attempt to impose unilaterally its decision to interchange certain chlorine traffic . . . .”<sup>28</sup> At oral argument UP stated that BNSF did not discuss with UP its plans to change the route.

In support of Kansas City as the point of interchange, UP states that Kansas City was already chosen by BNSF as the interchange point; an analysis of traffic data shows that Kansas City is used far more often than Portland for similar traffic (i.e., BNSF-served origins in the

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<sup>21</sup> Id. 12.

<sup>22</sup> Canexus Rebuttal 2.

<sup>23</sup> Id. 5-6.

<sup>24</sup> Id. 7-8.

<sup>25</sup> UP Opening Statement 3.

<sup>26</sup> Id. 4.

<sup>27</sup> UP Rebuttal 2-3.

<sup>28</sup> Id. 2.

Pacific Northwest to UP-served destinations similar to the ones here) and that Spokane was not used at all.<sup>29</sup> UP maintains that BNSF has placed “embargo” conditions on the interchange of chlorine at Spokane.<sup>30</sup> UP asserts that BNSF’s tariffs demonstrate that BNSF is willing to interchange other chlorine traffic at Kansas City without any preconditions.<sup>31</sup>

UP cites the contract with Canexus as evidence that Kansas City is a feasible interchange point and that Canexus believed the route would meet its commercial needs. However, UP disagrees with the controlling weight Canexus gives to the existence of the contract. Rather, UP views the contract as a strong factor among many that weighs in favor of Kansas City as the interchange location.<sup>32</sup>

CP. CP takes no position with respect to the merits of this dispute. CP states that its only interest in this proceeding is to clarify the record with respect to the current availability of CP service for Canexus. CP acknowledges that it provided Canexus with an informal rate quote.<sup>33</sup> CP, however, clarifies that under Canadian law, a quote is not official until a carrier publishes it as a tariff or agrees to that rate as part of a private contract – neither of which has occurred. Therefore, CP asserts that it is not currently an alternative in place for this traffic.

BNSF. BNSF argues that it has met its common carrier obligation by establishing rates from North Vancouver to Portland, and from Marshall to Spokane. BNSF asserts that it has no obligation to establish rates to additional interchange points selected by the shipper.<sup>34</sup> Quoting Burlington Northern Railroad v. United States, 731 F.2d 33, 40 (D.C. Cir. 1984), an interchange case interpreting 49 U.S.C. § 10742, BNSF argues that when a carrier can provide two or more options that are reasonable, proper, and equal for interchanging traffic, it has the right to offer only one of those options.<sup>35</sup> Moreover, as to movements originating in Canada, BNSF argues that the Board lacks jurisdiction to compel the establishment of common carrier rates from Canada to points in the United States. BNSF frames the central issue as a determination of the appropriate interchange point in the United States for interline traffic and acknowledges that the Board has jurisdiction to resolve that issue.<sup>36</sup>

Citing 49 U.S.C. § 11101(a), BNSF argues that the common carrier obligation only requires that railroads provide service upon “reasonable” request and that here, no such request was made. Rather, BNSF claims that because Canexus knew BNSF’s preference for short-

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<sup>29</sup> UP Opening Statement 4-5.

<sup>30</sup> UP Answer filed in FD 35524, June 15, 2011, at 3.

<sup>31</sup> UP Opening Statement 5.

<sup>32</sup> UP Rebuttal 5.

<sup>33</sup> CP Reply filed under FD 35524, Oct. 19, 2011, Attach. 1.

<sup>34</sup> BNSF Legal Position, June 15, 2011, at 6.

<sup>35</sup> Id. 8.

