

BEFORE THE
SURFACE TRANSPORTATION BOARD

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STB WB17-44-10/20/17

RELEASE OF WAYBILL DATA

REPLY TO
APPEAL OF DIRECTOR'S DECISION
TO GRANT ACCESS TO CONFIDENTIAL CARLOAD WAYBILL SAMPLES

Pursuant to 49 C.F.R. § 1244.9(d)(4)(iii), Thompson Hine LLP hereby replies in opposition to the January 16, 2017, appeal by the Association of American Railroads ("AAR") ("AAR Appeal") from the December 27, 2017 decision of the Acting Director of the Office of Economics ("Waybill Decision"), which granted in part and denied in part Thompson Hine's October 20, 2017 "Request for Release of 2006-2015 Confidential Waybill Data" ("Waybill Request").¹ The Waybill Request sought the release of all fields and records included in the Confidential Carload Waybill Sample ("CWS"), with masking factors, for calendar years 2006-2015, and for 2016 when it becomes available. The Waybill Decision granted the Waybill Request only from 2006-2013 and denied the request for unmasked revenues.² AAR, however, objects even to this substantially narrowed scope of access to the CWS.

AAR contends that the Waybill Request should be denied in its entirety on three grounds.

- First, AAR asserts that the plain language of the Board's rules do not permit release of the CWS to lawyers and consultants except pursuant to 49 C.F.R. § 1244.9(b)(4),

¹ Thompson Hine submitted the Waybill Request on behalf of itself, Economists, Inc., and L. E. Peabody & Associates, Inc., in their capacities as counsel or consultants to the American Chemistry Council ("ACC").

² On January 16, 2017, Thompson Hine also appealed the Waybill Decision as to the denial of unmasked revenue, but accepted the date restrictions.

whereas Thompson Hine submitted the Waybill Request pursuant to § 1244.9(c) which applies to “Other Users.” AAR Appeal at 3-6.

- Second, AAR argues that Thompson Hine has not established a “legitimate and particular” need for the CWS because the stated purpose in the Waybill Request to develop a “benchmarking” approach to rate reasonableness is inconsistent with the statute. *Id.* at 7-14.
- Third, AAR contends that information in the CWS concerning toxic inhalation hazard (“TIH”) shipments is Security Sensitive Information (“SSI”) which the Board may not release to Thompson Hine without authorization from the Department of Transportation (“DOT”). *Id.* at 14-16.

All three arguments are specious. Furthermore, they are disingenuous in view of AAR’s own recent request for the CWS in WB17-45, which fails each of AAR’s foregoing objections.

I. AAR Has Misread The Plain Language Of The Board’s Rules And Ignored The Decision In Which The Board Adopted Those Rules.

AAR posits an illogical argument that, according to the plain language of the Board’s regulations governing the release of the CWS, transportation consultants and lawyers, such as Thompson Hine, may only obtain the CWS pursuant to 49 C.F.R. § 1244.9(b)(4), and that they may not under any circumstances invoke the provisions for release to “Other Users” pursuant to § 1244.9(c). AAR Appeal at 3-6. The AAR misreads the plain language of these rules.

The complete title of § 1244.9(b)(4) is “*Transportation practitioners, consulting firms, and law firms—specific proceedings.*” This subsection sets forth the standards for releasing the CWS to law firms and consultants in specific types of proceedings, which the text of the rule identifies as “formal proceedings before the STB and/or State Boards....” The text in this subsection nowhere restricts the release of the CWS to lawyers and consultants to just formal proceedings; rather it restricts the application of § 1244.9(b)(4) to requests by lawyers and consultants in formal proceedings. Correspondingly, § 1244.9(c) applies to release of the CWS to “Other Users,” which it defines as “Users other than those described in paragraphs (b)(1) through (b)(5)....” A transportation practitioner, consulting firm, or law firm which requests the

CWS for use outside of a “formal proceeding,” therefore, may, and must, invoke § 1244.9(c) because §1244.9(b)(4) applies only to requests for the CWS in formal proceedings.

