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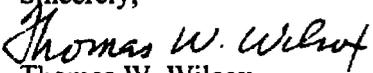
Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: STB Docket No. NOR 42131, *Canexus Chemicals Canada, L.P. v BNSF Railway Company*

Dear Ms. Brown:

Enclosed for filing in the above-captioned proceeding please find the Opening Statement of Canexus Chemicals Canada, L.P. ("Canexus"). Also being filed separately in this docket today under seal is a list of the ultimate destinations covered by the rail transportation contract between Union Pacific Railroad Company and Canexus that UP serves from the BNSF/UP interchange in Kansas City, Missouri. This information is being provided pursuant to the Board's November 1, 2011 order in this proceeding.

Please feel free to contact me if you have any questions.

Sincerely,

Thomas W. Wilcox
Counsel for Canexus Chemicals Canada, L.P.

Enclosure
cc: Counsel for BNSF Railway
Counsel for UP
Counsel for CP Railway

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**CANEXUS CHEMICALS
CANADA, L.P.**

Complainant,

v.

BNSF RAILWAY COMPANY

Defendant

Docket No. NOR 42131

OPENING STATEMENT OF CANEXUS CHEMICALS CANADA, L.P.

Canexus Chemicals Canada, L.P. ("Canexus") hereby submits its Opening Statement in this re-designated proceeding¹ pursuant to the decisions served by the Board in this docket and docket FD-35524 on October 14, 2011 and November 1, 2011. In the October 14 Decision, the Board exercised authority granted to it by 49 U.S.C. §11123 to direct defendant BNSF and the Union Pacific Railroad Company ("UP") to continue to provide, pending resolution of the legal issues presented by Canexus' complaint, joint line rail service to Canexus from North Vancouver, Canada, and Marshall, Washington to

¹ The Board originally assigned Docket No. FD-35524 to Canexus' Request for Order Compelling Establishment of Common Carrier Rates, which the Board's regulations and decisions characterize as a type of formal complaint. Request for Order at 1, note 1. The Board has since referred to the Request as a complaint, as does this Opening Statement for consistency.

UP-served destinations in Arkansas, Texas, and Illinois² via the railroads' interchange in Kansas City, Missouri. The Board also established a procedural schedule to take additional evidence and argument on the legal issues presented by this dispute.

Factual Background

The facts underlying this dispute were initially set out by Canexus in the Complaint, and have been supplemented in Canexus' unopposed Reply to BNSF's Response to the Board's Order of June 8, 2011 Regarding Its Legal Position ("June 20 Reply"). Additional factual information has been added to the record in the filings of Canexus, BNSF, UP and intervenor Canadian Pacific Railway Company ("CP") in FD 35524. Rather than repeat all of its prior factual statements in this Opening Statement, Canexus incorporates them by reference, and attaches for the Board's convenience Canexus' prior filings in FD 35524. Canexus also provides the following summary of the key facts underlying this dispute:

1. Chlorine and other toxic inhalation hazardous ("TIH") commodity shipments are vital to the Nation's economy and the Board is "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." October 14 Decision at 4; citing *Common Carrier Obligation of R R. – Transp. of Hazardous Materials*, EP 677 (Sub-No.1) (STB served June 4, 2008).

² In its November 1 Decision the Board required Canexus to submit, under seal if necessary, evidence as to the ultimate destination of the movements at issue in Illinois, Arkansas and Texas. This information is being filed separately in this docket under seal. Canexus notes that since the filing of its Complaint on May 25, 2011, its contract with UP has been amended to add two additional end users located in Louisiana and Missouri, whose identity is also being disclosed to the Board.

2. Canexus manufactures and markets chlor alkali products at its main production facility located in North Vancouver, British Columbia, Canada ("North Vancouver Facility"). The North Vancouver Facility produces for sale approximately 170,000 tons of chlorine per year, all of which must be transported to the customers of Canexus and Canexus U.S. - the latter which handles the sale and distribution of the chlorine in the United States - by railroad. The chlorine is transported in specialized rail tank cars supplied by Canexus. Canexus is the corporate entity with responsibility for arranging rail transportation on behalf of itself and Canexus U.S.

Canexus U.S. operates a railcar storage facility in Belmont, Washington, which is used to store loaded chlorine railcars from time to time before they are transported to end user customers. The Belmont facility is located on the tracks of the Washington and Idaho Railway, Inc., which, in turn, is physically connected to only BNSF at Marshall, Washington.

3. Prior to 2011, chlorine produced by Canexus at its North Vancouver Facility was transported to U.S. destinations served only by UP pursuant to rail movements by BNSF and UP in joint line service, with BNSF supplying common carrier rates and service terms from this origin to a number of BNSF/UP interchange points, and UP transporting the chlorine to final destinations pursuant to confidential rail transportation contracts. *See Complaint at 4.*

4. It is undisputed that BNSF and UP have an established, efficient rail interchange in Kansas City (the "Kansas City Interchange"). *See Complaint at 5.*

5. On May 24, 2011 Canexus entered into a contract with UP for the transportation of its chlorine from the Kansas City Interchange to UP-served customers in

Illinois, Arkansas and Texas. (the "UP Contract"). The parties had agreed in principle on the contract terms in March of 2011. *See* Complaint at 6. BNSF had actual knowledge of the contract negotiations between UP and Canexus. *See* Complaint at 5.

6. In early 2011 BNSF informed Canexus that it had decided that BNSF would henceforth "short haul" itself on joint line chlorine movements with UP, meaning that as the originating railroad it would now only provide common carrier rates to the closest BNSF/UP interchange point from the origin. BNSF refused a request by Canexus to establish rates and service terms from North Vancouver and Marshall to the Kansas City Interchange, and instead stated it would only provide common carrier rates and service terms to Canexus for interchange with UP at the railroads' interchanges in Portland, Oregon and Spokane, Washington. *See* Complaint at 6-7.

7. Effective April 8, 2011, BNSF established what it characterized as "temporary" rates from North Vancouver and Marshall to the Kansas City Interchange for interchange with UP "and movement to any final destinations located on UP." Complaint, Attachment 3. However, BNSF put an expiration date of June 30, 2011 on these rates and service terms. These rates and service terms were in place when Canexus filed its Complaint on May 25, 2011, which sought a ruling from the STB requiring BNSF to continue to provide rates and service terms to the Kansas City Interchange after June 30, 2011. *See* Complaint at 6-7.

8. The rates and terms were subsequently kept in place by BNSF beyond June 30, 2011 primarily due to intervening Board-supervised mediation requested by BNSF, and then the Board's October 14 and November 1 Decisions after the mediation was not successful. As of October 20, 2011 ninety (90) carloads of chlorine have been

efficiently and safely transported in 2011 in joint BNSF/UP service to customers ultimately served by UP via the Kansas City Interchange pursuant to common carrier rates and terms established by BNSF, in combination with common carrier and contract rates (after the rail transportation agreement was executed on May 24, 2011) supplied by UP. See Complaint at 6; Canexus' Reply to BNSF's Petition to Vacate the Emergency Service Order and Establish an Expedited Schedule to Address Complainant's Common Carrier Claims ("Petition to Vacate") at 4.

9. CP is the only other railroad that could physically transport Canexus' chlorine from North Vancouver to Kansas City for interchange with UP, since CP and/or its affiliates own tracks that extend to Kansas City. See June 20 Reply at 8. However, CP has never transported Canexus' chlorine from the North Vancouver Facility to Kansas City. Canexus submitted un rebutted verified statement testimony from Mr. Martin W. Cove, Manager, Logistics of Canexus that the CP alternative to Kansas City "is demonstrably inferior to BNSF's routing, which is why CPR has never transported chlorine from the North Vancouver facility to Kansas City. See June 20 Reply, Cove V.S. at 2 (summarizing the numerous deficiencies of this alternative). Subsequent actions and filings by CP in FD 35524 provided additional and conclusive confirmation that CP is not an alternative to BNSF for this transportation. See Tab 5; letter from Thomas W. Wilcox to Cynthia T. Brown; see also, FD 35524, October 5, 2011 letter from Terrence M. Hynes to Cynthia T. Brown; and Reply of CP Railway to BNSF's Petition to Vacate. Consequently, if BNSF does not continue to provide this service to Kansas City, the Canexus contract with UP is effectively nullified and Canexus will be unable to fulfill its obligations to its customers in Texas, Illinois, Arkansas, Missouri and Louisiana.

Argument

1. The Board has Jurisdiction Over all Aspects of this Dispute

There is no dispute that the STB has jurisdiction over the Complaint to the extent it asks the STB to order BNSF to continue to provide common carrier rates and service terms from Marshall, Washington to the Kansas City Interchange. Moreover, BNSF concedes that the Board has jurisdiction to rule on the key issue before it, which is whether the Kansas City Interchange is the appropriate BNSF/UP interchange for transportation from North Vancouver and from Marshall to the destination facilities at issue. See BNSF's Response to the Board's Order of June 8, 2011 Regarding its Legal Position ("Legal Position Statement") at 8. However, BNSF has asserted that the Board does not have jurisdiction to order BNSF to continue providing common carrier rates and service terms from the North Vancouver Facility to the Kansas City Interchange. These arguments are unavailing. Canexus has previously responded to BNSF's arguments in its June 20 Reply at pages 2-5. As set forth there, as a general policy matter the Board applies the agency's "rules and decisional criteria liberally to ensure that justice is not denied" in cases involving cross-border movements. *National Insulation Transp. Comm. v. Aberdeen and Rockfish Railroad Co.*, 365 ICC 624, 628 (1982). *Accord*, Ex Parte No. 646 (Sub-No.1) *Simplified Standards for Rail Rate Cases* (Served September 4, 2007) at 99-100 ("*Simplified Standards*") (Where STB denied attempt of railroads to obtain immunity from rate reasonableness rules for cross-border movements because it "would circumvent the intent of Congress by leaving thousands of captive shippers at the mercy of the carrier.") It is also well established that §10501(a) does not preclude the STB from considering all matters associated with cross-border rail movements. For example, the

STB has jurisdiction over rate challenges involving cross-border movements, and reviews the reasonableness of such rates examining the entire routing from origin to destination. *Canada Packers, Ltd v. Atchison, Topeka & Santa Fe Railway Co., et al*, 385 U.S. 82 (1966); *Great Northern R. Co. v. Sullivan*, 294 U.S. 458 (1935); *Simplified Standards* at 100.

Additionally, this is not a case where the Board could be construed as potentially regulating the affairs of a Canadian or Mexican railroad entity, which has been the issue in nearly every agency decision and court case applying §10501(a) to cross-boarder issues. Rather, the STB is being asked to order the continuation of common carrier rates and service terms for what is essentially a single line movement from an origin to an interchange point by BNSF, a United States Class I railroad.³ Canexus is aware of no BNSF tariff provisions or operating rules applicable to its movement that are unique to the short section of BNSF's track located in Canada. *Canadian Pacific Ltd. v. United States*, 379 F. Supp. 128 (D.D.C. 1974); *Great Northern Pacific & Burlington Lines, Inc. – Merger – Great Northern Railway in the Matter of Paul E. Van Blaricom*, 6 I.C.C. 2d 919 (1990). Moreover, BNSF does not claim that granting the relief sought by Canexus in this proceeding would be contrary to its common carrier obligation to provide rates and terms upon request under Canadian law, assuming it applied, and indeed it would not be contrary to such laws. See Canadian Transportation Act, Section 118 (A railway company shall, at the request of a shipper, issue a tariff in respect of the movement of

³ As Canexus explained in its Complaint, notwithstanding BNSF's claims that it is merely a "bridge carrier," Canexus pays one rate to BNSF for transportation from the North Vancouver Facility to the Kansas City Interchange point. BNSF absorbs the reciprocal switch charge of the Canadian National Railway. Complaint at 4.

traffic on its railway”). Thus, there is no dispute that BNSF has a common carrier obligation to provide rates and service terms for the entire movement from North Vancouver to the Kansas City Interchange.

