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November 23, 2011

VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

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Office of Proceedings

NOV 23 2011

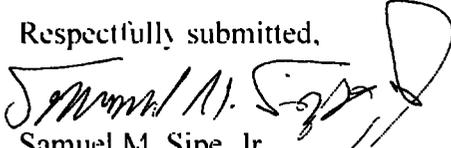
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Re: ***Canexus Chemicals Canada L.P. v. BNSF Railway Company,***
STB Docket No. 42131 & Finance Docket No. 35524

Dear Ms. Brown:

Enclosed is the Public Version of the Reply Statement of BNSF Railway Company for filing in the above-captioned matter. Certain information at page 13 has been redacted. A Version of this Reply Statement containing the redacted information is being filed separately under seal.

Respectfully submitted,

Samuel M. Sipe, Jr.
Counsel for BNSF Railway Company

cc: Counsel of Record w/enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

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Office of Proceedings

NOV 23 2011

Part of
Public Record

CANEXUS CHEMICALS)
CANADA L.P.)
))
Complainant,)
))
v.)
))
BNSF RAILWAY COMPANY)
))
Defendant.)

Docket No. 42131
Fin. Docket No. 35524

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MANAGEMENT

REPLY STATEMENT OF BNSF RAILWAY COMPANY

Pursuant to the Board's October 14, 2011 and November 1, 2011 Orders in the above-captioned matter, BNSF Railway Company ("BNSF") hereby submits its Reply Statement in response to opening statements by Canexus Chemicals Canada, L.P. ("Canexus"), Union Pacific Railroad Company ("UP") and Canadian Pacific Railway Company ("CP") filed on November 3, 2011.

I. Introduction

The Board should not use this dispute to expand the law regarding the common carrier obligations of railroads with respect to the handling of TIH commodities. The issue presented in this case is straightforward and discrete – should BNSF interchange Canexus's chlorine traffic at issue here with UP at Portland and Spokane or at Kansas City? Disputes between railroads as to the proper interchange location for joint-line traffic are rare, but occasionally the Board must step in to resolve them. When it does so, the Board's decision should be fact-based and narrowly limited to the particular interchange dispute.

BNSF believes that the proper interchange points should be Portland and Spokane.

BNSF proposes Portland and Spokane interchanges as part of a broader, principled framework for handling Canexus's multiple Canadian-originated chlorine movements under which the rail carrier serving the U.S. destination would handle the long haul. Such an approach would ensure that Canexus obtains adequate service for the chlorine that Canexus exports to the United States, and it would give effect to the statutory preference accorded to the originating carrier for the establishment of an appropriate interchange location. Interchanges at Portland or Spokane would be at least as efficient as an interchange at Kansas City. Indeed, BNSF already interchanges Canexus's chlorine with UP at Portland for California destinations. UP claims that BNSF and UP should interchange Canexus's traffic at Kansas City. UP's sole argument is that BNSF's past practice has shown that such an interchange is feasible and reasonably efficient. BNSF believes that its framework for resolving this interchange dispute, which would be applied consistently to all Canexus movements in which BNSF participates, is the better approach for resolving the interchange dispute and that the Board should adopt it in this case.

This case arises against the backdrop of increasingly contentious issues relating to the common carriage transportation of ultra-hazardous materials, particularly chlorine. Canexus has tried to exacerbate the interchange dispute at issue here by inaccurately portraying this case as one involving a railroad's refusal to comply with its common carrier obligation to handle TIH commodities. That is simply not the case. BNSF has agreed to move Canexus's chlorine to interchanges with UP in the United States, and UP has apparently agreed to move the chlorine to UP-served destinations in Texas, Illinois and Arkansas. There is no danger that Canexus will not be able to receive adequate service. The only question in this case is where the interchange between BNSF and UP should take place.

The Board's October 14, 2011 Decision in this case adopted Canexus's characterization of the issue as involving common carrier obligations, stating that "[o]ne or both of these railroads [BNSF and UP] is violating its common carrier obligation by refusing to provide service."

October 14 Decision, at 5. BNSF respectfully asks the Board to reconsider this statement in its final decision. This is not a case about a railroad's refusal to provide common carrier service. It is a dispute only over the interchange between BNSF and UP that will take place for Canexus's traffic destined to UP-served destinations. The Board should expressly reject Canexus's contention that by insisting on Portland and Spokane interchanges, BNSF has violated its common carrier obligations.

