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BEFORE THE
SURFACE TRANSPORTATION BOARD

CANEXUS CHEMICALS CANADA L.P.,	)	
Complainant,	)	
v.	)	Finance Docket No. 35524
BNSF RAILWAY COMPANY,	)	
Defendant.	)	

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SUBMISSION OF UNION PACIFIC RAILROAD COMPANY

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SUBMISSION OF UNION PACIFIC RAILROAD COMPANY

Union Pacific Railroad Company ("UP") hereby responds to the Board's June 8, 2011, order directing UP to address its legal obligation, if any, to interchange chlorine shipments by Canexus Chemicals Canada, L.P. ("Canexus"), with BNSF Railway Company ("BNSF") at Portland, Oregon, and Spokane, Washington, for movement to final destinations in Arkansas, Illinois, and Texas. As discussed below, under the Board's traditional rules for addressing interchange disputes, UP has *no* legal obligation to interchange Canexus's chlorine shipments with BNSF at Portland to the destinations at issue or at Spokane for any destination.[1]

However, Canexus's complaint presents issues that will likely arise again and again in cases involving chlorine and other toxic inhalation hazards ("TIH"). UP urges the Board not to rely on case-by-case adjudication to resolve these matters, but instead to help develop coherent rules that are sensitive to the unique and often conflicting government

[1] UP has a contract with Canexus that provides proportional rates from an interchange with BNSF in Portland to specified destinations. None of those destinations is involved in this dispute.

directives that apply to movements of TIH. UP offers several suggestions for further action in these comments. In offering these suggestions, UP is speaking only for itself and recognizes that other parties, including other railroads, may disagree. UP recommends that the Board institute proceedings to address our suggestions, so that other parties, including other railroads and TIH shippers, can comment on them and propose their own.

I. UP HAS NO LEGAL OBLIGATION TO INTERCHANGE CANEXUS'S CHLORINE SHIPMENTS WITH BNSF AT PORTLAND OR SPOKANE.

Under the Board's traditional rules for addressing interchange disputes, UP has no common carrier obligation to interchange Canexus's chlorine shipments with BNSF at Portland or Spokane. BNSF has embargoed interchanges of Rail Security-Sensitive Materials, which include chlorine, from UP at Spokane.[2] As a result, UP has no obligation to interchange chlorine with BNSF at Spokane. Even apart from the embargo, however, Board precedent would not require UP to interchange Canexus traffic with BNSF at Portland for the destinations at issue or Spokane because UP and Canexus have a contract that establishes rates from an interchange with BNSF at Kansas City and BNSF had previously established a Kansas City interchange with UP for Canexus traffic moving between the origins and destinations at issue.

When a shipper needs two-carrier service from an origin to a destination, "the determination of an interchange point for the required through movement is, in the first instance, 'a matter of mutual consultation and agreement' between the two carriers."[3] The carriers "together must provide at least *one* route to complete the shipper's needed multi-carrier service

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[2] *See* OPSL Note No. BNSFAD0125, Amendment No. 9 (Published Oct. 1, 2009), *available at* https://aarembargo.railinc.com/epdb/searchEmbargoAction.do?step=viewDetails&embargoNumber=BNSFAD0125.

[3] *Central Power & Light Co. v. Southern Pacific Transp. Co.*, 2 S.T.B. 235, 243 (1997) (*quoting New York, C. & St. L.R.R. v. New York Cent. R.R.*, 317 I.C.C. 334, 346 (1961)).

from the desired origin point."[4] "[I]f the carriers cannot agree on an interchange that would act to create that route, [the Board] will determine one."[5]

"[A]bsent an agreement between the carriers," the Board's determination of an interchange is governed by a variety of factors, including "a comparison of the physical and operational feasibility of interchange at the points selected by the carriers," the existence of a "shipper-carrier contract for service" for one of the segments, and the "efficiency of the entire origin-to-destination service using each of the chosen interchange points."[6]

BNSF's prior establishment of a Kansas City interchange with UP for Canexus chlorine traffic moving to the destinations at issue demonstrates that the interchange location is feasible and that the routing is at least reasonably efficient.[7] In fact, BNSF's tariff governing movements of chlorine shows that BNSF remains willing to interchange chlorine traffic from

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[4] *Id.*

[5] *Id.* at 243-44.

[6] *See id.* at 244 & n.13.

[7] *Cf. FMC Wyo. Corp. v. Union Pacific R.R.*, Finance Docket No. 33467 (STB served Dec. 12, 1997) at 5 n.12.