The jurisdictional assertions made by CP in FD 35524 that BNSF attempted to rely upon in its Petition to Vacate are also inapplicable. More specifically, CP in its October 5, 2011 letter filing in FD 35524 raised several cross-border jurisdictional arguments in support of its position that it was not an alternative to BNSF. However, unlike BNSF, CP has no history of transporting Canexus’ chlorine, and it has never established a rate from North Vancouver to Kansas City. Thus, the Board is not faced with the specific jurisdictional issue CP raised, which is the limitations 49 U.S.C. §10501 places on the Board to order a Canadian railroad to establish in the first instance a rate for transportation originating in Canada. *Canadian Pacific Ltd. v. U.S.*, 379 F.Supp. 128 (D.D.C. 1974); *Canadian Packers v. Atchison, Topeka and Santa Fe Railway Co.*, 385 U.S. 182 (1966). Here, the rates and service terms have been established, and the issue is whether BNSF would violate its common carrier obligation by terminating those rates and terms (1) even though it has a track record of providing this service to Canexus; (2) even though BNSF provides the safest and most efficient routing to the Kansas City Interchange; (3) despite the fact that the Kansas City Interchange is an indisputably established and efficient interchange point; and (4) despite the presence of the UP Contract governing the final delivery of chlorine originating in North Vancouver and Marshall to Canexus customers who are served by UP. See October 14 Decision at 2 and November 1 Decision at 2 (“This dispute arises from BNSF’s position that, *in the*

future, it will carry the chlorine only as far as Spokane, Wash. . . . and Portland, Ore. . . .

“) (emphasis supplied). The Board clearly has jurisdiction over all aspects of this dispute.

2. BNSF's Obligation to Provide Rates to the Kansas City Interchange

As the Board observed in its October 14 Decision, the Nation's Class I railroads for several years have been attempting "to restrict their common carrier obligation to haul TIH." October 14 Decision at 2. This effort has been aggressive and public. The Board has commendably resisted such attempts, in recognition that "the safe and efficient shipment of TIH by rail is in the public interest." *Id.* This proceeding presents the Board with yet another attempt by a Class I railroad to restrict its common carrier obligation to haul TIH, and it should also be denied. BNSF's efforts in this proceeding are very similar to the unsuccessful attempt by UP in STB Finance Docket 35219, *Union Pacific R.R. – Petition for Declaratory Order*, to restrict UP's obligation to transport chlorine in single line service over distances UP deemed to be too long. The Board rejected this attempt in a decision served June 11, 2009 in that proceeding. This case involves BNSF's attempt to restrict its obligation to participate in joint line chlorine movements with UP (indeed, BNSF unsuccessfully tried to convince the Board to entirely replace BNSF with CP for the movement from North Vancouver to the Kansas City Interchange). The presence of joint line movements entails application of the Board's rules concerning the obligation to provide common carrier rates to interchange points and the relationships between the railroads participating in the movements first set out in STB Docket 41242, et al, *Central Power & Light Co. v. Southern Pac. Transp. Co.*, 2 S.T.B. 235 (1997)(*"CPL"*). As Canexus has explained in its filings in FD 35524, these rules and precedent applying them clearly establish that BNSF must continue to

provide rates from the North Vancouver Facility and from Marshall, Washington to the Kansas City Interchange. *See* Complaint at 7-8, June 20 Reply at 5-9; Reply to BNSF's Petition to Vacate at 6-7. The applicable rules were also summarized by UP in its submission in response to the Board's June 8, 2011 decision in FD 35524, in which UP informed the Board that "under the Board's traditional rules for addressing interchange disputes, UP has *no* legal obligation to interchange Canexus' chlorine shipments with BNSF at Portland to the destinations at issue or at Spokane for any destination," because of the presence of the UP Contract and the fact that the Kansas City Interchange is an established, efficient interchange between UP and BNSF. Submission of Union Pacific Railroad Company at 2, and 3-5 (emphasis in original).

There is no viable alternative to BNSF for transportation of chlorine from North Vancouver and Marshall to the Kansas City Interchange. *See* June 20 Reply at 8-9, CP's Reply to BNSF's Petition to Vacate at 2-4. The BNSF segment of the joint route is therefore a "bottleneck" segment to an origin which UP cannot also serve. In *CPL*, the Board determined in such cases, the bottleneck carrier's initial routing discretion, including its right to maximize (or in this case, minimize) its long-haul "is no greater than that of the [destination]⁴ carrier that must also participate in the transportation. As a result, the choice of an interchange for the required two-carrier service in these circumstances cannot be dictated unilaterally by either the bottleneck carrier or, through

⁴ While *CPL* dealt with situations where the bottleneck carrier was the delivering carrier and the shippers believed they had competitive options at origin, "the principle is equally applicable 'if the bottleneck exists at the origin.'" STB Finance Docket No. 33467, *FMC Wyoming Corp and FMC Corp. v. Union Pacific RR Co.* (served December 12, 1997) ("*FMC*"), at 4, note 9; *aff'd*, *Union Pacific RR Co. v. Surface Transportation Board and United States*, 202 F.3d 337 (D.C. Cir. 2000).

its contract with the shipper, the [destination] carrier.” *CPL* at 243. Instead, under 49 U.S.C. §10742, either the participating railroads must mutually agree to the interchange point, or the Board will determine the appropriate interchange. *Id.* at 244. As explained by the Board (*Id.*):

In those circumstances, our determination of an interchange, absent an agreement between the carriers, would not be governed by the competitive access rules, but rather by a variety of other factors, including a comparison of the physical and operational feasibility of interchange at the points selected by the carriers. The shipper-carrier contract for service over the non-bottleneck segment, while not conclusive by itself, could also be useful as a factor in our determination of an interchange point (compare Bottleneck at 9-11, in which we discussed the role of contracts in competitive access cases).⁵

While a shipper-carrier contract is a factor in the Board’s determination of the interchange point - in part because it demonstrates that the contracting railroad “has chosen not to enter into a joint rate arrangement with the bottleneck carrier, thus necessarily circumscribing the latter’s rate discretion” under 49 U.S.C. §10701(c)⁶ - once the interchange has been determined by the Board, if a shipper has a contract for service from that interchange point, a railroad “cannot refuse to complete the transportation [to]

⁵ Contrary to BNSF’s assertions, BNSF’s Legal Position Statement at 14, this determination expressly does not entail the Board’s competitive access rules. *CPL* at 244 (where carriers disagree the STB’s interchange determination does “not involve the competitive access regulations. As we explained in our December 31st decision, the competitive access rules provide an avenue for remedies for situations where a carrier has exploited its market power to perpetuate its own inadequate service or to foreclose more efficient service offered by another rail carrier. By determining an interchange for service from an origin that the bottleneck carrier does not serve, we would not be adding a competitive alternative, but merely resolving the carriers’ disagreement as to the route over which the carriers would be required to provide service.”).

⁶ *CPL* at 245, note 14.

that point simply because it cannot enter into a preferred joint rate with the [destination] carrier. Rather it *must* provide whatever rate is necessary to complete the transportation” over the established route. *Id.* at 244 (emphasis added, citation omitted). In this case, in addition to the presence of the UP Contract, the Kansas City Interchange is indisputably a physically and operationally feasible and efficient interchange, and indeed this joint line movement has transported 90 railcars of Canexus’ chlorine to Canexus’ customers in 2011. Thus, BNSF’s obligation to provide rates to complete the transportation is clear.

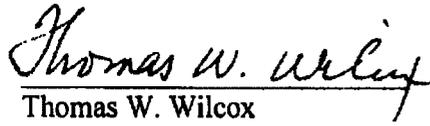
The Board subsequently applied the rules set out in *CPL* in *FMC*, a case with facts similar to these. In that proceeding, the shipper entered into contracts with various carriers for transportation to final destinations from established interchange points with UP, but UP refused to provide rates from origins to the interchange point. *FMC* at 2. The Board, applying the rules in *CPL*, ordered UP to provide rates to its interchange points with the connecting railroads, stating that “where a connecting carrier and shipper have entered into a transportation contract to 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.” There, as here, the operational feasibility and efficiency of the interchanges with UP was not an issue. In addition, in *FMC* the STB emphasized the important policy reasons behind its rules, namely the encouragement of rail transportation contracting. Specifically, the Board noted that “there are substantial benefits that derive from a transportation contract that another carrier should not be able to negate. A contract provides commercial certainty for both the shipper and the carrier – the shipper has rate certainty for the period of time specified in the contract and the carrier has the traffic commitments contained in the contract.

Moreover, as we noted in *Bottleneck I*, Congress broadly ‘encouraged’ shippers and carriers to transact rail transportation in this way.” *FMC* at 5, citing H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 98-101 (1980). The STB thus concluded in *FMC* that UP would not be “permitted to effectively negate a transportation contract with a connecting carrier, but rather is obliged to provide proportional rates that could be used in conjunction with” the rail transportation contracts.” *Id.* These rules compel the STB to reach the same result in this case in response to BNSF’s attempt to negate the UP Contract.

C. Conclusion

BNSF clearly has the legal obligation to provide common carrier rates and service to Canexus for the transportation of chlorine from Canexus’ North Vancouver facility and from Marshall, Washington, to the Kansas City Interchange to be transported to UP-served destinations pursuant to the rail transportation contract between Canexus and UP. The Board should issue an order requiring BNSF to establish such rates and applicable service terms.

Respectfully Submitted,



Thomas W. Wilcox
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Svetlana Lyubchenko
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*Attorneys for
Canexus Chemicals Canada, L.P.*

November 3, 2011

TAB 1



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7:11 PM

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May 25, 2011

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: STB Docket No. FD-35524, *Canexus Chemicals Canada L.P. v. BNSF Railway Company, Request for Order Compelling Establishment of Common Carrier Rates*

Dear Ms. Brown:

Enclosed for filing in the above-captioned proceeding please find the original and ten (10) copies of the Request for Order Compelling Establishment of Common Carrier Rates of Canexus Chemicals Canada, L.P. ("Canexus"). Please note that Canexus has asked the Board for EXPEDITED CONSIDERATION of this Request, since the common carrier rates it is seeking to compel BNSF Railway to establish must be in effect on July 1, 2011 for the reasons described in the Request.

A check in the amount of \$200 is enclosed to cover the applicable filing fee. An extra copy of this filing is also included to be stamped and returned to the undersigned.

Please feel free to contact me if you have any questions.

Sincerely,

Thomas W. Wilcox

Counsel for Canexus Chemicals Canada, L.P.

Enclosure

cc: Counsel for BNSF Railway

EXPEDITED ACTION REQUESTED

MAY 25

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

CANEXUS CHEMICALS)
CANADA L.P.)
100 Amherst Ave.,)
North Vancouver, B.C., V7H 1S4)
Canada)

Complainant,)

v.)

Docket No. FD-35524)

BNSF RAILWAY COMPANY)
2650 Lou Menk Drive)
Fort Worth, TX 76131-2830)

Defendant)
_____)

**REQUEST FOR AN ORDER COMPELLING
ESTABLISHMENT OF COMMON CARRIER RATES**

Thomas W. Wilcox
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GKG Law, P.C.
1054 31st Street NW, Suite 200
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Tel: (202) 342-5248
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Dated: May 25, 2011

MAY 25 2011

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

<hr/>)
CANEXUS CHEMICALS)
CANADA L.P.)
100 Amherst Ave.,)
North Vancouver, B.C., V7H 1S4)
Canada)
	Complainant,)
)
	v.)
)
)
BNSF RAILWAY COMPANY)
2650 Lou Menk Drive)
Fort Worth, TX 76131-2830)
)
	Defendant)
)
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Docket No. FD-35524

**REQUEST FOR AN ORDER COMPELLING
ESTABLISHMENT OF COMMON CARRIER RATES**

COMES NOW, Canexus Chemicals Canada, L.P. ("Canexus"), pursuant to 49 U.S.C. §11701 and 49 C.F.R. Part 1111¹, and submits to the Surface Transportation Board ("STB" or "Board") this Request for an Order Compelling Establishment of Common Carrier Rates ("Request"). This Request asks the Board to immediately compel BNSF Railway Company ("BNSF") to establish, effective July 1, 2011, common carrier

¹ The Board's regulations and decisions categorize requests for orders compelling the establishment of a common carrier rate as a type of formal complaint. 49 CFR §1002.2(56)(vi). STB Finance Docket No. 35219, *Union Pacific Railroad Company – Petition for Declaratory Order*, (STB Served June 11, 2009) at 6, fn 29; STB Ex Parte No. 542 (Sub – No.4) *Regulations Governing Fees for Services Performed in Connection with Licensing and Related Services – 2002 New Fees*, (STB Served August 22, 2002).

rates and service terms for the transportation of chlorine from (1) a chlor alkali (caustic soda, hydrochloric acid and chlorine) production facility owned and operated by Canexus in North Vancouver, British Columbia and (2) Marshall, Washington, which is in the vicinity of a railcar storage facility operated by Canexus' United States operating affiliate, Canexus U.S. Inc. ("Canexus U.S."), in Belmont, Washington, to the established rail interchange between BNSF and the Union Pacific Railroad Company ("UP) in Kansas City, Missouri ("Kansas City Interchange"). Such common carrier rates are necessary to enable deliveries of chlorine originating at these two locations to be made by UP from the Kansas City Interchange to final destinations served by UP in Texas, Illinois and Arkansas pursuant to a confidential rail transportation contract between Canexus and UP. As set forth in more detail below, BNSF's refusal of Canexus' request to establish rates and service terms for this transportation beyond June 30, 2011 violates 49 U.S.C. §§11101(a), 11101(b), 49 C.F.R. Part §1300, and established Board precedent. The Board should therefore immediately issue an order compelling BNSF to provide the requested rates and terms. In support hereof, Canexus states as follows:

IDENTITY OF THE PARTIES

1. Canexus is a privately owned limited partnership with offices in North Vancouver, British Columbia, Canada. Canexus manufactures and markets chlor alkali products at its main production facility located in North Vancouver ("North Vancouver Facility"). The North Vancouver Facility produces for sale approximately 170,000 tons of chlorine per year, all of which must be transported to the customers of Canexus and Canexus U.S. - the latter which handles the sale and distribution of the chlorine in the United States - by railroad. The chlorine is transported in specialized rail tank cars

supplied by Canexus. Canexus is the corporate entity with responsibility for arranging rail transportation on behalf of itself and Canexus U.S.

