UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

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ORAL ARGUMENT

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IN THE MATTER OF: :
: CANEXUS CHEMICALS CANADA L.P., :
: : Docket No.
: v :
: NOR 42131
BNSF RAILWAY COMPANY, :
: :

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Tuesday,
January 17, 2012

Surface Transportation Board
Suite 120
395 E Street, S.W.
Washington, D.C.

The above-entitled matter came on for hearing, pursuant to notice, at 9:30 a.m.
BEFORE:
DANIEL R. ELLIOTT, III Chairman
FRANCIS P. MULVEY Vice Chairman
ANN D. BEGEMAN Commissioner
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(9:32 a.m.)

CHAIRMAN ELLIOTT: Good morning.

Welcome.

Today we'll hear oral argument in Canexus versus BNSF, Docket No. 42131.

This case concerns a complaint that Canexus has filed asking the Board to issue an order compelling BNSF to establish common carrier rates and service terms between North Vancouver and Kansas City and between Marshall and Kansas City.

This dispute arises from BNSF's position that, in the future, it will carry the chlorine only as far as Spokane, Washington, for movements originating from Marshall; and as far as Portland, Oregon, for movements originating from North Vancouver, where it will interchange with UP. Canexus and UP have objected to BNSF's proposed interchange points.

In an effort to move things along,
the Board members will not be making opening remarks this morning. But I wanted to cover a few procedural matters before we begin.

First, while the Board will make every effort to avoid soliciting information that is confidential in nature, if it becomes necessary to do so, we'll recess at the end of the public portion of this hearing and conduct an additional in camera proceeding for that portion of the argument.

We have asked each party to make a short statement of its argument, but Counsel should be prepared to answer questions from the Board at any time during your allotted time.

I assure you that we have read all of your pleadings and there is no reason to repeat every argument.

We have the following time allotments for Counsel. The opening parties, Canexus and UP, have agreed to divide their 30-minute allotment of time. Counsel for
Canexus will begin with 12 minutes on opening followed by Counsel for UP who has requested six minutes. Counsel for BNSF will then have 30 minutes. Canexus has reserved eight minutes for rebuttal and Union Pacific has reserved four minutes.

If you wish to make a change to your reserved rebuttal time, please advise us when you begin your opening presentation. Any party making a PowerPoint presentation or using similar hard copy aides using materials previously placed in the record should have provided these materials in hard copy size to -- 8-1/2 by 11 size -- to opposing Counsel and the Board.

We will have any pages used today in such presentations bound into the transcript of this proceeding.

Speakers please note that the timing lights are in front of me. You will see a yellow light when you have one minute remaining and a red line when your time has
1 expired. The yellow one-minute light will be
2 accompanied by a single chime, and the red
3 light signifying that your time has expired
4 will be accompanied by two chimes.
5 Please keep to the time that you
6 have been allotted. When you see the red
7 light and hear the double chime, please finish
8 your thought and take a seat.
9 In addition, just a reminder to
10 everyone, please turn off your cell phones.
11 We will now proceed.
12 Counsel for Canexus, please step
13 up to the podium, introduce yourself for the
14 record, and begin.
15 MR. WILCOX: Good morning. My
16 name is Thomas Wilcox. I'm here on behalf of
17 Canexus, the Complainant.
18 I'd like to introduce a couple
19 client representatives who are here, Mr. Marty
20 Cove, who is the Manager of Logistics for
21 Canexus. He came in from Vancouver. And we
22 have Ms. Diane Pettie, who is the Vice
President, General Counsel, and Corporate Secretary who is from Calgary.

I do not intend to introduce any confidential information. So I don't think that will be an issue. But I'm sure my clients will let me know --

CHAIRMAN ELLIOTT: Could you just speak up a little bit? Right into the mic?

Thank you.

MR. WILCOX: Is that better?

CHAIRMAN ELLIOTT: Yes.

MR. WILCOX: Okay. I don't plan on introducing any confidential information. But I am sure they will let me know.

To begin, Canexus would like to thank the Board for its actions in the case so far. You've been timely. You've been proactive. And you've allowed service to continue to these customers pending this dispute. And Canexus appreciates it.

This is a straightforward case. And it's whether BNSF is legally obligated to
maintain common carrier rates and service
terms from Canexus facilities in North
Vancouver and Marshall to the Kansas City
interchange.

The underlying facts have been
developed in a pretty full record. But the
salient fact is that, prior to 2011, BNSF had
no problem hauling Canexus's chlorine long
distances and interchanging with UP for
further movement by UP by contract. And that
included the Kansas City interchange where
they had rates in place.

But BNSF unilaterally decided in
2011 it would adopt a position for TIH
commodities where BNSF, quote, is entitled to
the short haul when BNSF does not serve the
destination. Canexus learned of this position
in 2011 while it was simultaneously making its
transportation arrangements for 2011. And
UP's preference for these particular movements
was to enter into a contract with Canexus from
the Kansas City interchange, which was
consistent with prior practices where BNSF had common carrier rates and UP entered into contracts with Canexus.

Canexus was caught in the middle of this to some extent, but believes it and UP acted reasonably in entering into a contract for the transportation from Kansas City, and that BNSF violated its common carrier obligation by not supplying rates or by not first refusing to supply rates, but then now has taken the position that they want to only establish temporary rates that they want to terminate and only go to Spokane and Portland.

VICE CHAIRMAN MULVEY: How long has BN been delivering the chemicals from Vancouver to Kansas City interchange? When did it start? When did those shipments begin?

MR. WILCOX: As I understand it, there was a rate in place in 2010 to Kansas City for interchange with UP that was not used -- I believe that's correct -- that was not
used or, if used, not very much. However, there were shipments made between January 1, 2011 and March 16th, 2011, using that rate and a common carrier rate that was temporarily in place with UP while they were still negotiating the contract.

VICE CHAIRMAN MULVEY: So it was a relatively new movement then? It's not something that has been going on for ten years or so and now all of a sudden there's been a change. Is that correct?

MR. WILCOX: I believe that's correct but --

COMMISSIONER BEGEMAN: Your filing says there were 18 carloads --

MR. WILCOX: Yes.

COMMISSIONER BEGEMAN: -- in January to March. You filed your first submission in May.

MR. WILCOX: Yes.

COMMISSIONER BEGEMAN: Had there been any carloads between March and May when
you filed? Or were there just the 18 that had
occurred before you came to the Board?

MR. WILCOX: There were 18 before
we came -- before Canexus came to the Board.
And there's been --

COMMISSIONER BEGEMAN: Did you
ship to these shippers prior to 2011? And if
so, how did you get your products to them?

MR. WILCOX: I don't know that it
is in the record how that was done. I can ask
for clarification from Mr. Cove if you'd like
right now.

COMMISSIONER BEGEMAN: Yes, I'm
just trying to understand if it is now just a
convenience of moving it through Kansas City
or if you had not ever shipped to any of these
customers before.

CHAIRMAN ELLIOTT: Mr. Cove, if
you'd like to approach, you can. You probably
weren't expecting this today.

MR. COVE: Yeah, first to answer
your question, between March and May, we were
continuing to ship over to the Kansas City interchange. There was a brief period of time when there was not a rate available to us. So we were using other interchanges that BN objected to, and quite rightly so. But BN then agreed to put a new rate in place with a limited time horizon.

COMMISSIONER BEGEMAN: Could you clarify when or -- if you want to clarify, when was the rate not in effect?

MR. COVE: There was a period of about ten days where the rate had expired and where --

COMMISSIONER BEGEMAN: Is this during pre-May or post-May?

MR. COVE: This is in March.

COMMISSIONER BEGEMAN: Okay.

MR. COVE: So the rate had expired --

COMMISSIONER BEGEMAN: Okay.

MR. COVE: -- on March the 15th.

