

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35524

CANEXUS CHEMICALS CANADA L.P.

v.

BNSF RAILWAY COMPANY—
EMERGENCY SERVICE ORDER

Docket No. NOR 42131

CANEXUS CHEMICALS CANADA L.P.

v.

BNSF RAILWAY COMPANY¹

Digest:² This decision directs BNSF Railway Company and Union Pacific Railroad Company to maintain service for the complainant through the current interchange point at Kansas City, Mo. This order, issued pursuant to the Board's emergency service powers, will preserve temporarily existing service for complainant's traffic originating in Canada and the U.S. Northwest, and destined to points in Illinois, Arkansas, and Texas. In addition, the decision sets forth a procedural schedule to enable the Board to resolve the merits of the dispute.

Decided: October 14, 2011

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.

¹ Complaints against rail carriers are docketed under a "NOR" prefix, not the "FD" prefix used by Canexus. Therefore, we have given a new docket number to the complaint. We have given the original docket number under which Canexus filed its complaint, Docket No. FD 35524, to the new proceeding we have instituted in which we are issuing an emergency service order pursuant to 49 U.S.C. § 11123.

² 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).

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. Canexus also maintains a railcar storage facility in Belmont, Wash. That facility connects to the lines of the Washington and Idaho Railway, Inc., which in turn connects to BNSF at Marshall, Wash.

In 2010, Canexus' chlorine was transported from North Vancouver and from Marshall via joint line BNSF and Union Pacific Railroad Company (UP) movements pursuant to common carrier rates and terms established by BNSF in Price Authority 90096, Implementing Agreement 1063, Amendment 16, and by contract with UP to the ultimate destinations in Illinois, Arkansas, and Texas. BNSF and UP billed Canexus separately for each of their movements in accordance with Association of American Railroads Accounting Rule 11. This dispute arises from BNSF's position that, in the future, it will carry the chlorine only as far as Spokane, Wash. (for movements originating from Marshall), and Portland, Or. (for movements originating from North Vancouver). Both Canexus and UP object to BNSF's proposal that it interchange with UP at Spokane and Portland.

Currently, BNSF is hauling Canexus' shipments of chlorine from North Vancouver and Marshall to Kansas City in joint line service under rates that terminate on October 15, 2011.³ According to the complaint, BNSF is now interchanging with UP in Kansas City and the shipments are hauled by UP to their final destinations in Illinois, Arkansas, and Texas.

The Board directed BNSF and UP to submit pleadings in this case. In its June 15, 2011 filing, BNSF requested Board-supervised mediation. In addition, BNSF stated that Canexus could, as an alternative, ship its chlorine to an interchange at Kansas City with UP on either CN or Canadian Pacific Railway (CP). By decision served June 21, 2011, the Board called for mediation among the three parties. On September 14, 2011, Canexus filed a letter with the Board 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 rate expires.

After filing its complaint, Canexus filed a letter on September 19, 2011, with the Board indicating that it recently sought and obtained a rate quote from CP for its chlorine shipments from North Vancouver to the Kansas City interchange. Canexus asserted, however, that the CP option is not a viable one because the rate is too high, and there are operational problems and inefficiencies associated with that routing. On September 20, 2011, BNSF filed a response, arguing that the rate quoted by CP is evidence that there is no need for expedited action on the Board's part as Canexus has alternative service to Kansas City.

On October 5, 2011, CP filed a request for leave to intervene as a party to this proceeding and to submit comments in response to Canexus' September 19, 2011 letter. CP stated that under Canadian law, a rate quotation does not become a "lawful rate" unless it is either published in a tariff or set forth in a confidential contract. CP also noted that it has neither published such a tariff nor entered into such a contract.

³ Initially, these rates were set to expire on July 1, 2011, but BNSF has extended them until the current expiration date of October 15.

DISCUSSION AND CONCLUSIONS

Petition to Intervene. Pursuant to 49 C.F.R. § 1112.4, the Board may grant a petition to intervene if intervention would not unduly disrupt the schedule for filing verified statements, and would not unduly broaden the issues raised in the proceeding. We will grant CP's request to intervene. Intervention by CP will not disrupt the schedule. The record contains correspondence between CP and Canexus, and both parties address whether CP might be an alternative carrier for the shipments at issue. CP's comments are in direct response to issues already raised by the parties in this case. Thus, CP's participation will not unduly broaden the issues presented.

Complaint. Canexus argues that BNSF has violated its common carrier obligation under 49 U.S.C. § 11101. It is apparent that either BNSF, or UP, or both, have the common carrier obligation to haul Canexus' chlorine. However, because the current BNSF rate is scheduled to expire on October 15, there is insufficient time for the Board to review the facts and arguments submitted by the parties to determine their rights and obligations. Further, more information from the parties would aid the Board in this proceeding. Therefore, we will establish a procedural schedule for the filing of evidence and argument, as set forth below.

