

231690

BEFORE THE  
SURFACE TRANSPORTATION BOARD

Office of Public Affairs

JAN 13 2012

Part of  
Public Record

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CANEXUS CHEMICALS CANADA, L.P.	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. 42132
	)	
BNSF RAILWAY COMPANY	)	
	)	
Defendant.	)	
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**DEFENDANT'S MOTION TO COMPEL DISCOVERY**

Defendant BNSF Railway Company ("BNSF") hereby requests pursuant to 49 C.F.R. § 1114.31(a) that the Board issue an order compelling Complainant Canexus Chemicals Canada, L.P. ("Canexus") to respond to certain of BNSF's First Set of Discovery Requests identified below on issues relating to the market for chlorine shipments. As explained below, Canexus has admitted that the issues that are the subject of the requests are factual issues that are in dispute in this case. Moreover, the requests are narrowly drawn and responding to the requests would therefore not impose a significant burden on Canexus. Canexus should be ordered to provide the requested discovery. Canexus' January 5, 2012 Objections and Responses to BNSF's First Set of Discovery Requests are attached at Exhibit 1.<sup>1</sup>

The Board's rules permit "discovery . . . regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding." 49 C.F.R. §1114.21(a). Discovery is not limited to "the information that [a party] believes is sufficient" to prove its case. See *Seminole Electric Coop., Inc. v. CSX Transport, Inc.*, STB Docket No. 42110, at 2 (STB served

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<sup>1</sup> On January 11, 2011, counsel for BNSF conferred by telephone with counsel for Canexus regarding Canexus' objections to BNSF's discovery requests addressed in this motion, but the parties were unable to resolve the disputed matters addressed herein.

Feb. 17, 2009). Instead, a party is generally “entitled to all relevant and potentially admissible information.” *Id.* BNSF recognizes that in a Three-Benchmark case, like this one, discovery is expedited. Consequently, BNSF has propounded narrow, focused discovery. The discovery requests at issue in this motion to compel are narrowly drawn and relate to factual issues that are in dispute in this case. Under the STB’s rules, BNSF is entitled to the requested discovery.

### **BACKGROUND**

Canexus filed this Three Benchmark case on November 14, 2011, challenging the reasonableness of BNSF’s common carrier rates for the transportation of chlorine, an ultra-hazardous toxic-by-inhalation (“TIH”) commodity, from North Vancouver, British Columbia, Canada to Glendale, Arizona and to Albuquerque, New Mexico. These two chlorine movements are among the longest chlorine movements transported by BNSF. Canexus has asked the Board to assess the reasonableness of the challenged rates under the Board’s Three Benchmark rate reasonableness standard.

On December 14, 2011, BNSF filed a Motion to Permit Consideration of 2011 TIH Movements from BNSF Traffic Data in Selecting Comparison Group (“Motion Regarding Comparison Group”). In that Motion, BNSF explained that BNSF’s 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.” Motion Regarding Comparison Group at 2. As BNSF explained, BNSF’s March 2011 change in the pricing of TIH movements is highly relevant to the Board’s assessment of the reasonableness of the challenged rates under the Three Benchmark methodology. The purpose of the Three Benchmark methodology is to determine whether the rates currently being charged to the issue

traffic are comparable to the *current* rates charged for comparable movements. Since the challenged rates are the product of the March 2011 change in TIH pricing, a comparison of those rates to rates predating the March 2011 change in TIH pricing, such as the rates for movements contained in the Carload Waybill Sample provided to the parties in this case, would not provide a valid basis for the Three Benchmark analysis.

On January 3, 2012, Canexus replied to BNSF's Motion and opposed it on various grounds. Among them, Canexus asserted that "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."<sup>2</sup> According to Canexus, one of those significant facts "very much in dispute" is "BNSF's alleged need to raise its TIH rates to 'market' levels." Canexus Reply at 9. Canexus further asserts that BNSF's "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." *Id.*

BNSF served its First Set of Discovery Requests on Canexus on December 21, 2011. In those requests, BNSF sought information relating to, among other things, chlorine transportation prices and other information about the market for chlorine transportation. BNSF sought the information because it is relevant to BNSF's claims regarding its March 2011 rate increase. On January 5, 2012, Canexus submitted its objections and responses to BNSF's First Set of Discovery Requests. *See* Exhibit 1. While Canexus had previously stated that BNSF's efforts to raise rates to market levels in March 2011 would be the subject of "the discovery and evidentiary

