

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, :  
 :  
 -----X

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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1 P-R-O-C-E-E-D-I-N-G-S

2 (9:32 a.m.)

3 CHAIRMAN ELLIOTT: Good morning.

4 Welcome.

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

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

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

22 In an effort to move things along,

1 the Board members will not be making opening  
2 remarks this morning. But I wanted to cover  
3 a few procedural matters before we begin.

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

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

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

19 We have the following time  
20 allotments for Counsel. The opening parties,  
21 Canexus and UP, have agreed to divide their  
22 30-minute allotment of time. Counsel for

1 Canexus will begin with 12 minutes on opening  
2 followed by Counsel for UP who has requested  
3 six minutes. Counsel for BNSF will then have  
4 30 minutes. Canexus has reserved eight  
5 minutes for rebuttal and Union Pacific has  
6 reserved four minutes.

7 If you wish to make a change to  
8 your reserved rebuttal time, please advise us  
9 when you begin your opening presentation. Any  
10 party making a PowerPoint presentation or  
11 using similar hard copy aides using materials  
12 previously placed in the record should have  
13 provided these materials in hard copy size to  
14 -- 8-1/2 by 11 size -- to opposing Counsel and  
15 the Board.

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

19 Speakers please note that the  
20 timing lights are in front of me. You will  
21 see a yellow light when you have one minute  
22 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

1 President, General Counsel, and Corporate  
2 Secretary who is from Calgary.

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

7 CHAIRMAN ELLIOTT: Could you just  
8 speak up a little bit? Right into the mic?  
9 Thank you.

10 MR. WILCOX: Is that better?

11 CHAIRMAN ELLIOTT: Yes.

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

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

21 This is a straightforward case.  
22 And it's whether BNSF is legally obligated to

1 maintain common carrier rates and service  
2 terms from Canexus facilities in North  
3 Vancouver and Marshall to the Kansas City  
4 interchange.

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

13 But BNSF unilaterally decided in  
14 2011 it would adopt a position for TIH  
15 commodities where BNSF, quote, is entitled to  
16 the short haul when BNSF does not serve the  
17 destination. Canexus learned of this position  
18 in 2011 while it was simultaneously making its  
19 transportation arrangements for 2011. And  
20 UP's preference for these particular movements  
21 was to enter into a contract with Canexus from  
22 the Kansas City interchange, which was

1 consistent with prior practices where BNSF had  
2 common carrier rates and UP entered into  
3 contracts with Canexus.

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

14 VICE CHAIRMAN MULVEY: How long  
15 has BN been delivering the chemicals from  
16 Vancouver to Kansas City interchange? When  
17 did it start? When did those shipments begin?  
18 Can you tell us that?

19 MR. WILCOX: As I understand it,  
20 there was a rate in place in 2010 to Kansas  
21 City for interchange with UP that was not used  
22 -- I believe that's correct -- that was not

1 used or, if used, not very much. However,  
2 there were shipments made between January 1,  
3 2011 and March 16th, 2011, using that rate and  
4 a common carrier rate that was temporarily in  
5 place with UP while they were still  
6 negotiating the contract.

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

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

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

16 MR. WILCOX: Yes.

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

20 MR. WILCOX: Yes.

21 COMMISSIONER BEGEMAN: Had there  
22 been any carloads between March and May when

1 you filed? Or were there just the 18 that had  
2 occurred before you came to the Board?

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

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

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

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

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

21 MR. COVE: Yeah, first to answer  
22 your question, between March and May, we were

1 continuing to ship over to the Kansas City  
2 interchange. There was a brief period of time  
3 when there was not a rate available to us. So  
4 we were using other interchanges that BN  
5 objected to, and quite rightly so. But BN  
6 then agreed to put a new rate in place with a  
7 limited time horizon.

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

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

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

16 MR. COVE: This is in March.

17 COMMISSIONER BEGEMAN: Okay.

18 MR. COVE: So the rate had expired  
19 --

20 COMMISSIONER BEGEMAN: Okay.

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

22 And there was a period of time in which there

1 was no rate in place to Kansas City. And it  
2 was about ten days later that BN agreed to put  
3 a rate in place temporarily until the end of  
4 June.

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

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

12 COMMISSIONER BEGEMAN: Okay.

13 MR. COVE: It was dozens though.

14 COMMISSIONER BEGEMAN: Okay.

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

21 So we are certainly not large  
22 enough to say dictate pricing or had a large

1 control over the marketplace. We are  
2 essentially following other competitors and  
3 trying to fill niche markets. In particular,  
4 we tend to be largely in the water treatment  
5 marketplace -- not strictly, but typically.

