

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42132

CANEXUS CHEMICALS CANADA, L.P.

v.

BNSF RAILWAY COMPANY

Digest:<sup>1</sup> This decision denies BNSF Railway Company's motion to compel the production of rate, fuel surcharge, specific carload, and other information relating to transportation arrangements between Canexus Chemicals Canada, L.P. and other railroads.

Decided: February 2, 2012

This decision denies a motion from BNSF Railway Company (BNSF) to compel the production of rate, fuel surcharge, specific carload, and other information relating to transportation arrangements between Canexus Chemicals Canada, L.P. (Canexus) and railroads other than BNSF. In Simplified Standards for Rail Rate Cases, EP 646 (Sub-No.1), slip op. at 22 (STB served Sept. 5, 2007),<sup>2</sup> the Board explained that discovery in Three-Benchmark cases such as this should be limited to ensure that discovery does not render such proceedings cost-prohibitive in light of applicable recovery limits. For the reasons set forth below, BNSF's motion will be denied.

BACKGROUND

By a complaint filed on November 14, 2011, Canexus Chemicals Canada, L.P. (Canexus) challenges the reasonableness of rates charged by BNSF for the transportation of chlorine from: (1) North Vancouver, B.C., to Glendale, Ariz.; and (2) North Vancouver, B.C., to Albuquerque, N.M. Canexus seeks relief pursuant to the simplified procedures set forth in Simplified Standards. Canexus has elected to utilize the Three-Benchmark method, under which the total available rate relief is limited to \$1 million over a 5-year period. The complaint included a

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> Aff'd sub nom. CSX Transp., Inc. v. STB, 568 F.3d 236 (D.C. Cir. 2009), vacated in part on reh'g, CSX Transp., Inc. v. STB, 584 F.3d 1076 (D.C. Cir. 2009).

request for access to the Board's unmasked Waybill Sample pursuant to 49 C.F.R. § 1111.9(a)(2). Waybill Sample data covering the 2006-2009 period—the four years corresponding to the most recent Revenue Shortfall Allocation Method figures available at the time—was provided to the parties on November 23, 2011. BNSF filed its answer to the complaint on December 5, 2011.

On December 14, 2011, BNSF filed a motion seeking permission for the parties to introduce comparison group evidence regarding toxic-by-inhalation (TIH) movements drawn from BNSF's 2011 traffic tape data, and on December 16, 2011, filed a request for expedited consideration of its motion.<sup>3</sup> Canexus filed in opposition to BNSF's request for expedited consideration on December 19, 2011, and then on January 3, 2012, filed its reply in opposition to BNSF's motion.<sup>4</sup>

On January 13, 2012, BNSF filed the subject motion to compel discovery, to which Canexus filed a reply on January 23, 2012. In its motion, BNSF seeks to compel Canexus to produce information responsive to the following discovery requests:

Interrogatory No. 1: Identify each Origin/Destination Pair between which Canexus shipped chlorine and the number of carloads of chlorine shipped between each Origin/Destination Pair on an annual basis from 2006 through 2011.

Interrogatory No. 2: For each Origin/Destination Pair identified in response to Interrogatory No. 1, specify the transportation price, including fuel surcharge if any, assessed by a Rail Carrier other than BNSF and/or another mode of transportation for transporting chlorine between that Origin/Destination Pair on an annual basis from 2006 through 2011.

Document Request No. 4: Produce all documents prepared between January 1, 2006 and November 14, 2011 that compare BNSF's transportation rates for chlorine shipments to those of another Rail Carrier specifically or those assessed in the transportation industry generally.

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<sup>3</sup> The parties filed a joint motion for a protective order on December 15, 2011. The joint motion was granted by a decision served on December 29, 2011. Canexus Chems. Can., L.P. v. BNSF Ry., NOR 42132 (STB served Dec. 29, 2011).

<sup>4</sup> The BNSF motion regarding 2011 TIH movements will be addressed in a separate decision.

Document Request No. 8: Produce all documents that relate to or refer to the level of transportation rates for chlorine movements from North Vancouver to Glendale or Albuquerque vis-à-vis the level of transportation rates for chlorine movements from an Origin to another destination whether or not served by BNSF.

According to BNSF, it seeks to compel production of this information because the information “is relevant to BNSF’s claims regarding its March 2011 rate increase.”<sup>5</sup> BNSF argues that it “is entitled to . . . discovery from Canexus that will support BNSF’s claims about the market for chlorine shipments and the reasonableness of BNSF’s pricing of TIH movements, including the issue traffic, in the context of that market.”<sup>6</sup>

Canexus responds that it has produced, or has agreed to produce, information relevant to the above discovery requests, and that it has only objected to providing the following in response to the above requests: (1) information from or relating to Canexus’ confidential contracts with railroads other than BNSF, and (2) common carrier rate and service term information established by other railroads for Canexus movements.<sup>7</sup>

#### DISCUSSION AND CONCLUSIONS

In Simplified Standards, slip op. at 22, the Board explained that to keep Three-Benchmark cases manageable, “we must impose certain limits on the nature of the ‘other relevant factors’ evidence we will consider and the brea[d]th of discovery we will permit.” We reserved the right to prohibit entire categories of evidence if “the introduction of such evidence would or does unduly complicate this process, which must be relatively simple and inexpensive to have any value.” Id. We explained further that “[p]arties seeking such evidence will have to show how the information requested is consistent with the expedited and simplified nature of this process.” Id. at 78.

