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October 5, 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

**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 Canadian Pacific Railway Company (“CP”). CP takes no position with respect to the merits of the dispute between Canexus Chemicals Canada L.P. (“Canexus”) and BNSF Railway Company (“BNSF”) regarding the appropriate U.S. interchange point for the chlorine shipments at issue in this proceeding. Rather, CP submits this letter for the purpose of correcting certain inaccurate statements of fact, and mischaracterizations of the law governing the Board’s jurisdiction over cross-border rail transportation, which have recently come to CP’s attention.¹

In recent correspondence with the Board, Canexus and BNSF each asserted that CP has “established” a common carrier rate for transportation of Canexus’ chlorine traffic from North Vancouver, BC to Kansas City.² Those assertions are incorrect. As Attachment 1 to Canexus’ September 19 letter shows, CP did respond to an informal email inquiry regarding the rate that CP might charge for such shipments. However, under Canadian law, such a rate quotation does not become a lawful rate unless it is either published in a tariff or set forth in a confidential

¹ CP hereby petitions the Board pursuant to 49 C.F.R. § 1112.4 for leave to intervene as a party to this proceeding, in order to clarify the record with respect to the existence of a CP rate for the subject traffic, and to address the jurisdictional issue.

² See Letter dated September 19, 2011 from Thomas W. Wilcox to Cynthia T. Brown at 2; Letter dated September 20, 2011 from Samuel M. Sipe to Cynthia T. Brown at 1, 2.

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contract with the shipper.³ CP has not published a common carrier tariff for shipments of chlorine from North Vancouver to Kansas City, nor has CP contracted with Canexus to transport the subject movements. Accordingly, no such rate is currently in effect. In any event, Canexus has advised the Board that it “has never seriously considered” offering the subject traffic to CP, given the circuitry of CP’s route from North Vancouver to Kansas City and the level of the rate set forth in CP’s response to Canexus’ email inquiry. *See* Canexus September 19 Letter at 1-2.

Canexus’ assertion that the notion that the Board lacks jurisdiction to compel it to establish a common carrier rate for traffic originating at North Vancouver “rests on an overly strict interpretation of 49 U.S.C. § 10501(a)”⁴ is simply wrong. The unambiguous language of Section 10501, and longstanding court and agency precedent, make clear (1) that the “common carrier obligation” does not extend to the provision of rail transportation outside of the United States, and (2) that the Board does not have jurisdiction to compel any railroad (U.S. or Canadian) to establish a common carrier rate for transportation provided in Canada.

The scope of the Board’s jurisdiction over cross-border rail transportation is set forth at 49 U.S.C. § 10501(a)(2):

Jurisdiction under paragraph (1) applies only to transportation in the United States between a place in . . . the United States and a place in a foreign country.” (Emphasis added)⁵

There is nothing ambiguous about this strict geographic limitation on the Board’s jurisdiction. As the Supreme Court observed in *United States v. Penn. R.R. Co.*, 323 U.S. 612, 621 (1945), “whatever power Congress might have to regulate the conduct of its domestic companies doing business abroad, it had, by the limiting provisions . . . expressed its purpose not to empower the [ICC] with general authority to regulate rail transportation in foreign

³ Section 117 of the Canada Transportation Act (the “Act”) requires that all common carrier rates be published in a tariff. Section 126 of the Act authorizes railways and shippers to enter into confidential transportation contracts.

⁴ Canexus Reply to BNSF’s Response To The Board’s Order of June 8, 2011 at 3.

⁵ Predecessors to current Section 10501(a)(2) confirm Congress’ unequivocal intent that the geographic scope of the Board’s jurisdiction be limited to rail transportation that takes place within the United States. For example, the Transportation Act of 1920 gave the ICC jurisdiction over rail transportation “only in so far as such transportation . . . takes place within the United States.” Transportation Act of 1920, § 400(1), 41 Stat. 474 (originally codified at 49 U.S.C. § 1(1)). Likewise, the 1978 recodification of the Interstate Commerce Act (the immediate predecessor to Section 10501(a)(2)) stated that “(a) . . . the Interstate Commerce Commission has jurisdiction over transportation -- (2) to . . . the extent the transportation is in the United States. . . .” Pub. L. No. 95-473, § 10501(a)(2), 92 Stat. 1359 (Oct. 17, 1978).