And there was a period of time in which there
was no rate in place to Kansas City. And it was about ten days later that BN agreed to put a rate in place temporarily until the end of June.

COMMISSIONER BEGEMAN: And could you give me a sense of how many shipments you shipped in 2011 since the 18 shipments in January to March? Just to -- or maybe tell us later in confidential --

MR. COVE: Okay, yeah, I'll tell you later.

COMMISSIONER BEGEMAN: Okay.

MR. COVE: It was dozens though.

COMMISSIONER BEGEMAN: Okay.

MR. COVE: Prior to that time -- now we're going to get into a lot of complexity, the nature of our business is we are a very small producer. We account for less than one percent of the chlorine that's sold in the marketplace.

So we are certainly not large enough to say dictate pricing or had a large
control over the marketplace. We are essentially following other competitors and trying to fill niche markets. In particular, we tend to be largely in the water treatment marketplace -- not strictly, but typically.

And our ability to find customers is often quite complex. So we're constantly changing our customer base in response to market conditions.

Prior to let's say January 1st, 2011, Canexus has shipped over a variety of -- to a variety of customers over a variety of corridors, including Kansas City. I don't have the exact numbers available. I'd have to go back and look at my database.

It wouldn't have occurred often. But it definitely has occurred. There are some customers actually in Kansas City itself that we have served in the past through BNSF, but I'd have to go back and check my data to give you a more definitive answer on how often we've shipped through that corridor.
Does that answer your question?

COMMISSIONER BEGEMAN: I think so, for now.

MR. WILCOX: How am I doing on time after that?

CHAIRMAN ELLIOTT: I don't know. Timekeeper? Four minutes.

MR. WILCOX: Okay. Well, I only have three points to raise and I will try to get through them quickly since you do have a full record ahead of you, or in front of you.

The refusal to provide the common carrier rates necessarily requires application of the Board's principles and rules that came up in the Central Power & Light cases on what is the appropriate interchange point. And --

CHAIRMAN ELLIOTT: I know with respect to that, but this is a 10705 case.

MR. WILCOX: Well, those cases did involve, to some extent, the routing preference under 10705(a)(2). The Board was balancing the routing preference of that
statute versus the contracting statute. And that's -- in fact, the DC Circuit, this came up in the FMC case when the FMC case was affirmed by the DC Circuit.

UP, in that case, tried to make a similar argument and said that the routing preference takes preference over the contracting preference. And they even called it, you know, jurisdictional stripping, because it took away the long haul.

And the DC Circuit rejected that. And the cite is at 202 F3d 344, where they said that the CPL decisions, it talked about this balancing of where a long-haul preference has to be balanced against the destination railroad's preference to enter into a contract.

They said the Board's discussion was a lengthy and well-reasoned explanation of the intersection of the conflicting mandates of its contractual and long-haul provisions.

And so this has come up before and --
CHAIRMAN ELLIOTT: In that case, then, wasn't it really dealing more with the rates as opposed to the routes? That they were entitled to get a rate to a certain point? And to divide that rate so that they could get a short haul or on the bottleneck, a rate on the bottleneck also?

MR. WILCOX: The routing, it was still an issue. I mean the Board -- the Court and -- you know, UP wanted it all. They wanted the whole route. They didn't want to divide it up. And so they wanted the single line haul. And so they still made these similar arguments.

CHAIRMAN ELLIOTT: So going back to my original question, I mean do you still consider this case a 10705 case or some form of hybrid? Because none of it was really clear in our briefs about the statute that we would be relying on.

MR. WILCOX: Well, in terms of choosing the interchange point, it's 10742.
And the Board in the CPL case said this is a statute that is to be used for other things. But it is a statute that will apply here in terms of coming up with the criteria for the interchange points.

I'd say it is a hybrid because in our view, once you establish the interchange point and you have a contract -- and we believe the FMC case raised the significance of the contract, you know, in the analysis, once you have those things, then the carrier from the origin has an obligation to supply a rate under 10101 to that interchange point.

CHAIRMAN ELLIOTT: In the FMC case though, the interchange wasn't in dispute, so it was already a settled matter?

MR. WILCOX: Well, I think that there is a -- UP did not, as in here, object to that interchange point because it had been used. But I don't think it is that much of a difference because here BNSF doesn't dispute the efficiency or the operational feasibility,
anything about the Kansas City interchange point. It just doesn't want to use it.

So I think there is -- I'm not saying there is no difference. But I don't think the difference is very significant.

CHAIRMAN ELLIOTT: Thank you.

MR. WILCOX: I'll try to reach my other two points on rebuttal.

CHAIRMAN ELLIOTT: Okay.

MR. SIPE: Although it will make it hard for me to respond.

CHAIRMAN ELLIOTT: That's true. Do you want to take a little more time? I know we've asked a lot -- we'll be flexible with respect to time. This is a very important case.

MR. WILCOX: Well, actually --

CHAIRMAN ELLIOTT: Just so at least you can hit your two points.

MR. WILCOX: -- yeah, I'll actually --

CHAIRMAN ELLIOTT: And I'll lay
off.

MR. WILCOX: -- no, as a matter of fact, I think I've actually hit them because our second point was that 10705 does not give a unilateral preference or a preferred preference to the origin carrier. That those are balanced. So I've made that point.

The third point was just that, from a policy consideration, in terms of overall policy, there's no issue here about shippers -- this shipper, in particular or in general, trying to dictate the routings of TIH movements or doing backroom deals with railroads. If you look at the facts, they surely belie that.

There are other policy issues, which are whether the Board is going to allow these carriers to short haul TIH movements and negate contracts that are valid and valuable to the shippers and to the railroads.

VICE CHAIRMAN MULVEY: This is a very different case, isn't it, in the sense
that the railroads here are desiring to short haul themselves, whereas typically railroads do not want to be short hauled.

MR. WILCOX: Well, absolutely.

VICE CHAIRMAN MULVEY: So that's a unique part of this case. One other thing though, under 10705 where we talk about reasonable preference to the originating carrier, we also talk about other factors such as adequacy of service, efficiency, et cetera --

MR. WILCOX: Yes.

VICE CHAIRMAN MULVEY: -- do you think the Board should take into consideration other factors such as length of haul or population exposure or other things in deciding which carrier should have it? Should it take into account these public policy issues? Or should we limit ourselves to what's specifically listed in 10705?

MR. WILCOX: Well, I think that in this case in particular, you have a case where
BNSF is saying they want to short haul themselves. You should give them that preference.

But the only reason that they wanted to do it is because they want to minimize the risk to BNSF. But that, as UP has pointed out, that's just foisting risk onto UP and to other railroads with no consideration of what the alternative movement is going to be.

This is an efficient movement. And it works. It has worked. And so I think as far as looking at a reasonable preference in the TIH movement, you should look at what's the alternative. BNSF is not -- they basically said well any alternative other than us is what you should do.

Now there are difficulties with that because the routings are not -- for TIH routings, they are not public. We don't know how BNSF gets the chlorine from North Vancouver down to Kansas City. We don't
really care obviously. Of course we care from a public safety standpoint. But in terms of how they run their railroad. But anyway --

VICE CHAIRMAN MULVEY: Okay. Thank you.

MR. WILCOX: Okay. Thanks for the extra time.

MS. RINN: Good morning, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Mulvey -- or Begeman.

I'm going to depart from my prepared remarks and go to where I discern the interest is. So I will try to clarify the movement history. And then I will try to clarify the law that we're relying on before getting to my summation.

Fundamentally, Canexus has seven destinations to five states that are issue in this proceedings. Two of those destinations previously received chlorine moving BNSF UP. But not via Portland, Spokane, or Kansas City. They received it via Chicago or Dallas/Fort
Worth.

