

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

301313

Office of Economics

ENTERED
Office of Proceedings
November 25, 2020
Part of
Public Record

November 24, 2020

Mr. Raymond A. Atkins
Sidley Austin LLP
1501 K Street, N.W.
Washington D.C. 20005

Re: Waybill Request WB20-56 & EP 704 (Sub-No. 1)

Dear Mr. Atkins:

The Surface Transportation Board (STB or Board) has received your request under 49 C.F.R. § 1244.9(b)(4) dated November 19, 2020 for permission to access the confidential Carload Waybill Sample (CCWS) with unmasked revenues in connection with EP 704 (Sub-No.1), Review of Commodity, Boxcar, and TOFC/COFC Exemptions, on behalf of Norfolk Southern Railway Company (NS). Specifically, you request the unmasked 1987-2019 CCWSs for all commodities.

Based on the explanations and justifications contained in your request, you will be authorized to access the requested data for use in the EP 704 (Sub-No. 1) proceeding. Specifically, I will grant you, in accordance with 49 C.F.R. § 1244.9(b)(4), access to the 1987-2019 unmasked costed waybill samples. These datasets may only be used for purposes of this proceeding. See 49 C.F.R. § 1244.9(b)(4)(v). Accordingly, your request to “use these data for any related proceedings related to the exemption of individual commodities” will be denied. You may seek authorization to use the data in other specific proceedings at the appropriate time.

The approval for EP 704 (Sub-No. 1) becomes effective when signed agreements from the individuals listed below are received by the STB:

- a) Mr. Raymond A. Atkins – Sidley Austin LLP*
- b) Ms. Amanda Norton – Sidley Austin LLP*
- c) Mr. Mark Israel – Compass Lexecon LLC*
- d) Ms. Catherine Barron – Compass Lexecon LLC*

The expiration date for this agreement is November 30, 2021. Unless you seek and obtain a renewal from the STB, this agreement upon expiration obligates you to return or destroy all copies of the data as described in item 7 of the agreement.

Several aspects of the CCWS limit the conclusions that may be drawn from analysis of the CCWS: 1) the CCWS is a sample, and 2) the CCWS is based on terminating shipments from relatively large carriers. Only those railroads with more than 4,500 annual terminating carloads are

included in the sample. The limited sampling of small railroads may have a substantial effect on studies covering areas served predominately by non-sampled railroads. For additional information on the CCWS, see *Reference Guide* @ <https://prod.stb.gov/reports-data/waybill/> on the Board's website.

The rules for release of waybill data are codified at 49 C.F.R. § 1244.9. The CCWS contains confidential shipper and railroad data. As a result, the CCWS is commercially sensitive and has the potential to cause competitive harm to shippers and railroads if disclosed. Therefore, the following agreement must be signed, and a copy of the signature pages returned to the STB, before any waybill data can be used.

Your signature acknowledges your agreement to comply with the following:

1. You will use the CCWS data released to you solely for purposes of the proceeding identified above. Such purposes include any judicial review arising from that proceeding.
2. Absent permission from the STB, you shall make the information contained in the CCWS (including work product and analyses derived from the CCWS) available only to the individuals identified above. The STB may approve access for additional individuals for purposes of the proceeding. In general, such individuals must be outside counsel in this proceeding, transportation practitioners, and those individuals working with or assisting such counsel or practitioners who are not regular employees of the party represented, who have a need to know, review, or handle the CCWS for purposes of the proceeding, including testifying and consulting experts. Each such additional individual must review and sign this agreement and return a copy of the signature page to the STB.
3. Pleadings and evidence filed with the Board in the proceeding may contain CCWS data (including work product and analyses derived from the CCWS). Unless data in the pleadings and evidence are aggregated to the level of at least three shippers and will prevent the identification of an individual railroad, the pleadings and evidence must be filed with the Board under confidential filing procedures (both in e-filing and paper submissions). Such pleadings and evidence should be appropriately marked to indicate that they contain confidential Waybill data and, if submitted in paper or on physical media, be in a package clearly marked on the outside "Highly Confidential Material: Contains Waybill Data." Such pleadings will not be posted in the publicly available docket. A public version of the pleading and evidence that redacts unaggregated CCWS data should also be filed for posting in the public docket.
4. Pleadings and evidence (and underlying workpapers) containing CCWS data (including work product and analyses derived from the CCWS) may be disclosed only to outside counsel or other independent representatives for other parties to

Waybill Agreement WB20-56

the proceeding who have signed an agreement with the Board that grants them access to the underlying CCWS data.

5. CCWS data may be disclosed to the reviewing court in briefs filed or oral argument made in connection with judicial review arising from the proceeding, but the party making such disclosure must take adequate steps to maintain the confidentiality of the data by filing pleadings under seal and seeking confidential treatment of the data at oral argument (and in any transcripts). Counsel who wish to access CCWS data for purposes of participating in judicial review arising from the proceeding must have signed an agreement with the Board that grants access to the data, and may be added pursuant to paragraph 2 above.
6. Except as provided in paragraph 4 above, you will refer any requests for CCWS data in your possession (including work product and analyses derived from the CCWS) to the STB for processing and will inform the requesting party of such referral to the STB. If you are compelled by law or order of a governmental or judicial body to release CCWS data, you shall notify the Board in writing within three days of any determination that CCWS data must be released, and in no event later than five days before the CCWS data is scheduled to be released.
7. In order to retain access to the CCWS beyond the expiration date specified above, you must submit a written request for an annual extension of the agreement no later than thirty days prior to the expiration date and the renewal request must be approved by the Office of Economics. **If an annual agreement is not signed and approved, you must certify by no later than the expiration date 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.** Notwithstanding the foregoing, outside counsel (but not outside consultants or transportation practitioners) for each party may retain file copies of all pleadings and evidence filed with the Board and file copies of all work product. The non-disclosure requirements of this agreement shall continue to apply to such file copies for as long as they are retained.
8. Failure to request an extension (if necessary), or destroy or return CCWS data when required, may prevent any future release of CCWS data to you. Violations of this agreement may subject you to sanctions by the Board.

