

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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CANEXUS CHEMICALS CANADA, L.P.)

Complainant,)

v.)

BNSF RAILWAY COMPANY)

Defendant.)

Docket No. NOR 42132

**REPLY IN OPPOSITION TO MOTION TO PERMIT CONSIDERATION
OF 2011 TIH MOVEMENTS FROM BNSF DATA IN
SELECTING COMPARISON GROUP**

Complainant: Canexus Chemicals Canada, L.P. ("Canexus") hereby submits its reply in opposition to Defendant BNSF Railway Company's Motion to Permit Consideration of 2011 TIH Movements from BNSF Data in Selecting Comparison Group ("Motion"). BNSF's Motion should be quickly and summarily denied so as not to delay the discovery and evidentiary phases of this case.

The use of data from the defendant carrier's own files to assemble comparison groups is prohibited by the Board's rules in Three-Benchmark rate cases. BNSF has attempted to circumvent this fundamental aspect of the Three-Benchmark method rules by misapplying a statement made by the Board concerning the use of additional confidential Waybill Sample data in extremely limited circumstances that are not applicable in this case. In addition, granting the Motion would require the Board to accept as true significant factual issues that are in dispute prior to completion of the discovery and evidentiary phases of this case. The Motion is clearly an attempt by BNSF to game the application of the Three-Benchmark method in this case so as to preclude any relief to Canexus,

despite the fact that BNSF increased the rates for the issue movements nearly 100% in March of 2011.

I. ARGUMENT

A. BNSF's Request to Use Partial 2011 Traffic Data is Not Permitted by the Rules Governing Three-Benchmark Cases

1 BNSF's Reliance on the Board's Statement in *Simplified Standards* Concerning Unique Rail Movements is Misplaced

In its Motion, BNSF requests that the Board agree that traffic data in BNSF's files from the first three quarters of 2011 may be used by the parties to prepare their comparison groups in lieu of the 2006-2009 confidential Waybill Sample provided to the parties pursuant to the *Simplified Standards for Rail Rate Cases* (*Simplified Standards*). BNSF's request is flatly contrary to the fundamental rules of *Simplified Standards* that the comparison groups are to be based on the Waybill Sample released to the parties at the outset of the case and other publicly available information. *Simplified Standards* at 83. As the Board stated in *Simplified Standards*, "[t]his limitation is necessary to place the shipper on an even playing field with the carrier so that the final-offer selection process is fair. If the carrier were permitted to use information in its files, the shipper would be entitled to discovery as to all information the carrier might have that would bear on the proper comparison group. Such discovery would be very expensive." *Id.*; accord, *E.I. DuPont De Nemours and Co. v. CSX Transportation, Inc.*, STB Docket 42099 (STB served January 15) at 2 ("We therefore provided, over the objection of several carriers, that the selection of the comparison group is to be based only on information set out in the confidential Waybill released to parties and on

1. Ex Parte 646 (Sub-No. 1), *Simplified Standards for Rail Rate Cases* (served Sept. 5, 2007); *aff'd*, *CSX Transp., Inc., et al. v. STB*, 568 F.3d 236 (D.C. Cir. 2009); *vacated in part*, 584 F.3d 1076 (D.C. Cir. 2009).

any other publicly available information.”). In its Motion, BNSF states that it would supply Canexus traffic records selected by BNSF for “all THH movements” for the first three quarters of 2011. Motion at 3. BNSF also would “provide traffic records that BNSF’s consultants have costed, although Canexus would be free to question BNSF’s calculations if it saw fit.” *Id.* It is highly doubtful that Canexus would simply accept at face value the data and “costed” records provided by BNSF. All of which means that granting BNSF’s Motion would result in exactly the additional discovery, increased costs, complications and delays the Board sought to prevent in *Simplified Standards*, and actually did prevent in *DuPont*.