2. Canexus U.S. operates a railcar storage facility in Belmont, Washington, which is used to store loaded chlorine railcars from time to time before they are transported to end user customers. ("Belmont Facility"). The Belmont Facility is located on the tracks of the Washington and Idaho Railway, Inc., which, in turn, is physically connected to only BNSF at Marshall, Washington.

3. BNSF is a common carrier by railroad and engages in the transportation of property in interstate and intrastate commerce. BNSF is subject to the provisions of the ICC Termination Act of 1995 (49 U.S.C. §§ 10101 *et seq.*) and to the jurisdiction of this Board with regards to its interstate rail transportation service.

JURISDICTIONAL STATEMENT

4. The Board has jurisdiction over this Request pursuant to 49 U.S.C. §§10501, 11101 and 11701.

MATERIAL FACTS

5. The North Vancouver Facility is physically connected to the Canadian National Railway ("CN"), which, in addition to providing line haul transportation services, also provides switching services between the North Vancouver Facility and interchanges with Canadian Pacific Railway ("CPR") and BNSF in Canada pursuant to a mandatory reciprocal switching arrangement under Canadian law and regulations.

6. A portion of BNSF's rail system in the State of Washington extends north across the border of the United States and Canada at Blaine, Washington, into Vancouver, where it connects with the tracks of CN at Brownsville Junction. BNSF

interchanges with CN at this location to pick up loaded Canexus railcars originating at the North Vancouver Facility for delivery to BNSF-served destinations and interchanges with UP and other railroads in the United States.

7. In 2010, Canexus' chlorine was transported from the North Vancouver Facility and from Marshall, Washington to final destinations in Texas, Illinois and Arkansas and numerous other destinations via joint line BNSF and UP movements consisting of transportation by (a) BNSF to UP/BNSF interchanges pursuant to common carrier rates and terms established by BNSF in Price Authority 90096, Implementing Agreement 1063, Amendment 16 ("2010 BNSF Tariff")² and (b) UP pursuant to a confidential rail transportation contract between Canexus and UP covering transportation from BNSF/UP interchanges to UP-served destinations ("UP 2010 Contract"). BNSF and UP billed Canexus separately for their respective portions of the 2010 movements pursuant to Rule 11 of the Association of American Railroads Accounting Rules.³ The 2010 BNSF Tariff contained no restrictions on the use of its rates in joint line service with UP.

8. In the Fall of 2010 BNSF informed Canexus that it intended to revise and renew the 2010 BNSF Tariff and Price Authority 90096 effective January 1, 2011. BNSF later delayed the expiration date of its revisions and renewal until March 15, 2011.

² BNSF Price Authority 90096 and its numerous Implementing Agreements including prior versions are posted on BNSF's website. See http://www.bnsf.com/bnsf.was6/epd/EPDController?txtSrchVal=&SRCHTXT=ALL&PAGE=PRC_AUTH_SRCH_HANDLER&EPDACTION=Search+by+Authority+Number

3

³ The common carrier rates and service terms provided by BNSF for the transportation of Canexus' chlorine from the North Vancouver Facility have historically entailed the absorption by BNSF of the reciprocal switch charges assessed by CN. Accordingly, Canexus has been invoiced by and pays one rate to BNSF.

9. The 2010 BNSF Tariff included unrestricted common carrier rates and terms for transporting chlorine from the North Vancouver Facility and from Marshall, Washington to the Kansas City Interchange which Canexus did not use in 2010. However, between January 1, 2011 and March 15, 2011 Canexus shipped 18 carloads of chlorine from the North Vancouver Facility to a customer in Arkansas served exclusively by UP using these rates in combination with common carrier rates established by UP for transportation from the Kansas City Interchange described in paragraph 10 below.

10. Canexus began negotiations with UP in late 2010 concerning new rail transportation contracts to replace the 2010 UP Contract and other contractual arrangements between them. The parties' contracts expired during their negotiations, and on January 14, 2011 UP published UP Tariff 4951, which established common carrier rates for its portion of BNSF/UP Canexus chlorine movements originating in North Vancouver starting January 16, 2011. Tariff 4951 included a rate from the Kansas City Interchange to UP-served destinations in Texas, Illinois and Arkansas.

11. In January, 2011 Canexus orally informed BNSF that it would require common carrier rates to be republished in the revised Price Authority 90096 in 2011 from the North Vancouver Facility and from Marshall to the Kansas City Interchange to be used in conjunction with rates Canexus was negotiating with UP for final delivery from that interchange to customers in Texas, Illinois, and Arkansas. BNSF declined this request, and BNSF further informed Canexus that effective March 16, 2011, it was BNSF's intention to only interchange Canexus' cars of chlorine out of North Vancouver with UP at Portland, Oregon, and to only interchange chlorine cars out of the Belmont Facility with UP at Spokane, Washington via Marshall.

12. After further oral and email requests to BNSF to re-establish non-restricted rates to the Kansas City Interchange were unsuccessful, Canexus submitted to BNSF on March 2, 2011 a written request for the establishment of common carrier rates and service terms pursuant to 49 U.S.C. §11101(b) and 49 C.F.R. §1300.3 for the rail transportation of chlorine from North Vancouver and Marshall to the Kansas City Interchange effective March 16, 2011 to be used in conjunction with rates provided by UP for service to destinations in Texas, Illinois and Arkansas. (Attachment 1).

13. On or around March 3, 2011, Canexus reached an agreement in principle with UP on the contract rates and other terms for the transportation of Canexus' chlorine from the Kansas City Interchange to customers served by UP in Texas, Illinois, and Arkansas in 2011 and additional years.⁴

14. Despite the presence of Tariff 4951, and despite being informed of the pending contract between Canexus and UP, BNSF refused Canexus' written request to reestablish common carrier rates and service terms to the Kansas City Interchange for use in joint line service with UP. After further correspondence between BNSF and Canexus (Attachment 2), BNSF informed Canexus that effective April 8 it would establish "temporary rates" from North Vancouver and from Marshall to the Kansas City Interchange for interchange with UP to destinations in Texas, Illinois, Arkansas, and other UP-served destinations, but only until June 30, 2011. (Attachment 3). The stated purpose of the temporary rates is to "provide Canexus additional time to negotiate a solution with UP" that would require UP to agree that "any chlorine shipments moving

⁴ The parties also reached agreement on contract rates and service terms for UP's portions of joint UP/BNSF movements from other UP/BNSF interchanges, but BNSF has established common carrier rates to those interchanges so they are not at issue.

on BNSF from N. Vancouver or Marshall to final destinations located on UP must be interchanged at Portland or Spokane.” According to the letter, “[i]f after July 1, you anticipate that Union Pacific will not accept such traffic in interchange at these established and reasonable gateways, then your recourse would be to address that situation before the Surface Transportation Board.” The “temporary rates” were published in BNSF Price Authority 90096, Implementing Agreement 5000.

15. Contract discussions between Canexus and UP were eventually concluded in late April, 2011, and rail transportation contracts for transportation in 2011 and subsequent years were executed by both Canexus and UP as of May 24, 2011. One of the contracts includes rates and service terms for the transportation of chlorine originating in North Vancouver and Marshall from the Kansas City Interchange to UP-served destinations in Texas, Illinois, and Arkansas. Canexus informed BNSF that it was finalizing a contract with UP for contract service from the Kansas City Interchange, but BNSF did not change its position and establish common carrier rates from these origins for use in combination with the UP contract rates.

16. Canexus made a proper request for rates and service for the transportation of cars of its chlorine by BNSF to the Kansas City Interchange under 49 U.S.C. §11101(b) and 49 CFR §1300.3. BNSF has not objected to any aspect of the request other than the location where the shipments will be interchanged with UP. BNSF has provided no reasons for its refusal to interchange in Kansas City with UP after June 30, 2011 other than it prefers to interchange with UP in Portland and Spokane, thereby significantly “short hauling” itself for joint line BNSF/UP movements of Canexus’ chlorine. BNSF’s refusal to provide rates and other service terms for the requested

transportation violates 49 U.S.C. §11101(a) and §11101(b) and 49 CFR §1300.3 and established Board precedent governing a railroad's obligation to establish rates for the transportation of chlorine upon request. *See e.g.*, STB Finance Docket No. 35219, *Union Pacific Railroad Company – Petition for Declaratory Order* (STB served June 11, 2009).

17. BNSF's refusal to establish rates from North Vancouver or Marshall to the Kansas City Interchange that can be used for joint line service with UP after June 30, 2011 is also discriminatory because BNSF has transported Canexus' chlorine from North Vancouver to Kansas City in single line service to BNSF-served customers in the Kansas City area pursuant to the common carrier rates and service terms established in Price Authority 90096, Implementing Agreement 5000.

18. Finally, BNSF's refusal to provide rates and service terms for transportation service from the North Vancouver Facility and the Belmont Facility to the Kansas City Interchange after June 30, 2011 despite the presence of a rail transportation contract between Canexus and UP violates 49 U.S.C §11101 and established Board precedent and policy governing rates for segments of joint line railroad movements. *Central Power & Light v. S. Pac., et al*, 1 STB 1059 (1996) ("*Bottleneck I*"); *clarified*, 2 STB 235 (1997) ("*Bottleneck II*"), *aff'd sub nom, Mid American Energy Co. v. STB*, 169 F.3d 1099 (8th Cir. 1999); STB Finance Docket No. 33467, *FMC Wyoming Corp. and FMC Corp. v. Union Pacific Railroad Company* (STB Served December 16, 1997) *aff'd Union Pacific Railroad Co. v Surface Transp. Bd.*, 202 F.3d 337 (D.C. Cir. 2000).

REQUESTED RELIEF

WHEREFORE, Canexus respectfully asks the Board to grant the following relief in response to this Request:

1. The Board should immediately issue an order directing BNSF to show cause in its reply to this Request why BNSF should not establish, effective July 1, 2011, common carrier rates and service terms for shipments of chlorine from the North Vancouver Facility and from Marshall, Washington to the Kansas City Interchange without any restrictions on the use of such rates in combination with contract rates governing transportation by UP to UP-served destinations in Texas, Illinois, and Arkansas, and any additional destinations that might be subsequently added to the contract.

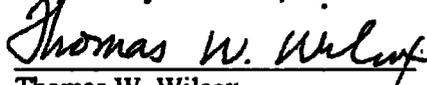
2. The Board should determine, after receiving any additional evidence or information from the parties it determines is necessary, but in any event prior to June 30, 2011 that BNSF has violated 49 U.S.C. §11101(a), §11101(b), 49 C.F.R. Part 1300, and established Board precedent by refusing Canexus' request for rates and service terms for the transportation of chlorine from the North Vancouver Facility and from Marshall, Washington to the Kansas City Interchange to be used in conjunction with contract rates and terms established by UP for final deliveries to UP-served destinations in Texas, Illinois, and Arkansas, effective July 1, 2011; and

3. The Board should immediately issue an order compelling BNSF to establish common carrier rates and service terms for the requested service, effective July 1, 2011.