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<sup>2</sup> Canexus' Reply in Opposition to Motion to Permit Consideration of 2011 TIH Movements from BNSF Traffic Data in Selecting Comparison Group (hereafter "Canexus Reply") at 8.

phases of the case,” Canexus nevertheless objected to BNSF’s requests for information about the market for chlorine shipments on relevance grounds and refused to provide the requested information. Canexus reiterated its relevance objection to BNSF’s requests for information about the market for chlorine shipments in a January 12, 2012 letter to BNSF counsel on discovery issues. *See Exhibit 2.*

In this motion, BNSF only seeks to compel Canexus to provide limited information relating to the market for chlorine shipments, as discussed below.

### ARGUMENT

#### **I. Canexus Should Be Ordered to Produce Information Regarding Its Rail Transportation Prices and Volumes, and Transportation Price Comparisons for Chlorine Shipments.**

Canexus objected to the following BNSF’s discovery requests which seek information regarding the market for chlorine shipments, specifically the rail transportation prices paid by Canexus for chlorine shipments and its shipment quantities from 2006 (the earliest year that Carload Waybill sample data was provided in this case) through 2011:

- 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.
- 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 is the level of transportation rates for chlorine movements from an Origin to another destination whether or not served by BNSF.

See Exhibit 1 at 3-4, 7-8, 9.

Canexus objects to all of these requests on relevance grounds. Specifically, Canexus objected to each of these discovery requests on grounds that they seek "information that is not relevant to any issues in this case." Canexus' relevance objection is groundless. A critical issue in the Board's assessment of Canexus' rate reasonableness challenge in this case is the fact that BNSF established the challenged rates as part of a broad and fundamental change in its pricing of TIH movements in an effort to bring its TIH prices up to market levels. BNSF will show that the challenged rates are not out of line with the rates on other BNSF comparable movements, since BNSF raised the rates on all TIH traffic as part of an effort to make its pricing structure more rational and consistent with the market. BNSF is entitled to pursue 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.

Indeed, Canexus has already admitted that information relating to the market for chlorine shipments is relevant in this case. As shown above, in its Reply to BNSF's Motion Regarding Comparison Group, Canexus characterized BNSF's explanation relating to the March 2011 change in TIH pricing as "unsupported assertions about significant facts that are very much in dispute." Canexus Reply at 8. Canexus further claimed that these factual issues "will be resolved during the discovery and evidentiary phases of the case." *Id.* Canexus' objection that BNSF's discovery requests relating to these issues seek irrelevant information is belied by Canexus' own prior statements in this case.

In its January 12, 2012 letter to BNSF counsel, Canexus expanded on its relevance objection, arguing that the requested information is not relevant because there is no reason to

believe BNSF marketing personnel relied on confidential information about rates paid by Canexus to other transportation providers in determining that BNSF's rates were below market levels. *See* Exhibit 2 at 1-2. Canexus' argument is beside the point. Canexus has disputed BNSF's claim that BNSF's March 2011 rate increase on TIH shipments was necessary to bring BNSF's rates up to market levels and to discourage illogical routing of TIH traffic due to BNSF's below-market rates. Regardless of whether BNSF's marketing personnel knew about the specific rates that Canexus paid to other carriers when BNSF changed its pricing structure in March 2011, information about Canexus' rates will shed light on the validity of BNSF's claims about the market for chlorine shipments and BNSF's below-market rates prior to March 2011, which Canexus has acknowledged to be "significant facts that are very much in dispute."

Canexus' further objection that all of these requests seek "information relating to confidential rail transportation contracts between Canexus and other rail carriers" is equally meritless. The protective order entered in this case on December 29, 2011 contemplates that information relating to confidential transportation contracts may be produced and includes provisions protecting the disclosure of any such information. *See* Protective Order ¶ 8.

With respect to Document Requests 4 and 8, Canexus also contends that information sought by these requests "is also readily available to BNSF in the common carrier pricing documents for chlorine published by other railroads, and other public sources." *See* Exhibit 1 at 7-8, 9. As an initial matter, common carrier pricing documents published by other railroads are only a subset of information sought in these requests, which seek *comparisons* between BNSF's transportation rates for chlorine shipments and those of another rail carrier or those assessed generally in transportation industry, as well as documents regarding the level of BNSF's rates for the issue traffic movements and rate levels for other chlorine movements. Even if common

carrier prices of other railroads were publicly available, BNSF is requesting internal Canexus documents that compare those other carrier rates to BNSF's rates.

