

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

Office of Economics

December 27, 2017

Jeffrey O. Moreno
Thompson Hine LLP
1919 M Street N.W.
Suite 700
Washington DC 20036

RE: WB17-44-10/20/17 – Release of Waybill Data

Dear Mr. Moreno:

On October 20, 2017, I received a request from Thompson Hine LLP, on behalf of itself, Economists, Inc., and L.E. Peabody & Associates, Inc. (Requestors) for access as an “other user” under 49 C.F.R. § 1244.9(c) to the Confidential Carload Waybill Samples (CCWS) for 2006-2015 and 2016 when available. Following publication of the notice of the request in the Federal Register, the Association of American Railroads (AAR) filed a letter objecting to the requested release on November 22, 2017.

Requestors seek access to the unmasked CCWS “to facilitate the development, evaluation, and proposal of alternatives” to the Board’s Stand-Alone Cost (SAC) methodology. Requestors assert that they have the skill and expertise needed to identify and advance such alternatives, and argue that CCWS data is necessary to develop an econometric model “that measures the statistical relationship between rail rates and shipment characteristics to predict the competitive rate levels.” Requestors indicate that their objective is to submit a rate benchmarking alternative to the Board in *InterVISTAS Study*, Docket No. EP 736, or “such other proceeding(s) the Board may designate for that purpose.”

AAR objects to the release of the CCWS for this purpose, arguing that: (1) there is no showing of the CCWS is essential to meet a particular and legitimate need; (2) release of commercially sensitive data would be detrimental to shippers and railroads; (3) Requestors do not qualify as an “other user” and therefore are not entitled to the data; and (4) Requestors are not entitled to receive Sensitive Security Information (SSI) in the CCWS without approval from the U.S. Department of Transportation.

After considering the request and the objections, I have determined that, pursuant to 49 C.F.R. §1244.9(d)(4)(i), the request will be granted in part as discussed below.

In seeking the CCWS to develop an alternative rate reasonableness methodology based on benchmarking that will be submitted in an STB proceeding, Requestors have sufficiently demonstrated a legitimate need for some CCWS data. Many elements of the CCWS would

appear to be highly relevant to the Requestors' planned submission to the Board, and no reasonable alternatives to the CCWS exist for this specific use. In particular, the CCWS has much more granular level data than does the Public Use Waybill Sample, and thus use of the CCWS should prove helpful in attempting to establish a reliable statistical relationship between rates and shipment characteristics.

Several of AAR's objections, however, warrant limitations on the breadth of the CCWS data Requestors may obtain. In particular, I agree that release of contract rates in the unmasked waybill sample is not necessary for a "proof of concept" of a new alternative to SAC, and that the release of contractual rates in this circumstance could be detrimental to shippers and railroads. Likewise, the STB does not release the waybill masking factors due to their highly confidential nature, and I will not do so here.

I will also modify the period of CCWS data to be released to address AAR's concerns about the harm that could be caused to shippers and railroads if more contemporaneous data were released. Eight years of historical data, ending with 2013, should be sufficient to enable Requestors to explore alternatives to SAC while avoiding the risk associated with releasing a large amount of more contemporaneous data.

AAR has also objected to release on the ground that the Requestors are transportation practitioners and thus, AAR argues, may *only* seek access to CCWS under 49 C.F.R § 1244.9(b)(4). But the Board's regulations do not foreclose an applicant for access who does not satisfy all of the requirements of user categories addressed in sections 1244.9(b)(1)-(4) from seeking access under section 1244.9(c). Here, Requestors sought to make broader use of the CCWS than is contemplated under section 1244.9(b). Requestors therefore appropriately sought access under 1244.9(c).

Finally, AAR objects to release of the CCWS because it contains SSI data. AAR has failed to establish that the cited Federal Railroad Administration regulations and memorandum it cites preclude the Board from releasing the waybill here, pursuant to the Board's longstanding regulations and confidentiality safeguards.

Accordingly, it is my determination to release the CCWS, with masked revenues, for the period of 2006-2013, subject to a confidentiality agreement that limits dissemination of the data to employees of the Requestors working on the project for which the data was requested. The Board will require the Requestors, as it does all "other users," to agree to allow the Board to review and approve any results intended for public release so that the Board can ensure compliance with the waybill aggregation regulations. (In this context, "public release" means any disclosure to an individual or entity other than one that has signed the confidentiality agreement with the Board, including disclosure to clients of the Requestors.) Requestors will be bound by the confidentiality provisions of 49 C.F.R § 1244.9(f)(1-3), which require that "[a]ny shipper data obtained from the Waybill Sample shall not be publicly released unless the data are aggregated to include at least three shippers," and will also be required to comply with the prohibition imposed on users under 49 C.F.R. §§ 1244.9(b)(2), (3), and (4) against disclosing data that permits identification of an individual railroad. The confidentiality agreement shall also require that Requestors certify by no later than one year from the date of the agreement that all

CCWS data received and all work product generated from that data has been destroyed or returned to the Board. This last requirement may be modified in the event that Requestors elect to file results of their analysis with the Board in a proceeding.

Pursuant to 49 C.F. R. § 1244.9 (d)(4)(iii), any appeals of this determination must be filed with the STB's Chairman with 10 days of the date of this letter. The filing of an appeal will automatically stay the effect of the Director's decision. If no appeal is filed, the Board will provide waybill access to Requestors on or after January 8, 2018.

Sincerely,

A handwritten signature in cursive script, appearing to read "William Brennan", with a horizontal line extending from the end of the signature.

William Brennan
Acting Director

cc: Raymond A. Atkins (counsel to AAR)