The other five are new destinations. In accordance with those, Canexus indicated they are reaching out to new markets. So a lot of the data that we provided in terms of what the past practice -- what the past routes have been, basically we're looking at both all of the traffic that BNSF was originating or handing to us in the Pacific Northwest, moving to the first three states that were at issue. And then also looking at it with the TIH.

And when you look at all of the traffic, it is clear Kansas City, while not the most common, was one of the most common interchange points for traffic that was flowing here. And it actually did move some TIH, although TIH all together is something in the neighborhood of one percent of the total traffic interchange between BNSF and UP.

So in that sense, the first, at least in recent history, BNSF/UP/Kansas City
movements would have been in January, moving under a previous BN group rate plus a UP point-to-point proportional rate. But as far as we can tell, that traffic began moving in mid-January.

So that is the movement history as we understand it. And then stepping back, we do have a lot of Portland traffic now being interchanged. But UP has agreed to that for western destinations. So --

CHAIRMAN ELLIOTT: Is that TIH that's being interchanged there?

MS. RINN: This is all chlorine and all TIH.

CHAIRMAN ELLIOTT: All chlorine, okay. Sure.

MS. RINN: But basically the distinction we are drawing is that you have to look at the suitability of both the interchange where the physical handoff occurs as well as what the entire route is going to be.
And so while we may have thought it was foolish for us to say even though BN had been handling the chlorine to Stockton and Colton before giving it to UP for a short haul, we thought it would look very strange for us to say it was unreasonable for us to take it in Portland instead, although we were obviously happy with the Colton and Stockton interchanges. But not for western destinations.

When you are talking about moving traffic into Arkansas, Louisiana, or Missouri, Portland looks to us to be very unusual interchange to be using for that type of a move. And so that's why we said look, we're going to be looking for a different interchange. And Kansas City seems to be centered relative to these destinations. And it is a commonly used interchange overall. And it has, in fact, moved TIH. Both railroads are open to viewing a TIH interchange in Kansas City.
So I hope that helps clarify the movement history.

CHAIRMAN ELLIOTT: What if the roles were reversed here? And you are the originator of the traffic? I mean would you want BNSF telling you where that interchange point would be and where you had to run it?

MS. RINN: UP's position is that both the originating road and the terminating road have a vote. That neither road gets to dictate to the other.

And our objection here is that BNSF had a right in its business judgment to choose to change its strategy from a group rate structure and going after the long haul to say we want to do point-to-point rates and we want to have a short haul. But they don't have a right, having decided that that's their strategy and that's where they want to be, they don't have a right to then dictate to their connecting carriers therefore you will take this in a city that has not been used as
an interchange for this type of traffic.

They need to reach an agreement with us. And if we can't work out an agreement, then we would get back to this.

CHAIRMAN ELLIOTT: So do you think -- I asked Mr. Wilcox this question. Do you believe that this case is a 10705 case strictly with respect to the route?

MS. RINN: In part. And we believe that there are several statutory provisions that come into play: 10701, 10703, 10705, and 10742. If you put those together, the principle is carriers are the ones who are supposed to establish the rate. And they are supposed to do it by agreement.

If they cannot agree, then the Board, under 10705, does have the authority to prescribe a through route. Under 10705(a)(1), that route is supposed to be in the public interest. Under 10705(a)(2), there are several considerations that are put in there. And as a tiebreaker, there is a provision in
the long-haul law that the origin carrier's reasonable preference should be granted.

CHAIRMAN ELLIOTT: But you think that only applies with respect to the long haul? Or do you think it applies to 10705(a)(1) and (2)?

MS. RINN: I think that this is a very unusual case because it may be the first time ever that 10705(a)(2), which was designed to protect the origin carrier's right to a long haul, is being turned around and has turned into a fiat according to how we read BN's pleadings that the origin carrier gets to decide and overthrows all of the other law that says in the first instance the connecting carriers are supposed to reach an agreement.

VICE CHAIRMAN MULVEY: And this is a very unusual case in the sense that in most cases, railroads want traffic and they want revenues. Here, neither railroad wants the traffic or the revenues even though it is very, very likely that whoever gets this
traffic in the long haul will probably be better off from an economic sense, providing, of course, that there are no mishaps along the way.

There haven't been any mishaps since the one we had -- a very, very serious one in Graniteville a while back -- but for the most part, TIH traffic has moved safely. But since one of the issues is exposure, there are two factors in exposure. There's population and then there's also length of haul.

And the proposals that BN has come up with -- interchanging in Portland or interchanging in Spokane -- that would change the exposure, it would change the populations that are at risk, and it would also change the length of haul that this material is going to move.

Now we don't know what the exact routing is going to be but we can make some reasonable estimates as to what they would be.
Do you think that the length of haul that's involved and the population size that is exposed should be factors in determining how the Board determines how this traffic should move?

MS. RINN: I would say clearly those are relevant factors. They are among the 27 that we are required to consider under PHMSA in coming up with what a route is.

What I would say is based on the record we have here, we know that both BN, because it has admitted UP's characterization, has said that routing this via Kansas City is a feasible and a reasonably efficient route. We are not sure that Portland is because we're not sure how BNSF would move it via Portland. And we are fairly confident that we believe that Spokane is not a suitable interchange because one of the other factors you ought to consider is where you are doing the handoff is how often do the carriers do it? Is it part of their ordinary course of business?
Both carriers hold themselves out as accepting and receiving TIH from each other in Portland and in Kansas City. BNSF has published a restriction that says no, we don't accept it. Don't bill it through Spokane unless you call us first. And then we'll make arrangements, which to our mind is a disqualifier for using Spokane as a movement.

But I would say that aside from the risk, which is obviously a major consideration, but we try to deal with the risk in a variety of ways, one is obviously short hauling, but obviously 100 percent of the distance has to be covered by some combination of carriers. Ultimately there is no way of everybody being able to do the short haul. But it still is rational for a carrier to pursue the short haul.

We believe that there are other factors as well that may be motivating BN's decisions. We know that we take it into consideration. And one is how much investment
are you going to have to make in PTC?

And to our mind, it makes sense if you're just looking at from a very top level view, if you're looking to minimize the amount of PTC investment that has to be made, it makes sense for the origin carrier to have a longer haul as opposed to the destination carrier because there are fewer origins than there are destinations.

So just looking at it from the terms of the network, if a factor you are trying to take into consideration is minimizing the incremental PTC investment, then that would tend to point you in the direction of the origin carrier taking the long haul.

But UP is not even insisting on that. We think it is too complicated. And that what makes sense is for the carriers involved to sit down and develop a TIH routing protocol if, in fact, they're saying, you know, the way we've historically routing this
isn't making sense in this regulatory environment and we ought to make adjustments. The carriers ought to be talking about it.

CHAIRMAN ELLIOTT: And why can't the carriers get together on this? It seems like from what I've heard since I've been Chairman, you guys don't want us regulating your business. And here you are asking us to pick the interchange. Is there any way that this can be worked out?

MS. RINN: UP is willing and we renew our invitation to begin to discuss a routing protocol. We believe that what happened here is that there were changes in business decisions by two of the three parties. Canexus decided that they wanted to ship to some destinations that they hadn't shipped before, as well as shipping to some destinations, let's say east of Missouri, that they had shipped to previously.

BNSF made a business decision at the end of 2010 that they wanted to go for a
short haul, that they wanted to drop their
group rate structure and go to point-to-point
rates, and that presumably, therefore, or as
a result of those, they then said the way this
traffic has been routed in the past doesn't
make sense under our new strategy. We want to
do new routes. And they have a right to make
that business decision.

What we're saying is when they
made that decision and when it became apparent
that the way the traffic had been routed
wasn't the way they wanted it to route in the
future, they should have told UP and initiated
a dialogue. And that didn't happen. We
didn't know about this business strategic
decision of BNSF until June 15th when they
filed the response in this proceeding.

