

SERVICE DATE – JUNE 17, 2021

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. WB 20-50

REQUEST FOR WAYBILL DATA

Digest:¹ This decision denies an appeal of a ruling by the Director of the Office of Economics relating to access to the Confidential Carload Waybill Sample.

Decided: June 17, 2021

Trinity Industries, Inc. (Trinity), has appealed a ruling by the Director of the Board's Office of Economics (Director) denying Trinity's request for access to the Confidential Carload Waybill Sample (CCWS). For the reasons discussed below, the Board affirms the Director's ruling.

BACKGROUND

In a letter dated October 13, 2020, Trinity requested access to selected fields from the 2019 CCWS, as well as an annual extension for continuing access to CCWS data for 2003-2018. Trinity did not request access to the revenue and cost information fields in the CCWS, but did request access to detailed commodity, car identification, railroad, origin, destination, and routing fields.² The request was submitted as an "other user" request under 49 C.F.R. § 1244.9(c).

Trinity is a railcar manufacturer that also "provides comprehensive railcar fleet management services, including railcar leasing and financing, administration, regulatory compliance, tax preparation, and maintenance and repairs." (Trinity Req. 1.) The stated purpose of its request is to permit Trinity's consultant "to prepare analyses of (1) trends in the uses of and handling of various combinations of rail-hauled commodities by equipment types, particularly

¹ 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. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

² The CCWS contains commodity information at the 7-digit Standard Transportation Commodity Code (STCC) level. The Public Use Waybill Sample, which is available on the Board's website, has data at the more general 5-digit STCC level. The CCWS fields that Trinity has requested also include the origin and termination Freight Station Accounting Code (FSAC). FSACs "identif[y] many freight stations which serve only one shipper of a given commodity." Procs. on Release of Data from the ICC Waybill Sample (49 C.F.R. Part 1244), 4 I.C.C.2d 194, 213 (1987).

tank car traffic; and (2) the effects of various regulatory changes affecting equipment standards and uses that have been or may be proposed.” (Id. at 2.) According to the request, the proposed analyses will permit Trinity to “enhance its understanding of the numerous types of railcars in use in the rail system as well as the range of specific uses to which this equipment is applied” and “its ability to design equipment and services that address the needs of the shipping and carrier communities more efficiently and directly.” (Id.)

Notice of the request was published in the Federal Register on October 16, 2020 (85 Fed. Reg. 65,895). On December 4, 2020, the Director denied Trinity’s request for access to the 2019 data and for continued access to data for 2003-2018 (Director Decision). The Director determined that the request could not be granted because Trinity sought access for private, commercial use of the type that the Board recently confirmed was not permissible. See Request for Waybill Data (U.S. Wheat), WB 20-40 (STB served Nov. 20, 2020). The Director noted that U.S. Wheat confirmed that CCWS data should not be made available for such purposes and reaffirmed the Board’s policy that it “will not permit CCWS data that is collected to further the Board’s regulatory mission to be converted to private, commercial use.” Director Decision, WB 20-50, slip op. at 1 (quoting U.S. Wheat, WB 20-40, slip op. at 5).

On December 11, 2020, Trinity timely appealed the Director Decision. On April 8, 2021, Trinity filed a letter requesting that the Board act on its appeal.

DISCUSSION AND CONCLUSIONS

Parties appealing the Director’s waybill determinations face a high burden. Pursuant to 49 C.F.R § 1011.6(b), “[a]ppeals are not favored and will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice.” The Board finds that Trinity has not demonstrated a clear error of judgment by the Director or manifest injustice flowing from his decision.

