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VIA E-FILING

Ann D. Begeman, Chairman
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

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Re: Appeal of Director's Decision to Deny Request by Trinity Industries, Inc.
for Access to Select Data from the 2019 Confidential Carload Waybill Sample
and for Renewed Access to Prior Years' Data (WB20-50)

Dear Chairman Begeman:

On behalf of Trinity Industries, Inc. ("Trinity"), and pursuant to 49 C.F.R. §1244.9(d)(4)(iii), we hereby appeal the above-referenced decision of the Director of the Office of Economics (the "Director") of the Surface Transportation Board (the "Board") dated December 4, 2020.¹ That decision denied Trinity's request of October 13, 2020 for permission to access selected data fields from the confidential Carload Waybill Sample ("CCWS") for 2019.² In addition, the Director's Decision denied Trinity's request to maintain continued access to data from the confidential Carload Waybill Samples for 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017 and 2018, which the current and prior Directors had granted to Trinity on sixteen occasions over the past several years.³

¹ Letter from William Brenner to John B. Totaro, Jr. (December 4, 2020) (Waybill Request WB20-50) ("*Director's Decision re Trinity*").

² Letter from John B. Totaro, Jr. to William Brennan (October 13, 2020) ("*Trinity 2020 Request*").

³ See Waybill Agreements WB605, WB605-1, WB605-2, WB605-3, WB605-5, WB605-6, WB605-7, WB605-8, WB605-9, WB605-10, WB605-11, WB605-12, WB17-04, WB17-51, WB18-33 and WB19-58.

We understand that under the Board’s regulations, appeals “are not favored and will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice.”⁴ For the reasons discussed herein, we believe that the instant circumstances are exceptional, and that the Director’s denial of Trinity’s request was inconsistent with the Board precedent cited as the rationale for this denial, as well as with the Board’s longstanding practice. On these bases, we respectfully request that the Board review the Director’s decision and determine that the Director should grant access to Trinity to the limited number of data fields it requested from the CCWS for 2019, for the limited purposes described in its request, and to renew Trinity’s access to the comparable data now in its possession from previous years’ CCWS.

I. BACKGROUND

A. Trinity’s Request Letter and the Board’s Notice in the Federal Register

On October 13, 2020, Trinity filed with the Director its most recent request for access to certain data from the CCWS (Waybill Request WB20-50) in a form consistent with subsection 49 C.F.R. §1244.9(e) of the Board’s regulations.⁵ Trinity’s request included a list at Attachment A of the data fields from the CCWS to which it requested access. Trinity explained that it had excluded from this list fields that identify cost and revenue information and fields that could “contain or reveal other particularly sensitive and/or shipper-specific data.”⁶ Trinity also explained that this limited range of data fields was narrowly tailored to the types of research and analyses to be conducted by its consultant, which it described in its request letter. Trinity is a railcar manufacturer and provider of railcar-related services, and therefore identified itself in this

⁴ 49 C.F.R. § 1011.6(b). *See Director’s Decision* at 2.

⁵ Letter to William Brennan, PhD, from John B. Totaro, Jr., Re: Request for Permission to Use Data from STB Carload Waybill Sample (October 13, 2020) (“Trinity’s 2020 Request”).

⁶ Trinity’s 2020 Request at 2.

request as an “other user” to which waybill data could be released pursuant to 49 C.F.R. §1244.9(c). A copy of Trinity’s request is included at **Exhibit 1** to this letter.

On October 16, 2020, pursuant to 49 C.F.R. §1244.9(d), the Board published a notice in the Federal Register to announce that it had received Trinity’s *2020 Request*, and to provide parties an opportunity to object to this request.⁷ No party objected to Trinity’s request.

B. The Director’s Decision Letter Denying Trinity’s Request

Nevertheless, by a letter dated December 4, 2020, the Director advised Trinity that its request would be denied.⁸ The following sentences constitute the entirety of the Director’s explanation of the reason for his denial of Trinity’s request for data from the 2019 CCWS, and for the effective rescission of his and prior Directors’ approvals of Trinity’s several prior-year requests for comparable data:

In Request for Waybill Data, Docket No. WB 20-40 (STB served Nov. 20, 2020)(affirming denial of CCWS access to consultant for U.S. Wheat Associates), the Board confirmed that CCWS data should not be made available for purposes of preparing private, commercial reports. The Board “reaffirm[ed] 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.” *Id.*, slip op. at 5. Because the purpose for which Trinity has requested the data is a private, commercial use of the type addressed in the Board’s recent decision, the requested data will not be made available.⁹

The Director summarily characterized Trinity’s clearly stated use of and purpose for the narrow range of non-financial data it requested as being “of the type” of private and commercial use of CCWS data that the Board had addressed in its decision regarding U.S Wheat Associates. The

⁷ *Release of Waybill Data*, 85 Fed. Reg. 65895 (October 16, 2020).