<sup>36</sup> Id. 6-8.

hauling chlorine yet still negotiated a private contract with UP, any request predicated on that conduct cannot be reasonable.<sup>37</sup>

BNSF attacks Canexus' complaint as flawed because it is premised on the characterization of BNSF's service as "necessary" for the transportation to UP-served destinations. BNSF states that because CN and CP routes are available, BNSF's service is not "necessary."<sup>38</sup>

BNSF argues that the statute, 49 U.S.C. § 10705, gives preference to the originating carrier when the Board prescribes a through route. While CN actually physically serves the origination point, BNSF argues that for the purposes of § 10705 here, BNSF should be treated as the originating carrier.<sup>39</sup> At oral argument, BNSF stated that: (1) it is the first line haul carrier involved; (2) it is the first carrier in the United States with control over the movement; and (3) Canexus went directly to BNSF to arrange these movements.

BNSF argues that Portland and Spokane are reasonable locations for interchanging this traffic because there is no basis in the record for concluding that Kansas City is superior to either of those locations.<sup>40</sup> BNSF asserts that Portland already handles BNSF-UP interchanges of chlorine heading to western destinations, and that, "prior to March 2011, BNSF had not historically interchanged Canexus' chlorine traffic with UP at Kansas City."<sup>41</sup> BNSF argues it is not possible for the Board, on this record, to undertake a thorough examination of the characteristics of alternative routes to resolve the question of the proper interchange. Therefore, BNSF argues that its framework for addressing these chlorine movements should be adopted by the Board; i.e., where a carrier serves the destination, it should be responsible for the long haul, and when the carrier does not serve the destination, it should be allowed to interchange with the carrier closest to the origin and the other carrier would provide the long haul.<sup>42</sup>

BNSF states that the Canexus-UP contract "should have no bearing at all on where the interchange between BNSF and UP should take place."<sup>43</sup> While BNSF acknowledges that the Board looks to contracts in competitive access cases as evidence used when determining an alternative through route, it argues here that because no party has made a competitive access

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<sup>37</sup> Id. 8-11. There is a dispute as to whether BNSF was aware of the contract negotiations. BNSF claims that it was not, id., but Canexus states that it "advised" BNSF of its contractual intentions several times. See Canexus Reply filed in FD 35524, June 20, 2011, Cove V.S. at 3.

<sup>38</sup> BNSF Legal Position, June 15, 2011, at 10.

<sup>39</sup> Id. 11-14.

<sup>40</sup> BNSF Reply 13- 14.

<sup>41</sup> Id. 13.

<sup>42</sup> Id. 14-16.

<sup>43</sup> BNSF Legal Position, June 15, 2011, at 14.

request, the contract is irrelevant.<sup>44</sup> Further, BNSF argues that Canexus' reliance on Bottleneck II is misplaced as to the usefulness of the contract here because not enough is known about the contract's terms. BNSF argues that in the first Bottleneck case the Board explained that a contract could be useful as evidence of the relative "benefits, advantages, and projected efficiencies" of the routing established by the contract. Cent. Power & Light Co. v. S. Pac. Transp. Co. (Bottleneck I), 1 S.T.B.1059, 1069 (1996).

BNSF argues that Bottleneck II establishes that a carrier cannot thwart the destination carrier's contract by altering the interchange point where the Board has already selected the interchange location. Thus, BNSF's view is that Bottleneck II is inapposite here where the question before the Board is a determination of the interchange location.<sup>45</sup> Further, BNSF argues that FMC Wyoming Corp. is not on point because the issues there dealt with the application of rates to movements, and the routes and interchange points were not in dispute.<sup>46</sup> See 2 S.T.B. at 769.

Finally, BNSF argues that under no circumstances should the Board, as a matter of public policy, allow a shipper to determine the route or interchange points. BNSF states that such an approach could raise safety concerns and regulatory problems, as there are specific regulations with which carriers might not be able to comply if shippers were to dictate routings.<sup>47</sup>

## DISCUSSION AND CONCLUSIONS

Canexus has brought a common carrier complaint claiming that BNSF's refusal to quote a rate and carry traffic tendered by Canexus at North Vancouver and Marshall for interchange in Kansas City is unreasonable. However, we cannot look only at the portion of the movements that Canexus has put in issue here. This case involves the carriage of chlorine not just to Kansas City, but also, and more importantly, its carriage to destinations in Texas, Illinois, Arkansas, Louisiana, and Missouri, destinations not served by BNSF. These destinations are served by UP, a carrier with which BNSF connects at numerous points. BNSF and UP have been unable to agree on the through routes for the Canexus traffic.

