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BEFORE THE SURFACE TRANSPORTATION BOARD

STB Docket No. WB25-33

Waybill Request

Appeal of Director's Decision

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Pursuant to 49 C.F.R. § 1244.9(d)(4)(iii), Thompson Hine LLP appeals the July 22, 2025, decision of the Acting Director of the Office of Economics (the Decision) in this proceeding. The Decision denies a June 9, 2025, request by Thompson Hine, on behalf of itself and Escalation Consultants Inc. (collectively, Requestors), as outside counsel and economic consultants to the American Chemistry Council (ACC), for limited access to the unmasked, Confidential Carload Waybill Sample (CCWS) (the Request). Because the Decision rests on clear errors in assessing the Request’s relevance to specific policy questions and active Board initiatives, and because it would unjustly withhold information that is critical to Board and federal initiatives to reduce rail regulatory barriers to competition, Thompson Hine respectfully requests that the Board reverse the Decision and grant the Request.

I. Background

In the Request, Requestors sought access to CCWS data for a single year—2023—with unmasked revenues at the five-digit STCC level. Request 1. Thompson Hine narrowly tailored the Request to data fields necessary for a three-step analysis that would quantify, by two-digit STCC, the total nationwide rail-cost advantage or disadvantage for American products that travel by rail compared to products originating at import terminals. *Id.* at 5-7.

The Request explained that the analysis results would play a critical role in the Board’s and other agencies’ current efforts to evaluate and improve rail policy and regulation. *Id.* 2-4. The results would quantify the benefits of reforming Board regulations to promote rail competition and, thereby, eliminate competitive barriers

for American products. *Id.* Thus, they would provide data for evaluating specific regulatory reform proposals under active Presidential and Board initiatives, including the Chairman’s policy review efforts and the Department of Justice’s (DOJ) Anticompetitive Regulations Task Force request for comments identifying anticompetitive regulations.¹ *Id.* at 3.

The Decision denied the Request on two grounds. First, the Director found that the Request lacked a connection “to any particular Board initiative or regulatory proceeding.” Decision 1. Second, the Director found that the Request did not identify “any particular regulatory initiative with which [it] is connected that would justify disclosing such confidential data,” characterizing the Request as related to areas of “potential Board interest.” Decision 2.

II. Standard of Review

The applicable standard of review provides that appeals of a Director’s denial of a waybill request will be granted to correct “a clear error of judgment or to prevent manifest injustice.” 49 C.F.R. § 1011.6(b).

III. Argument

The Director refused to grant the Request upon concluding that the Request lacks a connection to any particular Board initiative or regulatory proceeding, is not

¹ Since Thompson Hine submitted the Request, these regulatory initiatives have become more concrete and intentional. The Chairman’s Policy Review Team has met with stakeholders throughout July and announced plans for additional meetings in August. Additionally, the DOJ’s Anticompetitive Regulations Task Force has followed up on comments submitted to it, seeking additional information about the potential solutions and information quantifying their impacts.

relevant to specific policy questions, and relates only to areas of “potential Board interest.” This constitutes clear error. The Request seeks information to determine the rail cost disadvantage for American production, which is a critical metric for quantifying the impact of Board regulation on freight-rail competition and the global competitiveness of American products. This metric is directly relevant to the President’s regulatory initiatives, as set forth in multiple Executive Orders, which actively call on the Board to evaluate the impact of its regulation on competition and American production. It also is directly relevant to the Chairman’s active policy review and public meetings, which the Chairman commenced to implement the President’s directives of promoting competition, reducing regulation, and revitalizing American industry. Additionally, the Decision incorrectly applies Board precedent denying waybill requests for private, market-facing purposes, general regulatory advocacy, and purposes that are not connected to a specific Board initiative, even though the Request directly relates to active Board and federal-government initiatives. The Decision also results in manifest injustice by depriving ACC and other stakeholders of a competitive impact analysis that is critical to these ongoing regulatory initiatives and to support responsive reform proposals.

A. The President’s directives create a live, government-wide regulatory initiative that squarely implicates the Board regulations impacting rail competition.

The Decision’s denial of the Request because it is not specific to a regulatory policy question, a current Board interest, or a particular Board initiative conflicts with President Trump’s many directives that call for review of the competitive impact of the Board’s regulations. As explained in the Request, the President has

issued a coordinated suite of executive actions to promote American production by mandating the immediate identification and elimination of “anti-competitive regulatory barriers” in every sector of the economy, including transportation.

