

BEFORE THE
SURFACE TRANSPORTATION BOARD

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Docket No. WB 20-40

WAYBILL REQUEST

APPEAL OF DENIAL OF WAYBILL REQUEST

U.S. Wheat Associates (“USW”) respectfully submits its appeal of the September 4, 2020 decision by the Director of the Surface Transportation Board (“STB” or “Board”) Office of Economics pursuant to 49 C.F.R. § 1244.9(d)(4)(iii), denying USW’s request for access to the unmasked Confidential Carload Waybill Sample (“CCWS”). USW states that this appeal should be granted “to correct a clear error of judgment or to prevent manifest injustice.” 49 C.F.R. § 1011.6(b).

The Request by USW for Access to the CCWS Is to Meet a Legitimate Need.

On August 7, 2020, pursuant to 49 C.F.R. § 1244.9(c), USW, for its consultant, a university researcher, Wesley W. Wilson (collectively “Requestors”), requested that the Board release all fields and records included in the CCWS for all Class I railroads, with masking factors, for calendar years 1984-2018, and for 2019 when it becomes available. The request set out the information required by 49 C.F.R. § 1244.9(e). The Association of American Railroads objected to the request.

The request was solely for a research project for the transportation of wheat in the US by rail. USW has contracted with researchers at North Dakota State University and Dr. Wesley W. Wilson to conduct a study of the rail supply chain for wheat from the U.S. to Mexico. The study aims to identify strategies for USW to share with Mexican millers and U.S. and Mexican policymakers on how to improve the flow of U.S. wheat from the U.S. producer to the Mexican miller. Understanding the costs, time, and potential challenges associated with each step of rail shipments from the U.S. to Mexico will enable USW to develop strategies to ensure that Mexico continues to be a top buyer of U.S. wheat. USW views U.S. rail rates to Mexico as a key factor affecting the volume and value of U.S. wheat exports to the largest buyer of U.S. wheat in the world.

The primary objective of this project is to conduct a detailed study of the rail supply chain for wheat from the U.S. to Mexico. The focus of USW's study is on wheat shipments, by class, from U.S. origins to Mexico. In particular, the study aims to identify time and costs associated with all of the relevant components of the rail shipments from the U.S. to Mexico, including but not limited to: car ownership, demurrage, service charges, fuel surcharges, tariff rates, interchanges/interswitches, border crossing inspections, border crossing paperwork, border crossing wait times, transitions of locomotives (power), Mexican regulatory requirements, haul distance in the U.S., and haul distance in Mexico.

The unmasked CCWS is the best data available for this important study to help the U.S. wheat farmers, and the collection of these data from other sources is not only burdensome but is likely impossible. The unmasked CCWS is the only readily available and reliably consistent source for many of the explanatory variables needed to develop this study. Critical information such as

origin and destination pairs, traffic volumes, rates, and railroads participating in the movement are not available from any other single source. The public use waybill sample lacks sufficient details, such as detailed origin and destination information or fuel surcharges. The origin-destination and interchange information are needed to establish the rail supply chain and the railroads involved along with the extent of their involvement. Shipment distances and shipment sizes of course impact the costs of shipping as do the rates, miscellaneous charges, fuel surcharges, the number of interchanges, the terms of trade, i.e., contract or tariff rates, the equipment type, and the route. It is particularly imperative that Requestors have access to the unmasked data. The Board permits rail carriers to alter the revenues for contract traffic in the Carload Waybill Sample through the use of "masking factors," for confidentiality purposes. These masking factors may be different from carrier to carrier and for different commodities or commodity groups transported by each carrier. In addition, a masking factor may be either positive or negative (or not applied at all). Railroads apply masking factors to the revenue appearing in the Carload Waybill Sample and provide these masking factors to the Board. As one of the key purposes of the study is to understand costs of rail service between the US and Mexico, Requestors require access to unmasked data. The masked revenue would skew the results by exaggerating or understating the differential between competitive and captive rates and will render it impossible to assess their accuracy in the real world.

Only Dr. Wesley W. Wilson, a university professor at the University of Oregon, would have access to the data pursuant to this request. He would generate descriptive material and statistical output from the data and provide that output to the North Dakota State University study team members, William Wilson, David Bullock and Prithviraj Lakkakula, to write the report. USW and

Wesley Wilson agreed to adhere to all confidentiality requirements set forth at 49 U.S.C. § 1244.9(b)(4) and (f) and to execute the usual Confidentiality Agreement associated with the release of the CCWS.