While the interchange dispute itself is narrow, Canexus's actions in generating that dispute do point to one broader policy issue that demands resolution by the Board. The Board should make it clear in its decision in this case that a shipper of hazardous chlorine may not direct the routing of interline movements of that traffic through back room deals with individual railroads. Canexus's attempt to force its routing wishes on BNSF by entering into a contract with UP for a portion of the movement could create a very dangerous precedent. If the Board accepted Canexus's position that a shipper can determine where hazardous materials will be interchanged solely by entering into a contract for a portion of the movement, shippers would be able to direct the movements of hazardous traffic in ways that could be seriously detrimental to the public interest. A complex set of regulations governing TIH movements and routing is being developed by other agencies, including FRA and PHMSA. There could be serious unintended consequences that could undermine those other regulatory regimes if the STB were to give shippers the ability to direct the movement of hazardous traffic through contracting practices.

Canexus's reliance on the Board's *Bottleneck* decisions to justify its strategy is badly misplaced.¹ BNSF is not a bottleneck carrier for the movements of Canexus's chlorine at issue here, and this is not a case involving any of the competitive issues involved in the *Bottleneck* decisions. The issue here involves only the question of where the interchange between BNSF and UP will take place. The Board should make it clear that it will not allow a shipper to usurp a railroad's routing prerogative on critical and highly sensitive movements of ultra-hazardous materials.

II. Background

A. Factual Background

BNSF has addressed the facts relevant to this dispute in detail in prior pleadings, and it will not repeat that detailed discussion here. *See* BNSF Railway Co.'s June 15, 2011 Response to the Board's Order of June 8, 2011 Regarding Its Legal Position ("*BNSF's June 15 Legal Position*"). A brief summary is set out below.

Canexus is a Canadian manufacturer of chlorine whose manufacturing facilities are located in North Vancouver, British Columbia. Canexus is served directly by Canadian National Railroad ("CN"). BNSF and CP can receive Canexus's traffic from CN near Canexus's facilities in Canada pursuant to an interswitching arrangement with CN.

Canexus sells chlorine to a number of customers in the United States. Several of Canexus's customers are served directly by BNSF. Approximately two thirds of BNSF's total carloads of Canexus's chlorine are transported to BNSF-served destinations. For these

¹ *Central Power & Light Co. v. Southern Pac. Transp. Co.*, 1 S.T.B. 1059, 1069 (1996) ("*Bottleneck I*"); *Central Power & Light Co. v. Southern Pac. Transp. Co.*, 2 S.T.B. 235, 243-244 (1997) ("*Bottleneck II*").

movements, BNSF provides long-haul service from North Vancouver to the U.S. customers' facilities. Movements to these BNSF-served destinations are not at issue here.

Some of Canexus's chlorine is transported to U.S. customers in Texas, Illinois, and Arkansas that are served by UP. Canexus indicated in its November 3, 2011 Opening Statement that it also has customers in Louisiana and Missouri that are served by UP. All of that traffic originates at Canexus's North Vancouver facilities, but a small amount of that traffic moves through Marshall, WA, where there is a temporary storage facility for Canexus's chlorine tank cars. BNSF has agreed to bring Canexus's chlorine destined for UP-served customers of Canexus into the United States for interchange with UP. BNSF has proposed that the interchange points for UP-served destinations should be Portland, OR, for movements coming directly into the United States from North Vancouver, or Spokane, WA, for movements that go through the temporary storage facility near Marshall, WA.

The Portland and Spokane interchanges are consistent with a framework that BNSF proposed for dealing with all of Canexus's chlorine movements in which the carrier that serves the ultimate destination would be responsible for the long haul. BNSF handles the long haul on Canexus's movements to BNSF-served destinations. Since the destinations at issue here are served solely by UP, UP would be responsible for the long haul under this framework. Canexus had agreed with this framework in connection with a number of other movements of Canexus's Canadian chlorine to UP- and CP-served destinations. As explained by BNSF's Group Vice President, Marketing – Industrial Products, David L. Garin in a verified statement submitted in this proceeding on June 15, 2011, Canexus agreed with this framework in connection with its chlorine movements to its customers in Omaha and California that are directly served by UP, and

with its chlorine movements to St. Paul, MN, which is served by CP. *BNSF's June 15 Legal Position. Verified Statement of David L. Garin, at 8.*

But Canexus chose to ignore BNSF's proposed framework with respect to the UP-served destinations that are at issue here. In May 2011, Canexus apparently entered into a contract with UP for transportation of chlorine from Kansas City to UP-served destinations in Texas, Illinois, and Arkansas. Canexus then asked BNSF for a common carrier rate from North Vancouver to Kansas City for interchange with UP. When BNSF insisted that the proper interchange with UP for traffic that would ultimately be served by UP was Portland and Spokane, Canexus filed the complaint initiating this proceeding.