The Interstate Commerce Commission (“ICC”) decision which adopted these rules is quite clear that the agency’s different treatment of CWS requests by lawyers and consultants in formal proceedings versus all other contexts has to do with the applicability of “notice and protest” procedures, which do not apply to CWS requests under § 1244.9(b)(4), but do apply to all requests under § 1244.9(c). *Procedures on Release of Data From the ICC Waybill Sample* (49 C.F.R. Part 1244), 4 I.C.C.2d 194 (1987) (“*Waybill Release*”). The ICC adopted varying requirements for releasing the CWS to five classes of defined users: (1) Railroads; (2) Federal agencies; (3) States; (4) Transportation practitioners, consulting firms and law firms in specified [*i.e.*, “formal”] proceedings; and (5) Other Users. The ICC addressed waybill access by the first four classes in § 1244.9(b)(1-4) and “Other Users” in § 1244.9(c). The reason for this structure is that CWS requests by “Other Users” are subject to notice and protest procedures—the very procedures at work right now—that do not apply to the other four classes. The ICC determined that “notice and protest” procedures were unnecessary in the narrowly-defined circumstances covered by the first four user classes and that all other waybill requests would be subject to the “notice and protest” procedures in in § 1244.9(d). *See* 49 C.F.R. § 1244.9(c)(2).

The ICC’s decision to exempt practitioners, consultants, and law firms from “notice and protest” procedures when requesting the CWS in formal proceedings was a controversial decision that the ICC went to great lengths to explain. *Waybill Release* at 200-05. Those explanations demonstrate that the ICC exempted these entities from “notice and protest” procedures only when requesting the CWS in formal proceedings, and that such “notice and

protest” procedures continued to apply to requests by these entities in all other contexts.³ For example:

- “Transportation practitioners, consultants, and law firms are not subject to notice and protest procedures when requesting waybill data for the preparation of verified statements in formal ICC and State proceedings.” *Id.* at 200 [underline added].
- “First, we have created an exception from the notice and protest procedures for a very limited purpose—the preparation of verified statements for formal proceedings before the ICC and State Commissions only.” *Id.* [underline added].
- “Although notice and protest procedures are not afforded railroads and shippers in formal Commission proceedings, OTA is uniquely qualified to evaluate and, where appropriate, further refine data requested for the preparation of verified statements.” *Id.* at 201 [underline added].
- “In sum, although notice and protest procedures are not required by this special class of users, ample protective mechanisms exist to ensure that only waybill data essential to the preparation of the needed analyses are released in ICC and State Commission proceedings.” *Id.* at 202 [underline added].
- “[W]e were able to establish a mechanism whereby a limited class of users comprised of transportation practitioners, consultants, and law firms (key players in formal rail proceedings) could obtain essential waybill data by complying with stringent access and confidentiality requirements in lieu of notice and protest procedures.” *Id.* at 203 [underline added].
- “[T]his exception [to notice and protest procedures] is only permitted for the exclusive purpose of preparing verified statements in formal ICC and State proceedings and then only after the imposition of stringent access, review, and confidentiality requirements. Essentially, we engaged in a balancing act. We weighed the need to prepare timely and sound analyses against the competitively sensitive nature of the data. In so doing, we found we could only except this narrowly defined class of users in narrowly defined circumstances without compromising the confidentiality of the data.” *Id.* at 205 [underline added].

³ AAR’s interpretation also would restrict States to obtaining CWS data within the scope of §1244.9(b)(3) (*i.e.* records pertaining to traffic that originated, terminated, interchanged, or passed through that State). But § 1244.9(b)(3)) merely allows a State to obtain CWS records pertaining to the specified traffic without “notice and protest” procedures. A State still may request traffic beyond this scope under § 1244.9(c), which would be subject to “notice and protest.” Notably, while the regulation does not define a “State,” presumably the definition encompasses all State institutions, which includes universities that occasionally request the CWS for academic purposes.