⁸ *Director’s Decision e Trinity* at 1.

⁹ *Id.*

Director provided no explanation as to what elements of Trinity’s request supported such a determination. For the reasons set out herein, we respectfully submit that the Director’s characterization was incorrect and inconsistent with the Board’s precedent, and therefore that his denial of Trinity’s *2020 Request* was inappropriate.

II. ARGUMENT

A. The Board’s U.S. Wheat Decision Addressed Unjustified Requests for Cost, Revenue, and Contract Data, and Proposed Uses of Such Data Which Would Create Significant Risk of Competitive Harm – Elements Not Present in Trinity’s *2020 Request*

In *Request for Waybill Data*, Docket No. WB 20-40 (STB served Nov. 20, 2020) (“*Board Decision re USW*”), the Board affirmed the Director’s decision to deny access to CCWS data requested by U.S. Wheat Associates (“USW”). USW’s request was extremely broad: it covered nearly the entire CCWS, excluding only a few fields relating primarily to physical car characteristics, for a 36-year period.¹⁰ And the Director emphasized that USW’s request “seeks disclosure of confidential rail contract, rate, and other information” for the purpose of identifying “time and costs associated with all of the relevant components of the rail shipments from the U.S. to Mexico.”¹¹ Indeed, USW stated that “confidential contract revenues are a critical component” of the analysis it planned to conduct using the CCWS.¹²

The Director also noted that when the Board published a notice regarding USW’s request, the Association of American Railroads (“AAR”) filed an objection, “arguing that USW has not provided a legitimate need for the revenue-related data, origin and destination data, or the data

¹⁰ Letter from Daniel R. Elliott from William Brennan Re: Waybill Request WB20-40 (September 4, 2020) (“*Director’s Decision re USW*”) at 1.

¹¹ *Id.*

¹² *Id.*

pertaining to commodities aside from wheat.¹³ The AAR argued that “[o]n revenue-related data, USW has not stated a legitimate need in its request that meets the high-bar for other users.”¹⁴ According to the AAR, the information sought by USW was, “actual unmasked contract rate information with location information [which] would identify individual member companies or producers and would potentially benefit one member at the expense of another.”¹⁵

In denying USW’s request, the Director explained that the “confidential rail contract, rate, and other information” that USW sought “to access 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.”¹⁶ The Director noted that there are limited circumstances in which the Board has permitted access to this type of data, but the 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 you propose, particularly with regard to contract rates.¹⁷

USW appealed the Director’s denial of its request to the Board, and the Board affirmed that denial. In its decision, the Board emphasized the competitive harm that could result from the

¹³ *Id.*

¹⁴ Letter from J. Frederick Miller Jr., Association of American Railroads to Dr. William J. Brennan Re: Waybill Data Request 20-40 (August 28, 2020) (“AAR *Objection to USW Request*”) at 2. In this section of its objection letter, the AAR references *Procedures on Release of Data from the ICC Waybill Sample*, 4 I.C.C.2d 194, 1987 ICC LEXIS 377 (1987) (“*Waybill Procedures*”). *Id.*

¹⁵ *Id.*

¹⁶ *Director’s Decision re USW* at 1.

¹⁷ *Director’s Decision re USW* at 2 (*emphasis added*).

release of the types of data sought by USW for the purposes for which it intended to use those data:

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. ... 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.¹⁸

The Board also explained that the Director's decision to deny USW's request was consistent with the Interstate Commerce Commission's ("ICC") 1987 *Waybill Procedures*,

where the ICC acknowledged that CCWS data is commercially sensitive for both shippers and railroads. As the Director's Decision recognized, the [USW] 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.¹⁹

Moreover, the Board reiterated that 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

¹⁸ Waybill Data, Docket No. WB 20-40 (STB served Nov. 20, 2020) ("*Board Decision re USW*").

¹⁹ *Id.* at 2-3.

of wheat growers.”²⁰ In its appeal, USW offered to narrow the scope of data fields in its request, but the Board found that even in this amended list of fields, “USW is still requesting confidential contract information, including revenues.”²¹ The Board emphasized the Director’s statement that this type of data “is precisely the information that railroads and shippers are entitled to expect will ordinarily remain confidential.”²² The Board concluded that its “responsibility to maintain the confidentiality of such 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.”²³

The preceding analysis is important context to the Board’s subsequent statement, which the Director quoted in his denial of Trinity’s *2020 Request*: “[t]he 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.”²⁴ That is, the Board’s decision does not indicate that its policy is to deny all access to any portion of the CCWS to any “other user” that is or represents a private, commercial firm. Rather, this decision makes clear the Board’s view that the Director correctly denied USW’s request because it was overbroad in terms of data fields and time periods, included the portions of the CCWS that are the most sensitive and entitled to the greatest protection from release, was unsupported by a legitimate need for access to such revenue, rate

²⁰ *Id.* at 4.