UP has not had time to perform a detailed analysis of the relative efficiency of the routes at issue and does not know precisely how BNSF would route the Canexus traffic to Kansas City. However, BNSF's prior establishment of a Kansas City interchange and Canexus's willingness to continue using a Kansas City interchange strongly suggest that a BNSF-Kansas City-UP routing would be comparable to routes with a Portland or Spokane interchange.

Moreover, UP's preliminary analysis indicates that Kansas City has been used far more often than Portland (which appears to have been used just once in 2010) as an interchange point with BNSF for traffic moving from origins in the Pacific Northwest to destinations in Arkansas, Illinois, and eastern Texas, although interchanges in Fort Worth, Chicago, and Memphis are even more common.

other origins at Kansas City,[8] and BNSF has not embargoed interchanges of Rail Security-Sensitive Materials with UP at Kansas City.[9]

The Board should also recognize that, even if a Portland or Spokane interchange were decidedly more efficient for the destinations at issue than a Kansas City interchange, UP would not necessarily have a common carrier obligation to interchange Canexus traffic at Portland or Spokane. Other interchange points may be even better. For example, BNSF and UP could interchange some of the traffic at Fort Worth, Texas (*e.g.*, traffic moving to Cloudy, Texas, Houston, Texas, and Waldo, Arkansas), or St. Louis, Missouri (*e.g.*, traffic moving to Dupo, Illinois), or Memphis, Tennessee (*e.g.*, traffic moving to West Memphis, Arkansas). In fact, BNSF's tariff governing movements of chlorine contains rates for traffic moving from North Vancouver and Marshall to Fort Worth, St. Louis, and Memphis.[10]

II. THE BOARD SHOULD EXERCISE LEADERSHIP IN DEVELOPING RULES TO ADDRESS TIH REGULATORY DISPUTES.

Although UP does not have a common carrier obligation to interchange Canexus chlorine traffic moving to the destinations at issue at Portland or Spokane, UP believes that the application of Board precedents on a case-by-case basis often will not lead to optimal results in cases involving TIH. Public policy decisions and regulatory actions – some of them conflicting – have distorted the normal functioning of the market for transporting chlorine and other TIH and may now be the driving factors in railroad decisions about handling TIH. The conflicting and uncoordinated policies regarding TIH are leading to conflicts between railroads that handle

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[8] *See* BNSF Pricing Authority 90096, Implementing Agreement 5000, Amendment 36 (Effective June 6, 2011), *available at* http:/www/bnsf/com/bnsf.was6/epd/EPDController#.

[9] *See* OPSL Note No. BNSFAD0125, Amendment No. 9, cited above in footnote 2.

[10] *See* BNSF Pricing Authority 90096, Implementing Agreement 5000, Amendment 36, cited above in footnote 8.

TIH in interline movements, and between railroads and shippers, and attempts to resolve these conflicts using rules developed to address market-driven behavior may produce illogical results. UP urges the Board to exercise leadership, to the maximum extent of its capabilities, to bring some degree of order to this environment.

Canexus's complaint highlights how public policy decisions have distorted the marketplace for transporting TIH. First, Congress has decided that railroads must spend over ten billion dollars to implement Positive Train Control, plus perhaps another billion dollars annually to maintain it, on lines used to transport TIH, even though the Federal Railroad Administration's analysis shows that the costs of installing PTC dramatically outweigh the benefits. Second, the Federal Railroad Administration and other agencies have established dozens of new regulations designed to reduce the security and safety risks associated with transporting TIH, including a 27-factor matrix for determining TIH routes. Third, the Board allows TIH shippers to ship wherever they wish, without regard to the costs imposed on railroads or the risks that Congress and the Federal Railroad Administration want railroads to reduce. Fourth, the Board has not yet decided whether and to what extent railroads can recover their extra safety- and security-related costs from TIH shippers or allocate risk in the event of an incident involving TIH that is not attributable, or only partly attributable, to railroad negligence.

In combination, these public policy decisions have created an environment in which railroads have powerful incentives to avoid installing PTC on more of their lines than necessary and to reduce their overall transportation of TIH. They are driven to minimize the quantity of TIH they transport, the distance TIH travels over their lines, and the number of lines over which TIH moves, and to drive TIH shipments and their costs to their competitors. They appear to be reevaluating what had been established routings for TIH. At the same time,

shippers are apparently able to override these railroad efforts to minimize costs and risk exposure, with no accountability for the additional costs and risks their decisions impose on railroads. The ultimate result is that, due to government policies, TIH shipments have become unique in the world of railroading: unlike all other commodities, railroads do not have incentives to compete for these shipments.