The “exception” created by § 1244.9(b)(4), which the ICC explained in such detail in *Waybill Release*, quite clearly is an exception to the otherwise applicable “notice and protest” procedures in § 1244.9(d) for waybill requests. It is not—as AAR surmises—an exception to a general prohibition against the release of the waybill data in all other circumstances.⁴ Thus, contrary to AAR’s position, §1244.9(b)(4) merely provides standards and procedures for releasing the CWS to lawyers and consultants in formal proceedings, without “notice and protest,” whereas §1244.9(c) requires “notice and protest” procedures for CWS requests by anyone who does not qualify for any of the exceptions created by §§ 1244.9(b)(1-4), which includes requests by lawyers and consultants outside of a formal proceeding.

Finally, AAR incorrectly claims that its interpretation is confirmed by three letter decisions from the Director of Economics, which AAR describes as “agency precedent.” AAR Appeal at 6. All three letters were served on the same date—February 29, 2012—and requested access to waybill data pertaining to other Class I railroads pursuant to § 1244.9(c). The letter decisions, which are nearly identical, held that those particular railroad requests for access to the CWS should have been filed under 49 C.F.R. § 1244.9(b)(1). From that holding, AAR concludes that, if those railroads could not invoke § 1244.9(c), then consultants and outside lawyers such as Thompson Hine also may not do so.

There are several reasons why those letters do not carry any weight in this appeal. First, these are decisions by the Director of Economics, not the Board, and thus are not “agency precedent” that binds the Acting Chairman in this appeal. Second, there is support for those letter decisions in the plain language of the STB’s waybill rules that does not apply to Thompson

⁴ Any such restriction would call into question the Board’s recent release of the CWS to consulting firms and lawyers, including Thompson Hine, in EP 711, *Pet. for Rulemaking to Adopt Revised Competitive Switching Rules* (served July 25, 2012).

Hine's Waybill Request. Specifically, the letter decisions rely upon an explicit statement in §1244.9(b)(1) that a "railroad shall not have access to waybill data pertaining to traffic in which it did not participate." There is no comparable prohibition in § 1244.9(b)(4) that lawyers and consultants shall not have access to waybill data except in a formal proceeding. Third, the railroads in those letter decisions sought the data for "commercial planning and litigation analysis activities" which the Director deemed an inappropriate use of the data, even by outside consultants, because that would open the door for any firm with significant railroad transportation requirements (shippers and railroads alike) to obtain the data. In other words, the Director indicated that those requests would be inappropriate even under § 1244.9(c) because they did not establish a "legitimate need" to access the CWS of other railroads. In contrast, Thompson Hine has demonstrated a legitimate need for CWS data to prepare timely and sound analyses on a subject that is "a top Board priority."⁵

II. The Waybill Request Establishes A Legitimate Need For CWS Data To Develop A Benchmarking Model That Is Consistent With The Statute.

AAR challenges the Director's determination that Thompson Hine has established "a particular and legitimate need" for the CWS. AAR Appeal at 7, *quoting Waybill Release* at 199. According to the AAR, the Waybill Request "was fatally flawed because [it] offered no explanation of how a 'benchmarking' approach to rate reasonableness could be consistent with

⁵ STB Docket NOR 42121, *Total Petrochemicals and Refining USA, Inc. v. CSX Transp., Inc.*, slip op. at 49 (served Sept. 14, 2016) (Begeman, dissenting in part). In addition, in a rate case decision served only days ago, Acting Chairman Begeman lamented the cost, length, and unpredictability of the SAC process; expressed her belief that "the Board must establish an alternative to SAC;" and noted the establishment of an internal Rate Reform Task Force to "reform and streamline" the rate review process. STB Docket NOR 42142, *Consumers Energy Co. v. CSX Transp., Inc.*, slip op. at 74 (served Jan. 11, 2018) (Begeman commenting). Vice Chairman Miller expressed similar sentiments in the same decision and expressly identified "competitive market-rate benchmarking" as "an idea worth exploring." *Id.* at 74-75 (Miller commenting).

the statutory scheme,” because rate comparison methodologies “are incompatible with the demand-based differential pricing that Congress has endorsed.” AAR Appeal at 2-3. AAR miscomprehends Thompson Hine’s proposal, misrepresents the precedent, and improperly attempts to litigate the merits of that proposal before it even has been developed and presented.