USW is a non-profit trade association that develops export markets on behalf of U.S. wheat producers by demonstrating the value of U.S. wheat in over 100 countries through its network of domestic and overseas offices. USW's activities are made possible by producer check-off dollars managed by 17 state wheat commissions and through cost-share funding provided by USDA's Foreign Agricultural Service. In other words, USW works with these commissions regarding wheat issues in the US. USW proudly represents the hard-working farm families that produce enough wheat every year to fill American tables, while still supplying a substantial share of world wheat trade. More information is available at www.uswheat.org.

Director's Decision Denying CCWS Request

On September 4, 2020, the STB Director of the Office of Economics denied USW's request in its entirety. The Director supplied the following reasoning in support of the denial:

Your request seeks disclosure of confidential rail contract, rate, and other information "to identify time and costs associated with all of the relevant components of the rail shipments from the U.S. to Mexico." You state that confidential contract revenues are a critical component of your analysis because "U.S. rail rates to Mexico [are] a key factor affecting the volume and value" and because it will not be possible to assess the differential between "competitive" and "captive" rates without actual revenues. But the information you are seeking to access for a commercial purpose is precisely the information that

railroads and shippers are entitled to expect will ordinarily remain confidential, especially since contracts and contract rates are not regulated by the Board. There are limited circumstances where the Board has made such data available under stringent confidentiality restrictions, particularly when doing so would further the Board's regulatory role. For example, the Board has made CCWS data available in rulemaking or adjudication proceedings before the Board. The Board has also permitted scholarly researchers to obtain access for academic purposes. The Board has not, however, traditionally granted access to the unmasked CCWS when the intended use is of a private, commercial nature such as the gathering and analysis of market intelligence that you propose, particularly with regard to contract rates. As to your request for the masking factors, to protect the confidentiality of contract rates in the CCWS the Board has treated the masking factors as strictly confidential and not intended for disclosure. For these reasons, I will deny your request for CCWS access.

I will also deny your request on the separate ground that it does not adequately demonstrate the need for the breadth of CCWS data requested. While you propose to analyze the current transportation of wheat by rail to Mexico, your request seeks details for all shipments in the United States for all commodities over the past 35 years, regardless of any connection to Mexico. Your request does not adequately explain why data concerning commodities other than wheat is relevant to your purpose, why you require detailed information about precise origins and destinations of shipments, or why more than three decades of data is necessary for your analysis.

Argument in Favor of Granting Appeal

USW filed its request under 49 C.F.R. § 1244.9(c) as an “Other User” and followed the requirements in §1244.9(e) as set forth in this regulation. While the Director flatly rejected disclosure on the ground that it is not traditionally granted when the intended use is of a private, commercial nature for the analysis proposed for the report, USW believes this should not be the case when the information is subject to stringent confidentiality protections and when a report is made by a nonprofit in the public interest to support U.S. farmers who need this information to survive in a highly competitive world market. As such, USW states that this appeal should be granted “to correct a clear error of judgment or to prevent manifest injustice.” 49 C.F.R. § 1011.6(b). “The Board must balance the Requestors’ purported need for the data against the commercially sensitive nature of the unmasked revenue data.” *Request for Waybill Data*, Docket No. WB 17-44, slip op. at 8 (STB served March 23, 2018). Here, the balance must lean towards disclosure because USW has requested this data with extremely stringent confidentiality protections and the proposed report is crucial to U.S. wheat farmers who have no other way to obtain this information except through this process. “Manifest injustice” would clearly be the result if USW cannot obtain the data for these wheat farmers to learn about how rail transportation impacts its exports to Mexico.

As noted, the requested data would only be disclosed to one university professor who would be subject to the strict confidentiality requirements for such data under the Board’s rules. He will generate descriptive material and statistics from the data and provide the output to the North Dakota State University study team, comprised of William Wilson, David Bullock and Prithviraj Lakkakulaor, to generate a final report which would undergo an STB confidentially review

before being provided to USW. This narrow handling of the data should remove any concerns about disclosure of confidential data or misuse in any way.

Moreover, a denial of this request for confidential data would harm U.S. wheat farmers, resulting in a “manifest injustice”. USW is supported by 17 state wheat commissions. Wheat producers contribute a portion of their wheat sales (either by bushel or by production value) to their state wheat commission, called a checkoff. On average, U.S. wheat farmers contribute about one third of a penny per bushel (\$0.0034) to USW. In return, USW works closely with its state wheat commission members to carry out its mission “to develop, maintain, and expand international markets to enhance the profitability of U.S. wheat producers and its value for their customers.” While USW understands the important reasons to be extremely careful with this information, it also urges the Board to consider the crucial need for this information by U.S. farmers who compete in a complex global market. Without this information, farmers would not be able to understand fully how best to compete with other countries’ farmers. To put these U.S. farmers at this disadvantage should not be the result here, especially when the confidential data is controlled by one individual. As a result, failure to allow USW access to this information would result in “manifest injustice” because of the unnecessary harm that could result to the U.S. wheat farmers.