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

10 Prior to let's say January 1st,  
11 2011, Canexus has shipped over a variety of --  
12 to a variety of customers over a variety of  
13 corridors, including Kansas City. I don't  
14 have the exact numbers available. I'd have to  
15 go back and look at my database.

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

1 Does that answer your question?

2 COMMISSIONER BEGEMAN: I think so,  
3 for now.

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

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

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

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

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

19 MR. WILCOX: Well, those cases did  
20 involve, to some extent, the routing  
21 preference under 10705(a)(2). The Board was  
22 balancing the routing preference of that

1 statute versus the contracting statute. And  
2 that's -- in fact, the DC Circuit, this came  
3 up in the FMC case when the FMC case was  
4 affirmed by the DC Circuit.

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

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

18 They said the Board's discussion  
19 was a lengthy and well-reasoned explanation of  
20 the intersection of the conflicting mandates  
21 of its contractual and long-haul provisions.  
22 And so this has come up before and --

1                   CHAIRMAN ELLIOTT: In that case,  
2 then, wasn't it really dealing more with the  
3 rates as opposed to the routes? That they  
4 were entitled to get a rate to a certain  
5 point? And to divide that rate so that they  
6 could get a short haul or on the bottleneck,  
7 a rate on the bottleneck also?

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

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

21                   MR. WILCOX: Well, in terms of  
22 choosing the interchange point, it's 10742.

1 And the Board in the CPL case said this is a  
2 statute that is to be used for other things.  
3 But it is a statute that will apply here in  
4 terms of coming up with the criteria for the  
5 interchange points.

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

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

17 MR. WILCOX: Well, I think that  
18 there is a -- UP did not, as in here, object  
19 to that interchange point because it had been  
20 used. But I don't think it is that much of a  
21 difference because here BNSF doesn't dispute  
22 the efficiency or the operational feasibility,

1 anything about the Kansas City interchange  
2 point. It just doesn't want to use it.

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

6 CHAIRMAN ELLIOTT: Thank you.

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

9 CHAIRMAN ELLIOTT: Okay.

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

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

17 MR. WILCOX: Well, actually --

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

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

22 CHAIRMAN ELLIOTT: And I'll lay

1 off.

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

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

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

21 VICE CHAIRMAN MULVEY: This is a  
22 very different case, isn't it, in the sense

1       that the railroads here are desiring to short  
2       haul themselves, whereas typically railroads  
3       do not want to be short hauled.

4               MR. WILCOX:   Well, absolutely.

5               VICE CHAIRMAN MULVEY:   So that's a  
6       unique part of this case.  One other thing  
7       though, under 10705 where we talk about  
8       reasonable preference to the originating  
9       carrier, we also talk about other factors such  
10      as adequacy of service, efficiency, et cetera  
11      --

12              MR. WILCOX:   Yes.

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

21              MR. WILCOX:   Well, I think that in  
22      this case in particular, you have a case where

1 BNSF is saying they want to short haul  
2 themselves. You should give them that  
3 preference.

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

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

18 Now there are difficulties with  
19 that because the routings are not -- for TIH  
20 routings, they are not public. We don't know  
21 how BNSF gets the chlorine from North  
22 Vancouver down to Kansas City. We don't

1 really care obviously. Of course we care from  
2 a public safety standpoint. But in terms of  
3 how they run their railroad. But anyway --

4 VICE CHAIRMAN MULVEY: Okay. Thank  
5 you.

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

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

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

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

1       Worth.

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

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

21                   So in that sense, the first, at  
22 least in recent history, BNSF/UP/Kansas City

1 movements would have been in January, moving  
2 under a previous BN group rate plus a UP  
3 point-to-point proportional rate. But as far  
4 as we can tell, that traffic began moving in  
5 mid-January.

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

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

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

15 CHAIRMAN ELLIOTT: All chlorine,  
16 okay. Sure.

17 MS. RINN: But basically the  
18 distinction we are drawing is that you have to  
19 look at the suitability of both the  
20 interchange where the physical handoff occurs  
21 as well as what the entire route is going to  
22 be.

1                   And so while we may have thought  
2                   it was foolish for us to say even though BN  
3                   had been handling the chlorine to Stockton and  
4                   Colton before giving it to UP for a short  
5                   haul, we thought it would look very strange  
6                   for us to say it was unreasonable for us to  
7                   take it in Portland instead, although we were  
8                   obviously happy with the Colton and Stockton  
9                   interchanges. But not for western  
10                  destinations.