BNSF does not try to reconcile its Motion with the foregoing rule. Instead, it attempts to find an exception to this rule in an excerpt from a statement made by the Board in Appendix C of *Simplified Standards*, entitled *Public Comments & Board Responses*, which statement the Board made because “[s]everal parties asked that we address what we will do if the Waybill Sample contains *no* useful comparison traffic.” *Simplified Standards* at 83 (emphasis added). The full statement BNSF has selectively quoted is as follows (emphasis added):

This Three-Benchmark approach rests on the selection of a useable comparison group. *If a particular movement is so unique that there are insufficient comparable movements in the Waybill Sample, we will entertain a reasonably tailored request for comparable movements from the defendant’s own traffic tapes. Such motions will be decided on a case-by-case basis, but are not encouraged, as they will expand the cost and time of pursuing relief under this simplified approach*

This statement was made by the Board in response to a question raised by Union Pacific Railroad Company and a group of rail slipper associations about how the proposed Three-Benchmark rules would apply in extreme cases involving “small or isolated shipments,” or if there was “no readily identifiable traffic that is truly comparable,” or “high wide’ traffic.” *See, e.g.,* STB Ex Parte No. 646 (Sub-No.1), *Simplified Standards for Rail Rate Cases*, Opening Submission of

Union Pacific Railroad Company at 67-68, citing *Rate Guidelines -- Non-Coal Proceedings*, 1 S.T.B. 1004, 1010 (1996) ("*Simplified Guidelines*"). In asking this question, these parties specifically referred to *Southwest Railroad Car Parts v. Missouri Pacific Railroad*, Docket No. 40073 (Served December 1, 1988). That case involved the extremely unique movement of a one-way shipment of empty railcars to a scrap and recycling facility, for which no comparable movements were included in the Waybill Sample. *Id.* at 68; *see also*, Reply Submission of UP at 51; Joint Written Comments of American Chemistry Council, *et al*, Verified Statement of Gerald W. Fauth III at 58-59. Even in such rare cases, however, the Board stated that motions to expand the Waybill Sample provided to the parties were "not encouraged," since, as stated above, the Three-Benchmark methodology requires that parties' respective comparison groups "must be drawn from the Waybill Sample provided to the parties by the Board at the outset of the case." *Simplified Standards* at 18.

The movements at issue in this proceeding are *prima facie* not in the category of isolated, ultra-unique movements contemplated by the Board's statement on which BNSF's Motion rests. The Board has now decided two Three-Benchmark cases involving the movement of chlorine by rail, and both were decided using the Waybill Sample data supplied to the parties under the Three-Benchmark rules.² As discussed below, Canexus believes the Waybill Sample provided to the parties in this case is adequate for the parties to prepare useful comparison groups in this case, which is an evidentiary question in any event. Thus, the Board's statement in *Simplified Standards* relied upon by BNSF has no application to the movements in this case.

2. *E.I. Dupont De Nemours and Co. v. CSX Transportation, Inc.*, STB Docket No. NOR 42099 (Served June 30, 2008); *U.S. Magnesium LLC, v Union Pacific Railroad Company*, STB Docket No. NOR 42114 (Served January 28, 2010) *aff'd* *Union Pacific Railroad Company v. STB*, 628 F.3d 597 (D.C. Cir. 2010).

Moreover, even as to the ultra-unique movements the Board's statement does cover, nowhere in the statement or elsewhere in *Simplified Standards* does the Board even intimate that the additional data from the defendant's traffic tapes would be for years other than the years covered by the Waybill Sample provided to the parties at the outset of the case. On the contrary, the Board obviously meant that any additional traffic data would supplement the one percent sample provided to the parties for the years covered by the sample. This interpretation is entirely consistent with the rule that comparison groups may only be formed from the Waybill Sample provided to the parties. It is also consistent with the overall integrated structure of the Three-Benchmark method to estimate reasonableness using three benchmarks that are each derived from the same four years of applicable data, as explained in more detail below.

This interpretation is also consistent with the Board's subsequent Proposed Rule to require railroads to supply the Board 100% of their waybill information designated as a TIH commodity, in large part so that additional data would be available to supply to parties in future Three-Benchmark cases involving TIH movements. STB Ex Parte No. 385 (Sub. No. 7), *Waybill Data Reporting for Toxic Inhalation Hazards* (Served January 27, 2010). Nowhere in that proposed rulemaking does the Board state that it intended for defendant railroads to be able to supplement the Waybill Data provided to the parties pursuant to the Board's rules with TIH traffic data from other years, let alone data from other years that the defendant unilaterally selects in the first instance. Accordingly, assuming for the sake of argument that the issue movements in this case fall into the very narrow category of ultra-unique rail movements covered by the Board's statement – which they do not – any additional traffic data would have to be from 2006-2009 to supplement the Waybill Sample already provided to the parties, not partial 2011 traffic data hand-picked by BNSF.