B. Procedural Background

Canexus's May 25, 2011 complaint alleges that BNSF violated its common carrier obligation by refusing to establish rates for transportation of Canexus's chlorine to Kansas City for interchange with UP. Canexus's allegations were initially addressed by BNSF, UP and Canexus in pleadings filed shortly after the complaint.

In its June 15, 2011 Response, BNSF explained that it had not violated any common carrier obligation. BNSF reiterated that it was willing to provide common carrier interline service with UP for Canexus's traffic. The only issue was the proper interchange point for that traffic. BNSF noted the existence of a jurisdictional issue raised by Canexus's claim that the issue involved BNSF's common carrier obligations, given that the traffic originates in Canada. But BNSF explained that the Board did not need to address the jurisdictional issue since BNSF agreed to bring the chlorine into the United States and the only question was where BNSF would interchange that traffic with UP. Finally, BNSF explained that it would be extremely bad policy to give shippers, particularly shippers of TIH commodities like chlorine, the ability to dictate

where interchanges would occur or how TIH will be routed by entering into contracts with one interline carrier and effectively excluding other participating interline carriers from the routing discussion.

UP argued that the interchange should take place at Kansas City. UP argued that since BNSF had previously moved Canexus's chlorine to Kansas City for interchange with UP, such an interchange was clearly feasible and at least reasonably efficient. While UP disagreed with BNSF as to the proper interchange point in this case, UP agreed with BNSF that the Board should not allow shippers to determine the routing of ultra-hazardous materials.

In its reply comments, Canexus argued that BNSF was a "bottleneck" carrier for the origin portion of the movements to UP-served destinations in Texas, Illinois, and Arkansas. Canexus argued that since it had a contract with UP for transportation over the destination segment of the movement, BNSF, as a supposed bottleneck carrier, was obligated to provide a rate for transportation over its bottleneck segment of the movement.

In response to a request by BNSF, the Board subsequently referred the dispute to Board-sponsored mediation and stayed consideration of the underlying dispute while the Board-sponsored mediation took place. An in-person mediation session took place on August 24, 2011, followed by additional communications between BNSF and Canexus over the next two weeks. Ultimately, the parties did not succeed in resolving the dispute, and on September 14, 2011, Canexus notified the Board that the mediation had not produced a settlement of the underlying dispute and requested that the Board renew formal consideration of Canexus's complaint.

In the meantime, Canexus asked CP to establish a rate for transportation of chlorine from North Vancouver to Kansas City for interchange with UP. CP responded with a rate quote on September 14, 2011. Canexus notified the Board that it had received a rate quote from CP but

that it had rejected that service offer on grounds that the rate was too high. According to Canexus, “it makes absolutely no economic sense for Canexus to consider this [CP] alternative.” *Canexus’s September 19, 2011 Letter*, at 2. CP subsequently filed a letter with the Board explaining that while it had offered to provide service at the quoted rate, it had not formally established a rate for that service because under Canadian law, a rate quotation is not formally established until it is published in a tariff or a confidential contract. *CP’s October 5, 2011 Letter*, at 1-2.

Following Canexus’s September 14, 2011 request that the Board renew its consideration of Canexus’s complaint, BNSF extended its common carrier pricing authority for movements of Canexus’s chlorine to Kansas City until October 15, 2011. On October 14, 2011, the Board issued an emergency service order directing BNSF and UP to provide emergency service to Canexus that was consistent with the existing transportation service pending the Board’s resolution of the underlying dispute. The Board reasoned that the “lack of any readily available alternative service coupled with the carriers’ refusal to provide through service cooperatively after October 15, 2011, constitutes a ‘failure of traffic movement’ under 49 U.S.C. §11123.” *October 14 Decision*, at 4. The Board also established a procedural schedule for filing additional comments on the issues raised by Canexus’s complaint, and it granted CP’s request to intervene.