The Board collects CCWS data for regulatory purposes. The highly confidential nature of the data is well-recognized. See, e.g., Procs. on Release of Data, 4 I.C.C.2d at 197 (acknowledging that CCWS data is commercially sensitive for both shippers and railroads and “thus not subject to public release”); CSX Corp.—Control & Operating Leases/Exemptions—Conrail Inc. (Conrail), FD 33388, slip. op. at 6 (STB served Oct. 3, 1997) (CCWS data is available only in limited circumstances due to confidentiality). The CCWS dataset includes detailed information for each sampled rail shipment, including origin, destination, routing, transporting railroads, commodity, volume, number of carloads, revenue, and cost information. Even though the Board does not regulate transportation provided under transportation contracts, the CCWS data also includes information related to confidential contract shipments in addition to data related to rail shipments that move under common carrier tariffs. As the Board noted in U.S. Wheat, “when shippers and railroads sign confidential contracts, they generally expect that contract information to remain confidential.” U.S. Wheat, WB 20-40, slip op. at 2-3. Moreover, although the CCWS does not contain the identity of shippers and consignees, the combination of origin/destination and commodity data may “permit identification of a shipper and consignee, and might thereby disclose a railroad’s significant customers and also the rate (including

confidential contract rates) at which it transports the traffic.” Conrail, FD 33388, slip op. at 6. See also Procs. on Release of Data, 4 I.C.C.2d at 209, 213.

In considering the propriety of the release of confidential information contained in the CCWS, the Board follows the clear intent of its governing statute, which identifies as key concerns the release of confidential information that may be detrimental to shippers or improperly disclose shipper business transactions to competitors of those shippers. See 49 U.S.C. § 11904. Railroads are explicitly barred from disclosing information of the type contained in the CCWS: “information about the nature, kind, quantity, destination, consignee, or routing of property tendered or delivered to that rail carrier for transportation . . . or information about the contents of a contract authorized under section 10709 of [Title 49 of the U.S. Code], that may be used to the detriment of the shipper or consignee or may disclose improperly, to a competitor, the business transactions of the shipper or consignee.” 49 U.S.C. § 11904(b). As the Board has stated, the fact that the Board collects this sensitive data to further its regulatory mission does not establish a right for private parties to obtain and use the most confidential aspects of this data for commercial purposes. U.S. Wheat, WB 20-40, slip op. at 3.

Over the last several years, the Board has taken a close look at waybill confidentiality issues in several cases. See Request for Waybill Data, WB 20-23 (STB served Sept. 24, 2020); Request for Waybill Data, WB 17-44 (STB served Mar. 23, 2018). Most pertinently, in the recent U.S. Wheat decision, the Board addressed whether private parties should be allowed to access and use CCWS data for their own private, commercial purposes. The Board concluded that it would “not make the CCWS available as a resource for private parties to mine the data and create commercial reports” and reaffirmed “its policy that it will not permit CCWS data that is collected to further the Board’s regulatory mission to be converted to private, commercial use.” U.S. Wheat, WB 20-40, slip op. at 5. US Wheat, which was issued after Trinity’s most recent request, reaffirmed and further clarified the policy to be implemented by the Director.

Trinity is generally supportive of the Board’s U.S. Wheat decision but argues that the decision should not be applied to deny Trinity’s CCWS request. (Trinity Appeal 12.) First, Trinity suggests that U.S. Wheat should be read to bar commercial use of CCWS data only where release of the data would pose a risk of significant competitive harm, asserting that its access to the data would not result in such harm. (*Id.* at 6-7.) While U.S. Wheat describes the particular competitive issues regarding the proposed access in that request, the Board’s ultimate concern was the conversion of CCWS data for private, commercial use as a general matter. U.S. Wheat, WB 20-40, slip op. at 5. The Board is not persuaded that the modified policy that Trinity urges, which presumably would involve a time-consuming and uncertain inquiry into the competitive implications of each request for private, commercial use of the CCWS by the Director, would be advisable or administratively feasible. Moreover, such a policy would not fully protect the more general interest in maintaining the confidentiality of sensitive business data. 49 U.S.C. § 11904, 49 C.F.R. § 1244.9, and the Board’s precedent make clear that shippers and railroads are entitled to expect that this confidential data will not be turned over in the ordinary course to other business enterprises that wish to use the data for their own commercial purposes.