²¹ *Id.* at 5.

²² *Id.* at 4, quoting *Director’s Decision re USW* at 1.

²³ *Id.* at 5.

²⁴ *Id.*

and contract data, and because there was clear potential for competitive harm in the uses to which USW proposed to employ this information.

As explained *supra*, the Director denied Trinity's request because the "purpose for which Trinity has requested the data is a private, commercial use of the type addressed in the Board's recent decision" in USW.²⁵ We respectfully disagree; neither the type of data requested nor the type of commercial use (and the potential for competitive harm created thereby) that the Board reviewed in its USW decision were at all comparable to those set out in Trinity's request.

B. The Board's Decision Regarding the North Carolina Soybean Producers Association Addressed Concerns Similar to those in U.S. Wheat

The Board's decision in USW references its prior decision to affirm the Director's denial of a request for data from the CCWS by the North Carolina Soybean Producers Association ("NC Soybean").²⁶ While it was not cited by the Director in his denial of Trinity's 2020 *Request*, the facts at issue in the Board's NC Soybean decision are similarly distinguishable from those presented in Trinity's request. For example, the AAR objected to NC Soybean's request because it was over-broad (seeking 30 years of data), included cost and revenue data, and provided "no reasonable explanation for the need for" the other confidential data requested.²⁷ The AAR also argued that NC Soybean was seeking "access to the fundamental pricing structure of competitors so that their members can set prices," and that granting this request "is entirely inappropriate, especially when those figures are contained in private contracts."²⁸

²⁵ *Director's Decision re Trinity* at 2 (*emphasis added*).

²⁶ *Board Decision re USW* at 4, *citing* Request for Waybill Data, WB 20-23, slip op. at 2-3 (STB served Sept. 23, 2020) ("*Board Decision re NC Soybean*").

²⁷ Letter from J. Frederick Miller, Association of American Railroads, to Fr. William Brennan, Re: Waybill Data Request 20-23 (June 17, 2020) at 1-2.

²⁸ *Id.* at 2.

The Director’s denial letter concurred with the AAR’s objections, noting that NC Soybean’s request, “seeks disclosure of confidential rail contract, rate, and other information for competing growers of soybeans located in other states.”²⁹ The Director emphasized that the contract rate information requested by NC Soybean “is considered particularly competitively sensitive by shippers and railroads alike,” and that the Board’s governing statute, “generally proscribes the release of contract, rate, and other information ‘that may be used to the detriment of the shipper . . . or may disclose improperly, to a competitor, the business transactions of the shipper.’”³⁰ Because the “potential for competitive harm to these other growers from the disclosure of their confidential business information to a group of competing North Carolina growers is significant,” the Director concluded that “release of the requested data to NC Soybean for your stated purpose could compromise competitively sensitive data.”³¹

In its decision on NC Soybean’s appeal, the Board affirmed the Director’s decision “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.”³² The Board explained that the Director’s decision was consistent with the ICC’s 1987 *Waybill Procedures*, “where the ICC acknowledged that the type of data sought here is commercially sensitive for shippers.” Moreover, the Board found that the risk for competitive harm was inherent and unavoidable in the purposes for which NC Soybean planned to use the

²⁹ Letter from William Brennan to Mr. Owen Wagner, North Carolina Soybean Producers Association, Re: Waybill Request WB20-23 (June 24, 2020) at 1.

³⁰ *Id.*, quoting 49 U.S.C. § 11904(b) (*emphasis added*).

³¹ *Id.* (*emphasis added*).

³² *Board Decision re NC Soybean* at 2.

cost data it requested.³³ For these reasons, as it did in its decision regarding USW, the Board affirmed the Director’s denial because NC Soybean requested cost, price and other contract data from the CCWS that are highly sensitive to shippers, because its request was unsupported by a legitimate need for access to those types of data, and because there was clear potential for competitive harm in the uses to which NC Soybean proposed to employ this information. The Director made no such findings with regard to Trinity’s *2020 Request*, and Trinity’s request is distinguishable from U.S. Soybean’s in each of these respects.