### General Considerations in § 10705 Routing Disputes Between Carriers

Most through routes are established through negotiation and agreement by the carriers whose lines together permit the carriage of the freight from origin to destination. Failing agreement, however, a carrier may ask the Board to prescribe a through route, or the Board may do so on its own motion.

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<sup>44</sup> Id.

<sup>45</sup> BNSF Reply 16-18.

<sup>46</sup> Id. 18-19.

<sup>47</sup> Id. 19-21.

When two or more connecting carriers cannot agree on the establishment of a through route, the Board may prescribe the through route pursuant to 49 U.S.C. § 10705: “The Board may, and shall when it considers it desirable in the public interest, prescribe through routes . . . for a rail carrier providing transportation subject to the jurisdiction of the Board under this part.” Congress first enacted this provision in 1906 to vest the authority to establish through routes in our predecessor, the Interstate Commerce Commission (ICC).<sup>48</sup> In determining the public interest, consideration must be given to the interests of the general public, including shippers, affected by the movements as well as the carriers participating in the routes. See Routing, Louisville & Nashville R.R., 355 I.C.C. 810, 815 (1977) (discussing “public interest” concerning cancellation of routes in the context of a statutory predecessor to § 10705). Moreover, it is well established that Canexus has a right to service, 49 U.S.C. § 11101. We must resolve this dispute and prescribe routes so that Canexus will continue to have service to Arkansas, Illinois, Texas, Louisiana, and Missouri.

There are a broad variety of public interest factors that we consider here, including: the economy, efficiency<sup>49</sup> (particularly, if it adds to the number of interchanges), and feasibility of the route; the practicality of the movement (particularly, as is the case here with a TIH commodity, when the traffic has a special characteristic that should be considered); the impact the route has on all the parties involved; and whether the route represents a departure from a well-established routing for the traffic. This is a test driven by the facts and the record compiled in this case. The factors considered here are not the only factors that can be considered in a through route determination, nor will they be the relevant factors in every case; rather, given the

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<sup>48</sup> The provisions of 49 U.S.C. § 10742, “Facilities for interchange of traffic,” do not control our decision here. Section 10742 provides that “[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 . . . .” As both the title and text of this provision indicate, § 10742 (like its predecessor, 49 U.S.C. § 3(4)) focuses on whether the physical facilities made available for interchanging traffic at particular points within a narrow geographic area are sufficient. See, e.g., Kansas City S. Ry. v. La. & Ark. Ry., 213 I.C.C. 351, 359 (1935) (dispute over the most suitable place in Shreveport, La., for the interchange); N.Y., Chicago & St. Louis R.R. v. N.Y. Cent. R.R., 314 I.C.C. 344 (1961) (determining the appropriate yard in Cleveland, Ohio, for interchange). The Board mentioned § 10742 in the Bottleneck II dicta as it addressed what was then a hypothetical issue of “first impression.” 2 S.T.B. at 243 n.10. But this real-world case involves a routing dispute, not just an interchange location dispute within a narrow geographic area. In such cases, the provision that controls is § 10705.

<sup>49</sup> The Board has considered several factors in determining what was a more efficient route: distance; variable cost of transportation; the terrain and its impact on fuel consumption; train speeds; wear and tear on the track; and whether the route takes advantage of a higher-density line. Entergy Ark., Inc. v. Union Pac. R.R., NOR 42104 et al., slip op. at 13-14 (STB served Mar. 15, 2011).

complexity of prescribing a through route, they are subject to change with each analysis.<sup>50</sup>

We are directed to “give reasonable preference . . . to the rail carrier originating the traffic when prescribing through routes.” 49 U.S.C. § 10705(a). The origins of this directive can be traced to the 1910 statute.<sup>51</sup> The provision was amended in the Transportation Act of 1940 as part of an expansion of the ICC’s authority to prescribe routes, in order to limit the ICC’s ability to require a carrier to short-haul itself (i.e., to embrace a route substantially less than the entire length of its railroad). But the plain language of the statute does not limit the originating carrier’s preference to situations where the agency is prescribing a through rate that would require the originating carrier to short-haul itself.