11                  When you are talking about moving  
12                  traffic into Arkansas, Louisiana, or Missouri,  
13                  Portland looks to us to be very unusual  
14                  interchange to be using for that type of a  
15                  move. And so that's why we said look, we're  
16                  going to be looking for a different  
17                  interchange. And Kansas City seems to be  
18                  centered relative to these destinations. And  
19                  it is a commonly used interchange overall. And  
20                  it has, in fact, moved TIH. Both railroads  
21                  are open to viewing a TIH interchange in  
22                  Kansas City.

1                   So I hope that helps clarify the  
2 movement history.

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

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

12                   And our objection here is that  
13 BNSF had a right in its business judgment to  
14 choose to change its strategy from a group  
15 rate structure and going after the long haul  
16 to say we want to do point-to-point rates and  
17 we want to have a short haul. But they don't  
18 have a right, having decided that that's their  
19 strategy and that's where they want to be,  
20 they don't have a right to then dictate to  
21 their connecting carriers therefore you will  
22 take this in a city that has not been used as

1 an interchange for this type of traffic.

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

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

9 MS. RINN: In part. And we  
10 believe that there are several statutory  
11 provisions that come into play: 10701, 10703,  
12 10705, and 10742. If you put those together,  
13 the principle is carriers are the ones who are  
14 supposed to establish the rate. And they are  
15 supposed to do it by agreement.

16 If they cannot agree, then the  
17 Board, under 10705, does have the authority to  
18 prescribe a through route. Under 10705(a)(1),  
19 that route is supposed to be in the public  
20 interest. Under 10705(a)(2), there are  
21 several considerations that are put in there.  
22 And as a tiebreaker, there is a provision in

1 the long-haul law that the origin carrier's  
2 reasonable preference should be granted.

3 CHAIRMAN ELLIOTT: But you think  
4 that only applies with respect to the long  
5 haul? Or do you think it applies to  
6 10705(a)(1) and (2)?

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

17 VICE CHAIRMAN MULVEY: And this is  
18 a very unusual case in the sense that in most  
19 cases, railroads want traffic and they want  
20 revenues. Here, neither railroad wants the  
21 traffic or the revenues even though it is  
22 very, very likely that whoever gets this

1 traffic in the long haul will probably be  
2 better off from an economic sense, providing,  
3 of course, that there are no mishaps along the  
4 way.

5 There haven't been any mishaps  
6 since the one we had -- a very, very serious  
7 one in Graniteville a while back -- but for  
8 the most part, TIH traffic has moved safely.

9 But since one of the issues is  
10 exposure, there are two factors in exposure.  
11 There's population and then there's also  
12 length of haul.

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

20 Now we don't know what the exact  
21 routing is going to be but we can make some  
22 reasonable estimates as to what they would be.

1 Do you think that the length of haul that's  
2 involved and the population size that is  
3 exposed should be factors in determining how  
4 the Board determines how this traffic should  
5 move?

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

10 What I would say is based on the  
11 record we have here, we know that both BN,  
12 because it has admitted UP's characterization,  
13 has said that routing this via Kansas City is  
14 a feasible and a reasonably efficient route.  
15 We are not sure that Portland is because we're  
16 not sure how BNSF would move it via Portland.  
17 And we are fairly confident that we believe  
18 that Spokane is not a suitable interchange  
19 because one of the other factors you ought to  
20 consider is where you are doing the handoff is  
21 how often do the carriers do it? Is it part  
22 of their ordinary course of business?

1           Both carriers hold themselves out  
2 as accepting and receiving TIH from each other  
3 in Portland and in Kansas City. BNSF has  
4 published a restriction that says no, we don't  
5 accept it. Don't bill it through Spokane  
6 unless you call us first. And then we'll make  
7 arrangements, which to our mind is a  
8 disqualifier for using Spokane as a movement.

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

19           We believe that there are other  
20 factors as well that may be motivating BN's  
21 decisions. We know that we take it into  
22 consideration. And one is how much investment

1 are you going to have to make in PTC?

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

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

17 But UP is not even insisting on  
18 that. We think it is too complicated. And  
19 that what makes sense is for the carriers  
20 involved to sit down and develop a TIH routing  
21 protocol if, in fact, they're saying, you  
22 know, the way we've historically routing this

1 isn't making sense in this regulatory  
2 environment and we ought to make adjustments.  
3 The carriers ought to be talking about it.