C. The Board’s Longstanding Practice Permits Release of CCWS Data to “Other Users” Like Trinity Provided the Applicable Standards Are Met

As referenced *supra*, Trinity submitted its *2020 Request*, as it has in each of its prior requests, as an “other user” which may request permission to use confidential data from the CCWS pursuant to 49 C.F.R. §1244.9(c). Trinity, as a manufacturer of railcars and railcar components and a provider of comprehensive railcar fleet management services, is a type of “other user” that has long been recognized as an appropriate requestor and user of such data. For example, the ICC’s 1987 *Waybill Procedures*, in describing the procedures in effect at the time of the 1987 procedures, noted that among the non-government entities which “sometimes seek access to waybill sample data,” most fall into the following five groups: “(1) railroads, (2) shipper associations, (3) transportation consulting firms, (4) universities, and (5) freight car builders.”³⁴ While the *Waybill Procedures* do not use these specific terms, the freight car builders referenced in this document are clearly private, *i.e.*, non-governmental, commercial firms.

³³ *Id.*

³⁴ *Id.* at 195-196 and n.3 (*emphasis added*).

Moreover, the ICC explained that such parties had used those data for “many purposes including: ... analyses of rail traffic flows and patterns, ... studies of movements of hazardous materials, coal and other commodities, ... [and] development of freight car manufacturing plans.”³⁵ The ICC acknowledged that while in general, the release of data from the CCWS is proscribed, “because there may be instances in which these data are essential to meet a particular and legitimate need, OTA [(the Office of Transportation Analysis, the predecessor of the Office of Economics)] will consider requests by other users.”³⁶

The ICC stated that the final procedures it set out in 1987, which are reflected in the Board’s regulations at 49 C.F.R. §1244.9, “essentially embrace, with some refinements, OTA’s existing policy,” adding refinements “designed to add further safeguards” surrounding the release of CCWS data to non-governmental “other users.”³⁷ Importantly, there is no mention or indication in the 1987 *Waybill Procedures* that the ICC intended its final rules to proscribe the release of data from the CCWS that had been permitted under its then-current procedures to “other users” such as freight car builders or for purposes such as development of freight car

³⁵ *Id.* at n.2 (*emphasis added*).

³⁶ *Id.* at 196 (*emphasis added*).

³⁷ *Waybill Procedures*, 4 I.C.C. 2d at 198-200. One of these refinements was to formalize the notice and protest procedures applicable to requests by “other users” set out in subsection 49 C.F.R. §1244.9(d) of the Board’s regulations; as noted *supra*, no party objected when notice of Trinity’s response was published. In addition, the ICC explained that such users,

must include a complete and detailed explanation of the purpose for which the requested data are needed, a description of the specific waybill data or fields actually required (including pertinent geographic areas), and a complete explanation as to why the specified waybill data are needed. (See new §1244.8(e)) [current §1244.9(e)]. This will help to ensure that released waybill data are tailored to the actual needs of the requestor.

Finally, we should emphasize that the Director of OTA carefully evaluates all waybill requests and may further refine or qualify the data actually released. Also, if after careful deliberation, the Director determines that a request lacks a legitimate purpose and/ or release of data to a particular user could compromise competitively sensitive data, the Director will deny the request.

manufacturing plans. Thus, the Board’s predecessor recognized that under the appropriate circumstances, narrowly tailored requests for release of data from the CCWS for private, commercial use may be permitted. As discussed further *infra*, the Director’s past practice in granting Trinity access to data from the CCWS has recognized this as well.³⁸

In its decision regarding USW, the Board reaffirmed 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;”³⁹ we do not view this statement as inconsistent with the policy that the ICC described in the 1987 *Waybill Procedures*. Rather, the Board’s statement in *USW* is consistent with the high standards that it has long-applied to “other users” – including private businesses – before granting permission to such entities to use to data from the CCWS. The types of CCWS data requested by USW – “precisely the information that railroads and shippers are entitled to expect will ordinarily remain confidential” – created a significant potential for competitive harm to shippers; its analysis would provide a competitive advantage to one group of market participants over another; and it failed to establish a “particular and legitimate need” for those data. Thus, the problematic analysis that USW proposed to conduct using the problematic types of data it sought was the type of “private commercial use” that the Board determined was inconsistent with its policy and therefore properly denied by the Director. The Board’s decision in *USW*, or the policies referenced therein, does not reflect a general proscription against release of CCWS data to any “other users” which are private, commercial firms. As discussed further *infra*, Trinity’s 2020 *Request* meets the high standards for release of data from the CCWS to

³⁸ For example, as recently as November 2019, the Director approved release of certain data from the 2018 CCWS to Trinity based on the “the complete and sufficiently detailed explanations and justifications contained in” its request. Letter to John B. Totaro, Jr., Neville Peterson, LLP from William Brennan, Re: Waybill Request WB19-58 (November 20, 2019).

