

BEFORE THE
SURFACE TRANSPORTATION BOARD

301112

Docket No. WB 20-40

REQUEST FOR WAYBILL DATA

OBJECTION OF THE
ASSOCIATION OF AMERICAN RAILROADS

ENTERED
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In a letter dated August 7, 2020, U.S. Wheat Associates (“USW”) requested access to “all fields and records included in the Confidential Carload Waybill Sample (“CWS”) for all Class I railroads, with masking factors, for calendar years 1984-2018, and for 2019 when it becomes available.” Letter from Daniel R. Elliott, on behalf of US Wheat Associates, to Dr. William J. Brennan, Director Office of Economics, at 1 (dated Aug. 7, 2020) (“USW Request”). Notice of this request was served on August 14, 2020.

The request sought access to unmasked data (and the masking factors) from the years 1984-2019 for most fields in the CCWS, excluding a limited number of fields (related primarily to physical car characteristics) in order “[t]o conduct a detailed study of the rail supply chain for wheat from the US to Mexico” so that USW can “develop strategies to ensure that Mexico continues to be a top buyer of U.S. wheat.” USW Request at 1-2. The letter explained that “USW views U.S. rail rates to Mexico as a key factor affecting the volume and value of U.S. wheat exports to the largest buyer of U.S. wheat in the world.” USW Request at 1. The Association of American Railroads (“AAR”) filed an objection “to the release of any revenue-related information, especially unmasked contract revenues, the release of the specific origination and destination information, and the release of all commodities other than wheat” on

August 28, 2020, arguing that USW had not provided a reasonable explanation for the need for the information. Letter from J. Frederick Miller Jr., on behalf of AAR, to Dr. William J. Brennan, Director Office of Economics, at 3 (dated Aug. 28, 2020) (“AAR Objection”).

On September 4, 2020, the Director of the Office of Economics denied USW’s request making several findings. Letter from Dr. William Brennan, Director, Office of Economics, to Daniel R. Elliott, counsel for USW, (Sept. 4, 2020) (“Denial Letter”). With regard to the confidential rail contract, rate, and other revenue information requested, the Director found USW is seeking access to information “for a commercial purpose [and] is precisely the information that railroads and shippers are entitled to expect will ordinarily remain confidential, especially since contracts and contract rates are not regulated by the Board ... [and t]he Board has not, however, traditionally granted access to the unmasked CCWS when the intended use is of a private, commercial nature such as the gathering and analysis of market intelligence that [USW] propose[s], particularly with regard to contract rates.” Denial Letter at 2-3. Specifically, with regard to the masking factors, the Director clearly stated “to protect the confidentiality of contract rates in the CCWS the Board has treated the masking factors as strictly confidential and not intended for disclosure.” Denial Letter at 2. Further, regarding the breadth of the request, the Director found the request “does not adequately demonstrate the need for the breadth of CCWS data requested.” Denial Letter at 2.

In its appeal, USW claims the request meets a particular and legitimate need, reiterating that it is a research project, similar to prior research institution’s request, and notes that the confidentiality restrictions will be followed and the data cannot be obtained anywhere else. Appeal of Denial of Waybill Request, *Waybill Request*, WB 20-40 at 2 (Sept. 14, 2020) (“USW

Appeal”). USW further proposes to limit its request to avoid the concerns about the breadth. USW Appeal at 9-10.

ARGUMENT

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.”

USW has not demonstrated a clear error of judgment by the Director or manifest injustice flowing from the decision. The Board should therefore deny the appeal.