4. While Canexus believes that the Board's jurisdiction to compel BNSF to establish the requested rate from North Vancouver to The Kansas City Interchange is clear, should the Board ultimately conclude otherwise Canexus requests the alternative relief as to the North Vancouver origin of an order compelling BNSF to supply, effective

July 1, 2011, a common carrier rate for the transportation of Canexus' chlorine from the point at which BNSF's tracks cross into the United States at Blaine, Washington to The Kansas City Interchange.

Respectfully submitted,



Thomas W. Wilcox
Edward D. Greenberg
Svetlana Lyubchenko
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Tel: (202) 342-5248
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*Attorneys for
Canexus Chemicals Canada, L.P.*

May 25, 2011



By E-Mail and Regular Mail

March 2, 2011

Mr. Bradley Wycoff
 Manager Sales
 Industrial Products
 BNSF Railway Company
 1200 D Street
 Bellingham, WA
 98225

Dear Mr. Wycoff

Canexus Chemicals Canada Limited Partnership (Canexus) was advised by BNSF Railway Company ("BNSF") that it would be expiring rates published in BNSF Tariff 90096 covering the transportation of chlorine by BNSF to a wide variety of destinations and interchanges on March 15, 2011. Canexus entered into discussions with BNSF to put new rates into effect for March 16, 2011. As a result of correspondence between the two parties on March 1st, Canexus now understands that BNSF is unwilling to publish rates from Canexus' North Vancouver chlor-alkali plant and from Marshall, WA (near to a Canexus chlorine storage facility) to Kansas City, MO effective with March 16, 2011. Canexus desires to use BNSF's rates in conjunction with Union Pacific Railway (UP) rates Canexus has secured applying from Kansas City to Canexus customers located in the states of Texas, Illinois and Arkansas. Instead, BNSF has indicated that it desires to interchange traffic with UP at either Portland, OR when from North Vancouver, or from Spokane, WA when from Marshall. BNSF's proposal would effectively long-haul UP and for this reason, UP is unwilling to provide rates to those states over these two gateways.

Canexus had approached BNSF several times during the 4th quarter of 2010 seeking BNSF recommendations as to the most appropriate interchange between BNSF and UP for chlorine traffic moving to UP local destinations in TX, IL and AR. BNSF failed to respond to those inquiries. As a result, on January 10, 2011 during a meeting between BNSF and Canexus in North Vancouver, Canexus advised that it could not wait any longer and had selected Kansas City as the most reasonable interchange point for the traffic in question. The decision to use the Kansas City interchange was largely predicated on the fact Canexus had secured rates from UP over this interchange. On February 18, BNSF supplied Canexus with a rate of \$18,980 US per car to apply March 16, 2011 on shipments of chlorine from North Vancouver to Kansas City on a Rule 11 basis signalling to Canexus that BNSF agreed with our selection of interchange points.

As we have indicated to BNSF now on several occasions, Canexus believes that the use of the Kansas City interchange is fair and appropriate for traffic moving under UP Rule 11 rates from Kansas City to destinations in TX, IL and AR and we were frankly stunned when BNSF advised yesterday that it was withdrawing its offer to publish rates to Kansas City. Canexus is actively shipping chlorine now, and anticipates continuing to ship chlorine to customers in TX, IL and AR throughout 2011 and beyond. As a result, Canexus must have rates in place to service these customers.

Accordingly, and in light of BNSF's unwillingness to provide contract rates and service terms applying on chlorine movements to the Kansas City interchange effective with March 16, 2011, Canexus hereby requests, pursuant to 49 U.S.C. §11101, 49 C.F.R. Part 1300, and AAR Interchange Rule 11, that BNSF provide Canexus with common carrier rates and service terms for the transportation of chlorine from North



Vancouver and from Marshall, WA to the Kansas City, MO Interchange point between BNSF and UP, to be used in conjunction with rates UP has established for movements of chlorine from its interchange at Kansas City, MO to destination points in TX, IL and AR served by UP. Pursuant to 49 C.F.R. §1300.2 and/or §1300.3, respectively, Canexus requests that BNSF (1) disclose any existing common carrier rates and service terms that would apply to the transportation of Canexus' chlorine described above effective with March 16, 2011; or (2) establish reasonable rates and service terms that will apply to the described transportation effective with March 16, 2011. Canexus also requests that BNSF immediately notify Canexus of any future increases in the rates provided and any future changes to pertinent service terms.

Please provide the requested information in compliance with the time frames set out in section 49 U.S.C. § 11101 and 49 CFR Part 1300.

Sincerely,

Marty Cove
Manager, Logistics
Canexus Chemicals Canada LP



Denis J Smith
Vice President Marketing
Industrial Products Business Unit

BNSF Railway Company
P O Box 961065
Fort Worth, Texas 76161-0065
2650 Lou Menk Drive, 3rd Floor
Fort Worth, Texas 76131-2830
tel 817 867-6724
fax 817 352-7453
denis.smith@bnsf.com

March 21, 2011

Marty Cove
Canexus Chemicals Canada LP
100 Amherst Ave
North Vancouver, BC V7H 1S4

Dear Mr. Cove:

I write in response to your March 2, 2011 letter to Brad Wyckoff requesting that BNSF provide Canexus common carrier rates for the transportation of chlorine from North Vancouver, British Columbia and Marshall, Washington to Kansas City, Missouri. We have established rates for the transportation of chlorine from North Vancouver and Marshall to Portland, Oregon and Spokane, Washington (contained in BNSF 90096). Because Portland and Spokane are locations fully equipped to handle the interchange of chlorine traffic from BNSF to Union Pacific, those rates enable Canexus to ship chlorine from either North Vancouver or Marshall to any final destinations located on the Union Pacific.

You have indicated that Canexus also wants BNSF to quote rates for the same traffic for interchange via Kansas City to destination points in Texas, Illinois and Arkansas served by UP. Unfortunately, we cannot respond to your request without specific details regarding the location of those final destination points in Texas, Illinois, and Arkansas. Please identify the exact destination facilities in Texas, Illinois and Arkansas so that we may review which carriers serve those facilities and all routing options for this TIH traffic.

Sincerely,

A handwritten signature in black ink that reads "Denis J. Smith". The signature is written in a cursive style with a large, stylized "D" and "S".

Denis J. Smith



March 22, 2011

Denis J. Smith
BNSF Railway Company
P.O. Box 961065
Fort Worth, Texas
76161-0065

Dear Mr. Smith:

We are in receipt of your letter to Marty Cove dated March 21, 2011. Canexus respectfully disagrees that BNSF needs any additional information from Canexus in order to establish common carrier rates from North Vancouver and Marshall, Washington to Kansas City, Missouri for interchange with the Union Pacific Railroad Company. BNSF previously provided Canexus with a proposed rate from North Vancouver to Kansas City in February without any accompanying request for information concerning the ultimate destinations. BNSF then inexplicably withdrew this rate. Moreover, a rate for this lane was contained in BNSF 90096, Amendment 17, which expired on March 15, 2011. The parameters and circumstances surrounding this freight and routing have not changed in 2011, and they are substantially similar, if not identical to the parameters for movements from Marshall, Washington to the Kansas City interchange. We therefore disagree that the information BNSF now seeks is a valid prerequisite to responding to Canexus' March 2, 2011 request.

In addition, your request for specific information regarding the final destination points in Texas, Illinois and Arkansas asks for information concerning movements by other railroads that is subject to existing or pending contracts using Kansas City as the interchange. This information is not only confidential, it is also immaterial to our request for rates from BNSF for the portion of the overall movement it may participate in.

We therefore believe that BNSF has sufficient information for you to proceed as requested. We look forward to your immediate response to our request for common carrier rates from North Vancouver, British Columbia and Marshall, Washington to Kansas City, Missouri as stated originally in our letter dated March 2, 2011.

Yours truly,

Gina Jackson



Denis J. Smith
Vice President Marketing
Industrial Products Business Unit

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tel 817 867-6724
fax 817 352-7455
denis.smith@bnsf.com

April 8, 2011

Marty Cove
Canexus Chemicals Canada LP
100 Amherst Ave
North Vancouver, BC V7H 1S4

Dear Mr. Cove:

I write in response to your March 22 letter to me and your April 5 email to Howard Horn. We understand that Union Pacific's ongoing refusal to provide service from the established interchanges with BNSF at Portland, OR and Spokane, WA to UP-served final destinations has left Canexus in a difficult situation. In order to provide Canexus additional time to negotiate a solution with UP or make alternative arrangements with other carriers, BNSF will establish temporary rates for use in shipping chlorine from North Vancouver, B.C. and Marshall, WA to interchange with UP at Kansas City and movement to any final destinations located on UP. These rates will be effective only until June 30, 2011.

Effective July 1 and thereafter, any chlorine shipments moving on BNSF from N. Vancouver or Marshall to final destinations located on UP must be interchanged at Portland or Spokane. We believe that the publication of rates to Portland and Spokane, which are both established and reasonable locations for the interchange of TIH/PIH traffic with UP, fully satisfies our obligations with respect to this traffic. Our willingness to establish interim rates signifies the value we place on our ongoing commercial relationship with Canexus. If, after July 1, you anticipate that Union Pacific will not accept such traffic in interchange at these established and reasonable gateways, then your recourse would be to address that situation before the Surface Transportation Board.

To avoid any confusion, I also want to clarify one issue you have raised in prior correspondence. The rate that BNSF established on January 20 for the transportation of chlorine from N. Vancouver and Marshall to Kansas City was only for use on traffic with final destinations located on the BNSF. This is consistent with BNSF's unchanged position that we will fulfill our obligation to move Canexus's chlorine traffic to all BNSF-local final destinations. As Canexus was aware, that rate was not for use in conjunction with UP rates from Kansas City to UP-served final destinations. It is thus inaccurate to suggest that BNSF "inexplicably withdrew" a pre-existing rate upon which Canexus may have relied in arranging for transportation to UP-served final destinations beyond Kansas City.

Page 2

Finally, it has come to my attention that on multiple recent occasions, Canexus has tendered chlorine shipments to BNSF for movement to locations for which BNSF has no established rate. I understand that these instances were not the result of clerical error but a conscious decision by Canexus to submit waybills to destinations for which Canexus knew no BNSF rate existed. This practice is unacceptable, contrary to BNSF and industry regulations, and, given the TIH/PIH nature of these shipments, creates dramatically increased safety and operational risks. BNSF will be taking all steps—administrative, operational or otherwise—to ensure that no shipments Canexus tenders will be permitted to move to destinations for which BNSF has not established a rate. Further, in the event that Canexus submits another shipment in this inappropriate manner, the above-referenced temporary rates BNSF has established for interchange with UP at Kansas City will immediately be rescinded.

Sincerely,

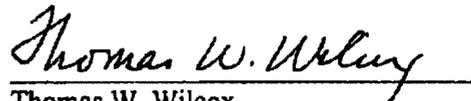
A handwritten signature in black ink, appearing to read "Denis J. Smith". The signature is written in a cursive style with a prominent initial "D".

Denis J. Smith

CERTIFICATE OF SERVICE

I do hereby certify that I have delivered a true and correct copy of the foregoing Request for an Order Compelling Establishment of Common Carrier Rates to the following addressees at the address stated by express overnight courier this 25th day of May, 2011.

Richard E. Weicher
Jill K. Mulligan
BNSF RAILWAY COMPANY
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2353


Thomas W. Wilcox

TAB 2



RICHARD BAR
BRENDAN COLLINS
STEVEN JOHN FELLMAN
EDWARD D. GREENBERG
KATHARINE FOSTER MEYER
DAVID K. MONROE
TROY A. ROLF
DAVID P. STREET
NETH G. SWIRSKY
THOMAS W. WILCOX
CHRISTOPHER B. YOUNGER

SVELLANA V. LYJUCHENKO

ROBERT N. KHARASCHIN

OF COUNSEL
NOT ADMITTED IN DC

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TELEPHONE 952 449 8817 FACSIMILE 952 449 0614

WRITER'S DIRECT E-MAIL ADDRESS
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WRITER'S DIRECT DIAL NUMBER
262 342-5248

June 20, 2011

Via E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: *Canexus Chemicals Canada L.P. v. BNSF Railway Company, FD 35524*

Dear Ms. Brown:

This letter is in response to the Board's Decision served in this proceeding on June 16, 2011. After giving careful consideration of BNSF's proposal to submit this matter to Board-supervised mediation, Canexus respectfully informs the Board that it does not believe this particular matter is appropriate for Board-sponsored mediation, primarily because of the presence of a confidential contract between Canexus and UP to which BNSF is not a party. Canexus therefore informs the Board that it respectfully declines to participate in Board-sponsored mediation in this particular matter.

