

SERVICE DATE – NOVEMBER 20, 2020

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. WB 20-40

REQUEST FOR WAYBILL DATA

Digest:<sup>1</sup> 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: November 19, 2020

U.S. Wheat Associates (USW) appealed the ruling by the Director of the Board's Office of Economics (Director) denying USW'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 August 7, 2020, USW requested access to the "unmasked" CCWS data (and the masking factors)<sup>2</sup> from the years 1984-2019 for most fields in the CCWS, excluding a limited number of fields (related primarily to physical car characteristics). The request was submitted as an "other user" request under 49 C.F.R. § 1244.9(c). USW stated that the purpose of its request is to allow it "to conduct a study of the rail supply chain for wheat from the U.S. to Mexico" so that USW can "develop strategies to ensure that Mexico continues to be a top buyer of U.S. wheat." (Req. 1.) According to the request, "the study aims to identify time and costs associated with all of the relevant components of the rail shipments from the U.S. to Mexico." (*Id.* at 2.) USW states that the study would help "identify strategies for USW to share with Mexican millers and U.S. and Mexican policymakers on how to improve the flow of U.S. wheat from the U.S. producer to the Mexican miller." (*Id.* at 1.) Following publication of notice of the request in the *Federal Register* on August 14, 2020 (85 Fed. Reg. 49,714), the Association of American Railroads (AAR) timely filed an objection to the release of the requested CCWS data, contending USW had not established a legitimate need for the data, that the specificity of the data requested would permit the identification of individual shipper information, and that no justification had been offered for seeking data for commodities other than wheat or for

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<sup>1</sup> 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 Pol'y Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> 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).

destinations other than Mexico. AAR argued that, in general, entities like USW “should not be able to circumvent the private, confidential nature of contractual relationships through a government entity’s collection of data, much less for the purpose of enhancing other private entities’ profitability.” (AAR Objection 2.)

After considering the request and AAR’s objections, the Director denied USW’s request on September 4, 2020 (Director’s Decision). The Director determined that the information sought by USW “for a commercial purpose 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.” (Director’s Decision 1.) The Director noted that the Board “has not . . . 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.” (*Id.* at 2.) The Director also denied the request on the separate ground that USW had not justified the breadth of data requested.

On September 14, 2020, USW timely appealed the Director’s Decision. On September 24, 2020, AAR filed a timely reply to the appeal in support of the Director’s Decision.

## 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 USW has not demonstrated a clear error of judgment by the Director or manifest injustice flowing from his decision.

As the Director’s Decision correctly noted, the Board, and its predecessor, the Interstate Commerce Commission (ICC), have a long history of carefully protecting confidential information contained in the Waybill Sample. The Board’s governing statute identifies as key concerns the release of confidential information that may be detrimental to shippers or improperly disclose shipper business transactions to competitors of those shippers. 49 U.S.C. § 11904. USW, as a trade association, represents the interests of wheat producers in the United States who compete against one another and against producers of other agricultural commodities, among others. The request makes clear that its purpose is to obtain information that would assist a particular group of U.S. wheat producers in obtaining a competitive advantage over other producers. The request therefore clearly implicates concerns about the potential competitive harm that could result for producers of other agricultural commodities and for wheat producers with different interests if the detailed revenue, shipment, and contract data sought were to be made available to USW for its commercial use.

The Director’s Decision was also entirely consistent with Procedures on Release of Data from the ICC Waybill Sample (49 C.F.R. Part 1244), 4 I.C.C.2d 194, 197-98 (1987), where the ICC acknowledged that CCWS data is commercially sensitive for both shippers and railroads. As the Director’s Decision recognized, the request emphasizes that obtaining confidential contract information is one of its core purposes. When shippers and railroads sign confidential

contracts, they generally expect that contract information to remain confidential. While the Board collects sensitive data relating to these contract shipments to fulfill its regulatory mission, the Board's collection of this information for regulatory purposes does not establish a right for private parties to obtain and use the most confidential aspects of this data for commercial purposes. It was not a clear error in judgment, or a manifest injustice, for the Director to decline to permit the detailed, shipment-specific, confidential data contained in the CCWS to be used to prepare commercial reports for a single group of market participants.