I. USW Has Not Articulated a Particular and Legitimate Need

USW’s request is, at its core, a request for commercially sensitive information for a commercial purpose by a group whose stated mission is to enhance the profitability of a select group of shippers. This is not a particular and legitimate need. Nothing in the appeal overcomes the basic principle that the information sought by USW is confidential rail contract, rate, revenue, and other sensitive information that USW admits “is not traditionally granted when the intended use is of a private, commercial nature.” USW Appeal at 6. Further, the Appeal confirms that it wants access to the data for a commercial purpose “to support U.S. farmers who *need this information to survive in a highly competitive world market.*” USW Appeal at 6 (emphasis added). Similarly, USW implores the Board to “consider the crucial *need for this information by U.S. farmers who compete in a complex global market.*” USW Appeal at 7 (emphasis added). Moreover, USW plainly states it “works closely with its state wheat commission members to carry out its mission ‘to develop, maintain, and expand international markets *to enhance the profitability of U.S. wheat producers and its value for their customers.*’” USW Appeal at 7 (emphasis added). These statements confirm that the underlying purpose of the request is commercial in nature and to gain a competitive advantage. In so doing, the Appeal reaffirms the appropriateness of the Director’s denial, which explained the Board does not grant

“access to the unmasked CCWS when the intended use is of a private, *commercial nature* such as the gathering and *analysis of market intelligence* that you propose, particularly with regard to contract rates.” Denial Letter at 2-3 (emphasis added). As the Board recently explained, “it is not a clear error in judgment or a manifest injustice for the Director to decline to permit the Waybill Sample to be used as a mechanism for one set of competitors to gain detailed, shipment-specific, confidential market intelligence about another set of competitors.” *Request for Waybill Data*, WB 20-23, at 2 (STB served Sept. 24, 2020). Similarly, release of the information in the request risks competitive harm to railroads, shippers of other commodities, and other purchasers because it would improperly disclose confidential business information. The Director’s decision to deny the request for CCWS for commercial purpose recognizes that this is not a particular and legitimate need. Therefore, the decision was not a clear error of judgment.

II. The Director’s Denial Was not a Manifest Injustice or Clear Error of Judgment

A. USW’s Legal Status as A Nonprofit and Purported Research Purposes Do Not Justify Release

USW argues that its status as a nonprofit should tip the balance toward disclosure, and not doing so was a manifest injustice. USW also noted its request is no different than a prior request from North Carolina State University (“NC State”) that was granted, therefore the Director erred in not granting USW’s request. In reviewing any request for release, while it is appropriate to look at the requester, the purpose for the information requested underlies the standard. The fact that USW is a nonprofit is immaterial in this instance. As discussed above, the purpose here is commercial in nature, and the Director properly denied it for that reason. Indeed, USW does not deny its mission is to “[d]evelop, maintain, and expand international markets to *enhance wheat’s profitability for U.S. wheat producers* and its value for their customers.” USW, About Us, found here <https://www.uswheat.org/about-us/> (emphasis added).

So, while USW is legally organized as a nonprofit, its role is to enhance profitability for its members. Essentially, USW is asking the Board to ignore the intended commercial use of the information, because it is using a mechanism of a non-commercial, nonprofit intermediary to request the information. USW also claims that it is acting in the public interest because it works with state wheat commissions; however, both arguments ignore the fact USW is requesting the information in support of certain rail customers' individual and commercial interests. Because the purpose for the information is not appropriate, the mechanism of the request and identity of requester, do not cure the deficiencies in the request itself. The requestor and purpose here matter, and in this instance reaffirm the appropriateness of the denial. For these reasons, the Director's denial should be affirmed.

In addition, USW likens itself to NC State drawing comparisons to NC State's previous request. Though USW plans to work with a university, USW is the requestor and is not a disinterested public university researcher, like NC State. *See* Letter from Heidi Schweizer, Assistant Professor and Extension Specialist in Grain Production and Logistics, Department of Agricultural and Resource Economics, North Carolina State University, to Director, Office of Economics, at 1 (June 20, 2019) ("NC State Letter"). Instead, USW's research and purpose for the information is commercially driven to a competitive market analysis, NC State's was not. NC State's stated purpose was academic research that was not commercial in nature.¹ Public university research into markets for academic purposes is quite distinct from research geared toward a commercial purpose. Confidential, private contract information on revenues, should

¹ *See* NC State Letter at 1; *see also Request for Waybill Data*, WB 20-23, at 2 (explaining "the researchers at North Carolina State University were not competitors of the growers whose data they sought nor would disclosure to such researchers result in the flow of highly detailed confidential business information from one group of competitors to another.").

not be released to an entity whose mission is to maximize profits for its members. The Director properly recognized the importance of protecting highly sensitive revenue information especially given the request for demurrage, service charges, fuel surcharges, tariff rates, unmasked revenues, and contract rates. The USW Appeal does nothing to prove Dr. Brennan's denial was a manifest injustice or demonstrated a clear judgment of error.