Please feel free to contact me with any questions.

Regards,

Thomas W. Wilcox
Attorney for Canexus Chemicals L.P.

CC: Counsel for BNSF
Counsel for UP

TAB 3



RICHARD BAR
BRENDAN COLLINS
STEVEN JOHN FELDMAN
EDWARD D GREENBERG
KATHARINE FOSTLER MEYER
DAVID K MONROE
TROY A ROLF
DAVID P STREET
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WRITER'S DIRECT E-MAIL ADDRESS
TWHCOY@GKNLAW.COM

WRITER'S DIRECT DIAL NUMBER
202 342-5248

June 20, 2011

Via E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

**Re: *Canexus Chemicals Canada L.P. v. BNSF Railway Company*, STB
Docket No. FD 35524**

Dear Ms. Brown:

Attached for e-filing in the above-referenced proceeding is Canexus Chemicals L.P.'s Reply to BNSF's Response to the Board's Order of June 8, 2011 Regarding its Legal Position. This Reply includes the Verified Statement of Mr. Martin W. Cove.

Please feel free to contact me with any questions.

Regards,

Thomas W. Wilcox
Attorney for Canexus Chemicals L.P.

Enclosure

CC: Counsel for BNSF Railway
Counsel for UP

Board's June 8 decision in this proceeding did not provide for the ability of Canexus to submit a written response to either filing by BNSF or Union Pacific Railroad Company ("UP"). However, Canexus submits that the Board's acceptance of this Reply, and the accompanying verified statement of Martin W. Cove, Manager of Logistics for Canexus, are nevertheless appropriate in light of the fact that the BNSF Legal Position contains numerous factual statements and legal arguments that go beyond the scope of straightforward question asked of BNSF, which statements and arguments Canexus should be allowed to rebut and also in order to ensure the completeness of the record in this proceeding. *AB-1053X-2, Michigan Air-Line Railway Co – Abandonment Exemption – In Oakland County, Mich.* (Served May 11, 2011) at 1. Canexus realizes that this filing is being made close to the scheduled oral argument date, but states that this is the earliest practicable date this Reply could be filed given that BNSF's Legal Position was received late in the day on Wednesday June 15, 2011, the need for Canexus personnel and counsel to confer and coordinate prior to responding, and the intervening weekend.

II. The Board Has Jurisdiction over Canexus' Request for an Order Compelling Establishment of Common Carrier Rates

BNSF first argues that the Board does not have jurisdiction to compel BNSF to establish common carrier rates from North Vancouver to the BNSF/UP interchange at Kansas City. BNSF Legal Position at 6-7. On the other hand, BNSF concedes that the Board has jurisdiction over this dispute because it can determine whether the BNSF/UP Kansas City interchange is the correct interchange point for interline movements of

chlorine to UP-served destinations in Texas, Illinois and Arkansas.² *Id.* The Board's jurisdiction to compel BNSF to provide rates to Canexus from its North Vancouver facility is an issue never raised by BNSF at any time during the parties' discussions. On the contrary, BNSF advised Canexus that this Board was the appropriate place to resolve this dispute. Attachment 3 to Canexus Request for Order Compelling Establishment of Common Carrier Rates ("Request") at 1. BNSF's argument rests on an overly strict interpretation of 49 U.S.C. §10501(a). It is well established that this statute does not preclude the STB from considering any matters associated with cross-border movements. For example, the STB has jurisdiction over rate challenges involving cross-border movements, and reviews the reasonableness of such rates examining the entire routing from origin to destination. *Canada Packers, Ltd v. Atchison, Topeka & Santa Fe Railway Co., et al*, 385 U.S. 82 (1966); *Great Northern R. Co. v. Sullivan*, 294 U.S. 458 (1935); *accord*, Ex Parte No. 646 (Sub-No.1) *Simplified Standards for Rail Rate Cases* (Served September 4, 2007) at 99-100 ("*Simplified Standards*"). In this proceeding, BNSF has not even provided a rate for service past June 30, 2011, let alone provided any transportation for the Board to review for reasonableness.³ Canexus notes that there is

² The Board can order BNSF, when it provides common carrier rates to Canexus from its North Vancouver facility for interline service with UP to specific destinations, to interchange that traffic at specific interchange points under the applicable legal standards. See, e.g., *H.K. Porter Co. et al, v. Central Vermont Railway, Inc.*, 366 U.S. 272 (1961) (STB can order railroads participating in United States portion of a movement to adjust their transportation practices in order to eliminate the discriminating aspects of the entire movement).

³ In this proceeding Canexus is asking the Board to order BNSF to provide rates and service terms pursuant to 49 U.S.C. §11101(b). A distinction between jurisdiction over actual transportation and jurisdiction over the establishment of rates is evident in §10501(b), which states that the "jurisdiction of the Board over -- (1) transportation by

even stronger justification for STB jurisdiction over its Request since this is not a case where the Board could be construed as potentially regulating the affairs of a Canadian railroad entity. Rather, it is being asked to order a rate be established for what is essentially a single line movement from an origin to an interchange point by BNSF, a United States Class I railroad.⁴

BNSF's jurisdictional argument would produce the anomalous result of the Board being able to examine the reasonableness of the rates BNSF has established from Canadian shipper facilities to the Kansas City Interchange, but the Board could not compel BNSF to provide a rate in the first instance. This would achieve a result similar to that unsuccessfully sought by several Class I railroads in *Simplified Standards*, which was to eliminate the entire category of cross-border movements from the Board's simplified rate reasonableness rules. *Simplified Standards* at 100. The Board rightfully rejected this attempt, stating "what the carriers ask for – complete immunity from rate challenge if the movement travels cross-border – is unacceptable. It would circumvent the intent of Congress by leaving thousands of captive shippers at the mercy of the carrier." *Id.* Taken together with other aspects of BNSF's Legal Position, BNSF would have the Board "prescribe Portland and Spokane as the appropriate interchange points for interline BNSF/UP Canexus chlorine movements to UP-served destinations," BNSF Legal Position at 11, but then BNSF could render such a decision moot by withdrawing the rates for transportation from North Vancouver to these and other interchanges at any

rail carriers, and the remedies provided in this part with respect to rates,. . . is exclusive." (emphasis supplied).

⁴ As Canexus explained in its Request, it pays one rate to BNSF for transportation from North Vancouver. BNSF absorbs the reciprocal switch charge of the Canadian National Railway. Request at 4.

time, thereby obviating the need for *any* BNSF/UP interchange points. To interpret 49 U.S.C. §10501 as precluding the STB from ordering BNSF to establish a rate in response to Canexus' Request – particularly given that BNSF has freely provided rates to Canexus before - is a far too restrictive interpretation of the Board's authority, and contrary to a policy of applying the agency's "rules and decisional criteria liberally to ensure that justice is not denied" in cases involving cross-border movements. *National Insulation Transp. Comm. v. Aberdeen and Rockfish Railroad Co.*, 365 ICC 624, 628 (1982).⁵

III. BNSF is Legally Obligated to Provide Rates to the Kansas City Interchange

In its June 8 Decision, the Board asked UP to address "its legal obligation, if any, to interchange traffic with BNSF at Spokane and Portland." Decision at 1. In response UP replied that "it has *no* legal obligation to interchange Canexus' chlorine shipments with BNSF at Portland to the destinations at issue or at Spokane for any destination." Submission of Union Pacific Railroad Company ("UP Submission") at 1 (emphasis in original, footnote omitted). While it stated that it has no legal obligation to interchange at Portland or Spokane for the movements at issue, UP confirmed that it had negotiated and assumed the legal obligation to Canexus, via a rail transportation contract, to interchange

⁵ BNSF overplays the significance of the inclusion of the alternative of Blaine, Washington as a point of origin for a compelled BNSF. Obviously, such a scenario is not preferred, since it would require Canexus to pursue remedies under Canadian law to obtain the component of the rates and terms north of Blaine. However, establishing such a rate is clearly within the Board's jurisdiction even if it concludes §10501(a) applies to requests for rates under §11101(b).

traffic with BNSF at Kansas City, and that this “interchange location is feasible and the routing is at least reasonably efficient.” UP Submission at 4.⁶

BNSF was asked the straightforward question of “whether BNSF has a legal obligation to provide the specific service Canexus has requested and to establish an appropriate rate,” Decision at 1. The jist of BNSF’s response, stripped of all of the surplusage accompanying it, which includes misstatements of fact,⁷ is that BNSF fulfilled its legal obligation to Canexus by providing rates to BNSF’s interchanges with UP at Portland and Spokane. BNSF Legal Position at 8. This conclusion is wrong for both factual and legal reasons.

In the first place, UP has stated that Spokane in fact cannot be an interchange for the movement of Canexus’ chlorine shipments because “BNSF has embargoed interchange of Rail-Security Sensitive Materials, which include chlorine, from UP at Spokane.” UP Submission at 3. This is directly contrary to BNSF’s representations about the reasons Spokane should be “prescribed” as an interchange for chlorine shipped

⁶ Part II of UP’s Submission consists of a wide ranging policy statement by UP that it has volunteered to provide in addition to answering the specific question posed to it by the Board. This Reply does not address Part II of UP’s Submission since it is largely irrelevant to Canexus’ specific Request.

⁷ For example, BNSF’s Legal Position states that “[u]nbeknownst to BNSF, Canexus negotiated a private contract with UP for interline movements in which UP would take traffic from BNSF at Kansas City.” Legal Position at 9. This is a false statement. The contract was finally executed in May, 2011. Request at 7. BNSF’s Answer to Canexus’ Request states that “BNSF admits that between March 3 and April 8, 2011, BNSF was informed of pending contract negotiations between Canexus and UP.” Paragraph 14. It also states “BNSF admits it was informed of ongoing contract negotiations between Canexus and UP for contract service from the Kansas City interchange. . . .” *Id.* at 5. Further, BNSF cannot legitimately claim any surprise that Canexus and UP would enter into a contract from any BNSF/UP interchange point, since BNSF had transported Canexus’ chlorine for numerous prior years via the combination of BNSF common carrier rates and UP contract rates on a “Rule 11” basis. See also, the attached Verified Statement of Martin W. Cove.

by Canexus. On June 17, 2011 BNSF filed a letter purporting to clear up this discrepancy, but this issue is still not clear to Canexus.

Second, as UP points out in its Submission, the Kansas City interchange easily meets all of the standards applied by the Board to resolve disputes over the appropriate point of interchange. Specifically, the determination of whether BNSF is legally obligated to provide rates from North Vancouver and Marshall to the Kansas City Interchange is "determined 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.'" UP submission at 4; quoting *Central Power & Light Co. v. Southern Pacific et al*, 2 S.T.B. 235, 244 ("*CPL*"). The BNSF/UP Kansas City interchange is indisputably a feasible, efficient, and acceptable interchange point for the interchange of chlorine rail cars. See UP Submission at 4-5. UP freely admits this, and BNSF's Legal Position doesn't even broach the possibility of this not being the case. Indeed, BNSF's reasons for wanting to use a different interchange point admittedly have nothing do with physical and operational feasibility and efficiency, and everything to do with BNSF's business decision to declare, starting in 2011, "that it is entitled to the short haul when BNSF does not serve the ultimate destination." BNSF Legal Position at 9.

