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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

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Public Record**

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

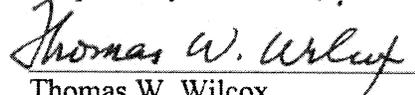
determination of an interchange point.” 2 S.T.B. at 244. However, since in this case the physical and operational feasibility of the Kansas City interchange is undisputed, the existence of the rail transportation contract between UP and Canexus should be the deciding factor in determining that BNSF must 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,



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June 20, 2011

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. While I do not know the precise routing CPR would use, I believe the route would go through the Chicago area, resulting in a significantly longer in 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 company, the DM&E Railway, to ultimately transport our rail cars to 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. While again I do not know the precise routing CPR would take to get to Kansas City, it appears that the movement would pass through 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.

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'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.

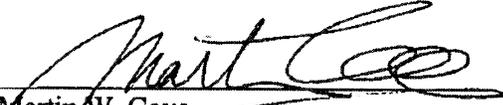
I also comment on BNSF's assertion that Canexus "acknowledged the logic of having other railroads that serve destinations that could not be served by BNSF be responsible for the long haul on those movements." Canexus met with BNSF in Fort Worth on October 29, 2010 to discuss chlorine rates and at that 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. We agreed to do so for several reasons. First, 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 interchange, 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. Second, 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

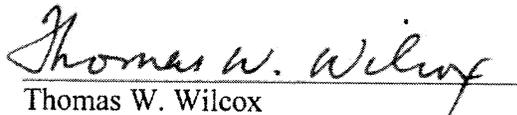
I do hereby certify on this 20th day of June, 2011 that I have delivered a true and correct copy of the foregoing *Reply to BNSF'S Response to the Board's Order Of June 8, 2011 Regarding Its Legal Position* to the following addressees at the addresses stated via email and hand delivery:

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Thomas W. Wilcox