VICE CHAIRMAN MULVEY: You
mentioned that there were 27 factors that need
to be considered in deciding how to route
this. One of the concerns that I have is that
if indeed the Board winds up de facto making
these interchange decisions because carriers can't agree on the long haul and short haul for TIH, that there are all these factors. How would we weight individual factors? I sort of envision this giant mathematical model where you have weights applied to each one of these and then it comes out and says okay, this is 47.6 versus 47.2. Therefore -- it is a very, very complicated process.

That can't be what the railroads are interested in doing, having the Board make these decisions. One would expect that the railroads would prefer to make these themselves.

Is there any way of facilitating discussions between the railroads so that we can avoid having this issue come before the Board again and again?

MS. RINN: I absolutely agree with you, Vice Chairman Mulvey, that it is not a good use of the Board's time and it is probably not the best way of coming up with
what are the optimal or the best overall routing decisions to be made. That that really ought to be left to the railroads.

I believe that if you decide in this proceeding that Kansas City is, in fact, a reasonable interchange at this point based on this record, that that basically sends a signal to railroads, whether they are the origin railroad or whether they are the destination railroad.

That unless you want to be like where I am here today, that they ought to sit down with other and talk about it based on all of the operating data, all of the other data that they have available to themselves, and hopefully we would be able to reach agreement in all circumstances but in certainly the majority of the circumstances, so that we could one, reduce or eliminate the number of times an issue like this would have to come to the Board and a poor TIH customer would get involved in the crossfire.
And secondly, when or if any such disputes did end up at the Board, that you would have a clearer record and we would be basically eliminating opportunities of saying okay, here's the clear example or here are the factors that are dividing the railroads about why we think, you know, this -- Railroad A thinks that this route is better and Railroad B thinks an alternative route is better. So that it would be at least clarified if not completely avoided.

COMMISSIONER BEGEMAN: Can you help me understand how a decision from the Board, as you suggested, which would be to find that Kansas City would be the reasonable interchange, how does that not send a signal that for TIH, all current routes are locked into basically the map that's existing today, not the 2008, but the January 2012 map? How does that allow flexibility?

MS. RINN: Well, needless to say, I cannot speak for all railroads. I can only
I speak for my railroad, Union Pacific.

But I will say that UP did not say thou shalt not change any interchange period on the Canexus traffic. In fact, once we were engaged in contract negotiations with Canexus late last year and as they extended into May, and we could discern that BN liked Portland a lot, we, in fact, did agree for the majority of traffic that Canexus was routing, BNSF UP today, that instead of continuing to receive it in Colton in Los Angeles and Stockton in California, which was a BNSF long haul and a UP short haul, we have agreed to accept it in Portland and accept the long haul because I said, as I understand the law, you need to be able to reach an agreement. And if you can't reach an agreement, you'd better be prepared to go before the Board and explain why you were reasonable in insisting on the existing interchange or a different interchange.

And I didn't feel comfortable defending an insistence on Colton so UP could
get its short haul, which is just as rational, 
I submit, as BNSF wanting a short haul. But 
I didn't feel comfortable defending that as a 
reasonable position. And, therefore, we 
adjusted and BN got its short haul. 

Where we drew the line is where it 
appeared to be BNSF always get the short haul 
with this customer without regard to the 
entire circumstances and the entire route. 

So that's a long way of getting 
back to I would hope that other railroads 
would look at this situation, not want to 
repeat the situation, and say I'd better reach 
an agreement. And if I can't reach an 
agreement, I'd better be prepared to explain 
why I am being more reasonable than the other 
fellow. 

VICE CHAIRMAN MULVEY: BN is 
proposing two new interchange points, Spokane 
and Portland, rather than going to Kansas 
City. Are you aware, or do you know if there 
is a difference in the total miles that this
material would travel from those two points as compared to Kansas City?

And if there were a difference, in one case the total amount of miles was longer through Kansas City and the other one was longer through Portland or what have you, do you think we could bifurcate this so that some of this traffic might go via UP interchange points in Washington State and Portland versus other traffic going to Kansas City so --

MS. RINN: We would certainly be very agreeable to, example, for saying that -- say the destinations that are more southerly, if that got routed via Dallas/Fort Worth or Houston as opposed to Kansas City, we'd be willing to do that. And if the ones that were further north either went through Kansas City or, you know, Chicago has been common, I don't know because I don't know all of the data, but I would say that Chicago would be the better one.

But we are certainly willing to
discuss that. I mean that's, to our mind, the
benefit -- the virtue of having a routing
protocol is that you are approaching this
objectively and scientifically using the data
to be making decisions.

VICE CHAIRMAN MULVEY: Thank you.

CHAIRMAN ELLIOTT: Why don't we
hear from BNSF now?

MR. SIPE: Good morning, Chairman
Elliott, Vice Chairman Mulvey, Commissioner
Begeman.

My name is Sam Sipe. I'm outside
counsel for BNSF Railway in this matter. With
me at the counsel table is Richard Weicher,
Vice President and General Counsel Regulatory
for BNSF. And Mr. Weicher is available to
answer any questions the Board might want to
put to a company officer of a policy nature.

BNSF appreciates the Board's
commitment to moving this matter towards
resolution on an expedited basis. And in
particular, we appreciate the Board's
representation that it would try to resolve this matter by January 31st.

In that connection, BNSF wants the Board to know that BNSF is still hopeful that it will be able to resolve its disputes with Canexus without the need for a Board decision. As you know, there's a second dispute between the parties, that is BNSF and Canexus, involving rates from North Vancouver to the southwest that is not before you today. That dispute, which is being adjudicated under the Board's three benchmark procedures, is the subject of a mediation between Canexus and BNSF this afternoon. And BNSF will be participating with business representatives in that mediation. We've reached out to Canexus in advance of the mediation and indicated that we're hopeful the parties can explore the full range of issues that are outstanding between them and perhaps solve the dispute in both the routing case and the rate case.
We have no way of knowing whether such a resolution could be accomplished this afternoon. But we hope the mediation will be at least a first step in moving towards a comprehensive resolution of these issues. And we will, of course, keep the Board advised of any progress. And we will respect the confidentiality of this afternoon's mediation as well.

As to the current dispute, I want to emphasize at the outset that this case has never been about the issue of whether BNSF will provide service to Canexus. The actual issue before the Board is a relatively narrow one. And I do regret the fact that the parties have not been able to -- the parties being UP and BNSF with Canexus's input -- were not able to resolve the matter of the interchange before this came before you.

And there's been a fair amount of discussion about that. And I could add my views on how that came to be. It's not an
optimal situation. We don't want to be in the business of bringing these matters before the Board and we will strive not to bring them before the Board in the future.

But here we are. And we think the issue before the Board is a relatively narrow one. And that's to determine the appropriate interchange point for Canexus's chlorine.

We believe that the Spokane and Portland interchanges are rational under the circumstances of this case. And that the statutory preference for the origin carrier carries heavier weight than the other factors that have been introduced on the record of this case.

VICE CHAIRMAN MULVEY: Are you actually an origin carrier? Because my understanding is that BNSF, in fact, is a bridge carrier. You don't actually pick it up at the manufacturing plant but rather that's done by a Canadian railroad and then it is transferred to BNSF, which sort of makes you
a bridge carrier instead of an originating carrier. And that, of course, might work against the reasonable preference for the originating carrier. Do you want to comment on that?

MR. SIPE: Yes, that's a very relevant question, Vice Chairman Mulvey.

Physically we are not the origin carrier. Canadian National switches the traffic to us. And we handle it from the CN switch outside of North Vancouver.

For purposes of the statute, we believe we clearly should be treated as the origin carrier for three reasons. First of all, in terms of the line haul movement for which we establish a rate from North Vancouver to wherever it is, Portland or Kansas City, in terms of the line haul movement, we are the origin carrier, the first carrier in that movement.