That BNSF's business decision to short haul itself on chlorine movements is at odds with the fact that in the rail transportation market shippers and railroads enter into commercially negotiated rail transportation agreements should not be cause for the Board to step in and nullify the rail transportation agreement between Canexus and UP. Indeed,

BNSF would have the Board simply brush aside the carefully negotiated, multi-year rail transportation contract between UP and Canexus, asserting that it is “irrelevant” to this proceeding. *Id.* at 13. This position misstates established law and policy, which is clearly to encourage railroads and shippers to enter rail transportation contracts. In addition to the physical and operational feasibility of competing interchange points, the existence of a shipper-carrier contract for service from an interchange point is a key aspect of the analysis. In this case, both segments of the overall movements involved are “bottleneck” movements. Contrary to BNSF’s assertions, Canexus has no feasible alternative to BNSF for transportation of chlorine from North Vancouver and from Marshall to Kansas City for interchange with UP pursuant to the contract between Canexus and UP. There is no alternative to BNSF from Marshall. The only railroad that is physically capable of providing an alternative from North Vancouver to Kansas City is the Canadian Pacific Railway (“CPR”) and its subsidiary railroads. However, as explained by Mr. Cove in his verified statement, CPR is not a feasible alternative to BNSF, and indeed, CPR and its operating subsidiaries have never transported any of Canexus’ chlorine to the Kansas City interchange. *Cove V.S.* at 2. The destination segments of the overall movements are also bottleneck movements since they are only served by UP. While the Board’s bottleneck rules were formulated based on facts involving destination bottlenecks, the rules clearly also apply to bottlenecks from origins to interchange points. STB Finance Docket No. 33467, *FMC Wyoming Corp and FMC Corp v Union Pacific RR Co.* (served December 12, 1997) at 4, note 9 (“*FMC*”). The Board has stated, “[t]he existence of a shipper-carrier contract for service over the non-bottleneck segment, while not conclusive by itself, could also be useful as a factor in our

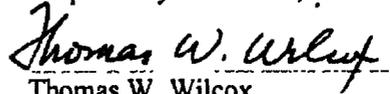
determination of an interchange point." 2 S.T.B. at 244. However, since in this case the physical and operational feasibility of the Kansas City interchange is undisputed, the existence of the rail transportation contract between UP and Canexus should be the deciding factor in determining that BNSF must provide the rates Canexus has requested. See *FMC* 4 ("once a shipper has a contract rate for transportation to or from an established interchange, the bottleneck carrier *must* provide a rate that permits the shipper to utilize its contract with the non-bottleneck carrier.") (emphasis added). Finally, BNSF tries to downplay the participation of UP as a party to the rail transportation contract by characterizing this dispute as a shipper unilaterally attempting to direct the routing of its traffic. BNSF Legal Position at 14. However, UP merely exercised its lawful right to decline to enter into the joint line arrangement preferred by BNSF for this traffic by entering into a contract with Canexus from the Kansas City interchange, "and that choice must be accommodated with [BNSF's] own preferences." *CPL*, 2 S.T.B. at 245. This is the same commercial right that CSX Transportation, Inc. exercised in the *FMC* proceeding, where the STB ordered UP to provide rates to be used in conjunction with the contract at issue there over the objection of UP, thereby rejecting UP's attempt "to effectively negate a transportation contract negotiated with a connecting carrier." *FMC* at 6.

IV. Conclusion

In conclusion, UP has confirmed in its submission to the Board that it has no legal obligation to interchange with BNSF at Spokane and Portland for transportation Canexus is seeking rates for. On the other hand, BNSF's Legal Position falls well short of overcoming the applicable legal principles, which establish that BNSF has a legal

obligation to provide common carrier rates to Canexus for the transportation of chlorine from Canexus' North Vancouver facility and from Marshall, Washington, to the Kansas City interchange to be transported to UP-served destinations pursuant to the rail transportation contract between Canexus and UP.

Respectfully Submitted, .



Thomas W. Wilcox

Edward D. Greenberg

Svetlana Lyubchenko

GKG Law, P.C.

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Washington, D.C. 20007

Tel: (202) 342-5248

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*Attorneys for
Canexus Chemicals Canada, L.P.*

June 20, 2011

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

CANEXUS CHEMICALS
CANADA L.P.
100 Amherst Ave.,
North Vancouver, B.C., V7H 1S4
Canada

Complainant,

v.

Docket No. FD-35524

BNSF RAILWAY COMPANY
2650 Lou Menk Drive
Fort Worth, TX 76131-2830

Defendant

Verified Statement of Martin W. Cove

My name is Martin W. Cove. I am the Manager, Logistics of Canexus Chemicals Canada L.P. I have been at Canexus since 2005 in my current position. I am responsible for the negotiation of freight rates to move Canexus' products across North America, among numerous other duties. I have reviewed the filings made by BNSF Railway Company ("BNSF") in this proceeding on June 15, 2011, and I am submitting this verified statement to respond to several aspects of BNSF's Response to the Board's Order of June 8, 2011 Regarding its Legal Position.

BNSF transported on average 83% of the chlorine produced at our North Vancouver facility destined to the Western and Midwestern United States in 2009 and in the first three quarters of 2010. However, in this proceeding BNSF, where Canexus is asking the Board to compel BNSF to provide Canexus with rail rates from our North

Vancouver facility and from Marshall, Washington to BNSF's interchange point with the Union Pacific Railroad Company, BNSF now alleges that Canexus could have made alternative arrangements with the Canadian Pacific Railway ("CPR") for transportation from North Vancouver to Kansas City in 2011. Like BNSF, CPR does not directly serve our facility. It accesses it in the same manner that BNSF does: through mandatory reciprocal switching by the Canadian National Railway pursuant to Canadian law. However, as BNSF well knows, a CPR alternative to Kansas City is demonstrably inferior to BNSF's routing, which is why CPR has never transported chlorine from the North Vancouver facility to Kansas City. This routing would result in significantly longer route miles than the BNSF routing – about 350 miles longer. I also understand that the movement would require the additional participation of CPR's subsidiary operating companies, the DM&E/ICE¹, to ultimately transport our rail cars from Chicago to Kansas City. This movement would therefore entail longer transit times, higher transit time variability, greater operational inefficiencies, and significantly greater financial cost to Canexus. Moreover, Canexus believes the longer, more complicated haul on CPR would entail additional safety and security concerns over a BNSF single line movement. The route would also pass through several large Canadian cities, as well as Minneapolis and Chicago, two High-Threat Urban Areas that are not part of the BNSF single line movement to Kansas City. All of these factors have historically discouraged Canexus from seriously exploring this alternative to BNSF for transporting our chlorine to the Kansas City interchange for further transportation by UP to our customers.

¹ Dakota, Montana & Eastern RR Corp. and the Iowa, Chicago and Eastern Railroad.

BNSF alternatively asserts that Canexus could have made transportation arrangements with CN to move chlorine from North Vancouver to CN/UP interchanges for furtherance to the Texas, Illinois, and Arkansas destinations at issue. However, this would require Canexus to breach its contract with UP, since CN cannot interchange with UP at Kansas City. This contract embodies UP's clear, stated preference for interchanging this traffic with BNSF in Kansas City. In any event, the CN UP routings available (CN-Superior-UP or CN-Salem-UP) are also significantly longer route miles than a BNSF-Kansas City-UP routing – generally about 400 miles longer – which like the CPR routing discussed above, also entail increased transportation risks, inefficient operational routings, and greater potential safety and security hazards.

I also dispute several factual allegations made by BNSF. First, Canexus did not negotiate a private transportation agreement with UP for interline movements over Kansas City “unbeknownst to BNSF.” Canexus, often me personally, advised BNSF about our intention to enter into new contracts with UP numerous times through e-mail correspondence and telephone conversation. BNSF itself states in its Answer to our Request that “BNSF admits that between March 3 and April 8, 2011 BNSF was informed of the pending contract negotiations between Canexus and UP.” BNSF's filing also fails to mention that Canexus twice sought BNSF input into the most appropriate interchange for the traffic in question (November 22, 2010 and December 3, 2010) and BNSF failed to respond to Canexus' requests.

I also disagree that BNSF informed Canexus in our January 10, 2011 meeting that it intended to use Portland as the interchange for all UP-destination traffic. If this was BNSF's position it was very poorly communicated because Canexus asked BNSF for

rates over Kansas City in the January 10 meeting and BNSF subsequently quoted a rate to Kansas City on January 20, 2011 without any indication that the rate was restricted in any way. In fact, it wasn't until March 1, 2011 that Canexus realized BNSF was only prepared to provide rates for interchange with UP at Portland.

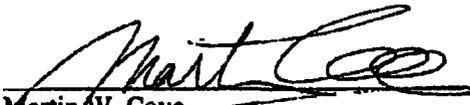
I would also comment on BNSF's assertion that Canexus "acknowledged the logic of having other railroads that serve destinations that could not be served by BNSF be responsible for the long haul on those movements." Canexus met with BNSF in Fort Worth on October 29, 2010 to discuss chlorine rates and at that meeting Canexus committed to shift business formerly moving long-haul BNSF but terminating at destinations served only by UP, CP or CN to the terminating carrier. In keeping with that philosophy it is important to point out that in every instance where Canexus has shifted business from BNSF long-haul to another carrier, that carrier could both originate and terminate the business, facilitating a single line haul. In Canexus' view, this avoided the need for additional interchanges, avoided potential out of route miles and helped mitigate security and safety concerns. These circumstances do not exist for traffic moving to UP destinations over Kansas City. In addition Canexus felt in fairness that it should, wherever possible, recognize the standard commercial practice of railroads to maximize long-hauls through the railroad's power to influence the interchange as the originating carrier.

In a related matter, BNSF asserts that Canexus agreed to shift the BNSF-UP interchange on traffic moving to Omaha, NE from Council Bluffs, IA to Portland, OR and cites this as another example where Canexus "acknowledged the logic" of BNSF's desire to short-haul itself. In fact, Canexus objected strenuously to this change and

communicated our objections to BNSF on several occasions. However, BNSF unilaterally cancelled its Rule 11 rates to Council Bluffs on 20 days notice effective October 20, 2010. Fortunately for Canexus, UP agreed to provide a Rule 11 rate from Portland to Omaha on November 5, 2010. However, during the 15 days period between the BNSF rate cancellation and the UP rate publication, Canexus was without a rate and therefore unable to ship to this customer.

VERIFICATION

I, Martin W. Cove, verify under penalty of perjury that the foregoing is true and
Correct and that I am qualified and authorized to file this statement.


Martin W. Cove

Executed June 20, 2011

CERTIFICATE OF SERVICE

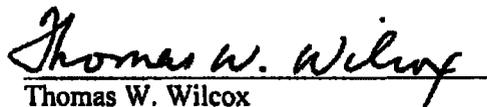
I do hereby certify on this 20th day of June, 2011 that I have delivered a true and correct copy of the foregoing *Reply to BNSF'S Response to the Board's Order Of June 8, 2011 Regarding Its Legal Position* to the following addressees at the addresses stated via email and hand delivery:

Samuel M. Sipe, Jr.
Anthony J. LaRocca
Steptoe & Johnson LLP
1130 Connecticut Avenue, NW
Washington, DC 20036-1795

Michael L. Rosenthal
Covington & Burling LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004
Union Pacific Railroad Company

and via U.S. Mail to:

J. Michael Hemmer
Louise A. Rinn
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179


Thomas W. Wilcox

TAB 4



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BRIAN DAN CULLINS
STEVEN JOHN FELLMAN
EDWARD D. GREENBERG
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WRITER'S DIRECTORIAL NUMBER
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EXPEDITED CONSIDERATION REQUESTED

September 14, 2011

Via E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

**Re: *Canexus Chemicals Canada L.P. v. BNSF Railway Company*, STB
Docket No. FD 35524**

Dear Ms. Brown:

By Decision served June 21, 2011 in this proceeding, the Board commenced a Board-sponsored mediation in this proceeding and suspended additional formal action pending a further Board order. On August 24, 2011, the mediators appointed by the Board for this case hosted a mediation session in the Board's offices between Canexus Chemicals Canada L.P., BNSF Railway Company, and the Union Pacific Railroad. Unfortunately, the attempt to mediate this dispute has been unsuccessful. Canexus accordingly asks the Board to re start its formal consideration of Canexus Request for Establishment of Common Carrier Rates and to issue a decision before September 29, 2011. The common carrier rates BNSF established for transportation from Canexus' facility in North Vancouver and from Marshall, Washington to Kansas City for interchange with UP are due to expire on September 30, 2011. Consequently, absent further extension of the rates voluntarily by BNSF or by order of the STB, the relief Canexus sought when filing its Request, namely to require BNSF to establish common carrier rates so this traffic can continue to move – is urgently needed.

Ms. Cynthia T Brown
Office of Proceedings
Surface Transportation Board
September 14, 2011
Page 2

Please do not hesitate to contact the undersigned if you have any questions.