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

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

21 BNSF made a business decision at  
22 the end of 2010 that they wanted to go for a

1 short haul, that they wanted to drop their  
2 group rate structure and go to point-to-point  
3 rates, and that presumably, therefore, or as  
4 a result of those, they then said the way this  
5 traffic has been routed in the past doesn't  
6 make sense under our new strategy. We want to  
7 do new routes. And they have a right to make  
8 that business decision.

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

18 VICE CHAIRMAN MULVEY: You  
19 mentioned that there were 27 factors that need  
20 to be considered in deciding how to route  
21 this. One of the concerns that I have is that  
22 if indeed the Board winds up de facto making

1 these interchange decisions because carriers  
2 can't agree on the long haul and short haul  
3 for TIH, that there are all these factors.  
4 How would we weight individual factors? I  
5 sort of envision this giant mathematical model  
6 where you have weights applied to each one of  
7 these and then it comes out and says okay,  
8 this is 47.6 versus 47.2. Therefore -- it is  
9 a very, very complicated process.

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

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

19 MS. RINN: I absolutely agree with  
20 you, Vice Chairman Mulvey, that it is not a  
21 good use of the Board's time and it is  
22 probably not the best way of coming up with

1 what are the optimal or the best overall  
2 routing decisions to be made. That that  
3 really ought to be left to the railroads.

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

11 That unless you want to be like  
12 where I am here today, that they ought to sit  
13 down with other and talk about it based on all  
14 of the operating data, all of the other data  
15 that they have available to themselves, and  
16 hopefully we would be able to reach agreement  
17 in all circumstances but in certainly the  
18 majority of the circumstances, so that we  
19 could one, reduce or eliminate the number of  
20 times an issue like this would have to come to  
21 the Board and a poor TIH customer would get  
22 involved in the crossfire.

1                   And secondly, when or if any such  
2                   disputes did end up at the Board, that you  
3                   would have a clearer record and we would be  
4                   basically eliminating opportunities of saying  
5                   okay, here's the clear example or here are the  
6                   factors that are dividing the railroads about  
7                   why we think, you know, this -- Railroad A  
8                   thinks that this route is better and Railroad  
9                   B thinks an alternative route is better. So  
10                  that it would be at least clarified if not  
11                  completely avoided.

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

21                  MS. RINN: Well, needless to say,  
22                  I cannot speak for all railroads. I can only

1 speak for my railroad, Union Pacific.

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

21           And I didn't feel comfortable  
22 defending an insistence on Colton so UP could

1 get its short haul, which is just as rational,  
2 I submit, as BNSF wanting a short haul. But  
3 I didn't feel comfortable defending that as a  
4 reasonable position. And, therefore, we  
5 adjusted and BN got its short haul.

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

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

18 VICE CHAIRMAN MULVEY: BN is  
19 proposing two new interchange points, Spokane  
20 and Portland, rather than going to Kansas  
21 City. Are you aware, or do you know if there  
22 is a difference in the total miles that this

1 material would travel from those two points as  
2 compared to Kansas City?

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

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

22 But we are certainly willing to

1 discuss that. I mean that's, to our mind, the  
2 benefit -- the virtue of having a routing  
3 protocol is that you are approaching this  
4 objectively and scientifically using the data  
5 to be making decisions.

6 VICE CHAIRMAN MULVEY: Thank you.

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

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

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

19 BNSF appreciates the Board's  
20 commitment to moving this matter towards  
21 resolution on an expedited basis. And in  
22 particular, we appreciate the Board's

1 representation that it would try to resolve  
2 this matter by January 31st.

3 In that connection, BNSF wants the  
4 Board to know that BNSF is still hopeful that  
5 it will be able to resolve its disputes with  
6 Canexus without the need for a Board decision.

7 As you know, there's a second  
8 dispute between the parties, that is BNSF and  
9 Canexus, involving rates from North Vancouver  
10 to the southwest that is not before you today.  
11 That dispute, which is being adjudicated under  
12 the Board's three benchmark procedures, is the  
13 subject of a mediation between Canexus and  
14 BNSF this afternoon. And BNSF will be  
15 participating with business representatives in  
16 that mediation.

17 We've reached out to Canexus in  
18 advance of the mediation and indicated that  
19 we're hopeful the parties can explore the full  
20 range of issues that are outstanding between  
21 them and perhaps solve the dispute in both the  
22 routing case and the rate case.