Moreover, contrary to Canexus' claims, common carrier pricing for chlorine published by other railroads is not readily available. Neither historic nor current transportation rates for chlorine are available on Union Pacific's ("UP") or Canadian National's ("CN") websites. When the Price Inquiry feature is used to look up rates on UP's website for chlorine movements, the response is "No Prices Found, Request a Price Quote." *See* Exhibit 3. Similarly, when the Price Inquiry feature is used to look up chlorine rates on CN's website, no rates can be located. *See* Exhibit 4. Canexus confirmed that all of its chlorine shipments to locations in the United States on UP and CN are pursuant to confidential contracts. *See* Exhibit 2 at 2. On Canadian Pacific's ("CP") website, only a single chlorine tariff (CPRS 4550) is available that includes 2011 rates for only three chlorine movements into the United States and no pre-2011 chlorine rate information is available. Indeed, Canexus' January 12, 2012 letter to BNSF counsel makes it clear that only 4% of its chlorine shipments on CP were under a public common carrier pricing authority. *See* Exhibit 2 at 2.

Finally, with respect to Interrogatory 2 (but not Interrogatory 1 or Document Requests 4, 8), Canexus' discovery responses include a burden objection. *See* Exhibit 1 at 4. However, Canexus provides no support for the claim that it would be unduly burdensome to produce information about the amount it paid for transportation on historical movements, and it is implausible that such information is difficult to locate. Canexus' January 12, 2012 letter includes a belated burden objection applicable to all of BNSF's requests for information about transportation rates paid to other carriers that should be rejected out of hand. Canexus now claims that it would be burdensome provide notice to other carriers (although it only identifies

three other railroads) and to “determine the applicability of Canadian law to any disclosures.” See Exhibit 2 at 2. Canexus’ belated objection is nothing more than an excuse for Canexus to avoid even the minimal effort required of a litigant in a Board proceeding. Canexus would be undertaking no more effort than it asked BNSF to undertake in responding to Canexus’ document requests that sought certain BNSF transportation contracts. Canexus cannot dispute an important claim that BNSF has made about the market for chlorine shipments and then expect to avoid taking any measures to develop and produce information that would support BNSF’s claims. As the party raising the burden objection, Canexus must establish that the request is unduly burdensome. See *South Plains Switching, Ltd. Co. - Compensation for Use of Facilities in Alternative Rail Service – West Texas & Lubbock*, Docket No. 35111 (STB served Dec. 28, 2007) (parties objecting to petitioner’s discovery requests failed to show that the requests were unduly burdensome or irrelevant). Canexus has not done so and, consequently, its burden objection cannot stand. While BNSF is willing to work with Canexus to minimize any burden associated with providing the responsive information, Canexus should be ordered to produce the requested information.

**CONCLUSION**

For the reasons set forth above, the Board should compel Canexus to produce information in response to the requests from BNSF's First Set of Discovery Requests identified above.

Respectfully submitted,



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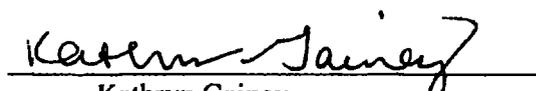
January 13, 2012

**Certificate of Service**

I hereby certify that on this 13th day of January, 2012, I have served a copy of the foregoing Motion to Compel Discovery on the following by e-mail:

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Washington, DC 20007

*Counsel for Canexus Chemicals Canada L.P.*

  
Kathryn Gainey

# EXHIBIT 1

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

<b>CANEXUS CHEMICALS CANADA, L.P.</b>	)	
	)	
<b>Complainant,</b>	)	
	)	
<b>v.</b>	)	<b>Docket No. 42132</b>
	)	
<b>BNSF RAILWAY COMPANY</b>	)	
	)	
<b>Defendant.</b>	)	

**COMPLAINANT'S OBJECTIONS AND RESPONSES TO  
DEFENDANT'S FIRST SET OF DISCOVERY REQUESTS**

Pursuant to 49 C.F.R. § 1114, Complainant Canexus Chemicals Canada, L.P. ("Canexus") hereby responds to BNSF Railway Company's ("BNSF") First Set of Discovery Requests as follows:

**GENERAL OBJECTIONS**

These general objections apply to each of BNSF's discovery requests and are in addition to any specific objections set forth with respect to individual interrogatories or requests for production of documents.