On appeal, USW offers several reasons why it believes the Board should release the requested data. USW suggests that because it is a non-profit organization, a report prepared for it would be "in the public interest." (USW App. 6.) An organization's non-profit status alone, however, does not mean that its activities serve the broader public interest. For example, many trade associations, like USW and AAR (which opposes release here), are non-profits. Such organizations serve the interests of their members, and any benefits to the general public result only if the interests of their members further the interests of the general public, not from the trade association's non-profit status. USW's own pleadings make clear that USW is pursuing the private commercial interests of its members in seeking access to the CCWS. USW states that its mission is "to develop, maintain, and expand international markets to enhance the profitability of U.S. wheat producers and its value for their customers." (*Id.* at 7.) USW "develops export markets on behalf of U.S. wheat producers," (*id.* at 4), and wants to "ensure that Mexico continues to be a top buyer of U.S. wheat," (*id.* at 2). USW contends that the requested data would provide its members with information that would help them "survive in a highly competitive world market" and "understand fully how best to compete." (*Id.* at 6, 7.)

USW also argues that the Board should release the requested waybill data because only USW's consultant would have access to the raw data and both the consultant and USW have agreed to comply with the confidentiality restrictions required by the Board. (*Id.* at 3-4, 6, 7.) But complying with the Board's regulations and executing the required confidentiality agreement are preconditions to accessing the CCWS, not a justification for release of the data in the first place. Entities like USW seeking access must demonstrate a legitimate need for the data. See Procedures on Release of Data, 4 I.C.C.2d at 196; 49 C.F.R. § 1244.9(e). In rejecting an argument that was nearly identical to USW's, the Board explained that the agency "has held this data close despite the availability of confidentiality agreements because, as a matter of process, limiting dissemination of sensitive data decreases the likelihood that the information will be improperly used or disclosed." See Intervistas Study, EP 736, slip op. at 4 (STB served June 28, 2018).

USW further asserts that release is justified because the consultant it has hired is an academic. (USW App. 6, 9.) In support, USW cites the Director's grant of waybill access to researchers at North Carolina State University (NCSU) in Request for Waybill Data, Docket No. WB 19-31, which USW claims is "almost identical" to its own request. (*Id.* at 9.) The Board disagrees that the purpose behind the NCSU request was "almost identical" to USW's stated purpose. As it did for NCSU, the Board does occasionally, under appropriate circumstances, grant waybill access to individuals engaged in academic research, many of whom are professors

or graduate students.<sup>3</sup> But as the Board recently explained in Request for Waybill Data, WB 20-23, slip op. at 2-3 (STB served Sept. 23, 2020), where it affirmed the Director's denial of access to a trade association of North Carolina soybean growers, academic research does not implicate the same concerns as commercial research because academics "are not participants in the markets they study."

Here, while it is true that USW's consultant is associated with an academic institution, USW's pleadings make clear that the consultant would not be functioning in a genuine academic research capacity. Rather, he has been hired in a commercial capacity as a consultant, for private purposes, to conduct commercial research intended to provide commercial benefits to USW and its members. (USW App. 2, 6, 7.) The Director's decision properly recognized that important distinction. (Director's Decision 2.) Genuine academic research does not create the same incentives for abuse of confidential data because the researchers are not competitors of the companies about which they seek confidential information and, as a result, would not gain a competitive advantage in the markets they study.