After all parties have signed and returned this agreement, please contact Mr. Dusenberry (202) 245-0319 to make the necessary arrangements to have a copy of the data sent to you. The STB will provide the data by email through file transfer protocol. Prior payment of processing and mailing cost of **\$383** (\$200 processing plus \$61 per signature) is required. Payment can be made through the Board's electronic payment system, Pay.gov. Your payment through Pay.gov will generate a unique Pay.gov transaction number, which you will need to provide with your

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signed agreement. Pay.gov accepts payment through bank accounts, credit cards, debit cards with a MasterCard or Visa logo, and digital wallet. Payment can also be made directly to the Board via check or money order.

Sincerely,

William Brennan

William Brennan
Director
Office of Economics

Waybill Agreement WB20-56

I have read and understand the conditions for release of the CCWS data. I agree to comply fully with these conditions and the provisions of this confidentiality agreement. No later than thirty days before the agreement expires, I will request an extension of this agreement, if necessary. If no extension is requested, I will return or destroy all CCWS data and certify that I have done so. I have the authority to sign this agreement.

By: Raymond A. Atkins

/s/ Ray Atkins

Signature

Waybill Agreement WB20-56

I have read and understand the conditions for release of the CCWS data. I agree to comply fully with these conditions and the provisions of this confidentiality agreement. No later than thirty days before the agreement expires, I will request an extension of this agreement, if necessary. If no extension is requested, I will return or destroy all CCWS data and certify that I have done so. I have the authority to sign this agreement.

By: Amanda Norton

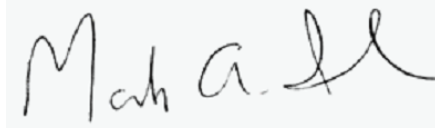
A handwritten signature in blue ink, appearing to read "Amanda Norton", is written over a horizontal line.

Signature

Waybill Agreement WB20-56

I have read and understand the conditions for release of the CCWS data. I agree to comply fully with these conditions and the provisions of this confidentiality agreement. No later than thirty days before the agreement expires, I will request an extension of this agreement, if necessary. If no extension is requested, I will return or destroy all CCWS data and certify that I have done so. I have the authority to sign this agreement.

By: Mark Israel

A handwritten signature in black ink, appearing to read "Mark A. Israel", is written over a light gray rectangular background.

Signature

Waybill Agreement WB20-56

I have read and understand the conditions for release of the CCWS data. I agree to comply fully with these conditions and the provisions of this confidentiality agreement. No later than thirty days before the agreement expires, I will request an extension of this agreement, if necessary. If no extension is requested, I will return or destroy all CCWS data and certify that I have done so. I have the authority to sign this agreement.

By: Catherine Barron

A handwritten signature in blue ink, appearing to read "Catherine P. Barron", is written over a light blue rectangular background.

Signature



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AMERICA • ASIA PACIFIC • EUROPE

November 19, 2020

By Email

Dr. William Brennan
Director
Office of Economics
U.S. Surface Transportation Board
395 E. Street, S.W.
Washington, D.C. 20423

Re: Docket No. Ex Parte 704 (Sub-No. 1), Request for Access to Confidential Carload Waybill Sample under 49 C.F.R. § 1244.9

Dear Dr. Brennan:

I write on behalf of Norfolk Southern Railway Company (“NS”) in connection with the above-referenced proceeding. On March 23, 2016, the Surface Transportation Board (“STB” or “Board”) issued a Notice of Proposed Rulemaking proposing to revoke the existing class exemptions under 49 C.F.R. part 1039 for five commodities. On September 29, 2020, following the feedback received during the course of this proceeding, the Board’s Office of Economics (“OE”) served a decision regarding an approach for possible use in considering class exemption and revocation issues, and requested that interested parties submit comments on the approach and its potential use here.

In order to respond to the Board’s request for comments on the approach OE has developed and offer improvements to the dashboard concept OE has proposed, NS respectfully requests the release of unmasked costed confidential Carload Waybill Sample (“CCWS”) from 1987 through 2019, inclusive, for all commodities. NS would also use these data for any related proceedings related to the exemption of individual commodities. This data lies at the heart of the OE’s analysis of the exemptions and is needed to assess and offer improvement to its framework.

Pursuant to 49 C.F.R. § 1244.9(b)(4), use of the requested CCWS data would be restricted to Mark Israel and Catherine Barron of Compass Lexecon, LLC, as well

SIDLEY

Dr. William Brennan
Director, Office of Economics
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as my colleague, Amanda Norton, and me. NS has retained Mr. Israel and Ms. Barron to serve as consultants in connection with the above-captioned proceeding. NS notes that the Board previously granted Mr. Israel and Ms. Barron access to the requested CCWS data from 1987 through 2017 in their capacity as consultants to the Association of American Railroads in the same proceeding. NS's counsel and consultants will scrupulously respect the confidentiality and commercially sensitive nature of the CCWS data and abide by the conditions placed on its use by the Board and by the terms of 49 C.F.R. § 1244.9.

Thank you for your consideration and please do not hesitate to contact me at (202) 736-8889 if you have any questions regarding this request.

Respectfully submitted,

/s/ Ray Atkins

Raymond A. Atkins, Ph.D.
Partner
*Counsel to Norfolk Southern Railway
Company*