Thompson Hine requested access to the CWS “to demonstrate the functionality and feasibility of a rate benchmarking standard as an alternative to SAC” through “the development of an econometric model that measures the statistical relationship between rail rates and shipment characteristics to predict the competitive rate levels for captive rail traffic based upon the principal factors that influence the rates of competitive traffic.” Waybill Request at 4. Thompson Hine further explained its intent “[t]o develop, test and evaluate” a specific concept it had submitted to the Board in Docket No. EP 722 (Sub-No. 2), *Railroad Revenue Adequacy*. *Id.* at 4 & note 1.

Notably, AAR acknowledges the ability of an econometric model to predict market rates based on shipment characteristics; but AAR nevertheless objects that Thompson Hine “offer[s] no explanation for how [it] could translate an econometric model of market rates into a viable rate-setting methodology” because “[t]he law is clear that challenged rates cannot be judged by comparison to other so-called ‘competitive’ rates.” AAR Appeal at 8 [underline in original]. Both statements are untrue.

As a threshold matter, the law does not preclude rate challenges based upon comparisons to competitive rate levels. *Burlington N. R.R. Co. v. ICC*, 985 F.2d 589 (D.C. Cir. 1993), does not support AAR’s position. That decision reversed and remanded an R/VC benchmarking methodology that the ICC had applied in that case because that methodology failed to consider the need for differential pricing of captive traffic to achieve revenue adequacy; moreover, there

was no discernible principle behind the ICC's choice of benchmark traffic. *Id.* at 595-98. A benchmarking methodology that addresses those issues would not run afoul of this precedent.

Nor does the Board's decision in *Rail Transportation of Grain, Rate Regulation Review*, STB Ex Parte No. 665 (Sub-No. 2), at 13 (served Aug. 31, 2016), definitively render traffic with an R/VC below 180% irrelevant to a benchmarking methodology. *See* AAR Appeal at 9, note 8. AAR fails to state that this decision was an Advanced Notice of Proposed Rulemaking and that the quoted text represents the Board's tentative conclusion upon which it invited public comment. The Board's tentative conclusion was influenced by the need to consider differential pricing. But the Board did not hold that excluding traffic with an R/VC below 180% from the comparison group was the only means to address that consideration. Nor does the Board's tentative conclusion necessarily apply to benchmarking based upon an econometric model, which is a different type of benchmarking from the straight-up R/VC comparisons proposed in EP 665 (Sub-No.2).

Thompson Hine seeks to develop a rate reasonableness methodology that will account for all of the foregoing issues, consistent with the statute. Specifically, Thompson Hine will use the CWS to develop a rate benchmarking proposal to facilitate the rail transportation policy "to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital..." 49 U.S.C. § 10101(6). The concept that Thompson Hine espoused in EP 722 (Sub-No. 2), and now seeks to develop with CWS data, does not contemplate determining a reasonable rate based solely upon the predicted competitive rate in an econometric model. It also envisions calculation of a higher rate threshold, called " R_{Max} ," which would be set at a point above the predicted competitive rate to "preserve the railroad's ability to set differential prices to captive

shippers...”⁶ The proposal recognized that, “whatever the results of the regression model, the STB can calibrate R_{Max} to minimize the degree of differential prices paid by captive shippers without jeopardizing a railroad’s revenue adequacy.”⁷ Indeed, Thompson Hine has separately appealed the Acting Director’s Waybill Decision not to release unmasked CWS revenue precisely because unmasked revenue is essential to calculating the R_{Max} and demonstrating how it would protect revenue adequacy.⁸

Finally, AAR’s objections are premature. AAR challenges the Waybill Request based upon arguments that Thompson Hine’s approach to benchmarking is unlawful and/or unworkable before Thompson Hine has had the opportunity to fully develop, evaluate and test its concept, for which the CWS data is critical. AAR’s objections thus are remote and speculative, as illustrated by the fact that Thompson Hine’s concept will be designed to account for AAR’s principal objections predicated upon differential pricing and revenue adequacy. AAR will have ample opportunity to review and critique the legality and functionality of Thompson Hine’s proposal once it has been fully developed, tested, and presented to the Board for consideration. The Board, however, should not allow AAR to employ such arguments to deny Thompson Hine access to the very CWS data it needs to actually develop and present its model to the Board as an alternative to SAC.