BNSF immediately asked the Board to vacate its emergency service order. BNSF Railway Co.’s October 17, 2011 Petition to Vacate the Emergency Service Order and Establish an Expedited Schedule to Address Complainant’s Common Carrier Claims (“*BNSF’s Petition to Vacate*”). BNSF explained that there were no valid grounds for an emergency service order, and in any event, BNSF offered to maintain service to Kansas City voluntarily if the Board would commit to resolving the dispute promptly. The Board, in its November 1, 2011 decision, did not

address BNSF's arguments as to the flaws in the emergency service order, but the Board ruled that the emergency service order "is terminated upon BNSF reinstating the prior common carrier pricing authority preserving service to Canexus through the Kansas City point of interchange with UP." *November 1, 2011 Decision*, at 5. BNSF reinstated its prior common carrier pricing authority on November 4, 2011.

III. The Issue in this Case Is the Proper Interchange Location with UP, Not BNSF's Fulfillment of its Common Carrier Obligation.

A. BNSF has not violated its common carrier obligation.

Canexus inaccurately claims that this case is about BNSF's fulfillment of its common carrier obligations. It is not. BNSF has agreed to provide common carrier service for Canexus's Canadian traffic. This case involves a dispute about where that common carrier traffic will be interchanged with UP for delivery to UP-served destinations. UP has insisted on a Kansas City interchange while BNSF believes the proper interchange should be Portland and Spokane.

BNSF never refused to provide common carrier service for Canexus. BNSF responded to Canexus's request for service by offering to provide common carrier service that would allow the traffic to move to UP-served destinations via interchange with UP in Portland or Spokane. These were not the interchanges that Canexus wanted, but a railroad does not violate its common carrier obligations by offering to interchange traffic at a location of its choosing for its own commercial reasons, instead of an interchange demanded by a shipper. *See Burlington N. R. Co. v. United States*, 731 F.2d 33, 40 (D.C. Cir. 1984) ("[C]ourts have long recognized that when a carrier has the power to provide two or more options for interchanging traffic, each of which is independently reasonable, proper, and equal, it need not provide all such options to connecting lines but may instead offer only that option that best serves its own business interests"). The governing statute does not require a railroad to establish the specific interchange requested by the

shipper, especially when the commodity at issue is TIH/PIH and the routing of the traffic therefore raises operational and safety issues far more complex than the norm.

BNSF has offered to provide common carrier service and it identified the interchange point of its choosing for that common carrier service. BNSF satisfied its common carrier obligations. If BNSF's interline partner – here, UP – does not agree to the interchange point designated by BNSF, the Board must determine the proper interchange point so that the service will be provided. But it would be wrong to conclude that either carrier violated its common carrier obligation by failing to agree to an interchange point that another party sought to impose on it.

The Board in its October 14, 2011 Decision stated that “[o]ne or both of these railroads [BNSF and UP] is violating its common carrier obligation by refusing to provide service.” *October 14 Decision*, at 5. BNSF requests that the Board reconsider this preliminary characterization when it issues a final decision in this case. Once the Board determines the proper interchange point, the obligations of the interline partners would be determined by the Board's decision. But the failure to reach an agreement on the proper interchange in the absence of such an order should not be considered a violation of a carrier's common carrier obligations.

This is not a case where BNSF has refused to provide service. The finding of a common carrier violation here would be unduly strong medicine and could further embolden chlorine shippers to seek relief that goes beyond what is needed to resolve discrete disputes. Resolution of this case on the narrow basis of determining the proper interchange point poses the least risk of unintended consequences.

B. While the Board can resolve the interchange dispute, it lacks jurisdiction to extend BNSF's common carrier service obligation into Canada.

By treating this case as one involving only the proper interchange between BNSF and UP, the Board can avoid the need to address a serious jurisdictional problem created by Canexus's claim that BNSF has a common carrier obligation to provide service from North Vancouver, BC to Kansas City. As BNSF's explained in its June 15, 2011 filing, and CP addressed in the October 5, 2011 letter from Terence M. Hynes to Ms. Cynthia Brown, the Board does not have jurisdiction to order a rail carrier to take actions on Canadian soil, even if those actions relate to traffic ultimately destined for the United States. Thus, the Board could not order BNSF as a common carrier to provide a rate for transportation of chlorine from Canada to points in the United States.