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<sup>5</sup> BNSF Motion 3. BNSF explains that its “pricing of chlorine and other TIH products managed by BNSF’s Industrial Products group underwent a fundamental change in March 2011 that was intended to bring BNSF’s rates up to market levels in light of the major changes in the transportation market for TIH products in the preceding two years.” Id. at 2 (internal quotation marks omitted).

<sup>6</sup> Id. at 5.

<sup>7</sup> Canexus Reply 4. With regard to the latter, Canexus indicates that it is not opposed to producing common carrier rate and service term information in its possession that BNSF can demonstrate its personnel viewed and relied upon in making rail market determinations, but that for some reason are no longer accessible to them or readily available in their files. Id. at 5.

In keeping with the discovery limitations discussed in Simplified Standards, we conclude that discovery of “other relevant factors” evidence regarding non-defendant rail carriers should be prohibited in Three-Benchmark cases.<sup>8</sup> The “other relevant factors” rubric was designed to allow parties to argue that the maximum lawful rate (calculated pursuant to the Three-Benchmark method) should be adjusted upwards or downwards to account for factors that legitimately affect the level of that rate but are not included in the underlying Three-Benchmark methodology. In Simplified Standards, slip op. at 82, the Board decided to exclude evidence of “non-defendant traffic from the comparison group because R/VC ratios of one carrier cannot fairly be compared with the R/VC ratios charged by another railroad.”<sup>9</sup> Furthermore, the “reasonable level of contribution to joint and common costs (reflected by the R/VC ratio) is first and foremost a function of the amount of joint and common costs that need to be recovered. This will vary between carriers, creating inevitable and proper differences in R/VC ratios.”<sup>10</sup>

We believe that prohibiting discovery relating to carriers other than the defendant in the “other relevant factors” context is equally appropriate because it is equally irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. See 49 C.F.R. § 1114.21(a). Because there will be “inevitable and proper differences in R/VC ratios” between carriers, discovery related to the rates, pricing structures, or practices of other carriers simply has no bearing on the maximum lawful rate that BNSF may charge Canexus for the movements at issue. Nor is that information likely to lead to the discovery of relevant information that could bear on the maximum lawful BNSF rate for Canexus movements in this Three-Benchmark case where the comparison groups are limited to the defendant carrier’s traffic.

Moreover, BNSF has failed “to show how the information requested is consistent with the expedited and simplified nature of [the Three-Benchmark] process.” Simplified Standards, slip op. at 78. As justification for its discovery requests, BNSF simply states that information relating to the market for chlorine transportation “is relevant to BNSF’s claims regarding its

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<sup>8</sup> BNSF’s motion does not specifically identify any particular component of the Three-Benchmark analysis to which the requested discovery is directed. Given the structure of a Three-Benchmark case, however, we find it most likely that BNSF intends to use the requested information in the context of its arguments concerning “other relevant factors.” Accordingly, this opinion assumes that BNSF seeks to justify its motion on that basis.

<sup>9</sup> “R/VC” refers to the ratio of the issue traffic’s revenues to variable costs.

<sup>10</sup> Id. The Board further explained that “the reasonable degree of differential pricing one carrier can exercise is also a function of the mix of traffic; for example a carrier with little revenue from competitive traffic will need to recover a larger share of joint and common costs from its potentially captive traffic.” Id.

March 2011 rate increase.”<sup>11</sup> However, BNSF fails to explain precisely how the requested discovery (1) could relate to these claims, and (2) is consistent with the expedited and simplified nature of the Three-Benchmark process.<sup>12</sup> Again, the limited discovery in Three-Benchmark cases balances the costs and burdens of discovery with fairness to all parties.<sup>13</sup> BNSF’s motion attempts to expand the scope of discovery in this case while “offer[ing] no means of controlling the litigation costs such a proposal would inevitably create.” Simplified Standards, slip op. at 84.

Because BNSF has failed to demonstrate the relevance of the requested information, and has failed to show how its request is consistent with the expedited and simplified nature of the Three-Benchmark process, its motion to compel must be denied.

It is ordered:

1. BNSF’s motion to compel discovery is denied.
2. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.

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<sup>11</sup> BNSF Motion 3.

<sup>12</sup> In this regard, BNSF simply argues that it has “propounded narrow, focused discovery” and that its motion “only seeks to compel Canexus to provide limited information.” BNSF Motion 2 & 4.

<sup>13</sup> See, e.g., E.I. DuPont de Nemours & Co. v. CSX Transp., Inc., NOR 42099 et al., slip op. at 4 (STB served Jan. 31, 2008). See also US Magnesium, L.L.C. v. Union Pac. R.R., NOR 42114, slip op. at 17 (STB served Jan. 28, 2010) (explaining that “[t]he Three-Benchmark methodology represents the smallest and simplest type of rate case in the Board’s toolbox, and it must remain relatively straightforward and inexpensive to have any value”), aff’d sub nom. Union Pac. R.R. v. STB, 628 F.3d 597 (D.C. Cir. 2010).