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SERVICE DATE – NOVEMBER 1, 2011

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 COMPANY

Digest:¹ This decision finds that BNSF's offer to preserve the status quo by continuing to provide service to Canexus during the pendency of this matter will obviate the need for the emergency service order issued by the Board on October 14, 2011. The emergency service order will terminate upon BNSF reinstating its prior pricing authority providing service to Canexus via an interchange with Union Pacific Railroad Company at Kansas City, Mo. The Board denies BNSF's request to modify the procedural schedule in the complaint docket.

Decided: October 31, 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.

Canexus manufactures chlorine at its main production facility in North Vancouver. There, Canexus tenders its railcars to Canadian National Railway, which interchanges the cars with BNSF at Brownsville Junction, B.C. Canexus also maintains a railcar storage facility in

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

Belmont, Wash. That facility connects to the lines of the Washington and Idaho Railway, Inc., which in turn connect to BNSF at Marshall.

At the time Canexus filed its complaint on May 25, 2011, BNSF hauled Canexus' shipments of chlorine from North Vancouver and Marshall to Kansas City in joint line service.² At Kansas City, BNSF interchanged with Union Pacific Railroad Company (UP), which hauled the shipments to their final destinations in Illinois, Arkansas, and Texas. The underlying dispute arises from BNSF's statement that, in the future, it would 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, rather than at Kansas City.

In a June 15, 2011 filing, BNSF requested Board-supervised mediation. 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.

In a decision served October 14, 2011, we established an expedited procedural schedule for the complaint that provided for the filing of opening statements, replies, and rebuttals,³ between November 3rd and December 5th. In addition, we concluded that the only readily available service for Canexus was the BNSF interchange with UP at Kansas City. Because BNSF indicated it would terminate service on October 15, 2011, we found that there was insufficient time to review the facts and arguments submitted by the parties and that a more complete record was necessary to resolve the dispute. To preserve rail service, we issued an emergency service order pursuant to 49 U.S.C. § 11123, directing BNSF and UP to continue to provide service to Canexus for 30 days via the existing interchange arrangement. Canexus Chems. Can. L.P. v. BNSF Ry.—Emergency Serv. Order (Emergency Service Order), FD 35524 et al. (STB served Oct. 14, 2011).

On October 17, 2011, BNSF filed a petition to vacate the emergency service order and to establish an expedited schedule in the complaint docket. In its petition, BNSF objects to the Board's exercise of its authority under § 11123. After describing its procedural and substantive objections to the Board's October 14th order, BNSF states that it would again be willing to voluntarily provide common carrier service to the Kansas City interchange if the Board vacates the emergency service order and commits to hear and fully resolve the underlying legal claims raised by Canexus by a date certain, which BNSF believes should be within 60 to 90 days.⁴

² Initially, these rates were set to expire on July 1, 2011, but BNSF had extended them until October 15, 2011.

³ In that decision, we did not expressly state which parties should file evidence and argument at which stage in the proceeding. We clarify the Board's expectations regarding those submissions later in this decision.

⁴ BNSF Pet., Oct. 17, 2011, at 15-16.

On October 19, 2011, UP filed a reply in support of BNSF's petition to vacate the emergency service order. Canadian Pacific Railway Company (CP) also filed on October 19, alleging that certain statements in BNSF's petition are "erroneous claims" and that CP is not an alternative to the BNSF/UP movements.

Canexus filed a reply on October 20, 2011, in opposition to the BNSF petition. Canexus objects to BNSF's use of material discussed during Board-sponsored mediation, citing it as a violation of the confidentiality provisions applicable to those proceedings. Canexus rejects BNSF's criticisms of the emergency service order and opposes accepting BNSF's offer to implement its prior pricing authority on the route. In a reply, also filed on October 20, BNSF states that it did not violate the Board's rules concerning mediation because it did not disclose any substantive material. However, BNSF concludes that "if the Board believes that it was not appropriate [to disclose those facts], BNSF would not object to striking the statement from the record."⁵

PRELIMINARY MATTER

In its petition, BNSF reveals the substance of confidential information between BNSF and Canexus discussed during Board sponsored mediation.⁶ Disclosure of this information is a clear violation of Board regulations and will not be tolerated. Our regulations at 49 C.F.R. § 1109.3, which govern all mediation proceedings conducted under Board auspices, provides:

In all ADR matters involving the Board . . . the confidentiality provisions of that Act (5 U.S.C. 574) shall bind the Board and all parties and neutrals in those ADR matters.