1           We have no way of knowing whether  
2           such a resolution could be accomplished this  
3           afternoon. But we hope the mediation will be  
4           at least a first step in moving towards a  
5           comprehensive resolution of these issues. And  
6           we will, of course, keep the Board advised of  
7           any progress. And we will respect the  
8           confidentiality of this afternoon's mediation  
9           as well.

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

20           And there's been a fair amount of  
21           discussion about that. And I could add my  
22           views on how that came to be. It's not an

1 optimal situation. We don't want to be in the  
2 business of bringing these matters before the  
3 Board and we will strive not to bring them  
4 before the Board in the future.

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

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

16 VICE CHAIRMAN MULVEY: Are you  
17 actually an origin carrier? Because my  
18 understanding is that BNSF, in fact, is a  
19 bridge carrier. You don't actually pick it up  
20 at the manufacturing plant but rather that's  
21 done by a Canadian railroad and then it is  
22 transferred to BNSF, which sort of makes you

1 a bridge carrier instead of an originating  
2 carrier. And that, of course, might work  
3 against the reasonable preference for the  
4 originating carrier. Do you want to comment  
5 on that?

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

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

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

21 Second, in terms of the Board's  
22 jurisdiction over this dispute, we are

1 indisputably the carrier that originates the  
2 portion of the movement in the United States.

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

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

17 And while I'm on that point, let  
18 me just respond to the question that Chairman  
19 Elliot has put to both the other counsel of  
20 whether this is a 10705 case, and I think I'm  
21 more or less in Ms. Rinn's camp and to say in  
22 part, in the second bottleneck decision, the

1 Board spoke about routing any interchange  
2 decisions in the context of the overall  
3 bottleneck issue, which as you know was an  
4 issue regarding competitive alternatives.

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

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

21 Accordingly, if the carriers  
22 cannot agree on an interchange that would act

1 to create that route, we will determine one.  
2 That determination would not involve the  
3 competitive access regulations.

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

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

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

19 MR. SIPE: That is correct,  
20 Chairman Elliott.

21 And the other thing I'm wanting to  
22 do is distinguish my position from Mr. Wilcox

1       who says he takes it further. Under the  
2       Board's reading of 10705, in the bottleneck  
3       decision, and says BNSF is the bottleneck  
4       carrier. And for that reason, you should give  
5       conclusive weight to our transportation  
6       contract with UP. And that's clearly wrong.

7               I mean the first part that our  
8       situation speaks to 10705 and implicates that  
9       section of the statute and the preference for  
10      the originating carrier is clearly correct.  
11      But the second proposition that somehow we are  
12      a bottleneck carrier and, therefore, the  
13      Canexus contract with UP basically trumps the  
14      statutory preference --

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

21              But how can a contract play no  
22      role at all in the Board's determination on

1 this issue? Don't we have the obligation to  
2 try to harmonize one carrier's contracts with  
3 another carrier's routing preferences? Isn't  
4 that the Board's job to balance those  
5 interests as opposed to the reasonable  
6 preference being the only thing we should be  
7 considering.

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

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

1 doesn't know anything about the terms at all.

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

16 MR. SIPE: I would say that both  
17 the statute and the Bottleneck II decision  
18 that I have been referring to suggests that  
19 the Board should consider other factors. I  
20 would also suggest that under the record --  
21 given the record that has been made in this  
22 case, you are somewhat constrained in your

1 ability to consider other factors because the  
2 parties have not made a comprehensive record  
3 on other factors relating to some of the  
4 considerations you've talked about such as  
5 length of haul, population densities, other  
6 factors involving safety.

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

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

20 And you, Vice Chairman Mulvey,  
21 have alluded a couple of times during this  
22 oral argument to the fact that we're dealing

1 with a situation here involving the  
2 transportation of chlorine, in which the  
3 normal incentives and preferences are flipped  
4 on their head.

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

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

21 And Ms. Rinn has candidly  
22 acknowledged that UP would rather have the

1 short haul. Indeed, UP did have the short  
2 haul on those movements to California before  
3 the route was changed to interchange at  
4 Portland. And she would have preferred if it  
5 had remained that way.

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

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

19 MR. SIPE: I'll tell you what my  
20 understanding is about Spokane. We proposed  
21 Spokane to handle these movements from  
22 Marshall, Washington. And the history behind

1 Marshall, Washington is that Canexus  
2 established it back around the time of the  
3 Vancouver Olympics as basically a staging area  
4 for its movements of chlorine. They wanted to  
5 get the chlorine out of the Vancouver area  
6 during the Vancouver Olympics, as I understand  
7 it.