Railroads should not be required to transport Canadian chlorine from North Vancouver through the heart of downtown Seattle to destinations in Arkansas, Illinois, and Texas when there are abundant sources of chlorine on the Gulf Coast. To the extent that government policy requires railroads to provide such transportation, the Board and other policymakers should attempt to create coherent, consistent policies that allow that transportation to occur under terms all parties can understand and use for planning purposes. Union Pacific offers the following recommendations:

- The Board should spearhead Section 333 conferences to allow railroads and government agencies to cooperate to identify the most appropriate routes for TIH shipments without fear of antitrust claims.
- The Board should reconsider its anything-goes policy of allowing TIH shippers to ship at will, regardless of cost to railroads or risk to the public. The Board should require TIH shippers to come to the Board with a threshold showing that any new TIH shipment beyond a certain distance threshold is in the public interest and cannot be avoided through a less risky or less expensive alternative. We suggest a 1000-mile threshold.
- The Board should allow carriers more than ten days to quote common carrier rates for TIH, to allow adequate time for the parties to navigate the regulatory

processes described above regarding TIH routing. We suggest allowing carriers 45 days.

- Where rate regulation is necessary – which might be the case more often for TIH than for other commodities – the Board should make clear that rates for transporting TIH will compensate railroads for PTC installation, maintenance, and capacity losses, less any benefits to railroads, and that it will support reasonable allocations of risk that reflect the inherent risks in TIH transport that government policy recognizes in so many ways.

UP and other railroads have raised these issues before. In response, the Board has emphasized that railroads are required to transport TIH,[11] but it has not addressed the other side of the equation – the side involving rates, routes, and risk allocation for such transportation.[12] As a result, in this case and others, two railroads have been placed in a situation that would not normally exist in a functioning market. In the current policy and regulatory environment, the

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[11] *See Union Pacific R.R. – Petition for Declaratory Order*, Finance Docket No. 35219 (STB served June 11, 2009).

[12] *See Common Carrier Obligation of Railroads – Transportation of Hazardous Materials*, STB Ex Parte No. 677 (Sub-No. 1) (STB served April 15, 2011) at 4 n.8 (explaining that the Board will resolve disputes regarding the reasonableness of liability-sharing arrangements between railroads and TIH shippers on a case-by-case basis); *Reporting Requirements for Positive Train Control Expenses and Investments*, Ex Parte No. 706 (STB served Feb. 10, 2011) (opening a rulemaking to explore whether to require separate reporting of spending by Class I railroads on development, installation, and maintenance of PTC, but no schedule has been issued); *Class I Railroad and Financial Reporting – Transportation of Hazardous Materials*, Ex Parte No. 681 (STB served Jan 5, 2009) (proceeding to evaluate whether to pursue a rulemaking to address how to classify separately the costs of hazardous material operations and refine URCS to better capture the operating costs of transporting hazardous materials); *see also* Petition of Union Pacific Railroad Company for a Declaratory Order, *Union Pacific R.R. – Petition for Declaratory Order*, Finance Docket No. 35504 (filed Apr. 27, 2011) (seeking a declaratory order regarding liability-sharing terms in a case involving TIH shipments).

long-haul means bearing more risk and cost without any assurance of obtaining fair compensation and is unattractive.

UP recognizes that the Board cannot make all of these changes immediately. In the meantime, the Board should resolve TIH routing and interchange disputes in a manner that is sensitive to the safety and cost considerations discussed above. The Board's precedents are not structured to produce optimal results in cases involving TIH. For example, transporting TIH on a route that is more efficient by traditional measures might create greater safety risks if the route passes through more densely populated areas or is shared with passenger traffic. As another example, one rail carrier may have a more efficient route than another rail carrier by traditional measures, but if the first carrier would not be required to install PTC on portions of its route unless it were required to transport the traffic at issue, public policy might favor allowing it to avoid the costs of installing PTC.

Currently, Federal Railroad Administration rules require rail carriers to use routes with the fewest overall safety and security risks to transport TIH and other security-sensitive hazardous materials.[13] But the Federal Railroad Administration has not established a process that allows railroads to compare systematically the level of risk associated with alternative interline routes or develop special TIH routing agreements. UP believes the Board can play a constructive role in encouraging the development of regulatory policies for TIH traffic. At the very least, the Board should implement a coherent approach to cases involving routing and interchange of TIH traffic. It should not allow shippers to determine the routes railroads use to transport TIH, and it should ensure that its decisions give substantial weight to the costs railroads

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[13] *See* 49 C.F.R. § 172.820 & Appendix D to Part 172.

must incur to comply with safety and security legislation and rules, and to the broad public interest in rail safety and security.

Respectfully submitted,

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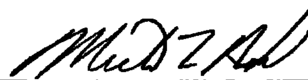

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June 15, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of June 2011, I caused a copy of the foregoing Submission of Union Pacific Railroad Company to be served by email and by first-class mail, postage prepaid, on:

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