The cases cited by Canexus on the jurisdictional issue are inapposite. The cases address the Board's authority to establish maximum reasonable rates on movements that cross the U.S. border. None of those cases suggests that the Board has the authority to order a carrier to take actions outside the United States. When a carrier provides transportation that crosses the U.S. border, the Board has the authority to determine the maximum rate that can be charged for that movement. But the Board cannot order a carrier to provide transportation outside the United States or, as here, to originate traffic outside the United States. The fact that the Board can regulate the rates charged for transportation when a carrier provides a cross-border movement says nothing about the Board's authority to order a carrier to provide such a movement.

There is no dispute that for movements that BNSF has agreed to bring into the United States for interchange with UP, the Board has the authority to determine where the proper interchange in the United States should take place. Therefore, the Board can avoid the jurisdictional problem created by Canexus's characterization of the issue in this case as involving

BNSF's common carrier obligation. BNSF has agreed to provide interline transportation with UP for delivery to customers located in the United States, and the Board unquestionably has jurisdiction to determine where the proper interchange point in the United States between BNSF and UP should be.

C. The Board should adopt BNSF's proposed framework for establishing the proper interchange locations for Canexus's traffic.

While BNSF has agreed to provide interline service to Portland and Spokane for interchange with UP, UP has not agreed to accept traffic from BNSF at those interchange locations. Instead, UP insists on receiving the traffic in interchange from BNSF at Kansas City. Railroads usually are able to work out interchange disputes without intervention by the Board, and the Board and its predecessor have made clear that they expect railroads to do so to the maximum extent possible. Accordingly, there is little law on how the Board resolves disputes over the proper interchange point where the railroads involved in the movement have not been able to resolve the issue.

In *Bottleneck II*, the Board stated that "if the carriers [in an interline movement] cannot agree on an interchange that would create that route, we will determine one." *Bottleneck II*, 2 S.T.B. at 243-44. The Board identified several factors relating to the characteristics of alternative routes that the Board would consider in the event the railroads are unable to reach agreement. *Id.* UP argues that a Kansas City interchange is appropriate under the *Bottleneck II* factors. While UP acknowledges that it has not investigated the characteristics of alternative routes, it nevertheless concludes that "BNSF's prior establishment of a Kansas City interchange with UP for Canexus chlorine traffic moving to the destinations at issue demonstrates that the interchange location is feasible and that the routing is at least reasonably efficient." *UP's November 3, 2011 Opening Statement*, at 4. UP asserts that Kansas City is a commonly used

interchange between BNSF and UP for general freight traffic originating in the Pacific Northwest destined for Arkansas, Illinois and Eastern Texas. *Id.*

BNSF does not contest UP's claim that the interchange of Canexus's traffic at Kansas City is feasible and at least reasonably efficient. But BNSF's current practice alone is not a sufficient reason to override BNSF's statutory routing discretion going forward by establishing Kansas City as the proper interchange point. Indeed, prior to March 2011, BNSF had not historically interchanged Canexus' chlorine traffic with UP at Kansas City.² It would be arbitrary and patently unfair to favor a Kansas City interchange simply because BNSF has agreed to move Canexus's chlorine to Kansas City for interchange with UP while the dispute with Canexus has been pending.

Moreover, an interchange of Canexus's chlorine at Portland is clearly feasible and "at least reasonably efficient," since BNSF and UP have interchanged Canexus's chlorine at Portland in the past. *BNSF's June 15 Legal Position, Verified Statement of David L. Garin*, at 7-8. Indeed, BNSF and UP interchanged { } carloads of TIH commodities at Portland in the one-year period between August 4, 2010 and August 4, 2011.³ As to the Spokane interchange, UP wrongly claimed that BNSF had "embargoed" the interchange of chlorine with UP at Spokane. BNSF explained that it has merely established a notice requirement for such movements to ensure that all safety and security rules will be met when the interchange occurs. *See Letter from Samuel M. Sipe, Jr. to Ms. Cynthia Brown*, at 1-2 (filed June 17, 2011).

There is no basis in the record for concluding that Kansas City is superior to either Portland or Spokane as interchange locations for Canexus's chlorine. Nor would it be

² See the attached verification of Howard T. Horn, BNSF's Market Manager-Industrial Products.