Request 2-4. These directives impose immediate and concrete obligations on federal agencies, including the Board, to review, amend, or rescind regulations that hinder competition and impair the global competitiveness of American industry. *Id.*

Several Executive Orders are especially relevant to the Board:

- **Executive Order No. 14,267, *Reducing Anti-Competitive Regulatory Barriers***, 90 Fed. Reg. 15,629 (Apr. 15, 2025), requires all agency heads, in consultation with the Federal Trade Commission (FTC) and DOJ, to identify and propose rescinding rules that create monopolies, “limit competition between competing entities,” or “impose anticompetitive restraints or distortions on the operation of the free market.”
- **Executive Order 14,213, *Establishing the National Energy Dominance Council***, 90 Fed. Reg. 9,945 (Feb. 14, 2025), charges a Cabinet-level council with advising on “improving the processes for . . . distribution . . . [and] transportation . . . of all forms of American energy,” which necessarily includes rail transportation as a critical component of the energy supply chain.
- **Executive Order No. 14,154, *Unleashing American Energy***, 90 Fed. Reg. 8,353 (Jan. 29, 2025), announces a policy “to establish our position as the leading producer and processor of non-fuel minerals.” It also directs all

agency heads to identify and rescind rules that “impose an undue burden on the identification, development, or use of domestic energy resources.”

This implicates the Board’s regulation of rail transportation as it relates to the movement of energy commodities.

- **Executive Order No. 14,192, *Unleashing Prosperity through Deregulation***, 90 Fed. Reg. 9,065 (Jan. 31, 2025), addresses regulation that “creates a substantial restraint on economic growth” and “hampers our global competitiveness” by requiring agencies to identify for removal at least ten regulations for every new regulation.

These Executive Orders do not merely invite the Board’s participation—they require it. They call upon the Board to actively review its existing regulations to determine which rules create barriers to competition in the rail sector, including those that burden American production. *E.g.*, Exec. Order No. 14,267, 90 Fed. Reg. 15,629 (Apr. 15, 2025). This includes regulations that insulate railroads from competition, such as those governing reciprocal switching or differential pricing power. They also leverage other agencies to assist the Board in reviewing its regulations. Exec. Order No. 14,267, 90 Fed. Reg. 15,629 §§ 1, 3(a), 3(b) (Apr. 15, 2025).

Moreover, the President’s Executive Orders provide multiple avenues for public input on identifying Board regulations that create barriers to competition. Executive Order 14,267 directs the FTC Chairman to seek public input identifying responsive Board regulations, which the FTC Chairman must convey to the Board.

Id. § 3(d). In connection with Executive Orders 14,192 and 14,219, the DOJ launched an Anticompetitive Regulations Task Force to work with federal agencies to eliminate anticompetitive laws and regulations that “undermine free market competition and harm consumers, workers, and businesses.” Press Release No. 25-310, U.S. Dep’t of Justice, Justice Department Launches Anticompetitive Regulations Task Force (Mar. 27, 2025), <https://www.justice.gov/opa/pr/justice-department-launches-anticompetitive-regulations-task-force>. The Task Force has invited the public to identify regulations that impair competition. *Id.* It also has a special interest in transportation regulations, observing that “[l]aws and regulations in areas like . . . rail . . . can grant antitrust immunities, outright monopolies, or safe harbors for conduct that undermines competition.” *Id.* According to the Task Force, it will work with the Board and other agencies to address regulations that burden competition. *Id.*

Additionally, the goal of the President’s directives—to promote American industry—inextricably links them to rail regulation. Rail transportation costs and access to competitive rail transportation options directly impact the competitiveness of American-produced goods with imports, which have access to vigorous rail competition because they can enter the country through a wide selection of ports. Thus, President Trump’s directives clearly implicate Board regulation that insulates railroads from competition.

In sum, the President’s directives and the resulting interagency initiatives create a live, ongoing regulatory process in which the Board must participate. Board

regulation addressing rail competition is at the center of these initiatives, which seek to promote American production. The Director's denial of the Request, which would quantify the impact of rail competition on the competitiveness of American products with imports, deprives ACC of metrics that are critical to engagement in these initiatives and their success.