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

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

21 So Spokane is, in fact, contrary  
22 to Portland, not a place we normally

1 interchange chlorine with Union Pacific. And  
2 so we have, because there's not a standard  
3 practice, we have this basically notice  
4 provision. And when you're bringing -- when  
5 we're bringing the chlorine to you in Spokane,  
6 or vice versa although I'm not aware of any,  
7 vice versa circumstance, you've got to call up  
8 and make sure we've got the right personnel  
9 there and we arrange to handle this material  
10 safely.

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

22 COMMISSIONER BEGEMAN: Given the

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

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

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

21 And we found that we were  
22 basically getting long hauled and sometimes

1 getting long hauled via irrational and  
2 circuitous routings, which compounded any  
3 disadvantage. And under the new point-to-  
4 point rates that we instituted, we tried  
5 generally to reduce the flexibility of  
6 shippers and connecting carriers to saddle us  
7 with the long haul.

8 That's about as specific as I can  
9 be about shippers other than Canexus. As to  
10 Canexus, there's more information in the  
11 record. And basically what that says is our  
12 policy is that the carrier who hauls this  
13 Canexus traffic that we participate in to  
14 destination should get the long haul. And in  
15 70 percent of the cases, that's us.

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

1 Arizona. Local BNSF, we take the long haul.

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

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

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

1 of stepping up to our obligation to take it  
2 all the way where we have to --

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

10 MR. SIPE: Yes.

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

21 MR. SIPE: I certainly think one  
22 could make the argument for coming up with a

1 comprehensive set of principles that should  
2 govern from the Board's perspective the  
3 routing of this TIH ultra-hazardous traffic.  
4 But I think it would be really a bad idea to  
5 try to get there through the vehicle of this  
6 individual dispute.

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

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

22 So the Board would want to

1 approach that broader objective, Chairman  
2 Elliott, which I think is a laudable  
3 objective, with really great care. And make  
4 sure you chose the appropriate vehicle.

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

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

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

1 the long haul for BNSF into California on  
2 Canexus movements.

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

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

17 MR. SIPE: Works except in this  
18 case.

19 CHAIRMAN ELLIOTT: But I mean you  
20 said --

21 MR. SIPE: It almost worked.

22 CHAIRMAN ELLIOTT: Your point-

1 to-point, you say works. And I understand  
2 that it works. And I assume you agree that  
3 the Kansas City interchange point also works,  
4 because it has been used.

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

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

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

21 And let me just say -- I think I'm  
22 probably close to the end of my time -- let me

1 just say one last thing unless you have  
2 further questions about the bottleneck  
3 business we went through earlier and I want to  
4 make sure you understand why I think Canexus  
5 and Mr. Wilcox are just wrong when they try  
6 and shoehorn this case into that box -- and by  
7 the way, UP agrees if you look at their  
8 footnote in their rebuttal filing, which takes  
9 issue with Canexus's reliance on the FMC case.

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

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

20 Well, I don't think so. I mean a  
21 dangerous precedent can't be ignored. And I  
22 don't know what people would make of that

1 decision. But the record and the positions  
2 that Canexus has taken in this case, stand for  
3 the proposition that the shipper ought to be  
4 able to determine who the railroad routes the  
5 traffic of this ultra-hazardous material,  
6 which is clearly inappropriate.

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

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

17 Thank you.

18 VICE CHAIRMAN MULVEY: Well, one  
19 more question.

20 MR. SIPE: Certainly.

21 VICE CHAIRMAN MULVEY: You've made  
22 the point several times that the record before

1 us is incomplete in order to take into account  
2 other factors because those other factors are  
3 not spelled out very well, and that this case  
4 is fairly narrow in terms of what's before us.

5           Should we open a rulemaking in  
6 order to decide what other factors we should  
7 consider in these routing decisions and what  
8 kind of weight we ought to give these various  
9 factors? And how should we interface with the  
10 other agencies that have a role in this,  
11 including FRA? If we open a rulemaking, do  
12 you think we could hold this case in abeyance?  
13 I know it's difficult because we have  
14 committed to resolving this case in the near  
15 future. But given the complexities and given  
16 the inadequacy of the record, as you have  
17 stated, would it be appropriate for us to open  
18 a rulemaking in this case and gather  
19 information that could be used both for this  
20 case and for subsequent cases, regarding what  
21 kind of things we're going to take into  
22 consideration, including public interest

1 factors?

