

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

Office of Economics

September 21, 2021

John T. Gray
 Association of American Railroads
 425 Third Street, SW
 Washington, D.C. 20024

Re: Waybill Request WB21-50

Dear Mr. Gray:

This letter responds to your July 28, 2021 request under 49 C.F.R. § 1244.9 on behalf of the Association of American Railroads (AAR) seeking permission to access to the full unmasked confidential Carload Waybill Sample (CCWS) for 2019. You also seek permission for AAR's continued access to the data granted in WB20-22, which expires on September 28, 2021. Your letter states that AAR is requesting the data for a broad set of educational and advocacy purposes, including (1) quantification of data in matters of regulatory economics before the STB and other federal and state agencies, (2) econometric modeling used to measure industry-wide impacts of certain events, (3) freight car utilization analysis, (4) measurement of hazardous material movements by commodity and other factors, and (5) rail industry database studies. Request 2-5. Your letter also provides examples of previous similar uses of CCWS by AAR. Id. at 3-5. In addition, your letter requests permission for an AAR contractor to use the CCWS (1972-2019) to conduct research on behalf of AAR, its member railroads and the RSI-AAR Railroad Tank Car Safety Research & Test Project. Your letter asserts that a single broad request each year, rather than individual requests for each purpose, saves resources and time for the Board and AAR's members. Id. at 2.

Your letter further argues that AAR is unique among "other users" under § 1244.9(c). Request 1-2. Specifically, you contend that the Board's recent decisions in 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), which found that release of the CCWS to "other users" for commercial purposes was not permissible, are distinguishable. You indicate that the key differences between AAR and the requesters in those cases are that those requestors (1) did not represent entities required to submit waybill data or to whom waybill information belongs; (2) did not represent entities whose members were individually entitled to waybill data under the Board's regulations; and (3) did not represent entities that had been recognized by statute as entities that the Board could direct to submit reports. Id. at 2.

You indicate that AAR is seeking all data fields of the CCWS "given the variety of uses of the CCWS" as well as "the unknown nature of what state or federal agencies may request or what specific matters may require an education report at the time of [its request]." Id. at 4-5.

You note that AAR does not seek the masking factors used to further protect the confidentiality of CCWS revenue data. Notice of AAR's request was published in the Federal Register on August 5, 2021.

Western Coal Traffic League (WCTL), an association of coal shippers, submitted a letter dated August 19, 2021 objecting to the release of the CCWS pursuant to 49 CFR § 1244.9(d)(3). First, WCTL argues that the Board rarely grants full CCWS access "for broad private, commercial, or stakeholder advocacy purposes outside of a specific proceeding" and that AAR itself has opposed such requests. Objection 1. Second, WCTL argues that while individual railroads are entitled to waybill data regarding their own traffic, railroads are not entitled to waybill information for movements in which they did not participate, and nothing in the Board's regulations contemplates "collective entitlement" to the CCWS for "open-ended purposes." Id. at 1-2. Third, WCTL objects to AAR's description of its purposes, which WCTL asserts "are defined very broadly and vaguely" and would encompass virtually any use. Id. at 2. Fourth, WCTL argues that AAR's request would not afford the Board or the public any notice as to where and how AAR would actually use the CCWS. Id. Finally, WCTL raises concerns regarding whether AAR's broad request could have "adverse ramifications for competition." Id. at 3.

Your request for AAR's access to the 2019 CCWS and for continued access to prior-year CCWS data will be denied. In U.S. Wheat and Trinity, the Board confirmed that CCWS data should not be made available for purposes of preparing private, commercial reports. Because it remains unclear whether certain of the broad and somewhat undefined purposes for which AAR has requested CCWS data are private, commercial uses of the type addressed in the Board's recent decisions, the requested data will not be made available.

In addition, although you argue that AAR should be treated differently from other "other users" with regard to CCWS access, you have not made a compelling case that the sorts of CCWS access you seek cannot and should not be handled on an individual and purpose-specific basis, as contemplated by the Board's waybill access regulations and consistent with precedent. While it is true that AAR represents the interests of individual railroads that are entitled to access to a limited subset of CCWS data without regard to purpose, it does not necessarily follow that AAR is therefore entitled to access to the complete CCWS regardless of the broad purposes for which the data is being sought. To the contrary, § 1244.9(e) requires all "other users" to provide a "complete and detailed explanation of the purpose for which the data are needed" and a "detailed justification as to why the specified waybill data are needed," indicating that broad and/or vague requests are not sufficient. Although similar CCWS requests by AAR have been granted by Directors in prior years, the Board's recent decisions in U.S. Wheat and Trinity have clarified that "other user" requests must be scrutinized to ensure that the purposes underlying such requests are consistent with Board policy. Some of the purposes you cite as examples of AAR's prior use of CCWS data may be sufficient under § 1244.9 should they become the subject of a specific CCWS access request. However, because this request is a broad request without defined and limited purposes, it will be denied.

Because your existing access to 2003-2018 data has been revoked, you must follow the requirements of numbered paragraph 5 of your June 16, 2020 access letter, which requires that you certify “that all CCWS data (including all work product and analyses derived from the CCWS) obtained under this agreement has been destroyed or returned to the STB.” Pursuant to 49 C.F.R. § 1244.9 (d)(4)(iii), you may appeal this determination within 10 days of the date of this letter. Under the Board’s regulations, “[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.” 49 C.F.R. § 1011.6(b). Responses to appeals must be filed within 10 days after the due date for appeals.

Sincerely,

William Brennan

William Brennan, PhD
Chief Economist & Director
Office of Economics

cc: Robert D. Rosenberg
Attorney for WCTL
Slover & Loftus, LLP