The route-prescription authority conferred in the Transportation Act of 1940 was contained in the provisions of former 49 U.S.C. §§ 15(3), 15(4) (1940). Subsection 3 established the general authority that “[t]he Commission may . . . establish through routes . . . by [rail] carriers.” Subsection 4 provided that “[i]n establishing any such through route the Commission shall not . . . require any [rail] carrier . . . to [short-haul itself]” except as necessary (a) to prevent unreasonably long through routes or (b) to ensure adequate and more efficient or economic service. Subsection 4 continued with a proviso that, “in prescribing through routes the Commission shall, so far as consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic.”

Although this proviso was contained in subsection 4, it applies to the agency’s role “in prescribing through routes,” and that role is clearly set out in both subsection 3 (which provides the general prescription authority) and subsection 4 (which contains the admonition against short-hauling). We interpret this broad and plain directive as a reminder to the agency that, while Congress was providing the agency with new route-prescription authority that could result in mandated short-hauls only under narrowly enumerated circumstances, a preference for the originating carrier should be observed *whenever* the agency prescribes a through route.<sup>52</sup> As

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<sup>50</sup> The parties agree that the Board’s “Competitive Access” rules at 49 C.F.R. Part 1144 do not apply to our review of this dispute.

<sup>51</sup> See Chicago, Milwaukee, St. Paul & Pac. R.R. v. United States, 366 U.S. 745, 750 (1961).

<sup>52</sup> The legislative history does not contradict our view that, while the language was adopted in connection with the concern that carriers generally not be required to short-haul themselves, it applies more broadly. The title of the relevant section in the Conference Report is “Limitation on ‘Short Hauling’ a Rail Carrier,” and the first paragraph of the discussion talks about short-hauling. But the report goes on to say in a more general way that “[t]he Commission in the exercise of this additional authority is directed to give reasonable preference in any particular case to the carrier by railroad which originates the traffic, so far as is consistent with the public interest and subject to the limitations with respect to unreasonably long routes and the necessity of providing adequate and more efficient or more economic transportation.” H.R. Rep. No. 2832, at 70-71 (1940).

noted by the Supreme Court in analyzing the legislative precursor to the § 10705 preference for the originating carrier, “the overriding purpose of the Congress seems to have been the protection of the traffic of the controlling line.”<sup>53</sup>

In reviewing the reasonableness of the routing preferences of the originating carrier when prescribing a through route, the Board considers the public interest factors discussed above. The originating carrier cannot trample over the interests of connecting carriers and the shipper by, for example, demanding a routing that is unduly circuitous, inadequate, inefficient, or uneconomical. For example, the preference to determine a route does not allow an originating carrier that can provide service to the destination point to force an interchange on an alternative delivery carrier. Rather, we consider the through route it proposes, and determine whether it meets the statutory public interest standards and criteria.

Generally, the responsibility for establishing a through route lies with the originating carrier, the carrier from whom the shipper requests service and to whom the shipment is tendered. Canexus has requested service from BNSF and BNSF is the first line haul carrier to participate in the movement in the United States.<sup>54</sup> Thus, BNSF effectively is the originating carrier.