Emergency Service. Canexus also seeks immediate relief, requesting that the Board compel BNSF to establish common carrier rates and service terms for service from North Vancouver and Marshall to Kansas City. While Canexus does not specifically request an emergency service order, pursuant to 49 U.S.C. § 11123(b)(1), the Board may direct emergency service on its own initiative. Congress has set forth the standard for Board directed emergency service:

When the Board determines that . . . [a] failure of traffic movement exists which creates an emergency situation of such magnitude as to have substantial adverse effects on shippers . . . the Board may, to promote commerce and service to the public, for a period not to exceed 30 days—

(1) direct the handling, routing, and movement of the traffic of a rail carrier and its distribution over its own or other railroad lines;

49 U.S.C. § 11123(a) (emphasis added).⁴

BNSF's existing rate for hauling the Canexus traffic that is the subject of the complaint is set to expire on October 15, 2011. On and after that date, BNSF has indicated that it will refuse to carry chlorine for Canexus and its customers any farther than Spokane and Portland. UP asserts that it has no common carrier obligation to

⁴ The Board has promulgated regulations at 49 C.F.R. Part 1146 for prescriptions of service under 49 U.S.C. § 11123. These regulations, which anticipate a request for service to be provided by an alternative carrier, are not applicable here.

interchange this traffic with BNSF at either Portland or Spokane and has refused to interchange chlorine traffic at either point.⁵

In its October 5, 2011 comments, CP stressed that no CP rate exists for a movement between North Vancouver and Kansas City, notwithstanding a September 14, 2011 email from a CP account manager that suggested a rate between the two points. CP states that it petitioned the Board for leave to intervene “in order to clarify the record with respect to the existence of a CP rate for the subject traffic. . . .” CP notes that both Canexus and BNSF have asserted that CP has “established” a common carrier rate from North Vancouver to Kansas City, but that “[t]hose assertions are incorrect.” CP states, however, that its response to an “informal rate inquiry” regarding a rate that CP “might” charge would not become a lawful rate unless it is either published in a tariff or set forth in a confidential contract. CP affirms that it has published no such tariff nor entered into any such contract and that “[a]ccordingly, no such rate is currently in effect.” Based on CP’s statements, we cannot find on this record that CP provides Canexus with an alternative routing to Kansas City from North Vancouver.

The lack of any readily available alternative service coupled with the carriers’ refusal to provide through service cooperatively after October 15, 2011, constitutes “a failure of traffic movement” under 49 U.S.C. § 11123. The record supports a finding that the cessation of service will have a substantial adverse effect on a shipper and its customers. Canexus has stated that service from BNSF is “urgently needed.” No challenge to this claim exists in the record, save BNSF’s argument that Canexus can ship on CP. But CP’s statement of October 5, 2011, recites that no rate for providing such service is in effect. Further, the movements of chlorine at issue are more than two thousand miles. It would be neither safe nor practical for Canexus to seek a non-rail alternative for the movement of this chlorine. Thus the requirements for exercising our authority under 49 U.S.C. § 11123 have been met.

The statute also recites that, having made those determinations, we may, “to promote commerce and service to the public,” . . . direct service. The traffic at issue is chlorine—a Toxic-by-Inhalation (TIH) commodity. The safe and efficient shipment of TIH by rail is in the public interest. Establishment of the Toxic by Inhalation Hazard Common Carrier Transp. Advisory Comm., EP 698, slip op. at 2-3 (STB served Aug. 5, 2010). Because of the hazards and liability issues surrounding TIH movements, there have been efforts by carriers to restrict their common carrier obligation to haul TIH. At least one Class I carrier has pursued a chlorine pricing policy of “de-marketing.” E.I. duPont de Nemours & Co. v. CSX Transp., Inc., NOR 42100, slip op. at 5 (STB served June 30, 2008). Another sought a declaratory order that it had no obligation to haul chlorine. Union Pac. R.R.—Petition for Declaratory Order, FD 35219 (STB served June 11, 2009) (clarifying that the carrier-petitioner has an obligation to quote common carrier rates and provide service for the transportation of chlorine for the movements at issue in that case). We are particularly cognizant of the need to maintain rail service for TIH or PIH materials, many of which are used for a variety of public purposes. See Common Carrier Obligation of R.R.—Transp. of Hazardous Materials, EP 677 (Sub-No. 1) (STB served June 4,

⁵ Canexus’ Complaint, May 25, 2011, Attach. 1.

2008) (giving notice of a public hearing examining issues related to the common carrier obligation of railroads with respect to the transportation of hazardous materials). Given the documented reluctance of rail carriers to haul this commodity, it represents an area of commerce where the Board will take action to direct service when necessary.

Given the circumstances in this case, we will order the parties to maintain the status quo until we have resolved the underlying legal question of the railroads' obligations. One or both of these railroads is violating its common carrier obligation by refusing to provide service. We are instituting an expedited briefing schedule to resolve this issue as quickly as possible. The hazardous nature of the commodity at issue favors our action here to maintain the status quo, rather than to order a new routing to maintain service. This traffic has been moving safely via BNSF to Kansas City at rates and pursuant to practices established by that carrier. Thus, it appears that BNSF can continue to haul this traffic safely to Kansas City for 30 days from the expiration of the tariff. The Board recognizes that a § 11123 emergency service order is an extraordinary remedy and does not issue such an order lightly. But here the parties have left the Board with no choice to ensure that traffic will continue to move. Because of the nature of the remedy, the Board in the future expects parties to pursue more promptly and more aggressively all viable routings and service alternatives prior to seeking emergency relief.

This directed emergency service will commence at the expiration of BNSF's service pursuant to the existing rate and continue for 30 days, until November 14, 2011. The Board may extend such service beyond the initial period if it finds that the transportation emergency continues to exist, but an extension cannot exceed 240 days beyond the original 30-day period. 49 U.S.C. § 11123(c).

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

It is ordered:

1. BNSF and UP are directed to provide emergency service to Canexus consistent with the current practice discussed above until November 14, 2011.

2. CP's request to intervene is granted.

3. The procedural schedule for the proceeding is as follows:

November 3, 2011	Opening statements due.
November 23, 2011	Replies due.
December 5, 2011	Rebuttals due.

4. A copy of this decision will be served on the Federal Railroad Administration and the Pipeline and Hazardous Materials Safety Administration.

5. This decision is effective on its service date.

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