USW maintains that it has established a "particular and legitimate need" for the requested data, and effectively argues that because it "needs access to information that is not available anywhere else but at the Board," (USW App. 8), the Director's denial of access is a "manifest injustice," (*id.* at 10). According to USW, the legitimate need exists because the requested data is "crucial" for wheat farmers "to understand fully how best to compete with other countries' farmers." (*Id.* at 7.) Lack of access to the data would, USW claims, put U.S. wheat farmers at a "disadvantage," which is an "unnecessary harm," and therefore a "manifest injustice." (*Id.*) To the extent that USW argues that the ability of its members to compete depends on access to decades of detailed, confidential rate and shipment information for competing wheat growers and thousands of other shippers, USW's arguments must be rejected. USW has not established the type of "legitimate need" for the data contemplated by the agency's precedent; at best USW has established that it believes that a detailed look into the confidential business information of thousands of shippers and the serving railroads would be useful in establishing some sort of competitive advantage for a subset of wheat growers.

In arguing that "the balance must lean towards disclosure" because access to the data is "crucial," (USW App. 6), USW ignores the competing interest of shippers and railroads in maintaining the confidentiality of data concerning them contained in the CCWS. The Director's Decision correctly noted that the confidential data USW seeks "is precisely the information that railroads and shippers are entitled to expect will ordinarily remain confidential." (Director's Decision 1.) While USW asserts that the data would enhance the ability of its members to

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<sup>3</sup> See, e.g., Request for Waybill Data, WB 19-31 (July 25, 2019) (granting access to researchers at NCSU); Request for Waybill Data, WB 19-57 (Nov. 25, 2019) (granting access to researchers at the University of Wisconsin); Request for Waybill Data, WB 20-41 (Oct. 9, 2020) (granting access for academic research purposes to Federal Reserve Bank of Atlanta economist and University of Oregon professor). Indeed, USW's primary consultant here, Wesley Wilson, has ongoing access to certain confidential waybill data for academic research purposes. See Request for Waybill Data, WB 20-43 (Sept. 2, 2020) (extending access originally granted in Docket No. WB 18-29).

compete against “other countries’ farmers,” (USW App. 7), the potential for competitive harm to other shippers, including domestic wheat farmers and producers of competing agricultural products, is clear. The Board’s responsibility to maintain the confidentiality of waybill data, the interest of shippers and railroads in maintaining the confidentiality of data relating to their shipments, and the potential for competitive harm to shippers clearly outweigh the possible usefulness of the data to USW. See Intervistas Study, EP 736, slip op. at 3-4 (rejecting argument that usefulness of data justifies release: “allowing any stakeholder to obtain confidential information merely to facilitate review of a general study would unduly expand access to protected information”).

The Board will not make the CCWS available as a resource for private parties to mine the data and create commercial reports. The Board reaffirms its policy that it will not permit CCWS data that is collected to further the Board’s regulatory mission to be converted to private, commercial use. Accordingly, the Board finds that there was no “clear error of judgment” or “manifest injustice” in the Director’s denial of USW’s request to access the CCWS for the purpose of preparing private, commercial reports intended to enhance the competitive position of USW’s members.

The Director’s Decision also denied the request on the separate ground that USW had not adequately justified the excessively broad scope of its request. On appeal, USW suggests that it would be willing to reduce the amount of data it requests by, among other things, limiting the commodity to wheat and reducing the number of years of data requested from 35 to 19. (USW App. 9-10.) AAR points out that USW does not explain why so many years of data are necessary or why shipments of wheat internal to the U.S. are relevant to the proposed project, and that USW is still requesting confidential contract information, including revenues. (AAR Reply to Appeal 7.) USW’s suggested modification would raise the same issues discussed above, albeit with respect to a somewhat smaller, but still substantial, data set. Given the Board’s finding regarding USW’s purpose in requesting the CCWS and the detailed, confidential information that its revised request would seek, the Board need not address this issue in detail.<sup>4</sup>

It is ordered:

1. USW’s appeal is denied.
2. This decision is effective on its date of service.

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

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<sup>4</sup> The Director’s Decision also denied USW’s request for the revenue masking factors. (Director’s Decision 2.) Although USW does not address that aspect of the Director’s Decision, the Board affirms the decision not to release the masking factors for the reasons stated in the Director’s Decision.