

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

Office of Economics

December 01, 2020

Mr. Michael L. Rosenthal
Covington & Burling LLP
One CityCenter, 850 Tenth Street, NW
Washington, DC 20001-4956

ENTERED
Office of Proceedings
December 1, 2020
Part of
Public Record

Re: Waybill Request WB20-57 & EP 704 (Sub-No. 1)

Dear Mr. Rosenthal:

The Surface Transportation Board (STB or Board) has received your request under 49 C.F.R. § 1244.9(b)(4) dated December 1, 2020 for permission to access the complete and unredacted confidential versions of the workpapers underlying the Board's decision in connection with EP 704 (Sub-No. 1), Review of Commodity, Boxcar, and TOFC/COFC Exemptions, on behalf of Union Pacific Railroad Company (UP). Appendices B and C (collectively "workpapers") include data from the 1992 and 2018 confidential Carload Waybill Sample (CCWS).

Pursuant to the Board's determination in EP 704 (Sub-No. 1) to grant access, subject to an appropriate confidentiality agreement, to the workpapers underlying the Board's decision, you will be granted access to the workpapers. These data and workpapers may only be used for purposes of this proceeding. ***This approval becomes effective when signed agreements from the individuals listed below are received by the STB:***

a) *Mr. Michael L. Rosenthal – Covington & Burling LLP*

The expiration date for this agreement is December 31, 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 workpapers contain confidential shipper and railroad data. As a result, the workpapers are commercially sensitive and have 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 (including workpapers) can be used.

Your signature acknowledges your agreement to comply with the following:

1. You will use the CCWS data and workpapers 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) and workpapers 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 and workpapers 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) and reference workpapers. 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 materials) containing CCWS data (including work product and analyses derived from the CCWS) and workpapers information may be disclosed only to outside counsel or other independent representatives for other parties to the proceeding who have signed an agreement with the Board that grants them access to the underlying CCWS data.
5. CCWS data and workpapers 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

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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 and workpapers 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 and workpapers 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 or workpapers, you shall notify the Board in writing within three days of any determination that CCWS data or workpapers must be released, and in no event later than five days before the CCWS data or workpapers are scheduled to be released.
7. In order to retain access to the CCWS and workpapers 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) and workpapers 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 and workpapers 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.

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Sincerely,

William Brennan

William Brennan
Director
Office of Economics

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I have read and understand the conditions for release of the CCWS data and workpapers. 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 workpapers and certify that I have done so. I have the authority to sign this agreement.

By: Michael L. Rosenthal

A handwritten signature in dark ink, appearing to read "Michael Rosenthal", written over a horizontal line.

Signature

From: Rosenthal, Michael <mrosenthal@cov.com>

Sent: Tuesday, December 1, 2020 9:29 AM

To: Brennan, William <William.Brennan@stb.gov>

Subject: EP 704-1 Workpaper request

Dear Mr. Brennan,

On behalf of Union Pacific Railroad Company, I am requesting permission to access the complete and unredacted confidential versions of the workpapers underlying the Board's decision in connection with EP 704 (Sub-No. 1), Review of Commodity, Boxcar, and TOFC/COFC Exemptions. I am willing to sign an appropriate confidentiality agreement.

Thank you for your attention to this matter.

Regards,

Mike Rosenthal

Michael L. Rosenthal

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