B. Chairman Fuchs has commenced an initiative to implement the President's competition agenda.

The Decision clearly errs in suggesting that the Request is not connected to any "particular Board initiative or regulatory proceeding." In reality, Chairman Fuchs has launched an ongoing public initiative that is action-oriented and directly implements the President's competition and deregulation directives.

On July 21, 2025, Chairman Fuchs announced that that Board "is holding a series of meetings designed to discuss ideas and opportunities to update the STB's regulatory framework to improve competition and reduce regulatory barriers." Press Release No. 25-26, Chairman Fuchs Kicks Off Meetings on Improving Competition and Reducing Regulatory Barriers (July 21, 2025), <https://www.stb.gov/news-communications/latest-news/pr-25-26/>. Citing Executive Orders 14,267 (Reducing Anti-Competitive Regulatory Barriers), 14,154 (Unleashing American Energy), and 14,219 (Ensuring Lawful Governance and Implementing the President's "Department of Government Efficiency" Deregulatory Initiative), the Chairman also announced that he formed a Policy Review Team in support of President Trump's "important initiatives" requiring agencies to "review

their regulations related to competition, regulatory barriers, and American energy dominance.” *Id.*

This policy review plainly constitutes a Board initiative. The Chairman has organized the review around meetings with stakeholders,² and the agency has specifically invited any interested party to schedule a meeting and provide input. *Id.* This is akin to how the Board, under established proceedings, conducts open hearings to receive public input or invites the public to participate in ex parte meetings. Also, the review’s scope is no broader than some proceedings that seek public input on issues facing freight rail transportation. *See, e.g., Growth in the Freight Rail Industry*, EP 775 (STB served July 9, 2024).

This initiative is not a passive or indefinite review, as the Decision suggests. Instead, it is a targeted, results-driven process that involves active solicitation of input and information from stakeholders and is designed to produce concrete regulatory reforms in the near term. The Chairman has made clear that the Policy Review Team’s meetings and work are “focused on action” and intended to gather and analyze policy proposals so that the Board can “act expeditiously to further competition and break down regulatory barriers.” Press Release No. 25-26.

Also, the scope of the Chairman’s initiative is consistent with the purpose of the Request. A clear focus of the initiative is the impact of Board regulations on

² While the Board has issued a press release stating that the Policy Review Team is holding meetings from August 4 to 15, the Policy Review Team has been actively meeting with stakeholders since at least early July.

competition and the global competitiveness of American producers. As the Request explained, ACC's analysis seeks to address these issues by quantifying this impact.

By denying the Request as unconnected to any "particular Board initiative," the Decision ignores that the Board is in the midst of an active, government-wide regulatory review process in which the Chairman has invited public participation and input on the very issue that the Request proposes to analyze. The analysis would quantify the rail cost disadvantage for American products and inform regulatory reform proposals, which aligns directly with the objectives of the Chairman's policy review and the President's executive orders.

C. Quantifying the rail cost disadvantage for domestic production is crucial for informing the Presidential directives and the Chairman's policy review.

The Decision erroneously characterizes the Request's purpose as "commercial" and irrelevant to any particular regulatory initiative. To the contrary, the Request supports data-driven policy advocacy that is directly responsive to the President's competition directives and the Board's related regulatory review.

As the Request explained, the Requestors sought access to the CCWS purely for advocacy purposes. Request 4. The access would enable ACC to quantify the rail cost disadvantage for American products relative to imports. This analysis is crucial for evaluating and demonstrating the real-world impact of Board regulations that insulate railroads from competition and, as a result, undermine the global competitiveness of domestic industry. The results would "guide government officials as they implement policies to remove impediments to fair competition and unleash American production." *Id.* at 3. Moreover, the Request detailed the urgent need for

these results because of the current government-wide focus on eliminating regulatory barriers to competition, which multiple Executive Orders mandate and the Board's policy review initiative reflects. *Id.* at 2-3.

In fact, ACC has put forward specific policy proposals to the DOJ Anticompetitive Regulations Task Force and the Chairman's Policy Review Team for which the rail cost disadvantage for American products would provide compelling support. For example, ACC has identified the Board's anticompetitive conduct standard for reciprocal switching as a regulatory barrier to rail competition. By removing this Board-imposed standard, the Board could help promote rail competition that is not currently available to American producers and that their foreign competitors enjoy by importing through ports with the most advantageous rail option. The rail cost disadvantage for American products is indispensable for quantifying the potential benefits of such a reform effort.