A. Canexus objects to BNSF's discovery requests and instructions to the extent they seek to impose obligations on Canexus beyond those established by the Surface Transportation Board's ("Board" or "STB") discovery rules. In particular, Canexus objects to the requests to the extent they are contrary to the strict discovery standards applied by the Board in Three-Benchmark method cases, in which greater emphasis is placed on the burden imposed. Moreover, Canexus objects to the requests to the extent they are not narrowly tailored to "other

relevant factors,” or otherwise inconsistent with the expedited and simplified nature of the Three-Benchmark process.

B. To the extent that any discovery requests may be construed as calling for information that is subject to a claim of privilege or immunity, including, without limitation, the attorney-client privilege or the work product immunity, Canexus hereby asserts such privileges or immunities and objects to the production of information subject thereto.

C. Canexus generally objects to producing any documents and/or information concerning the production of chlorine or other hazardous materials by Canexus, and Canexus objects to producing documents and/or information concerning its marketing of chlorine.

D. Canexus objects to production of, and is not producing, information prepared in connection with, or information related to, the mediation phase of this proceeding and/or possible settlement of this proceeding.

E. Canexus objects to the definition of “Canexus” used by BNSF in its requests as unduly burdensome, overbroad, vague and beyond the scope of permissible discovery. For purposes of responding to BNSF’s requests, Canexus defines “Canexus” as Canexus Chemicals Canada, L.P., the complainant in this case, and/or its employees with direct involvement with the issue movements.

F. Canexus objects to BNSF’s Instruction D as unduly burdensome, overbroad, vague, and beyond the scope of the Board’s discovery rules, particularly the strict standards of Three-Benchmark method cases. Canexus also objects to the extent the instruction seeks information that is privileged and/or not prepared for or supplied specifically to Canexus.

G. Canexus objects to the requests for production of documents to the extent each request is unduly burdensome, not calculated to lead to admissible evidence, or that the burden in searching Canexus' files outweighs any marginal benefit of producing the requested information.

H. Canexus objects to the interrogatories and discovery requests to the extent they seek information that is already known to BNSF, or publicly available for BNSF to know by conducting reasonable due diligence.

### CANEXUS' RESPONSES TO INTERROGATORIES

Canexus hereby responds to BNSF's interrogatories to Canexus. Canexus provides these responses based on the information presently available to it and specifically reserves the right to supplement its responses upon the discovery of additional responsive information. Canexus provides the following responses to BNSF's interrogatories on behalf of itself and no other persons or entities. Canexus has not secured verifications of the answers to interrogatories herein below. Canexus is willing to provide such verification with respect to any particular answer should BNSF consider it to be necessary and desired.

Subject to, and without waving, the foregoing General Objections, Canexus responds to BNSF's Interrogatories as follows:

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.

#### Canexus' Response:

In addition to its General Objections, Canexus specifically objects to this Interrogatory as asking for information that is not relevant to any of the issues in this case or calculated to lead to the discovery of admissible evidence. Canexus also specifically objects to this Interrogatory to the extent it seeks information about the number of carloads shipped, as this information is

contained in confidential rail transportation contracts between Canexus and other rail carriers. Subject to the foregoing objections, Canexus will provide BNSF with a list of the requested Origin/Destination Pairs sought by this Interrogatory for the requested time period.

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.

Canexus' Response:

In addition to its General Objections, Canexus specifically objects to this Interrogatory as asking for information that is not relevant to any of the issues in this case or calculated to lead to the discovery of admissible evidence. Canexus also specifically objects to this Interrogatory because it is unduly burdensome. Canexus also specifically objects to this Interrogatory to the extent it seeks information relating to confidential rail transportation contracts between Canexus and other rail carriers. Subject to the foregoing objections, Canexus responds that information responsive to this Interrogatory is available to BNSF in the common carrier pricing documents published by other railroads and other public sources.

Interrogatory No. 3: Identify each destination identified in response to Interrogatory 1 that can be served by a Rail Carrier other than BNSF or another mode of transportation.

Canexus' Response:

In addition to its General Objections, Canexus specifically objects to this Interrogatory as asking for information that is not relevant to any of the issues in this case or calculated to lead to the discovery of admissible evidence. Canexus also specifically objects to this Interrogatory because it is unduly burdensome. Subject to the foregoing objections, Canexus responds that the information sought by BNSF in this Interrogatory can be determined by BNSF from the information to be provided in response to Interrogatory No. 1.