Nor is Trinity's request limited in such a way to "essentially eliminate[] the potential" for competitive harm, as Trinity asserts. (Trinity Appeal 14, 17.) Trinity argues that after a prior access request was denied,³ it modified its list of desired fields to exclude cost and revenue information as well as some car ownership information, which "exclude[d] from its request all data fields that could contain or reveal other particularly sensitive and/or shipper specific data." (Trinity Req. 2.) While the Board appreciates that Trinity has tailored its request in the past, continued access to the data for Trinity's private, commercial use would inadequately protect the confidentiality of shipper and railroad information, as the cost and revenue fields Trinity eliminated from its request in 2009 are not the only confidential fields contained in the CCWS. Trinity still seeks FSAC origin and destination information, routing, railcar identification, volume, and commodity information at the 7-digit STCC level, which is very detailed. As Procedures on Release of Data and Conrail indicate, shippers may be identified based on FSAC and 7-digit STCC commodity information.⁴ As a result, the CCWS data that Trinity seeks would provide it with detailed shipment-by-shipment information that could reveal shipper traffic volumes and commodities, detailed origin/destination and routing information, and the identities of the serving railroads. In many cases, Trinity would also know which railcars (due to railcar identification information) were used for the transportation. Such information could disadvantage competing railcar manufacturers and create a competitive advantage for Trinity in negotiations with customers for its railcar services. Furthermore, although the data Trinity seeks would not include confidential revenues and costs, it would still reveal highly sensitive information that Trinity intends to use for private, commercial purposes.

Trinity also argues that withdrawing its access to the CCWS now is inconsistent with the agency's prior practice of granting it access to this data for many years. Given the sensitivity of CCWS data, it is imperative that the Director and the Board assess the safeguards of the waybill access program on an ongoing basis. Indeed, the Board's procedures build in an opportunity for the Director to review CCWS access renewal requests on an annual basis.⁵ The Board issued its U.S. Wheat decision after the most recent extension of Trinity's access in 2019, and it therefore was entirely appropriate for the Director to evaluate Trinity's current extension request in light of that decision.

In any event, there has been concern over the years regarding the types of issues implicated by this request. Because individual waybill access issues generally are not addressed

³ See Letter to Herbert E. Harris II & John B. Totaro, Jr. from Charles D. Nottingham, STB Chairman (March 11, 2009) (2009 Chairman Denial) (affirming Director's denial of Trinity's request) (Attached as Appendix A). At that time, appeals were decided by the Chairman rather than the entire Board.

⁴ Procedures on Release of Data, 4 I.C.C.2d at 212-13, specified that, to protect confidentiality, publicly available waybill data should contain commodity information only at the 5-digit STCC level and origin/destination information only at the Business Economic Area (BEA) level.

⁵ The Board's regulations require annual renewal for Federal and State requests and from participants in proceedings. 49 C.F.R. § 1244.9(b)(2)-(4). The Board has implemented the same requirement for other users in its access letters.

at the Board level absent an appeal, the most recent decision by a Board member on a Trinity request was the 2009 Chairman Denial. That denial describes the potential competitive issues (to another railcar manufacturer) raised by the request and Trinity's inadequate justification for requiring access to detailed commodity and origin/destination information. 2009 Chairman Denial 2. As Trinity indicates, (Trinity Appeal 13), after the Chairman denied its 2009 appeal, Trinity submitted a revised request that eliminated certain fields, including those reporting revenue, cost, and some car identification information. Because the then-Director found the revised request to be adequate, and there was no appeal, the Board itself was never called upon to address the 2009 post-appeal grant of access or renewals.⁶ Nonetheless, as noted above, it was entirely appropriate for the current Director to reassess continued grants of access to Trinity after U.S. Wheat. It was not a clear error of judgment or manifest injustice for the Director to do so.

Trinity also suggests that because "freight car builders" are mentioned in Procedures on Release of Data as one of the "non-government groups" that "sometimes seek access to waybill sample data," Trinity is in a favored class to obtain CCWS access. (Trinity Appeal 10-12.) Railcar manufacturers are mentioned twice (once directly and once indirectly) in footnotes in Procedures on Release of Data. First, "freight car builders" are identified among those who had previously sought waybill access. Procs. on Release of Data, 4 I.C.C.2d at 196 n.3. Second, one of the prior uses enumerated in the decision is "development of freight car manufacturing plans." Id. at 195 n.2. Trinity implies that each of the users identified in footnote three—railroads, shipper associations, transportation consulting firms, universities, and freight car manufacturers—was permitted access for all purposes identified in footnote two, including "analyses of rail traffic flows and patterns" and "studies of movements of hazardous materials, coal and other commodities." Id.