⁶ Consolidated Hearing Testimony on Behalf of Concerned Shipper Associations, EP 722 (Sub-No. 2), at 10 (dated July 20, 2015).

⁷ *Id.* at 13.

⁸ R_{Max} is the same concept discussed in Thompson Hine’s separate appeal of the Waybill Decision under the labels of “Competitive Threshold” and “CT.”

III. The Waybill Decision Does Not Release SSI Information In Violation Of Federal Law.

AAR contends that the Waybill Decision unlawfully releases SSI data with respect to movements of toxic-inhalation hazard (“TIH”) commodities in the CWS. AAR Appeal at 14-16. AAR cites SSI Order 2011-06-FRA-01 (“SSI Order”), which designated as SSI certain types of railroad traffic information produced in STB proceedings. The Waybill Decision, however, determined that AAR failed to establish that the SSI Order and pertinent regulations preclude the Board from releasing the CWS here, pursuant to the Board’s longstanding regulations and confidentiality safeguards. Waybill Decision at 2. Thompson Hine agrees that the SSI Order does not extend to the CWS; and even if it does, the STB may release SSI information in the CWS pursuant to the conditions set forth in the SSI Order.

The SSI Order was issued in the context of the very broad, comprehensive, and current rail traffic data that railroads must produce in SAC cases. It applies specifically to the detailed records that railroads compile on all rail shipments for business purposes.⁹ SSI Order at 3. Those records typically include three sets of raw data: revenue waybill, train event, and car event data. The CWS data contains most of the same information as the revenue waybill data, but not the detailed train and car movement information in the train event and car event data. These last two data sets, however, contain the detailed location-specific movement data—as to how, when and where individual TIH cars moved—that is security sensitive.

The rail traffic data produced in rate cases also is much broader in scope than the CWS data. The rail traffic data contains details pertaining to every single car movement over the defendant-railroad in the immediately preceding years. In contrast, the CWS is a random

⁹ Nothing in the SSI Order appears to apply to STB actions at all; nor is the STB a “covered person,” under 49 C.F.R. § 15.7, who is subject to the disclosure restrictions in § 15.9.

sampling of rail movements. Because the CWS is a random sample of movements on each railroad, it captures only a small fraction of the total movements contained in the railroad traffic data typically produced in STB proceedings. Thus, unlike railroad traffic data, the CWS does not reveal the frequency, repetition, and total volume between an origin and destination. There simply is no opportunity to draw the same conclusions and discern the same movement patterns from the CWS that is provided by access to all of a railroad's TIH movements.

Moreover, the Waybill Decision has granted the Waybill Request only through 2013, which means that the CWS data that will be released already is four or more years old, as opposed to current traffic data typically produced in rate cases. A random sample of movements that are four or more years old means that the CWS contains only a very small fraction of total TIH moves; those moves differ in the CWS from one year to the next; there is no ability to discern rail car movement patterns over time; and even the most current information released to Thompson Hine will be at least four years out-of-date. In short, releasing CWS data that is four or more years old to Thompson Hine does not pose the security concerns expressed in the SSI Order.

Regardless of whether TIH waybill data is SSI, that fact alone does not preclude Thompson Hine's Waybill Request. The SSI Order was accompanied by a Memorandum, issued pursuant to 49 C.F.R. § 15.15(e), that authorizes the release of SSI to parties, their legal counsel and their technical consultants who have a need to know in order to advocate a case before the STB, subject to the conditions outlined therein. AAR objects that this exception does not apply here because Thompson Hine has not sought CWS data in connection with a particular case before the Board. AAR Appeal at 16. But Thompson Hine has stated its intent to present its

proposal to the Board “in EP 736 or such other proceeding(s) the Board may designate for that purpose.” Waybill Request at 4.

