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SERVICE DATE – DECEMBER 4, 2019

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. WB 19-44

REQUEST FOR WAYBILL DATA

Digest:¹ This decision denies an appeal of a ruling by the Director of the Office of Economics relating to access to the Confidential Carload Waybill Sample.

Decided: December 2, 2019

This decision responds to an appeal filed by the Southern California Association of Governments (SCAG) of the ruling by the Director of the Board's Office of Economics (Director) on SCAG's request for access to the Confidential Carload Waybill Sample (CCWS). For the reasons discussed below, the Board affirms the Director's ruling.

BACKGROUND

In a letter dated September 4, 2019, SCAG requested access to the unmasked CCWS for 2017.² The request was processed as an "other user" request under 49 C.F.R. § 1244.9(c). SCAG indicated that it intends to use the CCWS "for the continued analysis of regional freight flows and upgrades to the regional demand forecast model." (Req. 1.) SCAG, which had been granted more limited waybill access for 2016 in a prior waybill request in Docket No. WB 18-11, stated that it "continues to upgrade and improve [its] regional travel demand model components" and "will be managing an integrated passenger and freight rail study focused on identifying freight and passenger mainline funding strategies for needed capacity and operational improvements." (*Id.*) Following publication of notice of the request in the Federal Register on September 18, 2019 (84 Fed. Reg. 49,173), the Association of American Railroads (AAR) timely filed an objection to release of the requested CCWS data, arguing that SCAG had not justified the release of commercially-sensitive information or explained "why there is compelling need for it to have access to rate information." (AAR Objection 2.)

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² Under the Board's regulations, railroads submitting waybill data are permitted to encrypt, or "mask," revenue associated with contract shipments to safeguard confidentiality. 49 C.F.R. § 1244.3(b).

After considering the request and AAR's objections, the Director denied SCAG's request on October 10, 2019 (Director's Decision). Specifically, the Director determined SCAG had failed to demonstrate why it needed data for geographic areas outside California or unmasked revenue data. The Director noted that SCAG's similar request for access to 2016 waybill data in Docket No. WB 18-11 was denied to the extent it sought nationwide, unmasked data.³ The Director also found that SCAG had failed to comply with the terms of its access letter in Docket No. WB 18-11, which required SCAG to either request an annual extension for continued access to the 2016 waybill data or certify that it had destroyed or returned to the Board the data in its possession.

SCAG filed a timely appeal of the Director's Decision on October 21, 2019. SCAG noted that it had now requested an extension in Docket No. WB 18-11 and that it was willing to forego access to "cost/revenue information." (SCAG Appeal 1.) The Board received no other filings in connection with the appeal.

DISCUSSION AND CONCLUSIONS

Parties appealing the Director's waybill determinations face a high burden. Pursuant to 49 C.F.R. § 1011.6(b), "[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." The Board finds that SCAG has not demonstrated a clear error of judgment by the Director or manifest injustice flowing from his decision.

With respect to the Director's first ground for denial—that SCAG had not justified the scope of its request—the Board finds no clear error or manifest injustice in the Director's Decision. When SCAG previously asked for nationwide, unmasked waybill data for 2016 in Docket No. WB 18-11, the Director denied the request by decision served April 30, 2018, and instead provided more limited access to data pertaining to traffic that was originated, terminated, or interchanged in, or that passed through, California, with masked revenues. Despite the prior denial, when SCAG made its request for access to 2017 data, it once again asked for nationwide, unmasked data without any justification as to why it required more expansive access to 2017 data than it received for 2016 data. Indeed, SCAG's appeal letter explicitly confirms that SCAG does not require "cost/revenue information" and strongly suggests that SCAG's interest is limited to traffic that originates, terminates, or interchanges in, or passes through, southern California. (SCAG Appeal 1 (indicating intent to use historical and forecast data "from the Ports of Los Angeles and Long Beach" and the need to distinguish between "direct intermodal and transloaded rail moves" in southern California).) SCAG's concession that it does not require all of the data it requested confirms the Director's decision on this issue.⁴

While the Director granted access to a more limited set of data in Docket No. WB 18-11

³ In Docket No. WB 18-11, the Director granted more limited access to traffic that was originated, terminated, or interchanged in, or that passed through, California with masked revenue data.

⁴ To the extent that SCAG seeks to modify its request for waybill access, the appropriate approach would be to submit a revised waybill request, as indicated below.

in response to a similarly overbroad request, his decision to deny this request altogether was neither clearly erroneous nor manifestly unjust, especially in light of SCAG's failure to comply with the terms of the waybill access letter in Docket No. WB 18-11. The Director's Decision noted that the waybill access letter required SCAG to, by April 30, 2019, either request an extension to retain access after that date or certify that they have destroyed or returned waybill data in their possession. Further, the waybill access letter indicated that failure to comply "may prevent any future release of CCWS data to you." (Director Decision, WB 18-11, ¶ 7.) The Board takes its responsibility to protect the confidentiality of waybill data seriously and expects signatories to comply with the terms of their access letters. SCAG does not dispute that, at the time of the Director's Decision in this docket, SCAG was not in compliance with its obligations under the access letter in Docket No. WB 18-11. The Director appropriately invoked his authority under 49 C.F.R. § 1244.9(g)(5) to deny SCAG further waybill access until SCAG brought itself into compliance.

The Director's Decision in this docket indicated that SCAG could submit a modified request for access to 2017 waybill data once SCAG had resolved compliance issues with respect to WB 18-11. Since those issues have now been resolved by SCAG's extension request in Docket No. WB 18-11, submitting a new waybill access request to the Office of Economics, suitably tailored to reflect SCAG's actual data needs, would be the appropriate procedure if SCAG still seeks access to 2017 waybill data.

It is ordered:

1. SCAG's appeal is denied.
2. This decision is effective on its date of service.

By the Board, Board Members Begeman, Fuchs, and Oberman.