Trinity's reading of these footnotes is overbroad. Procedures on Release of Data did not establish railcar manufacturers as a special class entitled to preferred access, but instead consigned them to the "other user" category whose waybill requests are subject to notice and objection procedures (unlike railroads and transportation consulting firms in specific agency proceedings). 4 I.C.C.2d at 216-18 (defining "other users" as "[u]sers other than" railroads, federal agencies, states, those seeking access to the Public Use Waybill Sample, and transportation practitioners, consulting firms, and law firms in "specific proceedings"). In fact, the ICC rejected arguments that CCWS data should be made more broadly available for "planning type efforts" that "would improve the efficiency of the transportation system." Id. at 212. As an "other user," Trinity was required to demonstrate that it has a "particular and

⁶ Since the 2009 Chairman Denial, and even more so since the ICC's decision in Procedures on Release of Data, there has been significant growth in the commercial use of data. Even in 1987, the ICC recognized that changes in the way data was being used had implications for the waybill program. Procs. on Release of Data, 4 I.C.C.2d at 197 (acknowledging that while certain data "may not have been considered to be confidential previously," such data can become "more sensitive to disclosure" due to the "evolution of data processing capabilities" and changes within the rail industry). The growth of data mining and the accompanying increasing useability, proliferation, and commercial importance of data since then would warrant a reevaluation of a commercial use request like Trinity's even if the Board had not recently made clear in U.S. Wheat that commercial use of waybill data would not be permitted.

legitimate need” and provide a “detailed justification” for the CCWS fields requested because the ICC determined that, as a general rule, it would limit the data released to non-government users. Id. at 196, 199. Trinity did not do so.

Although Trinity will not be granted continued access to the CCWS, as the Director indicated a wide variety of public data is available for Trinity’s use. Director Decision, WB -20-50, slip op. at 1. Trinity’s general assertion that public data “does not have the granularity in commodity (5-digit versus full 7-digit detail) or geographical detail (BEA regions versus FSAC/SPLC detail) that is important to Trinity’s annual analyses of equipment usage,” (Trinity Appeal 18), is not supported by any explanation of its need for detailed origin, destination, or routing information.⁷ Trinity’s specific argument that it cannot distinguish between railcars that transport silica sand (used in natural gas extraction) and cars that transport other types of sand used for other purposes does not justify the broad release of information Trinity seeks. That a party might find CCWS data more useful than the Public Use Waybill Sample to the studies it proposes to undertake is not sufficient justification to grant access. See 2009 Chairman Denial 2 (stating that “any party seeking to conduct an analysis of rail trends and traffic flows would prefer to use the more comprehensive and detailed confidential Waybill Sample”); U.S. Wheat, WB 20-40, slip op. at 4 (affirming denial of request and recognizing interest of railroads and shippers in maintaining confidentiality of data); Intervistas Study, EP 736, slip op. at 3-4 (STB served June 28, 2018) (stating that “allowing any stakeholder to obtain confidential information merely to facilitate review of a general study would unduly expand access to protected information”).

Accordingly, the Board finds that there was no “clear error of judgment” or “manifest injustice” in the Director’s denial of Trinity’s request to access the CCWS for the purpose of preparing private, commercial analyses for use in its own business.

It is ordered:

1. Trinity’s appeal is denied.
2. This decision is effective on its date of service.

By the Board, Board Members Begeman, Fuchs, Oberman, Primus, and Schultz.

⁷ Trinity’s failure to justify its request for detailed geographic data is notable given the conclusion in the 2009 Chairman Denial that Trinity offered “no compelling reason” why it should have access to the commodity and origin/destination data it sought. 2009 Chairman Denial 2.

Appendix A



Office of the Chairman

Surface Transportation Board
Washington, D.C. 20423-0001

March 11, 2009

WB 601-4

CHAIRMAN'S DENIAL

Mr. Herbert E. Harris II
Mr. John B. Totaro, Jr.
Saul Ewing LLP
2600 Virginia Avenue, NW
Suite 1000
Washington, DC 20037-1922

Dear Messrs. Harris and Totaro:

I am writing in response to your letter dated February 2, 2009, in which you appeal a decision by the Director of Economics, Environmental Analysis & Administration (the "Director") denying your request for access to the confidential Waybill Sample. For the reasons set forth below, I am denying your appeal.