Moreover, the Director's suggestion that the requested CCWS would only be available if the Board opens a proceeding is circular. Decision 2. The Request's purpose is to enable an analysis that informs and supports the regulatory reform proposals by providing concrete evidence of competitive disadvantages resulting from current regulations. Denying access at this stage deprives the Board of information for advancing from its current initiative to a formal proceeding.

At bottom, the Request is narrowly tailored to directly support Presidential and Board initiatives to promote competition and reduce regulatory barriers. Thus, the Director's determination that the Request is commercial and untethered to any

active regulatory initiative constitutes clear error. Additionally, the Director's contention that Respondents must wait until the Board opens a more formal proceeding relevant to the Request overlooks that the requested data plays a crucial role in informing the Board's decision to initiate such a proceeding.

D. The Decision misapplies Board precedent.

The Decision applies an erroneous reading of Board waybill decisions. It cites *Request for Waybill Access (U.S. Wheat)*, WB 20-40 (STB served Nov. 20, 2020), and *Request for Waybill Data (Trinity)*, WB 20-50 (STB served June 17, 2021), for the proposition that the "CCWS data will not be made available as a resource for private parties to mine . . . and create commercial reports." Decision 1. But *U.S. Wheat* involved use of CCWS data to develop reports that individual shippers could use to compete for sales. *U.S. Wheat*, slip op. at 1. *Trinity* involved a request by a rail-equipment manufacturer for CCWS data to conduct an analysis that would enhance its ability to design equipment and services for the market. *Trinity*, slip op. at 2. Here, the Request is materially different than in *U.S. Wheat* and *Trinity*. Its purpose is not to produce a private, market-facing analysis, but to inform active Board and federal efforts to address regulatory barriers to rail competition that harm the global competitiveness of American industry. Additionally, as the Request explains, the proposed analysis of the requested CCWS data will be aggregated at the two-digit STCC level, which effectively deprives it of any commercial value. Request 4.

The Decision also cites to *Intervistas Study*, EP 736 (STB served Feb. 28, 2018) and *Waybill Request (AAR)*, WB 21-50 (Director's Decision, Sept. 21, 2021) for

the proposition that disclosing confidential CCWS data is not justified unless the request is connected to an active regulatory initiative, rather than a broad area of potential Board interest. In *Intervistas Study*, the Board denied a request for waybill data to enable the requestor to evaluate a report that the Board commissioned, but was not the basis of any Board initiative and for which the Board had not sought additional analysis. *Intervistas Study*, slip op. at 2. In *AAR*, the Board denied a request for CCWS data that the requestor sought to, in part, quantify data “in matters of regulatory economics,” without tying the request to a specific matter. *AAR*, slip op. at 1. Here, by contrast, the Request seeks access to the CCWS to develop an analysis that is directly relevant to active Board and federal-agency initiatives, as described above. Moreover, under those initiatives the Board and DOJ Anticompetitive Regulations Task Force have solicited information and proposals from stakeholders on regulatory barriers to rail competition and their impacts, and the proposed analysis directly responds to those requests.

IV. Conclusion

By withholding the very dataset required to evaluate American producers’ rail-cost handicap, the Director’s decision undermines the President’s directives, impedes the Chairman’s announced review, and denies the Board the benefit of a critical analytical tool for assessing benefits of proposals that promote rail competition. Because the Director’s decision ignores an active Board initiative for which the Request’s proposed use of the CCWS is relevant and fails to recognize the clear connection between proposed use of the CCWS and the President’s and Chairman’s initiatives related to competition and regulatory reform, it constitutes a

clear error of judgment. Additionally, by preventing Requestors from quantifying the potential benefits of reforms that promote rail competition, which is crucial for advancing those reforms, the Director's decision creates a manifest injustice. Thus, Thompson Hine respectfully requests that the Board reverse the Director's decision and grant its request for access to the CCWS.

Respectfully submitted,

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Certificate of Service

I certify that I have this August 1, 2025, served copies of this document upon all parties of record in this proceeding by email.

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