Interrogatory No. 4: For shipments of chlorine made by Canexus from January 1, 2006 through November 14, 2011 to a Destination State, state whether Canexus would have been able, as an alternative, to sell the chlorine to a purchaser located at a destination closer to the Origin of the shipment and, if so, the reasons that Canexus decided not to sell the chlorine to such purchaser.

Canexus' Response:

In addition to its General Objections, Canexus specifically objects to this Interrogatory as asking for information that is not relevant to any of the issues in this case or calculated to lead to the discovery of admissible evidence. Canexus also specifically objects to this Interrogatory because it is unduly burdensome, vague, and seeking speculative information and information Canexus does not maintain in the ordinary course of business.

Interrogatory No. 5: Identify the employee(s) responsible for making the decision whether to sell the chlorine that is shipped to a Destination State or, as an alternative, to a destination closer to the Origin.

Canexus' Response:

In addition to its General Objections, Canexus specifically objects to this Interrogatory as asking for information that is not relevant to any of the issues in this case or calculated to lead to the discovery of admissible evidence.

Interrogatory No. 6: Has the chlorine shipped by Canexus to destinations in the United States from 2006 through 2011 always been a byproduct of the manufacture of other products at Canexus' facilities? If not, describe the reasons that Canexus manufactured the chlorine.

Canexus' Response:

In addition to its General Objections, Canexus specifically objects to this Interrogatory as asking for information that is not relevant to any of the issues in this case or calculated to lead to the discovery of admissible evidence. Subject to the foregoing objections, Canexus responds "no." The North Vancouver facility is a chlor-alkali production facility that manufactures chlorine, caustic soda and hydrochloric acid. Chlorine is manufactured there because it is a

critical building block chemical that impacts the well-being of society and, therefore, there is widespread need and demand for it in North America.

Interrogatory No. 7: Please identify all products that are potential substitutes for the chlorine purchased by your customers.

Canexus' Response:

In addition to its General Objections, Canexus specifically objects to this Interrogatory as asking for information that is not relevant to any of the issues in this case or calculated to lead to the discovery of admissible evidence. Canexus also specifically objects to this Interrogatory as asking for information in the possession of Canexus' customers, specifically the criteria and other factors they each employ to identify each of the potential substitutes for chlorine supplied to them by Canexus, and it would be extremely burdensome for Canexus to attempt to obtain that information. Subject to the foregoing, Canexus responds that information concerning the potential substitutes for chlorine are in the public domain and readily available to BNSF.

REQUESTS FOR PRODUCTION OF DOCUMENTS

Document Request No. 1: For shipments of chlorine made by Canexus from January 1, 2006 through November 14, 2011 to a Destination State, produce all documents that refer to or reflect any consideration that Canexus gave to the possibility of selling the chlorine to a purchaser located at a destination closer to the Origin.

Canexus' Response:

In addition to its General Objections, Canexus specifically objects to this Document Request on the same grounds it objects to Interrogatories Nos. 4 and 5.

Document Request No. 2: Produce all documents that refer to or reflect any discussions with BNSF concerning the transportation of chlorine.

Canexus' Response:

In addition to its General Objections, Canexus objects to the term "refer to or reflect" as overbroad and vague. Subject to the foregoing objections, Canexus will conduct a reasonable

search for, and produce responsive, non-privileged documents that are reasonably accessible and available to Canexus.

Document Request No. 3: Produce all documents prepared between January 1, 2006 and November 14, 2011 that discuss or analyze changes in the rates paid for transportation of any TIH commodity, including chlorine, by rail, including any projections or forecasts of the rates paid for transportation of chlorine.

Canexus' Response:

In addition to its General Objections, Canexus specifically objects to this Document Request as being vague, overbroad, and asking for information that is not relevant to any of the issues in this case or calculated to lead to the discovery of admissible evidence. Canexus also specifically objects to this Document Request because it is unduly burdensome. Canexus also specifically objects to this Document Request to the extent it seeks information relating to confidential rail transportation contracts between Canexus and other rail carriers. Subject to the foregoing objections, Canexus responds that information responsive to this Document Request is available to BNSF in the common carrier pricing documents published by other railroads, and other public sources. Subject to and without waiving its General Objections and its specific objections, Canexus will conduct a reasonable search for, and produce responsive, non-privileged documents that are reasonably accessible and available to Canexus.