³ See the attached verification of Howard T. Horn.

appropriate, or even possible on this record, for the Board to undertake a thorough examination of the transportation characteristics of alternative routes to resolve the question of the proper interchange. The Board's experience in the *Entergy* case shows that such analyses can be lengthy and difficult. See *Entergy Arkansas, Inc. v. Union Pac. R.R. Co.*, STB Docket No. 42104 (STB served Mar. 15, 2011). Additional complications would be raised in a case like this involving TIH movements. Instead, the Board should adopt the reasonable framework proposed by BNSF for resolving the interchange issue in this case.

As explained by BNSF's witness David Garin, BNSF established interchanges for the UP-served destinations in Texas, Illinois, and Arkansas at Portland and Spokane as part of a broader and more comprehensive plan for serving Canexus's multiple destinations for chlorine traffic in the United States. Mr. Garin explained that Canexus's situation is unique, since Canexus manufactures its chlorine in Canada and exports the chlorine to diverse locations in the United States using different rail transportation providers.

BNSF proposed a framework for ensuring that Canexus's chlorine would be transported to the different U.S. locations in a way that shared the responsibility to provide the service among the railroads needed for the service. Specifically, BNSF proposed that the rail carrier that serves the U.S. destination would be responsible for handling the long haul. Thus, for movements where BNSF serves the destination – about two-thirds of the traffic that BNSF handles for Canexus – BNSF would accept the traffic in an interswitching arrangement from CN and move the traffic for the long haul to Canexus's U.S. customer. However, where other rail carriers serve the ultimate U.S. destination, BNSF would move the traffic to a feasible interchange with the other carrier closest to the origin and the other carrier would provide the long haul to the U.S. destination. For UP-served destinations, the feasible interchanges closest to

the origin are Portland and Spokane, therefore BNSF proposed those interchange locations for movements to UP-served destinations in Texas, Illinois, and Arkansas. BNSF believed that Canexus understood the logic and fairness of this approach until Canexus demanded the Kansas City service for UP-served destinations that gave rise to this proceeding.

BNSF's proposed framework is reasonable under the circumstances of this case, and it is consistent with the statutory provision that gives preference in routing to the originating carrier. *See* 49 U.S.C. §10705(a)(2).⁴ The originating carrier normally exercises its statutory preference by selecting the long haul in order to maximize its revenues and contribution. But in the case of TIH/PIH traffic, the risk of liability and the increased capital and operating costs often make it logical for the originating carrier to minimize its length of haul. It is reasonable for BNSF to prefer the short haul on movements where the destination is ultimately served by another railroad, and the statute protects BNSF's decision in that regard.

BNSF's proposed framework for serving Canexus's U.S. chlorine customers is reasonable and ensures that Canexus will receive transportation to all of its destinations. It also ensures that the railroads needed to complete that transportation service will all contribute their fair share to providing the service.

⁴ BNSF is in reality a bridge carrier and not the originating carrier. As explained previously, CN actually originates the traffic at issue here. However, for the traffic that Canexus exports to the United States, BNSF is the first carrier in the United States with control over the movement. Therefore, it makes sense for purposes of Section 10705(a)(2) to treat BNSF as the originating carrier that has the statutory prerogative as to where the interchange will occur.

IV. The Board Must Make Clear that a Shipper May Not Dictate the Routing of Hazardous Materials by Entering into a Contract with One of the Railroads Needed to Provide Interline Service.

A. The *Bottleneck* decisions do not require establishment of a Kansas City interchange.

Canexus argues that BNSF must provide service to Kansas City under the rules set out in the *Bottleneck* decisions. Canexus claims that BNSF's route between North Vancouver and Kansas City is a "bottleneck" segment of a through movement because Canexus has concluded that the other rail carrier options at origin are not commercially "viable." See *Canexus's November 3, 2011 Opening Statement*, at 10 ("*Canexus's Opening Statement*"). Under Canexus's theory, since BNSF is supposedly a "bottleneck" carrier, the rules that are applied to rail carriers with a bottleneck must therefore be applied to BNSF. Under those rules, Canexus claims that "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." *Canexus's October 20, 2011 Reply to BNSF Railway Co.'s Petition to Vacate*, at 7 ("*Canexus's Reply to Petition to Vacate*").