Second, in terms of the Board's jurisdiction over this dispute, we are
indisputably the carrier that originates the 
portion of the movement in the United States.

        Also, we are the carrier that
Canexus asked to handle its traffic, to move
it from North Vancouver; whereas they could
have routed this -- presumably they could have
routed this traffic via CN, which has the
physical origin. Conceivably they could also
route this traffic via CP. There's been
discussion on the record about whether CP
would be willing to handle the traffic but
BNSF is the one that Canexus chose.

        So for all three reasons, we think
when you read this statute, you should treat
us as the origin carrier in terms of the
preference.

        And while I'm on that point, let
me just respond to the question that Chairman
Elliot has put to both the other counsel of
whether this is a 10705 case, and I think I'm
more or less in Ms. Rinn's camp and to say in
part, in the second bottleneck decision, the
Board spoke about routing any interchange
decisions in the context of the overall
bottleneck issue, which as you know was an
issue regarding competitive alternatives.

And when Chairman Elliott asks is
this a 10705 case, I think what he's asking is
is this a 10705 case for purposes of seeking
relief, the prescription of an alternative
route under the competitive access rules,
clearly it's not a 10705 case in that sense,
not an alternative route.

But the bottleneck decision
addresses 10705 and it speaks to the issue of
how the Board decides an interchange dispute
even if it's not in the context of a
competitive issue like a true bottleneck case.
And it says the normal practices the carriers
agree. They have to come up with at least one
route to complete the shipper's needed multi-
carrier service.

Accordingly, if the carriers
cannot agree on an interchange that would act
to create that route, we will determine one.

That determination would not involve the competitive access regulations.

So both the statute and the decision speak to this issue, the broader issue of what do you do about an interchange point.

CHAIRMAN ELLIOTT: So just so I understand with respect to 10705, I wasn't specifically referring to the competitive access rules with respect to that. I was just looking at the statute itself and the analysis that was required under that statute.

And kind of what I'm hearing from you is that you're applying some of these aspects to it as far as being the originator and some type of preference which comes from that statutory language. Does that kind of --

MR. SIPE: That is correct, Chairman Elliott.

And the other thing I'm wanting to do is distinguish my position from Mr. Wilcox.
who says he takes it further. Under the Board's reading of 10705, in the bottleneck decision, and says BNSF is the bottleneck carrier. And for that reason, you should give conclusive weight to our transportation contract with UP. And that's clearly wrong.

I mean the first part that our situation speaks to 10705 and implicates that section of the statute and the preference for the originating carrier is clearly correct.

But the second proposition that somehow we are a bottleneck carrier and, therefore, the Canexus contract with UP basically trumps the statutory preference --

VICE CHAIRMAN MULVEY: I'm not sure whether if it's trumping or not because BN has called the UP Canexus contract irrelevant in this dispute. And I think you've pretty much made the same point just now.

But how can a contract play no role at all in the Board's determination on
this issue? Don't we have the obligation to
try to harmonize one carrier's contracts with
another carrier's routing preferences? Isn't
that the Board's job to balance those
interests as opposed to the reasonable
preference being the only thing we should be
considering.

MR. SIPE: It's hard for me to
know how you give weight to the contract in
this circumstance, Vice Chairman Mulvey,
unless you treat it sort of like a wild card
in poker. And you say okay, for this hand --
in this hand I'm going to say contracts, you
know, you can turn a contract into an ace.

The contract here for purposes of
this dispute has no content other than to tell
us these guys have agreed to Kansas City. We
know nothing else about it. It doesn't flesh
out any factors regarding the efficiency of
the movement. It doesn't tell us anything
about the market for chlorine. We don't know
anything about the terms at all. The Board
doesn't know anything about the terms at all.

VICE CHAIRMAN MULVEY: But it is true there are other factors that need to be considered in addition to the giving the reasonable preference to the originating carrier. In fact the term reasonable itself would sort of imply that other factors ought to be considered as well. Would you agree that in the Board making the determination in this case -- if we have to make a determination because the carriers can't reach agreement and it comes to the Board -- that we should consider public interest factors as well as the rights of the originating carrier under 10705?

MR. SIPE: I would say that both the statute and the Bottleneck II decision that I have been referring to suggests that the Board should consider other factors. I would also suggest that under the record -- given the record that has been made in this case, you are somewhat constrained in your
ability to consider other factors because the parties have not made a comprehensive record on other factors relating to some of the considerations you've talked about such as length of haul, population densities, other factors involving safety.

I won't speculate on why that record hasn't been made. I will say that you may appropriately feel a little bit hamstrung because the parties have not made more of a record as to those factors.

And what we're saying is given what you've got here before you, which is not nearly as much, for example, as you had before you in the Entergy case when you were considering the prescription of an alternative through route, given what you have before you in this case, the best thing you've got is the statutory preference. And it fits.

And you, Vice Chairman Mulvey, have alluded a couple of times during this oral argument to the fact that we're dealing
with a situation here involving the transportation of chlorine, in which the normal incentives and preferences are flipped on their head.

And, you know, that may sound peculiar when one thinks about fashioning a rule of law. And yet everybody understands perfectly why these normal incentives are flipped on their head. It's because the uncertain and unquantifiable risk of a disaster exceeds the tangible benefits of hauling this chlorine for relatively high rates.

Managers don't want to incur even a very small risk of a disastrous outcome. And that influences behavior regarding the transportation of chlorine. And I don't think anybody in this case has suggested that BNSF's aversion to the long haul is irrational or unreasonable.

And Ms. Rinn has candidly acknowledged that UP would rather have the
short haul. Indeed, UP did have the short haul on those movements to California before the route was changed to interchange at Portland. And she would have preferred if it had remained that way.

VICE CHAIRMAN MULVEY: The railroads have made it very clear that they really don't want this traffic but have to carry it under their common carrier obligation. And we've heard that from various speakers in the past. And it's on the public record.

But let me ask you a question to follow up on what Commissioner Begeman raised before on Spokane. At Spokane, BN has a notice that it will not take TIH without prior notice. Can you explain why that have that rule at Spokane? What is the basis for that?

MR. SIPE: I'll tell you what my understanding is about Spokane. We proposed Spokane to handle these movements from Marshall, Washington. And the history behind
Marshall, Washington is that Canexus established it back around the time of the Vancouver Olympics as basically a staging area for its movements of chlorine. They wanted to get the chlorine out of the Vancouver area during the Vancouver Olympics, as I understand it.

So the idea was that they would bring it over to Marshall, Washington. And then when it was ready to move to further destinations in the U.S., they would ship it out of Marshall.

It was supposed to be, in my understanding, a short-term solution for a low volume of traffic. And I believe we have said in our papers without quantifying the movements, that the movements out of Marshall are a very small portion of the Canexus traffic handled by BNSF. The majority of it is out of North Vancouver.

So Spokane is, in fact, contrary to Portland, not a place we normally
interchange chlorine with Union Pacific. And so we have, because there's not a standard practice, we have this basically notice provision. And when you're bringing -- when we're bringing the chlorine to you in Spokane, or vice versa although I'm not aware of any, vice versa circumstance, you've got to call up and make sure we've got the right personnel there and we arrange to handle this material safely.

And contrary to Ms. Rinn's position that this sort of illustrates the inappropriateness of Spokane, I think it is entirely appropriate that if you have very rare shipments of a commodity that needs to be handled with special care, you make special arrangements to handle it. I don't think there's anything in the fact that you've got to make a phone call and arrange to have the right people on the premises that makes that disqualifying as far as Spokane is concerned.

COMMISSIONER BEGEMAN: Given the
railroad's interest in short hauling TIH, I think that's sort of how you described it and Vice Chairman Mulvey also raised it, are there other examples where BN has done just that besides with the Canexus shipments? Or is this a first effort to do that?