Regards,



Thomas W. Wilcox

Attorney for Canexus Chemicals Canada L.P.

cc: Counsel for BNSF Railway
Counsel for UP

TAB 5



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September 19, 2011

Via E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

**Re: *Canexus Chemicals Canada L.P. v. BNSF Railway Company*, STB
Docket No. FD 35524**

Dear Ms. Brown:

This letter is filed on behalf of complainant Canexus Chemicals Canada L.P. ("Canexus") for the purpose of adding relevant new information to the record for decision in this proceeding. Specifically, BNSF Railway Company's ("BNSF") opposition to Canexus' Request for Order Compelling Establishment of Common Carrier Rates is based in part on a claim by BNSF that the CP Railway provides a viable option to BNSF to transport Canexus' chlorine from North Vancouver to Kansas City.¹ Apart from the threshold issue of whether the existence of an alternative should even factor in to the STB's analysis of a request for common carrier rates, Canexus has vigorously disputed this claim, since the CP Railway movement would be significantly longer and involve an additional railroad in the DM&E/ICE railroad, among other reasons.² Because of these factors and Canexus' belief that transporting its chlorine to Kansas City via CP Railway would be significantly more costly than via BNSF, Canexus has never seriously considered this alternative.³

¹ BNSF Railway Company's Response to the Board's Order of June 8, 2011 Regarding its Legal Position at 3, 10.

² Canexus' Reply to BNSF's Response to the Board's Order of June 8, 2011 Regarding its Legal Position at 8, Verified Statement of Martin W. Cove at 2.

³ Cove V.S. at 2.

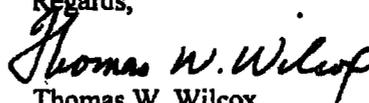
Ms. Cynthia T. Brown
Office of Proceedings
Surface Transportation Board
September 19, 2011
Page 2

Nevertheless, Canexus recently submitted a request to CP Railway for a common carrier rate from North Vancouver to Kansas City for interchange with UP. As shown by the attached exchange of emails between Canexus and CP Railway, the common carrier rate established by CP Railway for this transportation is nearly 50% higher than the rate of \$18,980 BNSF established for its transportation to the Kansas City interchange, which rate Canexus estimates is multiples of BNSF's variable costs of providing this service.

The common carrier rate established by CP Railway confirms that, in addition to the operational problems and inefficiencies associated with a CP Railway movement from North Vancouver to Kansas City, it makes absolutely no economic sense for Canexus to consider this alternative. This is further proof that Canexus' request to BNSF for a common carrier rate from North Vancouver to Kansas City for interchange with UP and furtherance to Canexus' customers pursuant to the rail transportation contract between UP and Canexus was reasonable, and BNSF should be required to continue providing a common carrier rate for this transportation.

Please do not hesitate to contact the undersigned if you have any questions.

Regards,



Thomas W. Wilcox

Attorney for Canexus Chemicals Canada L.P.

cc: Counsel for BNSF Railway
Counsel for UP

Attachment 1

From: Cove, Marty (North Vancouver)
Sent: Friday, August 26, 2011 9:08 AM
To: Arthur Feygelson
Subject: Rate Request: Chlorine, North Vancouver, BC to Kansas City, MO

Arthur, Canexus ships chlorine to a variety of receivers in the US Mid-South. Those receivers are served by UP (Local), but UP is unable to originate the business from North Vancouver. I'm wondering if CPR could please provide Canexus with a quote to move chlorine from North Vancouver to Kansas City, MO to interchange with UP at that location. Volumes YTD to August 22nd to those customers that would utilize this rate are 56 railcars and we believe that this is representative of going forward volumes. Your quick response to this message would be most appreciated.

Regards,

Marty Cove

Manager, Logistics

Canexus Chemicals Canada LP

100 Amherst Ave | North Vancouver, BC | Canada V7H 1S4

E-Mail: marty.cove@canexus.ca

Phone: (604) 924-2816

Cell (604) 612-7609

Fax: (604) 929-6918

IMPORTANT NOTICE This message is intended for the individual or entity to which it is addressed and may contain information that is privileged, confidential, and/or exempt from disclosure under applicable law. If you are not the intended recipient, you are hereby notified that copying, forwarding or other dissemination or distribution of this message is prohibited and that taking any action in reliance on the content of this message is to be avoided. Should you receive this e-mail in error, please notify the sender immediately via e-mail or call (403) 571-7300 and delete this message from your system. Thank you.

From: Arthur Feygelson [mailto:Arthur.Feygelson@cpr.ca]
Sent: Wedn -day, September 14, 2011 02:52 PM
To: Cove, Marty (North Vancouver)
Subject: Chlorine rates for furtherance on the UP

Marty-

CPRS can offer the following rates for chlorine subject to standard CPRS Tariffs & Conditions (terms similar to our publication CPRS 4550 for handling to the Twin Cities MN):

North Vancouver BC to Chicago IL
\$24,189 US per car

North Vancouver BC to Kansas City, MO
\$26,800 US per car

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arthur.feygelson@cpr.ca
Account Manager - Chemicals
CANADIAN PACIFIC
PO Box 389, Dunmore PA 18512 USA
F 570 344 5781
F 570 344 1782
C 412 473 7337
Customer Service 188 33-8111
Tariffs & Bulletins:
<http://www.cpr.ca/en/customer-centre/tariffs/Pages/default.aspx>

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October 20, 2011

Via E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

**Re: *Canexus Chemicals Canada L.P. v. BNSF Railway Company*, STB
Docket No. FD 35524 and NOR 42131**

Dear Ms. Brown:

Accompanying this letter for e-filing in the referenced dockets is complainant Canexus Chemicals Canada L.P.'s Reply to Petition of BNSF Railway Company to Vacate the Emergency Service Order and Establish an Expedited Schedule to Address Complainant's Common Carrier Claims.

Please do not hesitate to contact the undersigned if you have any questions.

Regards,

Thomas W. Wilcox

Attorney for Canexus Chemicals Canada L.P.

cc: Counsel for BNSF Railway
Counsel for Union Pacific Railroad Company
Counsel for CP Railway

the Board, continues to try and justify its actions with gross distortions of the underlying facts and misstatements of law.

As a preliminary issue, BNSF, in its misguided zeal to attempt to portray Canexus as an obstructionist in this proceeding, violated the Board's rules governing mediation by revealing details of that unsuccessful process in this proceeding. To support its theme that Canexus has created its own service emergency by being picky about a supposed plethora of rail rate offers placed before it, BNSF states that "while the substance is confidential, Canexus has also rejected the commercial terms offered to it for continued rail service offered to it for continued rail service to Kansas City by BNSF during STB-sponsored mediation." Petition at 2. This statement, and the purpose for which it is made, is a clear breach of the Board's rules governing the strict confidentiality of mediation proceedings. 49 C.F.R. § 1109.3, which governs all mediation proceedings conducted under the Board's auspices, provides:

In all ADR 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. (emphasis supplied.)

And, 5 U.S.C. § 574(b) makes it clear that a "party to a dispute resolution proceeding shall not disclose . . . *any* dispute resolution communication." (emphasis supplied.) Despite this clear prohibition, BNSF has seen fit to spread on the public record Canexus' response to a proposal made during the mediation and attempt to use that response to support BNSF's substantive position. This is both unfortunate and inappropriate.

As the Board will recall, it was BNSF that requested mediation in the first instance.¹ Canexus initially objected to that request, primarily because of its expressed concern that the matters would involve discussions of a confidential contract it had entered into with the UP to which BNSF was not a party.² Notwithstanding the reservations of Canexus, the Board ordered mediation and specifically directed the mediator to take steps to protect the confidentiality of those contract terms.³ BNSF has breached the confidentiality terms of the mediation by disclosing communications that took place during that session in an attempt to paint Canexus (incorrectly) as unreasonable and obstructionist. Those communications are not admissible in this matter. 5 U.S.C. §574(c).

BNSF's actions here threaten to discredit the ADA process established by the Board. Why should any complainant agree to participate in Board-supervised mediation requested by a railroad in the future if the railroad may offer a proposal no rational shipper would accept and then try to use the complainant's decision to not accept the proposal to the railroad's advantage later in the formal part of the proceeding? Consequently, the Board should summarily strike this passage from BNSF's Petition

¹ BNSF Request to Refer the Parties Interchange Dispute to Board Supervised Mediation, filed June 15, 2011.

² See letter from Thomas W. Wilcox to Cynthia T. Brown, dated June 20, 2011. Although not expressed in its letter to the Board at that time, Canexus was also concerned that BNSF would use the mediation to gain some tactical advantage in the expected event that the mediation failed to resolve the problem caused by the carrier's decision not to comply with its common carrier obligation to provide rates and service to Kansas City for the traffic in question. As it turns out, by misusing the mediation process, BNSF has now done exactly what concerned Canexus.

³ STB FD Docket 35524, Decision served June 21, 2011 at 2.

from the record in this proceeding both because its inclusion breaches the rules relating to ADR efforts and acts as a disincentive to participation in future mediations.

A. BNSF's Claims that Canexus has Multiple Alternatives to BNSF are False

BNSF's petition continues to try and make the facts of this case much more complicated than they actually are. As explained in Canexus' other filings in this case, for years its chlorine has moved to UP-served destinations in the Western United States via joint line moves with BNSF and UP. These movements have been pursuant to common carrier rates established by BNSF to BNSF/UP interchange points, and from those interchange points to the final customer via rail transportation contracts between UP and Canexus. Canexus has a contract with UP for the transportation of its chlorine from the BNSF/UP Kansas City interchange to customers in Texas, Illinois and Arkansas. It is undisputed that BNSF and UP have an established, efficient interchange in Kansas City. Indeed, the very movement that Canexus sought to establish in its May 25 Request for an Order Compelling the Establishment of Common Carrier Rates has been in place since April of this year and 90 carloads of chlorine have been efficiently and safely transported under the BNSF common carrier rates and UP contract since that time. Nevertheless, because of its business decision to short haul itself on certain chlorine movements starting in 2011 BNSF first refused to provide the common carrier rates to Kansas City and is now vigorously resisting keeping in place the "temporary" common carrier rates it established which led to the filing of Canexus' formal Request.

There is no viable or effective potential alternative to BNSF for transportation of chlorine from North Vancouver and Marshall to the Kansas City Interchange. Prior to CP Railway's ("CP") intervention in this proceeding Canexus had demonstrated that CP,

which has never transported Canexus' chlorine from North Vancouver to Kansas City, is not a viable alternative to BNSF. The routing is 500 miles longer, more circuitous and less efficient, all of which factors BNSF simply ignores.⁴ Similarly, even if it was relevant here (which is not the case), the potential "rate that CP might charge"⁵ was not commercially viable. Hence, BNSF is simply incorrect when it continually asserts that either its proposal at mediation or the "offer" from CP were "commercial terms."

But BNSF's claims regarding the alleged CP alternative are moot. On October 5, 2011, CP informed the Board that it had made no formal rate proposal to Canexus, and that it had not established a rate or terms for this transportation. On October 18, 2011, CP informed Canexus via email that its "informal quote expired as of October 13, 2011 (30 days as of the offer)," and that "CP does not plan to re-quote on this route." Finally, CP's October 19, 2011 reply to BNSF's Petition has erased any remaining shred of doubt that CP is not an alternative to BNSF for transporting Canexus' chlorine to the Kansas City interchange with UP.

CP has confirmed what the Board correctly pointed out in its Service Order Decision: Canexus has no actual rail alternative to BNSF for transportation from North Vancouver to Kansas City for interchange with UP and furtherance on to Canexus customers. Consequently, if BNSF does not continue to provide this service to Kansas

⁴ In its Petition BNSF attempts to further complicate the facts by mentioning Canadian National Railway as a potential alternative. But CN does not have any interchange with UP at Kansas City.

⁵ Letter to Board from Terrence Hynes on behalf of CP Railway, dated October 5, 2011 at 1.

City, the Canexus contract with UP is effectively nullified and Canexus will be unable to fulfill its obligations to its customers in Texas, Illinois, and Arkansas.