On September 10, 2008, you filed a request on behalf of Trinity Industries for access to the 2007 confidential Waybill Sample and continued access to the confidential Waybill Sample for 2003 - 2006 that the Board had previously released to Trinity. The purpose of your request is to permit Trinity to perform analysis of "recent trends in the uses and handling of various combinations of rail-hauled commodities and equipment types, particularly tank car traffic" and "the effects of various regulatory changes in equipment standards and the uses that have been or may be proposed." You represented that the information in the public Waybill Sample "would not provide the degree of specificity required for the analysis." In accordance with our regulations, your request was published in the Federal Register for public comment.

In response, the Greenbrier Companies "strenuously object[ed] to the release of any revenue data involving Greenbrier shipments . . . [and] the release of any confidential information that would enable Trinity to determine the origin, destination, routing or storage of railcars owned, leased or managed by Greenbrier or railcars moving to and from the various Greenbrier shops." Greenbrier expressed concern that the release of this highly confidential data could be used by Trinity "to a competitive disadvantage of Greenbrier."

On January 21, 2009, the Director denied your request for two reasons. First, you failed to explain why you needed the commercially sensitive and confidential data (particularly confidential revenue data) to conduct your analysis of rail trends. Second, you failed to explain why the public Waybill Sample was inadequate for Trinity's needs.

You argue in your appeal that you need commodity information at a 7-digit Standard Transportation Commodity Code (STCC) level, rather than at the 5-digit STCC level in the public Waybill Sample. You also argue that the public Waybill Sample only provides information on the origin and destination of particular movements at a Business Economic Area (BEA), and you want more detailed origin/destination information.

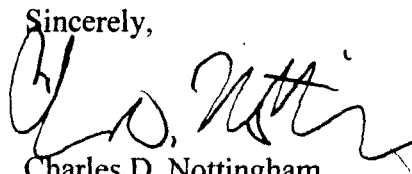
I have carefully considered these two arguments and concluded that they cannot justify the release you sought. You have not offered sufficient reasons why Trinity needs the highly confidential revenue and cost information in the confidential Waybill Sample. Nor have you explained why you need shipper-specific shipment information. The amount of a given commodity shipped by a shipper from a given location to another location is confidential and protected by our rules. Thus, when the Board created the public Waybill Sample, it carefully tested whether revealing the 5-digit STCC and BEA origin/destination information would protect the confidential information in the Waybill Sample. See *Procedures on Release of Data From The ICC Waybill Sample*, 4 I.C.C. 2d 194 (1987) (*Waybill Release*). After a detailed analysis, the agency concluded that the combination of 5-digit STCC and BEA information would best protect the confidential data. The additional information on commodity type and origin/destination you assert you need cannot justify the broad scope of your request, which included sensitive rate and cost information. Moreover, the additional information you seek would reveal confidential shipper information.

I appreciate that any party seeking to conduct an analysis of rail trends and traffic flows would prefer to use the more comprehensive and detailed confidential Waybill Sample. But the public Waybill Sample was created and designed for that purpose, to balance the public interest in having a robust dataset available for these kinds of studies while simultaneously protecting the confidential information of shippers like Greenbrier. Your desire for more specific commodity information or origin/destination may reveal confidential information and you have offered no compelling reason why this information is essential to the studies you would like to conduct. Nor have you shown that your interest in conducting these studies with the sought-after confidential information outweighs the interest of Greenbrier and others in keeping this information confidential.

Finally, while I understand that the Board has provided you access to this information in the past, it has done so in the absence of objection. In this case, the arguments by Greenbrier in response to your most recent request persuaded the Director that the release of this confidential information was inappropriate. I agree with the Director's conclusion.

For all the reasons set forth above, I affirm the decision by the Director denying your request for access to the confidential Waybill Sample and deny your appeal.

Sincerely,



Charles D. Nottingham
Chairman

cc: Vice Chairman Francis P. Mulvey
Commissioner W. Douglas Buttrey