Canexus and UP have urged that the Board consider the existence of their contract as an important factor—for Canexus, the determining factor—in establishing the point of interchange for the movements at issue. In Bottleneck II, 2 S.T.B. at 244, the Board stated that a “shipper-carrier contract for service . . . could also be used as a factor in our determination of an interchange point.” The Board went on to reference its prior discussion of the issue in Bottleneck I, in which it said that a contract’s terms might provide evidence of the “benefits, advantages, and projected efficiencies” of the routing established by the contract. 1 S.T.B. at 1069. We continue to subscribe to the view that contracts can be a relevant factor in § 10705 routing disputes. Here, however, UP and Canexus have not shared the terms of the contract with the Board or provided any evidence that would speak to the relative benefits, advantages, and projected efficiencies of a routing through Kansas City. As such, we can give little weight to the contract between Canexus and UP in this case.<sup>55</sup>

Canexus is mistaken in relying on FMC Wyoming Corp. for the proposition that BNSF is prohibited from altering the current route because of the contract. In FMC Wyoming Corp.,

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<sup>53</sup> Chicago, Milwaukee, St. Paul & Pac. R.R., 366 U.S. at 750.

<sup>54</sup> CN is the first carrier to accept the traffic from Canexus in Canada, but it performs only a switch there, and the shipper did not ask it for line haul service. As noted, CN’s switch charges are absorbed by BNSF’s overall charges and Canexus receives only one bill from BNSF, which includes those switching charges.

<sup>55</sup> BNSF argues that the behavior by Canexus, in forming a contract with UP, made its request for service from BNSF unreasonable. We disagree. Shippers and carriers are free to contract for service, see 49 U.S.C. § 10709, and forming such contracts is neither unreasonable nor undesirable.

neither the interchange location nor the route was in dispute.<sup>56</sup> Rather, the issue in that case was whether UP could establish proportional rates that were expressly limited to apply only where the subsequent movement beyond the gateway is transported under a common carriage rate. In other words, the rates UP wanted to establish to these gateways could not have been combined with contract rates over any routing, and the Board ruled that UP's attempt to establish such restricted rates contravened the core holding of Bottleneck I. That ruling, however, has no bearing on the issue here because BNSF has not attempted to prevent Canexus from contracting with UP over whatever routing is established.

### Proposed Through Routes

Turning now to the specific routings proposed here, we find reasonable BNSF's preference to route the Vancouver traffic through Portland for interchange with UP, for three reasons. First, this new routing is not a departure from any long-established routing protocol between UP and BNSF. Instead, the record is clear that only a limited number of carloads moved for a short period of time through the Kansas City interchange point under the group-to-group tariff before BNSF objected and notified UP and Canexus of its preference to interchange the traffic at Portland.

Second, examining the public system diagram maps of the carriers,<sup>57</sup> of which we take official notice, the Portland route appears to be a more direct routing for this traffic. UP has a direct corridor between Portland and Kansas City that is well traversed and provides an efficient means of transporting goods from the Pacific Northwest to eastern destinations. As such, the Portland interchange does not result in a routing that is overly circuitous.

Finally, the proposed interchange point on the BNSF route at Portland is established, feasible, and safe to interchange this traffic with UP—indeed, BNSF already interchanges chlorine shipments headed to western destinations served by UP at Portland. Based on this record, we cannot find that BNSF's preference to route the Vancouver traffic through Portland is unreasonable, nor is there evidence that a Portland route is not in the public interest.

We find unreasonable, however, BNSF's preference to route the Marshall traffic through Spokane, for two reasons. First, this routing appears more circuitous than a routing through Kansas City. Again using the system diagram maps of the parties, BNSF's preferred routing would entail moving the traffic west a considerable distance before it can travel east. Meanwhile, BNSF's route from Marshall to Kansas City is more direct. Prescribing a significantly more circuitous routing simply because that is the preferred routing of the originating carrier seems unreasonable and contrary to the public interest.

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<sup>56</sup> See FMC Wyoming Corp., 2 S.T.B. at 769 (“Here, it is clear that UP cannot provide transportation to FMC’s destinations beyond the UP gateways, and there is no dispute over the availability of these interchange points or of the routes involved”).

<sup>57</sup> See UPRR System Map, <http://www.uprr.com/aboutup/maps/sysmap.shtml> (last visited Feb. 6, 2012); BNSF System Map, [http://www.bnsf.com/customers/pdf/maps/carload\\_map.pdf](http://www.bnsf.com/customers/pdf/maps/carload_map.pdf) (last visited Feb. 6, 2012).