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

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

19           VICE CHAIRMAN MULVEY: You know  
20 the Board moves very quickly on -- never mind.  
21 We would like to move quickly obviously but I  
22 understand your point, yes.

1 MR. SIPE: Thank you Chairman --  
2 Vice Chairman Mulvey. Thank you Chairman  
3 Elliott.

4 CHAIRMAN ELLIOTT: Thank you, Mr.  
5 Sipe.

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

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

19 And that it thought Canexus  
20 understood that Canexus's job was to tell UP  
21 what they were supposed to do, which was to  
22 agree to a Portland and Spokane interchange.

1 How is that carrier to carrier? That is one  
2 carrier talking to the shipper, reaching an  
3 agreement on a framework to dictate to the  
4 other carrier what the route is going to be.

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

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

16 And when I go back and read the  
17 Central Power & Light decision, which Mr. Sipe  
18 was correct to point to, I see many references  
19 to the routing protections in 10705(a)(2)  
20 confer on each railroad the initial discretion  
21 to choose the route. I don't see anything in  
22 either of those decisions that gives the

1 origin carrier an effective veto, in effect  
2 the right to bypass the connecting carrier  
3 altogether.

4 Second point, Mr. Sipe claims that  
5 well BN is accepting the long haul for 70  
6 percent of the traffic. But my understanding  
7 listening to what he said carefully, my  
8 understanding is yeah, that's for the stuff  
9 that is local. Well, guess what? They have  
10 100 percent of the haul. The long haul is the  
11 short haul because they take it from the time  
12 they get it to the time they deliver it to the  
13 local destination. There is no question of  
14 long haul/short haul.

15 Finally, the contract rate or the  
16 existence of the contract is not controlling  
17 but it is relevant and it is entitled to some  
18 weight because one of the statutory factors in  
19 1070502 is the efficiency, the adequacy, and  
20 the economics of the transportation.

21 We submit the fact that there is a  
22 contract suggests that Kansas City is, in

1 fact, an efficient, adequate, and economical  
2 route for the transportation.

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

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

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

21 CHAIRMAN ELLIOTT: Thank you.

22 Mr. Wilcox?

1 MR. WILCOX: Thank you.

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

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

22 And Canexus has worked with the

1       railroads.  I think it's also in the record  
2       where Canexus has worked with the railroads in  
3       terms of trying to work with their long haul  
4       preference when possible.

5                    It's also in the record that  
6       Canexus tried to engage BNSF about the  
7       interchange point for these particular  
8       destinations --

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

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

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

21                   MR. WILCOX:  I probably should not  
22       have brought that one up first.

1                   Another factual point is BNSF --  
2                   Mr. Sipe mentioned that BNSF was the carrier  
3                   for 70 percent of the long haul movements. And  
4                   I'm told it's more along the lines of about 50  
5                   percent. In fact, maybe closer to 40 for, at  
6                   least, Canexus's traffic.

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

16                  They are very valuable. It is an  
17                  arms' length contract. BNSF was aware that it  
18                  was being negotiated. That's in the record.  
19                  And so what Canexus wants to be sure to be  
20                  clear that, you know, BNSF's actions here  
21                  would negate the value of that contract if  
22                  BNSF prevails.

1                   And we -- it's going too far to  
2                   say that Canexus says that this is conclusive,  
3                   meaning we have a contract, therefore we win.  
4                   We understand the standards from CPL in terms  
5                   of selecting a interchange point. But we  
6                   believe that the weight given to that contract  
7                   should be more than what certainly what BNSF  
8                   says.

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

19                  I'm sorry, sir. Were you --

20                  CHAIRMAN ELLIOTT: Oh, that's  
21                  okay. So what you're saying based on the  
22                  Bottleneck decisions is that the contract is

1 a factor and not an automatic requirement that  
2 there be an interchange point there in Kansas  
3 City? Or are you saying something different?

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

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

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

17 MR. WILCOX: Well, UP is a  
18 signatory to a contract. They are bound to  
19 deliver, as of now, the -- Canexus's cars from  
20 Kansas City to these destinations at certain  
21 rates and terms. If there was a deal made for  
22 another interchange point, then that would

1       require either an amendment of the contract or  
2       a new contract.  And certainly Canexus would  
3       be involved in that.