2. The Use of 2011 Waybill Data Would Create an Inappropriate Mismatch between the Three Benchmarks Used to Test Rate Reasonableness

BNSF's Motion does not address how using partial 2011 traffic data would affect the other two benchmarks making up the Three-Benchmark method: the RSAM and $RVC_{>180}$ benchmarks. The three components are part of an overall integrated formula developed by the Board to test the reasonableness of a rate. *Simplified Guidelines* at 1041 ("While none of the benchmarks is perfect, we are satisfied that each is instructive for a simplified rate reasonableness analysis. Taken together, they allow us to consider each of the relevant statutory factors."). In fact, the use of partial 2011 traffic data would create a serious mismatch with the remaining two prongs of the Three-Benchmark test and distort the overall result. Specifically, the RSAM and $RVC_{>180}$ are both, by design, average values calculated using the same four year range as the confidential Waybill Sample. *Simplified Guidelines* at 1032; *Simplified Standards* at 20. This is for the purpose of smoothing out annual variations and to minimize the impact of aberrational years. *Simplified Guidelines* at 1032. Accordingly, the three benchmarks together provide an integrated "apples to apples" test of rate reasonableness based on data drawn from the same four years. In its Motion, BNSF would propose to use partial 2011 revenue and variable cost data for the RVC_{COMP} benchmark, creating an "apples to oranges" mismatch of the three benchmarks and therefore altering the Three-Benchmark methodology and distorting the results. Specifically, the ratio of the RSAM and $RVC_{>180}$ benchmarks creates a "multiplier" that "provides an estimate of how much more or less the railroad would need to charge its potentially captive traffic to be revenue adequate." Docket No. EP 689 (Sub-No.2) *Simplified Standards for Rail Rate Cases - 2009 RSAM and $RVC_{>180}$ Calculations* (Served July 14, 2011) citing *Simplified Standards* at 20. Applying a multiplier estimating a defendant railroad's revenue needs from 2006-2009 to an RVC_{COMP} benchmark developed from

partial 2011 rate and cost data necessarily produces a distorted result. Moreover, mixing and matching the years of data making up the three benchmarks will necessarily compromise the reliability of an already imperfect method of crudely estimating rail rate reasonableness. BNSF does not explain how its Motion can be reconciled with the remainder of the Three-Benchmark methodology.

3. Current Law is Not that Only One Year of Waybill Data Must be Used

The Motion also rests upon a misunderstanding by BNSF that current law calls for only one year of Waybill Sample data to be used in preparing a comparison group. Motion at 13, note 24. This is not a correct statement of current law. This issue has been fully briefed by parties who participated in STB Ex Parte No. 646 (Sub-No.3), *Waybill Data Released in Three-Benchmark Rail Rate Proceedings*, the Board's pending Proposed Rulemaking affirming its rule of releasing to parties in Three-Benchmark cases four years of confidential Waybill Sample data.³ In short, when the Court of Appeals of the District of Columbia Circuit remanded the Board's decision in *Simplified Standards* to use four years of Waybill Sample data, it merely created a temporary void in the Board rules. This void was not filled with a one-year rule, since the Board had never adopted a one-year rule to fall back to, and in fact had always used multiple years in the few cases brought under the Three-Benchmark method prior to *Simplified Standards*. See *McCarty Farms v. Burlington Northern Inc.*, 4 I.C.C. 2^d 262 (1988); *Southwest Railroad Car Parts*, *supra*. Thus, to the extent BNSF claims that the Waybill Data provided to the parties is insufficient because they may only use one year of data, BNSF is incorrect.

3. Carexus refers the Board particularly to the Joint Opening Comments and Joint Reply Comments of American Chemistry Council, the Fertilizer Institute, *et al*, at pages 3-6, and 4-6, respectively.

B. The Motion Requires the Board to Accept as True Disputed Factual Assertions by BNSF

In addition to being based on misapplications of the applicable legal rules, BNSF's Motion requires the Board to simply accept as true BNSF's unsupported assertions about significant facts that are very much in dispute and will be resolved during the discovery and evidentiary phases of the case.