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countries.” Consistent with the unequivocal language and history of the statute, the courts and the STB/ICC have consistently held, in a variety of contexts, that the agency lacks jurisdiction over rail transportation performed in Canada or Mexico.⁶

The notion that the common carrier obligation set forth at 49 U.S.C. § 11101 can be applied extraterritorially was squarely rejected by the Supreme Court in *St. Louis, Brownsville & Mexico Ry. Co. v. Brownsville Navigation Dist.*, 304 U.S. 295 (1938). In that case, the Court reversed a Fifth Circuit decision requiring a U.S. rail carrier to provide cars for transportation from the Port of Brownsville, TX to Matamoros, Mexico (and subsequent reloading at Matamoros). In doing so, the Court held that “[t]he Act extends to transportation only so far as it takes place in this country. Petitioners are not bound by any law, regulation, or tariff to furnish cars for transportation in Mexico.” 304 U.S. at 300 (emphasis added). The Court’s holding confirms that the STB has no jurisdiction to enforce the common carrier obligation extraterritorially.

Canada Packers and *Great Northern Ry. v. Sullivan*, 294 U.S. 458 (1935), do not support the proposition that the Board may compel a carrier to establish a rate for, or to provide, transportation in a foreign country. Rather, those cases hold only that, if carriers choose to publish a joint rate (rather than separate local rates) for cross-border shipments, the Board must consider the entire through rate (and not just the U.S. segment thereof) in ruling on a shipper’s challenge to the reasonableness of the rate.⁷ Numerous other judicial and ICC decisions make clear that the Board may not, in the first instance, prescribe or compel a carrier to establish a rate for transportation in a foreign country. *See, e.g., Lewis-Simas-Jones Co. v. Southern Pacific Co.*,

⁶ *See, e.g., Canada Packers Ltd. v. Atchison, Topeka & Santa Fe Ry. Co.*, 385 U.S. 181, 182-83 (1966) (ICC has no jurisdiction to prescribe a rate for transportation in a foreign country or to order a foreign carrier to pay reparations); *Kansas City Southern—Control—KCS Ry. Co., Gateway E. Ry. Co., Tex. Mexican Ry. Co.*, STB Fin. Docket No. 34342, Decision No. 2 (June 9, 2003) (STB has no jurisdiction to authorize the ownership or use of railroad lines located beyond the borders of the United States); *Canadian Pac. Ltd., Canadian Pac. Ry. Co., and Napierville Jct. R.R. Co.—Corporate Family Transaction Exemption—St. Lawrence & Hudson Ry. Co.*, STB Fin. Docket No. 33136, 61 Fed. Reg. 52994 (Oct. 9, 1996) (Board notice in intra-corporate family transaction proceeding expressly limited to rail lines (including portions of tunnel and bridge spanning the U.S.-Canada border) located within the United States); *Int’l-Great N. R.R. Co. Trustee Trackage Rights*, 275 I.C.C. 27, 28 (1949) (ICC approval of trackage rights over the Laredo Bridge expressly limited to track north of the international boundary at the center of the bridge); *Great N. Pac. & Burlington Lines, Inc.—Merger—Great N. Ry.* (“*Matter of Van Blaricom*”), 6 I.C.C. 2d 919 (1990) (ICC not authorized to impose “extraterritorial” labor protective conditions for the benefit of foreign employees of a U.S. carrier).

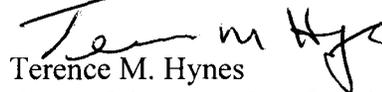
⁷ Indeed, in promulgating regulations governing the publication of joint through rates for cross-border shipments, the ICC explained that “Canadian or Mexican carriers file with us, if they so desire, the tariffs establishing joint rates with our domestic carriers, and we do not thereby obtain jurisdiction over those foreign carriers.” *Int’l Joint Rates and Through Rates*, 337 I.C.C. 625, 635 n.11 (1970) (emphasis added).

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283 U.S. 654, 660 (1931) (“the Act does not empower the Commission to prescribe or regulate such rates. It applies to international commerce only in so far as the transportation takes place within the United States.”); *Canadian Pac. Ltd. v. United States*, 379 F. Supp. 128, 133, n.11 (Dist. D.C. 1974) (“it is well established that the Commission does not have the power to prescribe joint international rates, as it does domestic rates”). Indeed, the ICC itself has “repeatedly held that it has ‘no jurisdiction to prescribe international rates for application partly in Canada.’” *Canadian Pac. Ltd. v. United States*, 379 F. Supp. at 134 (quoting *Thermoid Co. v. B&O R. Co.*, 303 I.C.C. 743, 752 (1958)).

Accordingly, CP respectfully submits that the Board does not have jurisdiction to compel a rail carrier (U.S. or Canadian) to establish a rate for transportation to be provided in Canada.

Respectfully submitted,



Terence M. Hynes
Counsel for Canadian Pacific Railway Company

TMH:aat

cc: Samuel M. Sipe
Thomas W. Wilcox
Michael L. Rosenthal