In *Procedures on Release of Data From the ICC Waybill Sample*, 4 I.C.C.2d 194, 196 (March 31, 1987), the Interstate Commerce Commission, the Board’s predecessor, reasoned that “because there may be instances in which these data are essential to meet a particular and legitimate need, OTA [Office of Transportation Analysis, a predecessor to the Office of Economics]

will consider requests by other users. Each request is considered on its merit, and if OTA decides to release the data it will do so only after: (1) notice and opportunity to comment have been given; and (2) the requesting party agrees to strict confidentiality requirements.”

Here, USW clearly has “a particular and legitimate need” for the CCWS. It needs access to information that is not available anywhere else but at the Board. It needs the information to learn about a crucial cost that its farmers must bear when selling wheat across the world which is rail transportation. Without this information, U.S. wheat farmers would be at a distinct disadvantage to many of their competitors in other countries.

In addition, in similar circumstances, access to unmasked CCWS was permitted by the STB to three professors at North Carolina State University (“NC State”) in WB 19-31 on July 25, 2019 under similar circumstances. In this matter, NC State asked for unmasked CCWS in its June 20, 2019 request for the following purpose:

These data would be used in a project titled “North Carolina Corn Basis Fundamentals.” A primary objective of the project is to establish historical in/outflows of feedstuffs to NC, specifically:

- a. Examining the transportation costs for importing feedstuffs from various locations and utilizing different modes;
- b. Examining the timing of these flows and the impact they may have on North Carolina basis;

c. Identifying the market conditions under which excess demand for feedstuffs in North Carolina will be met with international sources.

We believe this research is important for agricultural stakeholders in our state. A key fact of NC is that the state is feed deficit due to the large livestock industry. In 2017 North Carolina ranked 1st nationally in poultry and egg production, 2nd in hogs and pigs, and 18th in grains and oilseeds according to the USDA. Other top-ranked poultry and hog producers, such as Iowa and Minnesota, were also high producers of grains and oilseeds (USDA NASS State Reports). Feed accessibility and reliability is a determinant of where livestock production occurs, and the financial sustainability of NC agriculture is contingent on access to supplementary supply. Our research seeks to understand the market dynamics of supplementary feed sources.

(emphasis added). This request by NC State is almost identical to the request by USW here. The only difference between the requests is that USW is a nonprofit trade group established for the purpose of helping U.S. wheat farmers, whereas NC State is a university that is attempting to help farmers in its state. The disclosure in both circumstances is to a professor(s), and the likelihood of any breach of the strict confidentiality requirements is almost nonexistent. Therefore, USW urges the Board to allow it as a nonprofit with no incentive to expose the information to have access to the unmasked CCWS like in WB 19-31.

Finally, the Director also rejected the request on the grounds of breadth of USW's request. USW stands ready to limit the breadth of its request to provide further protection to the Board's data. In WB 19-31, the Board allowed unmasked CCWS from 1990-2017. USW would be open to

limiting its request even further to 2000-2018. It is also willing to limit its request to wheat movements only. In addition, it would be willing to limit the fields in its request to only average shipment revenue, miscellaneous charges, fuel surcharges, Origin and Terminal SPLC codes (location code), O_ST (state of origin), year, shipment distances, shipment size (number of cars) expanded and not, expansion factor, shipment and expanded tons, junction frequency, and railroads. USW believes these further limitations on its request makes this appeal more compelling.

Conclusion

Based on the foregoing discussion and the new limits on its request, USW states that this appeal should be granted “to correct a clear error of judgment or to prevent manifest injustice.” 49 C.F.R. § 1011.6(b). USW believes there was “a clear error of judgment” because its request “is essential to meet a particular and limited need” to help U.S. wheat farmers compete in the world market as the Board has found in a similar fashion in WB 19-31. Moreover, USW has stated it would only release the data in an extremely limited way to one university professor, thereby posing almost no risk of disclosure. Also, granting this appeal would “prevent manifest injustice”, because without this information, USW has nowhere else to go to obtain this crucial data, thereby taking away this tool for U.S. wheat farmers to learn how this rail expense impacts their ability to succeed in the world market. Finally, USW has agreed to further limit the breadth of its request to 2000-2018, wheat only, and fewer fields. As a result, USW respectfully asks the Board to grant this appeal.

Respectfully submitted,

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September 14, 2020

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2020, I caused the foregoing Appeal of Director's Decision to be served by first class mail or more expedient method upon the following:

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