The applicable confidentiality provisions of the statute recite that "[a] party to a dispute resolution proceeding shall not voluntarily disclose . . . any dispute resolution communication . . ." 5 U.S.C. § 574(b). We will not permit our mediation program to be undermined. Accordingly, we will grant the motion of Canexus to strike BNSF's statement regarding mediation discussions from the record in this proceeding. Any future breach of our mediation rules by BNSF, or any other party, may result in sanctions. We remind all parties to mediation that the Board's rules on confidentiality must be observed.

⁵ BNSF Reply, Oct. 20, 2011, at 2.

⁶ BNSF Pet., Oct. 17, 2011, at 2.

DISCUSSION AND CONCLUSIONS

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). In Emergency Service Order, slip op. at 4, the Board stated that, “[t]he 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’”

BNSF raises several arguments in its petition to vacate the emergency order. These arguments lack merit and do not form a basis upon which to vacate the order. However, we need not discuss BNSF’s arguments in detail because BNSF’s proposal to reinstate service would eliminate the emergency and would justify terminating the emergency service portion of the order when BNSF’s pre-October 15, 2011 service is reinstated.⁷ Therefore, the emergency service order will terminate upon BNSF reinstating the prior common carrier pricing authority preserving service to Canexus through the Kansas City point of interchange with UP. BNSF shall notify the Board in writing that it has done so. Accordingly, we will not, as requested by BNSF, schedule a hearing on the emergency service order.

BNSF requests that we modify the procedural schedule that we established in the prior decision (which BNSF assumed contemplated simultaneous filings by the parties) by eliminating rebuttals and holding an oral argument. But Canexus initiated this action by complaint, and therefore should have the opportunity to submit opening and rebuttal evidence and argument. As part of its opening evidence, we will require Canexus to submit, under seal if necessary, evidence as to the ultimate destination of the movements at issue in Illinois, Arkansas, and Texas. In addition, if UP intends to maintain the position it has taken in this proceeding, i.e., that it has no obligation to interchange traffic with BNSF at Portland, Or., or at Spokane, Wash., UP must submit an opening statement explaining its rationale for its refusal to do so does not violate its common carrier obligation to carry traffic over its line, and BNSF must have an opportunity to respond to those arguments.⁸ Finally, if CP wishes to participate in the complaint proceeding, it

⁷ Should BNSF decide to withdraw or terminate the prior common carrier pricing authority, the Board will subsequently issue a decision addressing the merits of BNSF’s petition to vacate.

⁸ As we stated in our October 14 Order, “. . . either BNSF, or UP, or both, have the common carrier obligation to haul Canexus’ chlorine.”

should also file an opening statement. We will not permit CP to submit only a rebuttal to which BNSF would not have an opportunity to respond.

We will build a record, evaluate the evidence, take oral argument (if necessary), and render a decision as quickly as possible. Given the voluntary nature of BNSF's offer to reinstate its prior common carrier pricing authority, we will make every effort to issue a decision on the merits of the complaint by January 31, 2012.

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

It is ordered:

1. The emergency service order served on October 14, 2011, is terminated upon BNSF reinstating the prior common carrier pricing authority preserving service to Canexus through the Kansas City point of interchange with UP. BNSF shall notify the Board in writing that it has reinstated its prior common carrier pricing authority.

2. BNSF's request to modify the procedural schedule is denied, as discussed above.

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

November 3, 2011	Canexus, UP, and CP (if it wishes to participate) opening statements due.
November 23, 2011	BNSF reply due.
December 5, 2011	Rebuttals due.

4. This decision is effective on its service date.

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