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.

Canexus' Response:

In addition to its General Objections, Canexus specifically objects to this Document Request as asking for information that is not relevant to any of the issues in this case or calculated to lead to the discovery of admissible evidence. Canexus also specifically objects to this Document Request to the extent it seeks information relating to confidential rail

transportation contracts between Canexus and other rail carriers. Information sought by this Document Request is also readily available to BNSF in the common carrier pricing documents for chlorine published by other railroads, and other public sources.

Document Request No. 5: Produce all documents that discuss insurance for the transportation of TIH products, including chlorine.

Canexus' Response:

Subject to and without waiving its General Objections, Canexus will conduct a reasonable search for, and produce responsive, non-privileged documents that are reasonably accessible and available to Canexus.

Document Request No. 6: Produce all documents that discuss, assess or analyze liability risks associated with the transportation of chlorine.

Canexus' Response:

Subject to and without waiving its General Objections, Canexus will conduct a reasonable search for, and produce responsive, non-privileged documents that are reasonably accessible and available to Canexus.

Document Request No. 7: Produce all documents that relate to PTC requirements and their effect on Rail Carriers, including but not limited to the effect on Rail Carrier costs, pricing and operations.

Canexus' Response:

Subject to and without waiving its General Objections, Canexus will conduct a reasonable search for, and produce responsive, non-privileged documents that are reasonably accessible and available to Canexus.

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 of [sic] rates for chlorine movements from an Origin to another destination whether or not served by BNSF.

Canexus' Response:

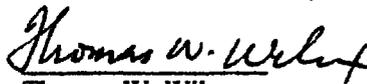
In addition to its General Objections, Canexus specifically objects to this Document Request as asking for information that is not relevant to any of the issues in this case or calculated to lead to the discovery of admissible evidence. Canexus also objects to the phrase "relate to or refer to" as being overbroad and vague. Canexus also specifically objects to this Document Request to the extent it seeks information relating to confidential rail transportation contracts between Canexus and other rail carriers. Information sought by this Document Request is also readily available to BNSF in the common carrier pricing documents for chlorine published by other railroads, and other public sources.

Document Request No. 9: Produce all documents that reflect any communication with another producer of chlorine or a trade association regarding the transportation of chlorine by rail.

Canexus' Response:

Subject to and without waiving its General Objections, Canexus will conduct a reasonable search for, and produce responsive, non-privileged documents that are reasonably accessible and available to Canexus.

Respectfully submitted,



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January 5, 2012

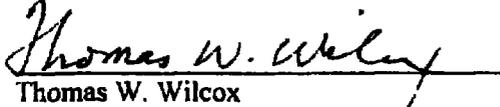
**Certificate of Service**

I hereby certify that on this 5th day of January, 2012, I served a copy of the foregoing Complainant's Objections and Responses to Defendant's First Set of Discovery Requests via email and first-class mail to the following addressees:

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Thomas W. Wilcox

# EXHIBIT 2



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January 12, 2012

**VIA EMAIL**

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**Re: Discovery in STB Docket No. NOR 42132**

Dear Linda:

This letter follows up the telephone conference call between counsel for the parties yesterday to discuss certain discovery issues in this case. The purpose of this letter is to further address several of the BNSF requests over which we appear to have a disagreement, and to also set forth Canexus' understanding of the responses it is expecting from BNSF to Canexus' discovery requests.

1. **Rates and Terms Contained in Rail Transportation Contracts or Common Carrier Pricing Documents**

In BNSF Interrogatories 1, 2, and Request for Production of Documents (RFP) 4, BNSF has asked for rate, service term and other information between Canexus and other railroads. The purpose for seeking this information from the files of Canexus is, as we understand it, to provide information to BNSF about the rail rate "market" for chlorine and other TIH products from 2006 through November 14, 2011. This is because BNSF has alleged that the significant increases in the issue rates to Glendale and Albuquerque were necessary in part to come up to some "market" level BNSF's rates were allegedly below. As we have discussed, Canexus maintains this material is not relevant to the issues in the case, since BNSF marketing personnel would have had no access to confidential contracts between Canexus and other railroads and therefore could not have

made any determinations about the rail market for TIH commodities based on this information. Further, you have not represented or demonstrated that BNSF marketing personnel relied on any publicly available common carrier pricing documents to make their "market" determinations that might be in Canexus' possession. We also question the relevance of the information requested when this case is about rates to indisputably captive locations, for which there is no "market" other than BNSF.