Canexus blatantly mischaracterizes existing *Bottleneck* precedent in several respects. But the first and most obvious flaw in Canexus's argument is that BNSF is not a bottleneck carrier on the movements at issue here, so the rules applicable to bottleneck carriers are irrelevant. BNSF is not even a necessary participant in the movement of the traffic to the destinations at issue. The attachment to Canexus's September 19, 2011 letter to the Board shows that CP offered to provide service from North Vancouver to Kansas City, the same service that Canexus claims is subject to a BNSF "bottleneck." CP also offered a rate for movements of Canexus's traffic from North Vancouver to Chicago, where it could be interchanged with UP. CN, which is the only

railroad actually serving the origin, could also bring the traffic into the United States for interchange with UP at numerous locations.

Canexus's rejection of the commercial terms offered by an alternative to BNSF does not make BNSF a "bottleneck" carrier on movements to Kansas City. For purposes of the rules set out in the *Bottleneck* decisions, a "bottleneck" railroad is a railroad with the exclusive *physical* ability to serve an origin or destination. *See, e.g., Bottleneck I*, 1 S.T.B. at 1078 (describing one of the underlying cases as involving "transportation to MidAmerican's power plant at Sergeant Bluff, IA, which is served only by UP"); *MidAmerican Energy Co. v. STB*, 169 F.3d 1099, 1103 (8th Cir. 1999) ("a rail segment is commonly termed a 'bottleneck' [if] it is serviced by only one carrier"). The Board has never suggested that a railroad may be considered to have a "bottleneck" if the shipper dislikes the rates or service terms offered by other railroads with the physical ability to provide an alternative service.

Canexus also misrepresents the Board's treatment of contracts in the *Bottleneck* decisions even where true bottlenecks exist. The Board made it abundantly clear in the *Bottleneck* decisions that the existence of a contract over one portion of a route "does not override the routing and long-haul protections afforded under section 10705 to the non-contracting, connecting rail carrier for service over its route segment; section 10709 was not intended to impose new regulatory obligations on non-contracting parties." *Bottleneck I*, 1 S.T.B. at 1069-70 n.17. The Board expressly rejected Canexus's claim that the existence of a contract for one portion of the movement would be "the conclusive factor in determining" where the interchange should occur. *Canexus's Reply to Petition to Vacate*, at 7. The Board stated that "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 its contract with the shipper, the origin

carrier.” *Bottleneck II*, 2 S.T.B. at 243. Instead, when the two carriers cannot agree on an interchange, the Board will determine where the interchange will occur based on a variety of factors, and the existence of a contract “could also be useful as a factor.” *Id.* at 244.

The Board explained that the existence of a contract could be “useful” in resolving an interchange dispute because the contract terms might shed light on relative “benefits, advantages, and projected efficiencies” of the routing established by the contract. *Bottleneck I*, 1 S.T.B. at 1069. But here, Canexus and UP have provided the Board with no details whatsoever about the terms of the contract that might justify establishing the interchange at Kansas City rather than Portland or Spokane. Thus, in this case, the mere existence of the contract does not speak authoritatively to the question of where BNSF and UP should interchange Canexus’s traffic.

Citing *Bottleneck II*, Canexus also argues that “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] that point simply because it cannot enter into a preferred joint rate with the destination carrier.’” *Canexus’s Opening Statement*, at 11-12 (citing *Bottleneck II*, 2 S.T.B. at 244). Canexus’s logic puts the cart before the horse. Canexus argues that BNSF must provide service to Kansas City based on an assumption that the Board has determined that Kansas City is the proper interchange point. But the very question that the Board must decide here is whether Kansas City is the proper interchange point.

Canexus’s claim that the facts in the *FMC* case are similar to those here is also flat out wrong. *Canexus’s Opening Statement*, at 12-13 (citing *FMC Wyoming Corp. & FMC Corp. v. Union Pac. R.R. Co.*, STB Fin. Docket No. 33467 (STB served Dec. 12, 1997) (“*FMC*”). In *FMC*, UP was required to establish common carrier rates to Chicago and East St. Louis that would allow FMC to ship traffic to final destinations using transportation contracts for the

destination portion of the movements. But UP never claimed that Chicago and East St. Louis were improper interchange points. The issue there was whether UP could establish rates to those interchanges that could be used only with other common carrier rates or whether, given the existence of a contract for the non-UP segment, UP was obligated to establish a separately challengeable common carrier rate. Indeed, the Board expressly stated that the question in the case did not involve the proper interchange for the traffic at issue: “[T]here is no dispute over the availability of these interchange points or of the routes involved.” *FMC*, slip op. at 3.