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

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

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

1 of the contract you have presently.

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

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

18 VICE CHAIRMAN MULVEY: Okay. Mr.  
19 Sipe expressed skepticism as to whether we  
20 would hold this in abeyance while we open the  
21 rulemaking on this. And understandably so  
22 because if we did that the status quo would

1 prevail for the length of the rulemaking until  
2 when the Board finally made its decision.

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

12 And it does involve TIH shipments.  
13 So do you think it is appropriate for the  
14 Board to develop a record on that upon which  
15 to make its decision? That there is not  
16 enough in the record, as Mr. Sipe suggests,  
17 for the Board to make a decision on this or to  
18 make a decision that would be other than  
19 simply recognize the originating carriers'  
20 right to choose the routing?

21 MR. WILCOX: Well, I think that  
22 this case can be decided on its merits and not

1       affect a rulemaking -- a future rulemaking. I  
2       think the Board decisions do that in terms of  
3       precedent all the time.

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

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

19               BNSF just -- they don't want to  
20       from a business standpoint. So I don't know  
21       if that's quite the same inquiry you would  
22       have in the rulemaking. I guess in terms of

1       - - from a complainant's standpoint, we  
2 believe that the record supports a decision in  
3 Canexus's favor. And we'd like the Board to  
4 proceed to a decision.

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

13                   And what we were looking at was  
14 the quickest and safest way of moving it. The  
15 choice was between sometimes the safest  
16 railroad, the best track, but going through  
17 heavily populated areas versus routing around  
18 those populated areas but then putting the  
19 materials over a longer route over track that  
20 was less than the best FRA-class track. The  
21 risk of an accident versus the risk of  
22 exposure.

1           So obviously for spent nuclear  
2 materials, there's Price Anderson. So that  
3 problem has already been taken away. We don't  
4 have Price Anderson in the case of TIH.  
5 Whether we should or not is a public policy  
6 decision that we can't make.

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

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

21           The other point to raise is that,  
22 you know, contrary to BNSF's view on this,

1       there are no alternatives to BNSF.  It's very  
2       clear for movement of the material from North  
3       Vancouver and from Marshall to the UP  
4       interchange in Kansas City.  It's very clear.  
5       CP made it very clear they're not an  
6       alternative.

7               And CN, BNSF has mentioned CN, CN  
8       doesn't get to Kansas City.  So in this  
9       particular case, BNSF is a true bottleneck  
10      carrier because there is no alternative to  
11      them.

12              And so I don't think you need to  
13      do -- I just -- I think you could do the  
14      analysis you're talking about and the inquiry  
15      without doing it in this case.

16              COMMISSIONER BEGEMAN:  Mr. Sipe  
17      said the reason they want to be treated as the  
18      originating carrier in this case, and he  
19      mentioned a number of factors, and he also  
20      said that Canexus is asking BN to move it from  
21      Vancouver.  Now what if Canexus were asking  
22      either CN or CP to move it from Vancouver, I

1 mean you could get to Kansas City by some  
2 alternative carrier, just as you can get there  
3 now with the BN-UP routing.

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

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

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

21 COMMISSIONER BEGEMAN: Help me  
22 understand. If Canexus asks BN to move it out

1 of Vancouver, does BN have more of an  
2 obligation in Canada to move it than if  
3 Canexus asked CP to move it?

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

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

21 VICE CHAIRMAN MULVEY: You  
22 mentioned CP but the traffic is really

1 originated by CN, correct?

2 MR. WILCOX: Yes.

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

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

11 VICE CHAIRMAN MULVEY: Right.  
12 Okay.

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

22 VICE CHAIRMAN MULVEY: You

1 mentioned earlier on, this is a little off the  
2 subject but that Canexus primarily  
3 manufactures chlorine for use in water  
4 treatment plants. Does it ship for any other  
5 purpose? Or is it almost -- is it 100 percent  
6 water treatment?

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

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

18 Yes, sir?

19 MR. COVE: So to answer your  
20 question, and I don't have the statistics in  
21 front of me, but the majority of what we do is  
22 ship to water treatment. But that's not the

1 only thing. So we also ship to a variety of  
2 other users, including pharmaceutical, PVC, et  
3 cetera, et cetera.

4 VICE CHAIRMAN MULVEY: Okay. Thank  
5 you.

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

8 Is that it?

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

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

18 (Whereupon, the above-entitled  
19 oral argument was concluded at 11:05 a.m.)  
20  
21  
22

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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.

  
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