You asked yesterday how much of Canexus' TIH commodities moved under contract and common carrier pricing authorities. Without waiving any of Canexus' objections to these requests, Canexus ships TIH commodities on BNSF, Union Pacific Railroad, Canadian National Railway, and Canadian Pacific Railway. The movements on UP and CN are all pursuant to confidential contracts, except for three movements on CN that occur entirely in Canada which are by tariff, one of which is only 20 miles in length. The movements on CP are under a public common carrier pricing authority, but constitute only about 4% of Canexus' chlorine shipments. In addition to the information sought by these requests being clearly irrelevant, it would be very burdensome for Canexus to collect all of the information BNSF seeks, provide necessary notice to railroad parties, and determine any applicability of Canadian law to any disclosures. Canexus therefore stands on its objections to these requests.

2. Selling Chlorine to Destinations "Closer to the Origin of the Shipment"

In BNSF Interrogatories 4 and 5, and RFP No. 1, BNSF has asked, "for shipments of chlorine made by Canexus [between 1/1/06 and 11/14/2011]. . . whether Canexus would have been able, as an alternative, to sell the chlorine to a purchaser located at a destination closer to the Origin . . ." Canexus continues to object to Interrogatory 4 and the related requests as being completely irrelevant to the issues in this case. Without waiving any of its objections, and to hopefully resolve this particular issue, the short answer to this question is "no." The quantities of chlorine sold by Canexus and the demand from its customers are such that the output of chlorine from the North Vancouver Facility can meet the requirements of all of Canexus' customers, so foregoing transporting chlorine to one destination means lost sales to that customer. Canexus therefore would not forego selling chlorine to one customer in order to sell that same chlorine to another customer, wherever that customer is located. Moreover, all purchasers, wherever located, determine whose chlorine they purchase, based on a variety of factors. Because the answer to the question posed in Interrogatory 4 is "no," there is no need to provide answers to Interrogatory and RFP 1.

3. BNSF Production to Canexus and Motions to Compel

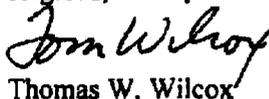
In general, BNSF has posed significant objections to Canexus' discovery requests, but nevertheless has stated it will produce responsive material. Based on our two telephone conferences to date, Canexus is satisfied to await production from BNSF before seeking to compel the production of any requested material. The parties have

agreed, however, that either may submit a motion to compel with the STB if, after review of the information and material produced, either party believes the other has improperly withheld discoverable material and there is a ripe dispute to present to the STB. Summarized below is our understanding of what BNSF is initially planning on producing in response to certain requests. We received the initial two CD's of BNSF's production earlier today and are reviewing them.

1. In response to Canexus' Request for Production No. 1, BNSF has initially produced a database of information for TIH and chlorine movements for the years 2006-2011 that have a R/VC ratio greater than or equal to 180%; BNSF is also producing its chlorine rail transportation contracts and amendments.
2. In response to Canexus' Request for Production No. 5, BNSF is initially producing general studies and analyses that address BNSF's handling and transportation of chlorine and other TIH commodities. However, you are initially not producing analyses and studies performed for specific TIH movements required by federal regulations, particularly movement-specific routing studies. You did not know if such movement specific studies existed for the issue movements, and we would expect BNSF to produce these if they do exist.
3. In response to Canexus' Request for Production No. 8, BNSF is initially producing an agreement between BNSF and the Arizona and California Railroad, and ten (10) amendments to that agreement; and
4. In response to Canexus' Request for Production No. 9, we have sent you a statement from our consultant that the information provided to date by BNSF is not, as represented in your response to this request, fully responsive to this request. We are expecting that BNSF will provide additional information in response to this request.

Please let me know if I have misstated any of the discussion, and give me a call if you have any questions.