BNSF's arguments that Canexus has alternatives to BNSF can be broken down into one basic premise: as long as BNSF can identify any potential alternative to it providing common carrier rail service to an established interchange point BNSF deems too far away – no matter how costly or circuitous the potential alternative is (or even unsafe, since BNSF does not even concede this point) – BNSF can be relieved of its common carrier obligation to provide service to that interchange point, even if the shipper and the connecting railroad have entered into a rail transportation contract.⁶ BNSF's position is unsupported, unsupportable, and directly contrary to the recognized and necessary national policy, highlighted by the Board in the Service Order Decision, that chlorine and other TIH commodity shipments are vital to the Nation's economy and the Nation's railroads have an obligation to transport them. As such, the Board must prevent BNSF from abdicating its common carrier responsibilities for its own private interests.

Moreover, CP's participation in this proceeding has affirmed that the BNSF segment of the joint route is a "bottleneck" segment, since Canexus has no other alternative to BNSF for transportation from North Vancouver and Marshall, Washington to the Kansas City interchange. Canexus has explained in its other filings in this case that the law is clear that BNSF must continue to provide service over its bottleneck segment of the entire route due to the undisputed fact that the interchange is feasible and efficient, and the presence of the contract between UP and Canexus. *Central Power & Light Co. v.*

⁶ Taken to its next logical step, BNSF's position would permit it to abdicate its common carrier responsibilities if there was *any* potential alternative to it for transporting the commodity by any other mode, no matter how far fetched or infeasible.

Southern Pacific, et al., 2 S.T.B. 235, 244 (1997).⁷ Indeed, under these circumstances the existence of the rail transportation contract between UP and Canexus should be the conclusive factor in determining that BNSF must continue to provide common carrier rates and service to the Kansas City interchange. See STB Finance Docket No. 33467, *FMC Wyoming Corp and FMC Corp. v. Union Pacific RR Co.* (served December 12, 1997), at 4 ("once a shipper has a contract rate for transportation to or from an established interchange, the bottleneck carrier must provide a rate that permits the shipper to utilize its contract with the non-bottleneck carrier.") (emphasis added).

Finally, BNSF contends, remarkably, that it was somehow "irresponsible" for Canexus to sell its products to markets served by UP. Petition at 15. BNSF, which was created by merging a number of railroads with the promise of providing long haul, efficient and competitive rail service, thus contends that it also became the arbiter of which markets a shipper should be able to serve and now should be able to short haul traffic it deems undesirable. Notwithstanding what BNSF might prefer, it is a common carrier, has no legitimate role in determining its customers' markets, and is obligated to provide service over its system on reasonable demand.

B. The Board's Application of Section 11123 Was Proper Under the Circumstances of this Proceeding

BNSF's contention that the Board misapplied section 11123 is simply wrong and contrary to the plain and unambiguous statutory language. The Board's reliance on this provision was fully justified by the facts before it, authorized by the plain language of the

⁷ BNSF's petition includes a rehash of the arguments BNSF has previously made about the Board's jurisdiction over cross-border movements. Canexus has addressed this issue in its other filings in the case and intends to do so again in its submittals pursuant to the Board's Service Order Decision.

statute, and was well within the Board's broad authority to apply its specialized expertise to resolve a specific dispute. This provision clearly states that, except for disputes between railroads over the terms of compensation not applicable here, "the Board may act under this section on its own initiative or on application without regard to subchapter II of chapter 5 of title 5." 49 U.S.C. 11123(b)(1)(emphasis supplied). Thus, not only was the Board fully within its authority to act on its own motion, the statute plainly states that the Board need not comply with the notice and hearing requirements of the Administrative Procedure Act. Accordingly, BNSF's extended arguments that the Board somehow misapplied this clearly worded statute are perplexing, to say the least.⁸

BNSF further complains that the Board has previously acted with "great restraint" when exercising this authority (Petition at 6) and that it should accordingly not set some sort of contrary precedent by granting relief to Canexus. However, BNSF cites no case in support of this forbearance that is in any way similar to the controversy it has created. BNSF clearly provides rail service, even chlorine transportation, over this routing in the normal course of business, but has inexplicably decided - and threatened through several deadlines - to cease doing so for Canexus and for BNSF's interchange partner UP.

⁸ Moreover, the Board clearly has both the general authority, under 49 U.S.C. § 721(a), and the ancillary authority, to take broad action to carry out its responsibilities to ensure that common carriers continue to provide service over their lines. The courts have long recognized that an agency may exercise ancillary authority when necessary to accomplish its statutory responsibilities. *See, e.g., ICC v. Am. Trucking Ass'ns*, 467 U.S. 354, 365-71 (1984); *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 636-38 (1978); *United States v. Chesapeake & Ohio Ry.*, 426 U.S. 500, 510 (1976); *Comcast Corp. v. FCC*, 600 F. 3d 642, 651-60 (D.C.Cir. 2010). Here, the Board's exercise of its authority is necessary to ensure that BNSF's gaming tactics do not wreak further harm on this shipper's ability to market its product.

Notwithstanding BNSF's protests, section 11123 was literally drafted to give the Board authority to quickly remedy the "unauthorized cessation of operations" of a common carrier that has a "substantial adverse effect" on a shipper. Once such a finding is made, the statute plainly gives the Board authority to "direct the handling, routing, and movement of the traffic of a rail carrier . . . over its own or other railroad lines." 49 U.S.C. 11123(a). That BNSF has selectively targeted Canexus or its chlorine traffic does not moot the essential principle that the Board has the authority to require a railroad to provide service over its own line if the criteria of the statute are met for an individual shipper.

BNSF curiously cites *Granite State Concrete Co. & Milford-Bennington R.R. Co., Inc. v. Boston and Maine Corp & Springfield Terminal Ry. Co.*, STB Docket No. 42083 (STB served Sept. 15, 2003) for the proposition that the Board may not properly issue emergency service orders in situations where "rail service is in fact available." (Petition, at 7.) In the first, place CP has confirmed that no alternative to BNSF is available to the Kansas City interchange. But in any event, that case is clearly not helpful to BNSF's position since the issue was whether the shipper could compel the serving railroad to make its tracks available to another carrier so that the latter could provide three switches per day as opposed to the two it was currently receiving. Here, BNSF believes it has the right to refuse any service at all.

Similarly, BNSF's reliance on *Expedited Relief for Service Inadequacies*, 3 S.T.B. 968 (1998) is misplaced and takes the quoted sentence out of context. The issue before the Board that was discussed at the cited pages related to whether the Board's proposed rules pertaining to the provision of "alternative rail service" covered situations where the

shipper had access to competing rail service. But here, no alternative to BNSF, let alone a competitive alternative, exists in this record, and so the Board is not ordering "alternative" rail service, but only that BNSF continue to provide the service required of a common carrier along its own line.⁹

Another red herring BNSF serves is its contention that the emergency service order issued here "cannot be used to address a shipper's concerns over rate levels." The several cases cited by BNSF are of course completely inapposite, as this particular matter has nothing to do with the level of the rates BNSF has established, but BNSF's desire to not have any rates in effect in the first instance. The Service Order Decision of which BNSF complains now was a response to that railroad's combination of refusing to provide service coupled with its tactics of waiting until the last moment to "voluntarily" extend its service along the route for some arbitrary period, which it refused to extend further, thus forcing the Board to act. There may well be a time and place to determine whether the rates BNSF has charged are unreasonable, but this is not that time.

Moreover, the Board's invocation of section 11123 in this dispute is salutary and justified for another very important reason: it removes control of this proceeding from BNSF, which has used the spectre of terminating its rates to Kansas City as a means to

⁹ For its part, UP's Reply to the BNSF Petition initially suggests that CP provides an alternative routing. As noted above, that suggestion would be incorrect even if CP was in fact willing to provide a rate, which of course is not the case. And, UP's citation of *Albemarle Corp. - Alternative Rail Service - Line of the Louisiana & North West R.R.*, STB Finance Docket No. 34931 (STB served Oct. 6, 2006), and *Keokuk Jct. Ry. - Alternative Rail Service - Line of Toldeo, Peioria & Western Ry.*, STB Finance Docket No. 34397 (STB served Oct. 31, 2003) as a purported basis for withholding the use of the section 11123(b) remedy is just as defective as are the arguments of BNSF on this issue. Both of those cases involved rate disputes between the shipper and the carrier. Here, BNSF is unwilling to provide service at *any* rate.

control the pace and the content of the record for decision. One of the more remarkable self-serving assertions in its Petition is the notion that BNSF is somehow "being penalized for acting responsibly while this dispute has been pending" Petition, at 13. The record belies that assertion and is graphic evidence of why the Board's action was both appropriate and necessary.

This controversy began when BNSF established "temporary rates" for this service on April 8, 2011, but only until June 30, 2011 for the stated purpose of giving Canexus time to rework its contractual agreement with UP. This action prompted Canexus to file its Request on May 25, 2011, and the Board to hurriedly schedule oral argument on the skimpy record at that time in order to be able to act by BNSF's imposed arbitrary deadline. Although Canexus was prepared to go forward with oral argument BNSF requested mediation and unilaterally extended its rate, but only until July 31, 2011, thus creating another deadline for Canexus, UP, and the Board. Due in large part to BNSF, the actual mediation session was delayed until August 24. In the interim, BNSF made additional short extensions, but had set September 30 as the new deadline for the rates to terminate, which put undue pressure on the mediators and the parties and affected the discussion. When mediation was unsuccessful and Canexus asked to restart the proceeding on September 14, BNSF unilaterally extended the rates again, but only to October 15. BNSF did not further extend the rates, thus forcing the Board to act by October 14 to preserve service. Having received decision adverse to it on October 14, BNSF now says it "would again be willing to provide service to the Kansas City interchange," but BNSF now wants to bargain with the STB and condition its extension on STB's agreement with BNSF's terms to (1) vacate the emergency service order and

(2) commit to “hear and fully resolve the underlying legal claims raised by Canexus by a date certain, which BNSF believes should be within 60-90 days.”

The Board’s use of its authority under section 11123 was not only entirely justified by the plain language of the statute and the record of this proceeding, it will permit the STB, not BNSF, to control the agenda and content of the record for decision. Completely aside from this abuse of the Board’s processes, BNSF’s conduct has interfered with Canexus’ legitimate business interests. Clearly, the uncertainty of the rate and route expiring or not makes it very difficult for Canexus to plan and operate its business. Consequently, the Board’s exercise of its authority under section 11123 in these circumstances enables the service to continue in a safe and efficient manner and Canexus to intelligently market and ship its product while the dispute is resolved under the control of the Board.

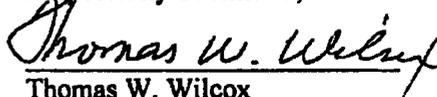
In any event, the Board’s expedited procedural schedule would appear to lead to a decision on the merits well within the 90-day window BNSF deems to be acceptable. Regardless, there is no need for the STB to negotiate with BNSF over how the STB should manage its docket.

C. Conclusion

The Board’s invocation of section 11123 to resolve the specific issues before it and ensure that the transportation at issue continues pending a final resolution of the legal issues presented by Canexus’ complaint was appropriate and well within the authority granted to the Board by that statutory provision. Canexus is completely agreeable to proceeding as the Board has determined in the Service Order Decision. BNSF’s objections to the Board’s Service Order Decision are unfounded and should be rejected,

as should also BNSF's continued attempts to muddy the waters of this fairly straightforward dispute. BNSF clearly has the legal obligation to provide common carrier rates and service to Canexus for the transportation of chlorine from Canexus' North Vancouver facility and from Marshall, Washington, to the Kansas City interchange to be transported to UP-served destinations pursuant to the rail transportation contract between Canexus and UP. Its threat to cancel those rates and routes justifies the Board's decision to compel their continuation.

Respectfully Submitted,



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October 20, 2011

CERTIFICATE OF SERVICE

I do hereby certify on this 20th day of October, 2011 that I have delivered a true and correct copy of the foregoing *Reply to Petition of BNSF Railway to Vacate the Emergency Service Order and Establish a Procedural Schedule to Address Complainant's Common Carrier Claims* to the following addressees at the addresses stated via email and regular mail:

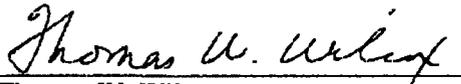
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CERTIFICATE OF SERVICE

I do hereby certify on this 20th day of October, 2011 that I have delivered a true and correct copy of the foregoing Opening Statement to the following addressees at the addresses stated via email and regular mail:

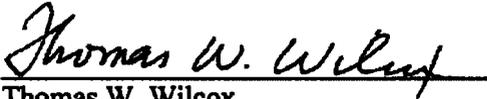
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