MR. SIPE: We described in our June 15 pleading, Commissioner Begeman, a change in both routing protocols and rates that BNSF undertook with respect to its TIH and chlorine, including chlorine traffic back in last March. It was kind of a watershed period in terms of the company's thinking about how were we going to deal with this TIH.

Prior to last March, as I understand it, we had what Ms. Rinn has referred to as a regime of group rates, which allowed shippers and connecting carriers considerable discretion in where they would accept the traffic.

And we found that we were basically getting long hauled and sometimes
getting long hauled via irrational and
circuitous routings, which compounded any
disadvantage. And under the new point-to-
point rates that we instituted, we tried
generally to reduce the flexibility of
shippers and connecting carriers to saddle us
with the long haul.

That's about as specific as I can be about shippers other than Canexus. As to
Canexus, there's more information in the
record. And basically what that says is our
policy is that the carrier who hauls this
Canexus traffic that we participate in to
destination should get the long haul. And in
70 percent of the cases, that's us.

We're not adverse to fulfilling
our common carrier obligation. And we do. We
take it to distances a whole long way from
North Vancouver, including the two
destinations that are involved in the 3B rate
case that I referred to earlier at the outset:
Albuquerque, New Mexico, and a point in
Arizona. Local BNSF, we take the long haul.

On the movements where we can hand it off after a short haul to a carrier who serves the destination, we instituted this practice of saying we're going to give it to you at the nearest workable junction point.

In addition to the UP movements to California, which fit in that paradigm, we also had a CP movement to St. Paul, Minnesota. And Canexus -- this is the record also in our June 15 filing in Garin's verified statement -- and Canexus was saying to us hey, would you guys take this to St. Paul and hand it off to CP where they can -- they serve the shipper and they'll take it into the shipper's facility.

And we said, you know, wait a minute. Does it really make any sense for us to take this traffic all the way to St. Paul when CP could take it after a relatively short haul? And Canexus agreed no. So that's an example of how the policy we have implemented
of stepping up to our obligation to take it
all the way where we have to --

CHAIRMAN ELLIOTT: Let me ask you
about that policy. Just so I'm understanding,
especially, I think, it was kind of what the
Commissioner was getting at -- with respect
to this case, are we specifically saying the
policy only applies with respect to Canexus
taxi

MR. SIPE: Yes.

CHAIRMAN ELLIOTT: Yes. So where
does that leave us after this case? Let's say
we buy your argument in this instance and then
after that it leaves us wide open for a case-
by-case analysis. Wouldn't it be better for
us to come up with one policy across the
board, across the system? I kind of compare
it to having each state coming up with their
own laws as opposed to federal law ruling the
whole area.

MR. SIPE: I certainly think one
could make the argument for coming up with a
comprehensive set of principles that should
govern from the Board's perspective the
routing of this TIH ultra-hazardous traffic.

But I think it would be really a bad idea to
try to get there through the vehicle of this
individual dispute.

I mean there are multiple reasons
why you would -- if you were ever to adopt
such broader principles, you would want to do
it on the basis of a broad record that allowed
all participants, all interested parties the
opportunity to participate.

And you would also -- and this
gets really complicated I'm afraid -- you
would also need to take account of these other
regulatory regimes, FRA principles, PHMSA, the
obligation to install PTC -- and Mr. Weicher,
by the way, is much more knowledgeable about
these than I am, because he is involved in
compliance with and implementation of plans in
response to these multiple regulatory regimes.

So the Board would want to
approach that broader objective, Chairman Elliott, which I think is a laudable objective, with really great care. And make sure you chose the appropriate vehicle.

CHAIRMAN ELLIOTT: If I look at it specifically with respect to this case on point-to-point, what is the BNSF's rationale behind that, why that's the more reasonable method to use in this instance?

MR. SIPE: Well, it works. If people adhere to it, it works. Canexus gets its chlorine. And we do, as I say, our share of the work by taking all these long hauls to the 70 percent of Canexus destinations where we serve the destination. And the other carriers who are in the route of the interline movement don't get a free ride.

Now you heard Ms. Rinn say that as to the Canexus's movements into California, she could understand the case for BNSF getting the short haul. And she didn't want to be in a position of saying that UP should insist on
the long haul for BNSF into California on
Canexus movements.

But she said she felt differently
about Kansas City. And I certainly respect
that. I have great respect for Ms. Rinn. But
I really don't -- I don't understand which --
what led her to the different conclusion
there, because it seems to me that the
principle that would have caused her to say it
is appropriate for BNSF to short haul itself
over Portland for movements into California
but not to do the same thing for movements
elsewhere in the country, you know I don't
understand the principle there.

CHAIRMAN ELLIOTT: You say it
works. That doesn't really --

MR. SIPE: Works except in this
case.

CHAIRMAN ELLIOTT: But I mean you
said --

MR. SIPE: It almost worked.

CHAIRMAN ELLIOTT: Your point-
to-point, you say works. And I understand
that it works. And I assume you agree that
the Kansas City interchange point also works,
because it has been used.

Is there something grander than
that? Why this is a better method for
choosing points of interchange as opposed to
just that it works? Are there safety concerns
making the destination for you better?

MR. SIPE: You know I'm always for
the grandest possible rationale. And I've
looked hard for the grand rationale in this
case on both sides. And I don't want to
denigrate any of us. But I'm not sure that
we've achieved the grand rationale.

We have a statutory preference
here. I think it fits the circumstances. And
that may be less than the Board would want to
have as the basis for deciding the case. But
it is a basis. And it is the best basis here.

And let me just say -- I think I'm
probably close to the end of my time -- let me
just say one last thing unless you have further questions about the bottleneck business we went through earlier and I want to make sure you understand why I think Canexus and Mr. Wilcox are just wrong when they try and shoehorn this case into that box -- and by the way, UP agrees if you look at their footnote in their rebuttal filing, which takes issue with Canexus's reliance on the FMC case.

The last point I want to make is that there is danger here in the Board ruling for Canexus on the basis of this contract. And the danger is that that could be construed as a precedent to allow shippers to control routing of these TIH materials.

And Mr. Wilcox said in his filed papers, oh, you know, the Board -- he said the Board can ignore that. That it might be a dangerous precedent.

Well, I don't think so. I mean a dangerous precedent can't be ignored. And I don't know what people would make of that
decision. But the record and the positions that Canexus has taken in this case, stand for the proposition that the shipper ought to be able to determine who the railroad routes the traffic of this ultra-hazardous material, which is clearly inappropriate.

CHAIRMAN ELLIOTT: When you say the shipper controls, doesn't that follow though that there has to be a railroad with them in that situation?

MR. SIPE: In this case, yes. And I don't know which of these two instituted the contract. But clearly Canexus was a big player in that. And clearly Canexus did not try very hard to give voice to our preference for the short haul.

Thank you.

VICE CHAIRMAN MULVEY: Well, one more question.

MR. SIPE: Certainly.

VICE CHAIRMAN MULVEY: You've made the point several times that the record before
us is incomplete in order to take into account other factors because those other factors are not spelled out very well, and that this case is fairly narrow in terms of what's before us. Should we open a rulemaking in order to decide what other factors we should consider in these routing decisions and what kind of weight we ought to give these various factors? And how should we interface with the other agencies that have a role in this, including FRA? If we open a rulemaking, do you think we could hold this case in abeyance? I know it's difficult because we have committed to resolving this case in the near future. But given the complexities and given the inadequacy of the record, as you have stated, would it be appropriate for us to open a rulemaking in this case and gather information that could be used both for this case and for subsequent cases, regarding what kind of things we're going to take into consideration, including public interest.
factors?