While AAR would require that there be both a pending STB proceeding and an open request for comments, the SSI Order does not require that. Thompson Hine has identified at least one pending proceeding in which it could present its analysis, *InterVISTAS Study*, Docket No. EP 736. Waybill Request at 3-4. Vice Chairman Miller has identified that proceeding as “provid[ing] the opportunity for the Board to begin a serious consideration of alternatives to SAC...[and] ...allowing our stakeholders to...offer their own thoughts and ideas on alternatives.”¹⁰ Shortly thereafter, the Board announced its intent to hold a hearing in EP 736 in which all interested parties may participate, but it has not yet announced a schedule.¹¹ The existence of a specific schedule for submitting comments in EP 736 is not a predicate for releasing the CWS under the SSI Order, assuming *arguendo* that the SSI Order even applies. Furthermore, Thompson Hine has explained that, “[b]ecause the type of analysis [it] intend[s] to perform on the CWS is complex and time-consuming, [it] require[s] access to the CWS now to be able to submit comments to the Board in a timely manner.” Waybill Request at 3. If Thompson Hine must wait for the Board to issue a schedule before requesting the CWS, it almost certainly would need to request a delay in that schedule to complete its analysis. This is not desirable for “a top Board priority.”

Finally, if the Board does not consider EP 736 to be the appropriate proceeding for evaluating SAC alternatives and otherwise concludes that such a proceeding is required under the SSI Order prior to releasing the CWS, ACC is prepared to initiate a proceeding by Petition

¹⁰ *Total Petrochemicals & Refining USA, Inc. v. CSX Transp., Inc.*, NOR 42121, slip op. at 46-47 (served Sept. 14, 2016) (Miller, concurring)

¹¹ *InterVISTAS Study*, Docket No. EP 736 (served Oct. 12, 2016).

for Rulemaking. However, ACC would face a “chicken and egg” conundrum because it needs the CWS to develop a Petition, but cannot access the CWS without a specific Board docket. The Board itself can resolve this conundrum, if truly required to address SSI concerns, by opening a docket for the purpose of exploring rate benchmarking alternatives to SAC.¹²

IV. AAR’s Objections Are Inconsistent With Its Own Recent Waybill Request.

AAR’s objections to Thompson Hine’s Waybill Request are particularly disingenuous in view of AAR’s own recent waybill request in WB17-45, which is attached as Exhibit 1. AAR filed WB17-45 just one month before Thompson Hine filed its Waybill Request and yet AAR’s request must be denied if the Board accepts any of AAR’s objections to Thompson Hine’s Waybill Request.

First, WB17-45 includes a request for several AAR consultants to have access to the CWS to conduct a multitude of analyses, none of which pertain to a “formal” STB proceeding, or any pending STB proceeding at all. AAR clearly submitted its request as an “Other User” because WB17-45 was published in the Federal Register under the “notice and protest” procedures that apply to Other Users. 82 FR 50221. Thus, AAR’s argument that consultants may only request CWS access through § 1244.9(b)(4), if legitimate, necessarily requires rejection of WB17-45 and any similar requests by AAR and/or its consultants and lawyers.

Second, AAR includes “quantification of data in matters of regulatory economics, including...rate regulation and other STB rulemakings” and econometric modeling among the many objectives identified in WB17-45. Ex. 1, p. 1. AAR offers far fewer details on these subjects than Thompson Hine’s Waybill Request and yet AAR accuses Thompson Hine of

¹² If the Acting Chairman ultimately concludes that the SSI Order applies to this Waybill Request and that the Board may not release the CWS under the terms of the SSI, the Board can and should refer this Request to DOT pursuant to 49 C.F.R. § 15.9(a)(3).

failing to establish a legitimate and particular need for the CWS. As noted in Part II above, AAR is prematurely attempting to litigate Thompson Hine's rate benchmarking proposal. In contrast, WB17-45 doesn't even offer sufficient information to surmise AAR's intended use except in the most general sense of "rate regulation and other STB rulemakings."¹³ According to AAR's objection to the Thompson Hine Waybill Request based upon a failure to demonstrate a "legitimate need," the Board should reject WB17-45.¹⁴

Third, WB17-45 requests the same CWS information as Thompson Hine that AAR contends may not be released because it is SSI. Among the objectives that AAR lists for WB17-45 are the following:

- "Measurement of hazardous material movements by commodity, car type, geographic factors and other criteria." Ex. 1, p. 1.
- "Assessment of product-specific routing patterns necessary for exposure analysis needed for environmental and human health risk analyses." Ex. 1, p. 2.
- "Analysis of product-specific tank car and shipment distances to quantify exposure." *Id.*
- "Analysis of traffic movement patterns in conjunction with and to verify capacity modeling techniques." *Id.*

The foregoing objectives necessarily require CWS information concerning the movement of TIH material, which AAR contends is SSI that the Board may not provide to Thompson Hine. If the AAR is correct, the STB also must reject AAR's request for the same information in WB17-45

¹³ It is important to keep in mind that Thompson Hine has submitted the Waybill Request in its capacity as outside counsel to ACC for the purpose of performing analyses on behalf of ACC for presentation by ACC to the STB. Both AAR and ACC are tax exempt 501(c)(6) organizations which have requested the same CWS information for the purpose of rate regulation rulemakings. The only difference is that Thompson Hine has explained precisely "why" it needs the CWS for this purpose and "how" it intends to use the CWS data, whereas AAR has not.

¹⁴ WB17-45 identifies over a dozen purposes for AAR's requested use of the CWS, some of which are more detailed than AAR's "rate regulation and other STB rulemakings" purpose. But even assuming that AAR has established a legitimate and particular need to access the CWS for those other purposes, AAR cannot ride the coattails of a legitimate need to pursue a different purpose for which no need has been expressed.

and require AAR to return all such information previously provided to it in related waybill requests.

Finally, WB17-45 undermines AAR's objection to providing unmasked revenue data to Thompson Hine. AAR itself appears to have requested unmasked revenue in WB17-45, which refers to the "raw" waybill sample and identifies the quantification of revenue-to-variable cost ratios as an objective. Ex. 1, p. 1. Moreover, AAR has requested that information for use by its internal staff, not just outside consultants. The production of such information to the trade association of an industry as highly-consolidated as the U.S. rail industry is far more rife for mischief and abuse than production to Thompson Hine. Note that WB17-45 makes all the same confidentiality commitments as Thompson Hine. There is no rational basis to accept those commitments from AAR but not Thompson Hine.

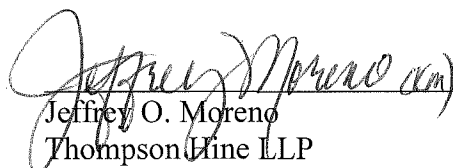
V. Conclusion

The Board has recognized deficiencies in the SAC rate reasonableness methodology for many years. It has explicitly made finding an economically viable alternative to SAC "a top Board priority." Accomplishing this objective, however, is challenging and resource-intensive. This is not something that the Board has the resources to accomplish alone. ACC has committed resources to facilitate the Board's efforts which it proposes to employ to develop and test a "benchmarking" alternative to SAC that is consistent with the statute. ACC has engaged Thompson Hine, Economists, Inc., and L. E. Peabody for this purpose. But they require access to the CWS, including unmasked revenue, to present a meaningful proposal to the Board that then could be subjected to the rigors of an informal rulemaking proceeding.

AAR has raised several specious and/or premature objections to thwart this process and preserve the status quo. First, AAR wrongly contends that consultants and law firms may only

obtain the CWS in formal proceedings. Second, AAR incorrectly and prematurely asserts that Thompson Hine's rate benchmarking proposal violates the statute. Third, AAR inaccurately labels the CWS data as SSI and then compounds its error by contending the STB may not release SSI data in response to Thompson Hine's Waybill Request. AAR's objections are particularly disingenuous in this instance because, just one month prior to Thompson Hine's Waybill Request, AAR filed its own request in WB17-45 which fails each of AAR's objections. The Board should reject each of the AAR's objections as meritless.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Jeffrey O. Moreno", is written over a horizontal line.

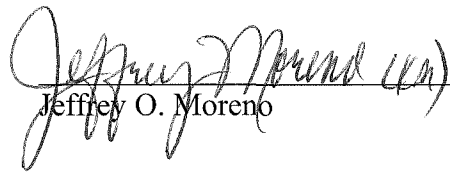
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January 26, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of January, 2018, I served a copy of the foregoing
“Reply to Appeal of Director’s Decision to Grant Access to Confidential Carload Waybill
Samples” by e-mail upon Raymond Atkins, Sidley Austin LLP, counsel for the Association of
American Railroads.