B. The Following of Confidentiality Rules and Unavailability of the Information Elsewhere Do Not Rehabilitate the Inappropriate Nature of the Request

USW also claims it is a manifest injustice to deny them the information because the recipient of the information will follow strict confidentiality, and USW cannot receive the information anywhere else. This argument is based on a faulty premise – that USW has a right to the information to begin with. The opposite is true, and the Director appropriately explained the information being sought “is precisely the information that railroads and shippers are entitled to expect will ordinarily remain confidential.” Denial Letter at 1.

The fact that the requester will follow confidentiality requirements does not turn an otherwise inappropriate request into a legitimate one. It is appreciated, expected, and required that any recipient of such highly-sensitive data follow the confidentiality rules. Contrary to USW's arguments, however, the balance does not shift to favor of release just because the recipient of the information will comply with the confidentiality requirements. Were that the case, anyone could request the CCWS for any reason, claim they would follow the confidentiality requirements, and receive it. Again, the focus should be, and properly was, on the particular and legitimate need for the information, and USW's appeal does not overcome that fact. The Director's denial should be upheld.

Similarly, USW's claim that it is not able to obtain the information anywhere else is immaterial, if the particular and legitimate need is not met. Again, contrary to USW's

implications, such a need does not arise from USW's inability to obtain the data it wants. And without such particular and legitimate need, it is not a manifest injustice to deny access simply because the data is not available elsewhere. Indeed, one would hope, given the extremely commercially sensitive nature of the CCWS, especially the revenue-related information and masking factors, individuals would not find it readily available from any other source. Again, granting the appeal because the information is not available elsewhere would set a precedent of allowing anyone to request and receive such extremely sensitive data simply because it is not available elsewhere. The fact that USW's desired information is unavailable elsewhere does not make the request legitimate, much less create a manifest injustice when such request is denied.

III. The Proposed Limitations Do Not Cure the Request's Deficiencies

USW's proposal to limit the request does not cure the inappropriate nature of releasing the requested information. While USW has appropriately amended its request to encompass only wheat traffic, the request still seeks broad amount of information, including highly sensitive revenue-related data. For example, the revised request still appears to include the disclosure of rates, particularly the contact rates, which serves a commercial, competitive purpose. Such information does not help identify problems associated with the supply chain to Mexico, as USW claims is its goal. *See* USW Appeal at 2. To that end, USW did not limit the proposed revision to only traffic exported to Mexico. There is no need to evaluate the movements of wheat to other destinations in order to examine the supply chain serving Mexico's wheat needs. Finally, the limitation still includes 19 years of data, which is a substantial amount of information that has not been justified. The AAR reiterates its arguments in support of limiting the request to ten years, as AAR agrees with USW's admission there were substantial changes in the last decade. *See* AAR Objection at 3 (citing USW Request at 1). This request should be denied or limited to only that amount of information necessary to satisfy the particular or legitimate need.

CONCLUSION

For the foregoing reasons, the AAR continues to object to the release to USW of any revenue-related information, especially unmasked contract revenues, the release of the specific origination and destination information, the release of all commodities other than wheat, and for a longer period than the last ten years. The Board should deny the appeal.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'JK' or similar initials, with a stylized flourish.

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September 24, 2020

CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2020, I caused a copy of the foregoing Objection of the Association of American Railroads to be served by electronic mail upon the following:

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Sincerely,

/s/ Kathleen Birch

Kathleen Birch