And as I said before, distance, population, exposure, and all of that matter in making a decision as to what would be the appropriate routing. Because quite frankly I really feel that if this case goes forward to a Board decision one way or the other, it is probably going to be the first of many cases along these lines as every railroad tries to short haul itself with regard to TIH movements.

MR. SIPE: Well, I could not endorse holding this case in abeyance if the consequence was that the status quo prevails because basically that means BNSF loses for as long as the interval continues. And we all know that if there is a rulemaking, that could be a long, long time.

VICE CHAIRMAN MULVEY: You know the Board moves very quickly on -- never mind. We would like to move quickly obviously but I understand your point, yes.
MR. SIPE: Thank you Chairman --

Vice Chairman Mulvey. Thank you Chairman Elliott.

CHAIRMAN ELLIOTT: Thank you, Mr. Sipe.

MS. RINN: A few points, first of all, I don't believe that I am the only one who thinks it is peculiar that BNSF would end its remarks with a plea to not let the shipper dictate to the railroads what the route is going to be, a point it makes repeatedly in its filings.

And yet, when it is setting the stage for why -- what it did was reasonable and what UP is doing is unreasonable, it explains its framework. It says it explained the framework to Canexus, that Canexus agreed to the framework.

And that it thought Canexus understood that Canexus's job was to tell UP what they were supposed to do, which was to agree to a Portland and Spokane interchange.
How is that carrier to carrier? That is one carrier talking to the shipper, reaching an agreement on a framework to dictate to the other carrier what the route is going to be.

But wait. Isn't that what Mr. Sipe just told you would be a bad public policy result in this case? And he is right. That would be a bad public policy result.

But that isn't what happened here. What happened here is BN made a change in its business strategy in order to implement that, in the minority of destinations that Canexus wants to ship to, it needed to get the agreements of its connecting carriers to a new route. And it skipped that step.

And when I go back and read the Central Power & Light decision, which Mr. Sipe was correct to point to, I see many references to the routing protections in 10705(a)(2) confer on each railroad the initial discretion to choose the route. I don't see anything in either of those decisions that gives the
origin carrier an effective veto, in effect
the right to bypass the connecting carrier
altogether.

Second point, Mr. Sipe claims that
well BN is accepting the long haul for 70
percent of the traffic. But my understanding
listening to what he said carefully, my
understanding is yeah, that's for the stuff
that is local. Well, guess what? They have
100 percent of the haul. The long haul is the
short haul because they take it from the time
they get it to the time they deliver it to the
local destination. There is no question of
long haul/short haul.

Finally, the contract rate or the
existence of the contract is not controlling
but it is relevant and it is entitled to some
weight because one of the statutory factors in
1070502 is the efficiency, the adequacy, and
the economics of the transportation.

We submit the fact that there is a
contract suggests that Kansas City is, in
fact, an efficient, adequate, and economical
route for the transportation.

Are we saying it needs to be that
for all time? No. But it is entitled to some
weight, if not controlling weight. And UP is
entitled to a voice.

We believe that the best role that
the Board can deal with, because let's face
it, decisions regarding TIH transportation are
too important to leave to a simple rule. We
believe that the best policy course the Board
can go with is to stress the importance of
carriers reaching a rationale agreement and
being prepared to defend when they cannot
reach an agreement why theirs is the superior
choice.

We think it would also help,
frankly, if we got guidance regarding
liability allocation and the ability of rates
to recover extra costs for TIH.

CHAIRMAN ELLIOTT: Thank you.

Mr. Wilcox?
MR. WILCOX: Thank you.

Just a few points on rebuttal. As Mr. Sipe mentioned, BNSF has reached out to Canexus. It was late last week. And so a considerable amount of travel time involved and we had the holiday weekend so they did not -- parties were not allowed to -- or did not have time to really talk. And we look forward to this afternoon's session. So we appreciate Mr. Sipe's comments.

A couple of points. In terms of long haul versus short haul. I wanted to point out one factual issue in terms of UP being -- hauling chlorine from Portland to California. That is part of the so-called I5 contracts through the BNSF, or excuse me, the UP SPOKANE merger. There is a condition where UP actually can be technically an originating carrier for certain -- for shippers in Canada. So they are, from a rate standpoint, an originating carrier.

And Canexus has worked with the
railroads. I think it’s also in the record where Canexus has worked with the railroads in terms of trying to work with their long haul preference when possible.

It’s also in the record that Canexus tried to engage BNSF about the interchange point for these particular destinations --

CHAIRMAN ELLIOTT: Just so I understand, with respect to the originating carrier, and it being possibly UP as a result of I guess trackage rights, can that occur in this instance, that UP could --

MR. WILCOX: It could not. It only works for certain destinations under the UP SPOKANE merger, and those are California and some other states. It does not work for these destinations.

CHAIRMAN ELLIOTT: Okay. I just want it to be clear.

MR. WILCOX: I probably should not have brought that one up first.
Another factual point is BNSF --

Mr. Sipe mentioned that BNSF was the carrier for 70 percent of the long haul movements. And I'm told it's more along the lines of about 50 percent. In fact, maybe closer to 40 for, at least, Canexus's traffic.

In terms of the -- we're talking about, you know, in choosing the interchange point and different factors and the railroad's choosing or deciding where they're going to interchange, what I don't -- what Canexus does not want to do is minimize the importance of the contract here. This is -- the contract is -- these are not easy to come by, particularly for the TIH.

They are very valuable. It is an arms' length contract. BNSF was aware that it was being negotiated. That's in the record. And so what Canexus wants to be sure to be clear that, you know, BNSF's actions here would negate the value of that contract if BNSF prevails.
And we -- it's going too far to say that Canexus says that this is conclusive, meaning we have a contract, therefore we win. We understand the standards from CPL in terms of selecting a interchange point. But we believe that the weight given to that contract should be more than what certainly what BNSF says.

It's certainly not irrelevant, as the Vice Chairman pointed out. But we believe that -- we concur with UP that it is relevant. But we also think the Board in the FMC case went further. And you can -- you know you can argue about whether that's a predictor or not. But the Board did very pointedly say that contracts have value. We need to not allow carriers to negate them. And it is the policy of Congress to encourage contracting.

I'm sorry, sir. Were you --

CHAIRMAN ELLIOTT: Oh, that's okay. So what you're saying based on the Bottleneck decisions is that the contract is
a factor and not an automatic requirement that there be an interchange point there in Kansas City? Or are you saying something different?

MR. WILCOX: No, I think that it's -- the Bottleneck rules is a factor. We believe it is a very strong factor if you have an established interchange point and you have a contract from that interchange point.

The rules are clear. The Board is the ultimate decider of whether the interchange point is appropriate.

CHAIRMAN ELLIOTT: Let me ask you a hypothetical here. Let's say Mr. Sipe and Ms. Rinn had backed into the corner. And they decide okay, we can pick an interchange point. Where does that leave you in the contract?

MR. WILCOX: Well, UP is a signatory to a contract. They are bound to deliver, as of now, the -- Canexus's cars from Kansas City to these destinations at certain rates and terms. If there was a deal made for another interchange point, then that would
require either an amendment of the contract or a new contract. And certainly Canexus would be involved in that.

And Canexus is not indifferent to discussing alternatives. But they have a value -- there is value to this contract. And they want to preserve that value. They don't want it to be negated by these decisions.

CHAIRMAN ELLIOTT: What if they just decided they wouldn't negate it, would that put you in the position that you would have to go to that interchange point that they chose together?

MR. WILCOX: Well, then you get into questions of, you know, breach of contract if UP is operating contrary to their obligations under that contract and as us -- since Canexus as the other signatory doesn't agree to amending it. Or say they decide to go to another interchange point, then the rates go up, you know, not proportionately but well beyond, then now you are losing the value
of the contract you have presently.