Jeffrey O. Moreno

EXHIBIT 1



John T. Gray
Senior Vice President, Policy & Economics

October 10, 2017

Dr. William Brennan
Acting Director, Office of Economics
Surface Transportation Board
395 E St., SW
Washington, DC 20423

Dear Dr. Brennan:

The Association of American Railroads (AAR) hereby requests permission from the Surface Transportation Board (STB) to use portions of the 1972 through 2016 Waybill Samples. This request is an extension of Waybill Request WB17-11, which will expire on March 31, 2018. The Waybill Sample will be used for the following applications:

1. Quantification of data in matters of regulatory economics, including, but not limited to:
(a) alternate methods of productivity quantification, (b) studies for exemption of certain rail commodities or services, (c) measurement of the amount of traffic interlined or rebilled, (d) traffic flows to, from, or through certain states or other politically or economically defined areas, (e) line capacity and traffic projection studies, (f) rate regulation and other STB rulemakings, (g) measurement of the amount of traffic affected by safety regulations, and (h) measurement of the amount of traffic subject to economic regulation, as quantified by revenue to variable cost ratios and other indicators.
2. Econometric models, used to measure the rail industry-wide impact on the railroad industry as a whole, from events such as a recession, a railroad strike, or a major change in truck and/or rail costs.
3. Freight car utilization analyses designed to estimate equipment supply and demand characteristics and provide input data to mathematical models which simulate optimal distribution patterns and assist with pooling and other fleet decisions.
4. Measurement of hazardous material movements by commodity, car type, geographic factors, and other criteria.
5. Railroad industry data base studies, including, but not limited to: (a) obsolescence studies for the Industry Reference Files, (b) investigations of the proper use and interpretation of the Waybill Sample itself, and (c) benchmarking other railroad databases.

In addition, the AAR is requesting permission for three of our contractors to use the 1972 through 2016 Waybill Samples:

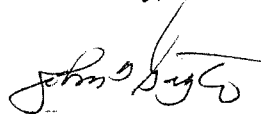
1. Dr. Christopher Barkan of the University of Illinois is conducting research on behalf of the AAR, its member railroads, and the RSI-AAR Railroad Tank Car Safety Research & Test Project. Dr. Barkan is also conducting research for AAR and its member railroads on rail capacity modeling, planning and analysis. Dr. Barkan will use the Waybill as input for the following applications:
 - a. Assessment of product-specific routing patterns necessary for exposure analysis needed for environmental and human health risk analyses.
 - b. Analysis of product-specific tank car and shipment distances to quantify exposure.
 - c. Statistical comparisons to assess the accuracy of other information sources.
 - d. Analysis of traffic movement patterns in conjunction with and to verify capacity modeling techniques.
2. Dr. Gerard McCullough of Northface Associates needs Waybill permission for rail-truck diversion analysis and development of rail elasticity measures.
3. Dr. Mark Burton of the University of Tennessee, Knoxville, needs waybill permission to conduct analysis of market related decision making in the rail industry, the changing composition of rail traffic, and the relationship of these issues to economic regulatory policy.

Varying numbers and combinations of Waybill Sample fields will be required for the various applications enumerated above. As always, the AAR will respect the confidentiality of the Waybill Sample and agrees to observe the STB conditions including:

1. The "raw" Waybill Sample data shall be made available only to those AAR employees who have a need for the data in conducting approved studies requiring the use of Waybill data.
2. The Waybill Sample data shall be used solely for the purposes requested.
3. None of the Waybill Sample data, or results generated from analyses thereof, will be released to the public unless the data are aggregated so that they contain at least three FSACs.

If any questions arise concerning this request, please contact me at your convenience. Per 49 CFR 1244.9, an original and two copies of this request are enclosed. Per the list of charges in 49 CFR 1002.2, I am attaching a check for \$666 (the \$450 fixed portion, plus \$54 each for the AAR and the three consultants) in payment of the filing fee.

Sincerely,



John T. Gray

cc: Frank Hardesty, AAR