Finally, there are strong policy reasons, discussed below, why the Board should not make new law by allowing shippers of hazardous TIH commodities to establish where interchanges will occur simply by entering into contracts with one of the rail carriers that is needed to provide the service.

B. It would be bad policy to allow shippers to dictate the routing of TIH traffic by entering into contracts for portions of the movement.

This case raises a policy issue of critical importance regarding the transportation of TIH commodities: Can a chlorine shipper usurp a railroad’s routing prerogative and direct the routing of its traffic so as to best serve its own commercial interests? If the Board accedes to Canexus’s attempt to force its routing wishes on BNSF in this case, it would create a very dangerous precedent.

BNSF recognizes that under existing law railroads, as common carriers, must transport TIH commodities. Indeed, it is generally in the public interest to keep such traffic off of the highways. But the flip side of that obligation is that railroads, which are committed to the safe transportation of TIH by rail, must retain the ability to determine how that transportation will be provided. It would be dangerous for the Board to allow shippers to dictate how this transportation will be provided. UP appears to be in agreement with BNSF on this issue.

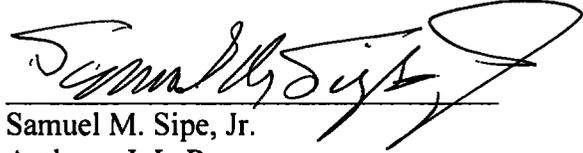
As the Board is aware, the transportation of chlorine poses grave potential risks as well as substantial operating and capital costs for railroads. As explained in BNSF's June 15, 2011 Legal Position, BNSF addresses these risks by changing its normal operating practices in accordance with FRA requirements and by routing such traffic on routes approved by PHMSA. BNSF is also in the process of planning for and investing in the legislatively mandated installation of positive train control technology over certain routes that carry TIH/PIH traffic. These risk-mitigation measures cannot be effectively carried out in an environment where the shipper is able to dictate the routing of traffic over BNSF's network based solely on the shipper's narrow commercial interests. The statutory and regulatory requirements administered by agencies other than the Board could be undermined by a Board ruling that gave shippers of hazardous chlorine the ability to control the routing of their traffic in the pursuit of their own commercial agendas. The Board must be very careful not to create precedent in this case that could have unintended consequences for other regulatory regimes involving TIH commodities.

Canexus cannot be allowed to dictate the interchange for hazardous chlorine by entering into a contract with another railroad over an interchange chosen by Canexus. Nothing in the statute or any existing Board decision, including *Bottleneck II*, allows shippers to exercise control over a railroad's routing decisions in this way. Indeed, it would fundamentally subvert the regulatory process governing TIH transportation if shippers are allowed to override railroad routing decisions. If shippers are allowed to dictate the routing of hazardous commodities through contracts, railroads may be unable to comply with the range of new regulations that are emerging to deal with the transportation and handling of hazardous commodities.

This case involves chlorine originating in Canada and moving over 2,000 miles in the United States. There is a serious question whether it is in the public interest for Canexus to

export chlorine to the United States and move it such vast distances, thereby increasing the risks of potential exposure to the hazards of chlorine. But if the chlorine is to move in the United States, the Board cannot responsibly allow Canexus to dictate how U.S. railroads will handle it.

Respectfully submitted,



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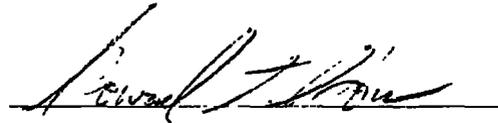
November 23, 2011

ATTORNEYS FOR DEFENDANT

**VERIFICATION OF
HOWARD T. HORN**

I, Howard T. Horn, Market Manager-Industrial Products for BNSF Railway Company, declare under penalty of perjury that I have read BNSF Railway Company's Reply Statement and that the portions regarding the interchanges of Canexus's chlorine traffic at Portland and Kansas City between BNSF Railway Company and Union Pacific Railroad Company are true and correct. Further, I certify that I am qualified and authorized to sponsor this evidence

Executed on November 02 2011

A handwritten signature in black ink, appearing to read "Howard T. Horn", is written over a horizontal line.

Howard T. Horn

CERTIFICATE OF SERVICE

I hereby certify that on this twenty-third day of November, 2011, I have served a copy of the foregoing Reply Statement of BNSF Railway Company on the following by e-mail and by first-class mail, postage prepaid:

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