VICE CHAIRMAN MULVEY: Mr. Sipe made the point that the Canexus plant in Marshall was developed in order to take some of the traffic out of North Vancouver during the Olympic Games. Does Canexus have any plans now to shut that plant down and move them back to Vancouver and consolidate there because the games have been played?

MR. WILCOX: That was -- as a matter of fact, that was another factual clarification I got in that Marshall was not all about the Olympics. It's used about -- it manages inventory from the North Vancouver plant. So it is used today. And I understand they ship about 60 cars out of that facility. So it is used.

VICE CHAIRMAN MULVEY: Okay. Mr. Sipe expressed skepticism as to whether we would hold this in abeyance while we open the rulemaking on this. And understandably so because if we did that the status quo would
prevail for the length of the rulemaking until when the Board finally made its decision.

Do you have any thoughts on whether or not a rulemaking is appropriate here? One that would take into account all of the factors that might be involved in deciding the appropriate interchange for TIH. I mean I think we need to focus on TIH here because this is a very unusual case before us where the railroads are fighting not to get the long haul. And that is extremely unusual. And it does involve TIH shipments.

So do you think it is appropriate for the Board to develop a record on that upon which to make its decision? That there is not enough in the record, as Mr. Sipe suggests, for the Board to make a decision on this or to make a decision that would be other than simply recognize the originating carriers' right to choose the routing?

MR. WILCOX: Well, I think that this case can be decided on its merits and not
affect a rulemaking -- a future rulemaking. I think the Board decisions do that in terms of precedent all the time.

I think that you also don't need to do a -- tie this into a greater rulemaking because there aren't that many facts to explore here because you've got a situation where the rate or the route that we -- that Canexus is complaining about is established. It was -- you know, their chlorine moved from North Vancouver and Marshall through Kansas City to these destinations. It's been happening for over a year.

And BNSF does not dispute this interchange. They don't dispute that it works, that it is efficient. And so I don't think you have a situation where you have that inquiry here.

BNSF just -- they don't want to from a business standpoint. So I don't know if that's quite the same inquiry you would have in the rulemaking. I guess in terms of
- from a complainant's standpoint, we believe that the record supports a decision in Canexus's favor. And we'd like the Board to proceed to a decision.

VICE CHAIRMAN MULVEY: Well, one of the factors, of course, is that this is a movement of a material that, if there is an accident, could threaten the health and the lives of people who will be affected. Many years ago when I was at the TRB, we had a study regarding the movement on spent nuclear materials.

And what we were looking at was the quickest and safest way of moving it. The choice was between sometimes the safest railroad, the best track, but going through heavily populated areas versus routing around those populated areas but then putting the materials over a longer route over track that was less than the best FRA-class track. The risk of an accident versus the risk of exposure.
So obviously for spent nuclear materials, there's Price Anderson. So that problem has already been taken away. We don't have Price Anderson in the case of TIH. Whether we should or not is a public policy decision that we can't make.

But those would be some of the factors that you might want to consider as to what the proper routing would be. Would you agree with that, that there should be these factors taken into consideration? And the record before us right now does not include enough information on those factors.

MR. WILCOX: Well, I'm not disputing those are the factors. I just don't think that this is the case to look at those factors. I think in a larger rulemaking, perhaps it is appropriate. But I don't think you need to do it in the context of this case or hold this case in abeyance.

The other point to raise is that, you know, contrary to BNSF's view on this,
there are no alternatives to BNSF. It's very clear for movement of the material from North Vancouver and from Marshall to the UP interchange in Kansas City. It's very clear. CP made it very clear they're not an alternative. And CN, BNSF has mentioned CN, CN doesn't get to Kansas City. So in this particular case, BNSF is a true bottleneck carrier because there is no alternative to them. And so I don't think you need to do -- I just -- I think you could do the analysis you're talking about and the inquiry without doing it in this case.

COMMISSIONER BEGEMAN: Mr. Sipe said the reason they want to be treated as the originating carrier in this case, and he mentioned a number of factors, and he also said that Canexus is asking BN to move it from Vancouver. Now what if Canexus were asking either CN or CP to move it from Vancouver, I
mean you could get to Kansas City by some alternative carrier, just as you can get there now with the BN-UP routing.

MR. WILCOX: Well, we can't -- you can't use CN because they can't interchange with UP for this -- the contract movement from Kansas City to the destinations. And we can't use CP because CP has no rates. And they have made it clear they're not going to provide any rates.

COMMISSIONER BEGEMAN: Well, so was more done than just an email to CP trying to get a rate?

MR. WILCOX: Well, the record shows there was at least an email. There was a response from CP. And then further discussion from CP saying you have to -- this is not a rate under Canadian law. And we are withdrawing this informal rate and we're not giving you a formal rate. So there were --

COMMISSIONER BEGEMAN: Help me understand. If Canexus asks BN to move it out
of Vancouver, does BN have more of an
obligation in Canada to move it than if
Canexus asked CP to move it?

MR. WILCOX: Well, I don't know
that the terms of the obligation -- I would
say their obligation would be the same. But
the reason CP was not asked in the first place
is because it is a considerably longer
movement. CP has never hauled this material
to Kansas City. And the record shows that
there were more HTUA areas. And it's just a
more complicated, longer movement. And so
they hadn't even asked in the past.

COMMISSIONER BEGEMAN: But I think
that somehow the record is getting a little
skewed in that when this case came to us,
there was not a long record of BN bringing the
product to Kansas City. There were 18-plus
shipments. So I think that we need to not
lose sight of that.

VICE CHAIRMAN MULVEY: You
mentioned CP but the traffic is really
originated by CN, correct?

MR. WILCOX: Yes.

VICE CHAIRMAN MULVEY: CN, last
time I looked, does go to Chicago. Could the
traffic go from North Vancouver to Chicago and
then be interchanged in Chicago with a carrier
that serves Kansas City?

MR. WILCOX: Well, again, the
contract that we have, that Canexus has, is
from Kansas City.

VICE CHAIRMAN MULVEY: Right.

Okay.

MR. WILCOX: You can unravel
things and go back. But, you know, Canexus is
making decisions literally at the last minute
for 2011 and negotiated with the two carriers
who have hauled their chlorine for years even
though, you know, Kansas City may not have
been used as much as others. These were the
--- these are the two carriers that they have
used for many years, wherever they go.

VICE CHAIRMAN MULVEY: You
mentioned earlier on, this is a little off the subject but that Canexus primarily manufactures chlorine for use in water treatment plants. Does it ship for any other purpose? Or is it almost -- is it 100 percent water treatment?

MR. WILCOX: I do not know but Mr. Cove does.

VICE CHAIRMAN MULVEY: Oh, okay. I mean the Chlorine Institute tells us that 93 percent of all manufactured goods in this country contain some chlorine in them. And that therefore chlorine is a widely used material. And it is not just for water treatment plants albeit that it is a major user of it. But one that's being substituted for all the time.

Yes, sir?

MR. COVE: So to answer your question, and I don't have the statistics in front of me, but the majority of what we do is ship to water treatment. But that's not the
only thing. So we also ship to a variety of
other users, including pharmaceutical, PVC, et
cetera, et cetera.

VICE CHAIRMAN MULVEY: Okay. Thank
you.

MR. WILCOX: Mr. Cove didn't
expect this but it was done well.

Is that it?

CHAIRMAN ELLIOTT: Yes, thank you
very much for coming, for your excellent
argument. We'll take this matter under
advisement. And we do encourage you to
resolve this matter in your afternoon session.
I think that is the best way to work this out,
not having us decide it.

So this meeting of the Board is
now adjourned. Thank you.

(Whereupon, the above-entitled
oral argument was concluded at 11:05 a.m.)
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CERTIFICATE

This is to certify that the foregoing transcript

In the matter of: Canexus v BNSF Railroad

Before: STB

Date: 01-17-12

Place: Washington, DC

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.

[Signature]
Court Reporter