Second, BNSF is trying to impose an entirely new point of interchange on UP. There is no history of these carriers interchanging chlorine in Spokane for similar movements, and UP has raised operational concerns about the Spokane interchange facility. Specifically, it points out that BNSF has a prerequisite for notice to be given to the yard ahead of time so that the proper personnel and protocol can be in place for the exchange of cars. At oral argument, BNSF confirmed this requirement and explained that it was consistent with safe practices when handling TIH at a smaller interchange point that is not as heavily staffed as those at Portland or Kansas City. However, it seems that this notification requirement could adversely affect the efficiency of the interchange, and thus, it is a factor that weighs against BNSF's preference. Accordingly, while BNSF gets a reasonable preference it may not simply select the first railroad junction with another carrier and demand that the receiving carrier accept TIH traffic for interchange.<sup>58</sup>

When viewed together, these two factors indicate that the route from Marshall to an interchange point in Spokane is unreasonable, given that the Kansas City route is demonstrably feasible, efficient, and economical.<sup>59</sup> Therefore, we will prescribe a route for traffic originating in Marshall to the Kansas City interchange point rather than the one located at Spokane.

#### Common Carrier Complaint

We now return to the common carrier complaint. Now that we have determined the routing, BNSF's common carrier obligation creates two interrelated requirements. First, it must provide, in writing, common carrier rates to any person requesting them. 49 U.S.C. § 11101(b). Second, it must provide rail service pursuant to those rates upon reasonable request. 49 U.S.C. § 11101(a); Union Pac. R.R.—Pet. for Declaratory Order, FD 35219, slip op. at 3-4 (STB served June 11, 2009). In light of our decision today, BNSF has no common carrier obligation to provide a rate for the Vancouver traffic to Kansas City for interchange with UP simply because that is the rate request from Canexus. Through the Railroad Revitalization and Regulatory Reform Act, Pub. L. No. 94-210, 90 Stat. 31 (1976), and the Staggers Rail Act, Pub. L. No. 96-448, 94 Stat. 1895 (1980), Congress ended the "open-routing" system. Rail carriers no longer have to establish and maintain interchanges and through routes on practically all combinations of railroad tracks between two points. Instead, carriers are free to "rationalize their route structures making maximum use of efficient routings and eliminating others." Interchange Provisions at Jacksonville, FL, SCL & SRS, 365 I.C.C. 905, 916 (1982). Accordingly, a shipper does not have the unqualified unilateral power to dictate the establishment of a through route since that would

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<sup>58</sup> Having considered the various decisional frameworks suggested by the parties, in resolving these route disputes, we will apply the standards of § 10705 as articulated in this decision.

<sup>59</sup> In response to one of the arguments presented by Canexus, we note that the statements made by BNSF's predecessors in their merger application (to form BNSF), explaining that a merger would increase efficiency and single-line service over a greater area, are not factors in determining whether a route is unreasonable.

defeat the statutory provisions that did away with the open-routing system. Bottleneck I, 1 S.T.B. at 1065-66.

In prescribing routes in this decision, we have now clarified what the common carrier obligation of each party entails. Based on the facts as they have been developed through the course of this proceeding, and since Canexus received service during the pendency of the complaint, we find no basis for concluding that the carriers' actions amounted to any violation of the common carrier obligation.

We urge the parties to work together in a collaborative fashion using the guidance provided here and their own knowledge to structure agreed-upon routing protocols for the movement of this kind of traffic.

To allow UP and BNSF sufficient time to arrange for the new interchange for this traffic we will make this decision effective 30 days from date of service.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Canexus' complaint is denied.
2. BNSF and UP shall provide service according to the routes we have above prescribed pursuant to 49 U.S.C. § 10705 unless the carriers mutually agree on a different routing.
3. This decision is effective 30 days from service date.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.