Regards,

  
Thomas W. Wilcox

Cc: Marty Cove  
Diane Pettie, Esquire

# EXHIBIT 3



**Price Inquiry System**

Current User: Unknown  
Logout

[Return To: Customers](#)

<a href="#">Price Inquiry</a>	<a href="#">Price Document Inquiry</a>					
<a href="#">Multi Lane Search</a>	<a href="#">Single Lane Search</a>					
<b>Price And Fuel Disclaimers</b>						
<ul style="list-style-type: none"> <li>• Returned Prices And Fuel Surcharge rates are as of Jan 12, 2012</li> <li>• Printed rate documents (tariffs/circulars/contracts/quotes) supersede results shown here. Rates are subject to conditions shown with each returned price.</li> <li>• Terms &amp; Conditions</li> <li>• Fuel Surcharge Programs</li> <li>• Price Inquiry Disclaimers</li> </ul>						
<b>Result # 1</b>						
<a href="#">Refine Search</a> <a href="#">Request a Price Quote</a>						
<b>Commodity (STCC):</b> 2812815 - Chlorne Gas, Liquefied <b>Origin:</b> Portland,OR <b>Destination:</b> El Paso,TX <b>Origin Carrier:</b> UP <b>Destination Carrier:</b> UP						
<b>Published Prices</b>						
<b>Route</b>	<b>Price(excluding surcharges)</b>	<b>Fuel Surcharge</b>	<b>Equipment Type</b>	<b>Price Application Weight Parameters</b>	<b>Shipment Quantity</b>	<b>Price Document</b>
No Prices Found <a href="#">Request a Price Quote</a>						
<b>Result # 2</b>						
<a href="#">Refine Search</a> <a href="#">Request a Price Quote</a>						
<b>Commodity (STCC):</b> 2812815 - Chlorne Gas, Liquefied <b>Origin:</b> Portland,OR <b>Destination:</b> Phoenix,AZ <b>Origin Carrier:</b> UP <b>Destination Carrier:</b> LP						
<b>Published Prices</b>						
<b>Route</b>	<b>Price(excluding surcharges)</b>	<b>Fuel Surcharge</b>	<b>Equipment Type</b>	<b>Price Application Weight Parameters</b>	<b>Shipment Quantity</b>	<b>Price Document</b>
No Prices Found <a href="#">Request a Price Quote</a>						
<input type="button" value="Back"/> <input type="button" value="Reset"/>						
<b>Start Shipping with Union Pacific</b>						

# EXHIBIT 4



Get a Carload Price

Follow the steps, then click Submit.

[Demo](#) [Help](#)

**1** Select the CN origin  
City: North Vancouver BC Carrier: CN

**2** Select the destination and carrier.  
City: Phoenix AZ Carrier: BNSF

Select a product by entering its STCC or commodity name  
**3** STCC/Commodity: 2812815, Chlorine Gas

Optional Search Criteria

Equipment Type:  
All Equipment

Equipment Ownership:  
All Equipment Ownership

\* Required Fields

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## Notification

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Get a Carload Price

Follow the steps, then click Submit.

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**1** Select the CN origin.  
City: North Vancouver BC Carrier: CN

**2** Select the destination and carrier.  
City: Glendale AZ Carrier: BNSF

**3** Select a product by entering its STCC or commodity name:  
STCC/Commodity: 2812815, Chlorine Gas

Optional Search Criteria

Equipment Type:  
All Equipment

Equipment Ownership:  
All Equipment Ownership

\* Required Fields

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**Get a Carload Price**

Follow the steps, then click Submit.

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**1** Select the CN origin  
City: North Vancouver BC Carrier: CN

**2** Select the destination and carrier  
City: Ft. Paso TX Carrier: BNSF

Select a product by entering its STCC or commodity name:  
**3** STCC/Commodity: 2812815, Chlorine Gas

**Optional Search Criteria**

Equipment Type:  
All Equipment

Equipment Ownership:  
All Equipment Ownership

\* Required Fields

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**Get a Carload Price**

Follow the steps, then click **Submit**.

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**1** Select the CN origin:  
City: North Vancouver BC Carrier: CN

**2** Select the destination and carrier:  
City: Chicago IL Carrier: CN

Select a product by entering its STCC or commodity name.  
**3** STCC/Commodity:  
2812815, Chlorine Gas

**Optional Search Criteria**

**Equipment Type:**  
All Equipment

**Equipment Ownership:**  
All Equipment Ownership

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### Get a Carload Price

Follow the steps, then click **Submit**.

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**1** Select the CN origin.  
City: Chicago IL Carrier: CN

**2** Select the dest nation and carrier.  
City: New Orleans LA Carrier: CN

Select a product by entering its STCC or commodity name:  
**3** STCC/Commodity: 2812815, Chlorine Gas

#### Optional Search Criteria

**Equipment Type:**  
All Equipment

**Equipment Ownership:**  
All Equipment Ownership

Required Fields

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