1. Route Mileage of the Issue Movements

As an initial factual issue, BNSF's Motion is based in part on asserted mileages for the issue movement that are in dispute. Specifically, Canexus' Complaint alleges that the mileages for the issue movements are 1,764 for the Glendale movement and 2,169 for the Albuquerque movement. These mileage figures are consistent with the mileages for these movements contained in the Confidential Waybill sample provided to the parties. Nevertheless, BNSF has disputed these mileages in its Initial Disclosures and has also asserted in its Motion that each movement is approximately 300 miles longer. Canexus believes that BNSF has inappropriately added miles to the movements for the purpose of skewing the Waybill Sample data to produce fewer comparable movements, and Canexus has sought discovery from BNSF on this issue, which will eventually be sorted out in the parties' evidence. However, BNSF's Motion proceeds as if BNSF's mileages were an established fact, and the allegedly longer routings are a key factor in BNSF's claim that the Confidential Waybill Sample provided to the parties is insufficient. This disputed evidentiary issue cannot be a basis for granting the relief sought by BNSF's Motion.

2. Disputed "Other Relevant Factors" Claims

BNSF's Motion asks the Board to adopt the following position: If a railroad suddenly and significantly raises the rates it charges for *all* of its customers' movements of a certain commodity or

class of commodities, no matter how high, then *no* individual shipper of that commodity can utilize the Three-Benchmark rules to challenge the reasonableness of the rate increase for its traffic because, when compared to all other shippers post-increase, it was not “singled out.” In short, no one customer can complain of being treated unreasonably if all of the shippers of that commodity are being treated unreasonably. Aside from the very serious negative policy implications of such a position to the Board’s rate reasonableness rules, the Motion asks the Board to simply skip over the fundamental question presented by a railroad rate case, which is whether the sudden and significant rate increases were reasonable in the first instance. Granting BNSF’s Motion would require the Board to accept as true several broad, unsupported factual assertions concerning its 2011 rate increases for TTH commodities⁴ that are not only vigorously disputed by Cancxus, but have been hotly disputed by shipper and railroad parties before the Board in other proceedings. These assertions include (1) BNSF’s alleged need to raise its TTH rates to “market” levels; and (2) alleged increased operational costs due to (a) the requirement it must install Positive Train Control (“PTC”); (b) “new regulatory requirements;”⁵ and (c) increased insurance costs. Motion at 7-10; Verified Statement of David Garin.

All of these reasons fall squarely into the category of “other relevant factors” that a railroad defendant may try to prove justify producing a higher rate than that produced by the Three-

4. The Verified Statement of Mr. David Garin, BNSF’s Group Vice President, Marketing – Industrial Products, offers no specific information about why BNSF dramatically increased the rates at issue in this case. Rather, the statement speaks in vague terms of BNSF’s rates being “below market,” “market indicators,” “increasing operational complexity and associated costs resulting from recent legislation and regulations,” and “BNSF’s very expensive liability insurance.” Such vague statements fall well short of the requirement that such factors must be quantified so the Board will have an objective, transparent means of adjusting the maximum lawful rate produced by the Three-Benchmark methodology.

5. BNSF includes in this category regulations by Pipeline and Hazardous Materials Safety Administration, Transportation Safety Administration, and the Federal Railroad Administration.

Benchmark method and the inevitable “regulatory lag” that is built into the methodology. The issue of regulatory lag has been vigorously contested by BNSF and other railroads for some time. See, e.g., *Simplified Standards* at 84 (“BNSF observes that using the Waybill Sample introduces 1 or 2 years of regulatory lag, because the Waybill Sample reflects prior market conditions. As a result, the carrier claims that the proposed approach would result in setting current maximum lawful rates based upon revenue and cost data that are dated.”). In *Simplified Standards*, the Board rejected BNSF’s and other railroads’ attempts to introduce more current rate levels into the Three-Benchmark process as a purported means to account for regulatory lag. It concluded instead that the solution was “parties may present (as ‘other relevant factors’) evidence that the presumed maximum reasonable lawful rate should be higher, or lower, due to market changes not reflected in the comparison group or the average RSAM and R/VC_{>180} benchmarks.” *Id.* at 85. BNSF’s Motion is a barely disguised attempt to collaterally attack the Board’s rejection of the railroads’ position in *Simplified Standards* and to avoid altogether in this case the explicit requirement that a party seeking to raise “other relevant factors” bears the burden of rebutting the presumption that the rate produced by the Three-Benchmark calculation is the maximum lawful rate, and that the party “will be required to quantify this evidence, so that the Board will have an objective, transparent means of adjusting the maximum lawful rate upwards or downwards.” *Id.* at 77.⁶

As one example of how granting the Motion would circumvent the “other relevant factors” aspect of the Three-Benchmark rules, BNSF claims that it significantly raised the rates to Albuquerque and Glendale in March of 2011 in part because of the costs BNSF expects to incur to install PTC. Motion at 7. However, the Board recently rejected an attempt by a railroad defendant

6. Indeed, BNSF admits that it is trying to use its Motion circumvent the “other relevant factors” proof and the regulatory lag issue altogether. See Motion at 5, note 8.

to justify increasing the maximum lawful rates produced by the Three-Benchmark method based on a claim that costs the railroad expected to incur for installing PTC were an “other relevant factor” contemplated by the *Simplified Standards*. In *U.S. Magnesium L.L.C. v UP*, Docket NOR 42114 (Served January 28, 2010), the Board found that such claims were too speculative and undefined “to quantify its costs or fairly attribute them to USM’s traffic.” *Id.* at 2. Moreover, the Board noted that “as UP makes the contemplated PTC investments, those expenditures will flow into our costing model, raising the variable costs of serving the issue traffic. There is an inevitable regulatory lag to that process, but fashioning an appropriate adjustment is too complex for the purposefully simple and cost-effective Three-Benchmark Process that USM elected to use in this case.” *Id.* at 2. The same rationale applies for the vague, unsupported allegations made by BNSF in its Motion about the significant rate increases on the issue movements being justified by additional costs of complying with various regulations and allegedly rising insurance costs.⁷

Granting BNSF’s Motion to use 2011 traffic data that includes rates BNSF represents are reflective of these unsupported increased “costs” would improperly permit BNSF to bypass the requirement that it specifically quantify any “other relevant factors” it believes justify a higher rate than that produced by the Three-Benchmark methodology. BNSF should not be permitted to circumvent this critical aspect of the Board’s rate reasonableness regulations by merely making conclusory, unsupported statements in a Motion to use more current traffic data.

7. BNSF offers no actual purported increased costs attributable to the issue movements. Tellingly, BNSF supports its allegations about increased insurance costs with only general, unquantified statements made by the Association of American Railroads, of which BNSF is a controlling member

C. The Waybill Sample Data Provided to the Parties is Adequate

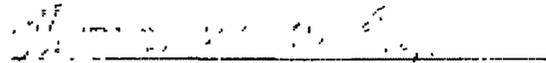
BNSF's claims about the inadequacy of the Waybill Sample provided to the parties in this case are overstated for several reasons. First, the Three-Benchmark process is crude and inexact by design and necessity. In exchange for a relatively quick, inexpensive, and un-complicated process, Complainants receive a maximum reasonable rate calculation that is less precise than other methods utilized by the Board. Canexus understood this when it chose to seek relief using this standard. Second, as stated previously, BNSF has wrongly concluded that only one year of the four years of data may be utilized by the parties. Third, Canexus believes that BNSF has improperly inflated the mileages of the two issue movements in order to skew the results and reduce the amount of comparable movements, an issue that will be resolved in the discovery and evidentiary phases of the case. Fourth, BNSF's analysis is incorrect to the extent it proceeds from the assumption that the parties' respective comparison groups must only consist of chlorine movements. Other TIH commodities have operating and demand characteristics that are substantially similar to chlorine, and BNSF admits that its pricing strategy encompassed all TIH commodities, not just chlorine. Motion at 10.⁸ In summary, Canexus maintains that the four years of Waybill Sample data provided to the parties contains a sufficient number of chlorine and other TIH commodity movements for the parties to prepare sufficient comparison groups to effectively apply the Three-Benchmark method in this case.

8. The Verified Statement of Benton V. Fisher accompanying BNSF's Motion provides little or no useful information because it is based on all of the flawed premises of BNSF's Motion. In particular, it proceeds from the inflated mileages asserted by BNSF, stresses only one year of data is appropriate, and is focused mainly on chlorine movements. Moreover, Mr. Fisher's discussion of BNSF's post March 15, 2011 revenue to variable cost ratios is merely demonstrative of BNSF's attempt to avoid altogether addressing the "regulatory lag" and "other relevant factors" aspects of the Three-Benchmark method.

II. CONCLUSION

For all the reasons set forth above, BNSF's Motion should be summarily denied.

Respectfully submitted,



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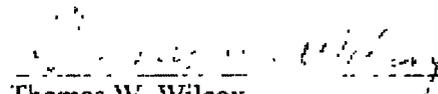
CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of January, 2012, I served a copy of the foregoing Reply in Opposition to Motion to Permit Consideration of 2011 TIH Movements from BNSF Data in Selecting Comparison Group via email and first-class mail to the following addressees:

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