³⁹ *Board Decision re USW* at 5.

“other users” that were affirmed by the Board in its recent decisions and should not have been summarily denied.

D. Trinity’s 2020 Request Excluded All Cost, Rate and Price Data as Well as Other Shipper-Specific and Contract Data

In each of its requests for access to data from the CCWS over more than a decade, Trinity has sought to exclude data fields that are not necessary for the research and analysis to be performed by its economic consultant, Patrick J. Krick. However, in 2009, following an objection to Trinity’s request regarding the 2007 CCWS, the Director, and subsequently the Board, denied Trinity’s request, primarily because its requested data fields included certain revenue and shipper-specific data.⁴⁰ In response to these concerns, Trinity resubmitted a revised request for data from the 2007 CCWS which eliminated from the list of requested data fields any remaining fields that identified cost and revenue information; Trinity also excluded fields that provided shipper-specific data, including Fields 56 and 57, Car Owner’s Mark and Car Lessee’s Mark. No objection was filed in response to the Board’s publication regarding that revised request, and it was approved by the Director.⁴¹ Since that time, Trinity’s annual requests for access to data from the CCWS for 2008 through 2019 have included this scaled-back list of data fields; no objections have been filed in response to any of these requests, and the Director has approved all but the request at issue in this appeal.⁴²

⁴⁰ Letter to Herbert E. Harris II and John B. Totaro, Jr. from Charles D. Nottingham, Chairman (March 11, 2009),

⁴¹ Letter to John B. Totaro, Jr. from Leland L. Gardner, In Response Refer to Waybill Request WB605-5 (July 1, 2009).

⁴² Trinity explained in its *2020 Request* that it

excluded from the list of data fields at Attachment A numerous fields of the confidential Carload Waybill Sample data file that identify cost and revenue information. Trinity has determined that these excluded fields are not of central importance to the studies to be conducted on its behalf by Mr. Krick. Moreover, Trinity has endeavored to exclude from

As can be seen in the copy of this request provided at Exhibit 1 to this appeal, specifically in the list of fields in Attachment A thereto, Trinity's 2020 Request is devoid of any financial data (*i.e.*, data stated in dollars) from the CCWS file. As such, and as has been the case in Trinity's prior requests beginning in 2009, there is no possibility that Trinity could access waybill revenue data, cost estimates, or (assumptively) profitability estimates based on the data it would receive if the Board were to approve its 2020 Request, nor could Trinity identify price, service or other "information about the contents of a contract"⁴³ from these data.

Because Trinity's 2020 Request does not encompass such cost, revenue, price, contract and shipper-specific information, release of the remaining confidential information for Trinity's limited purposes essentially eliminates the potential that this information "may be used to the detriment of the shipper or consignee or may disclose improperly, to a competitor, the business transactions of the shipper or consignee."⁴⁴ Moreover, as discussed further *infra*, Trinity's consultant is a practitioner with decades of experience enforcing the Board's confidentiality requirements, to whom the Board has entrusted such information on many prior occasions in connection with his work on behalf of a wide variety of rail industry shippers, carriers and suppliers.

Trinity's circumscribed data request contrasts starkly with the requests at issue in the Board's decisions in USW and NC Soybean. The fact that the CCWS data which USW and NC Soybean requested permission to use included cost, revenue, price and contract data was the

its request all data fields that could contain or reveal other particularly sensitive and/or shipper-specific data.

Trinity's 2020 Request at 2.

⁴³ 49 U.S.C. §11904(b).

⁴⁴ *Id.*

nexus of the objections to those requests filed by the AAR, the Director's denials of those requests and the Board's affirmation of the Director's denials. Trinity has not requested access to these types of data. Consequently, it was inaccurate for the Director to conclude that "the purpose for which Trinity has requested the data is a private, commercial use of the type addressed in the Board's recent decision" in USW.⁴⁵ Moreover, the purposes for which Trinity proposes to use the limited data fields in its *2020 Request* raise none of the competitive harm concerns that the Board discussed in its recent decisions.

E. Trinity's Request for Access to Certain Data from the 2019 CCWS Was Narrowly Tailored to Its Consultant's Research

In its 2020 Request, Trinity described its "particular and legitimate need" for the limited number of CCWS data fields for which it sought access as follows:

The purpose of the instant request is to permit Mr. Krick to prepare analyses of (1) trends in the uses of and handling of various combinations of rail-hauled commodities by equipment types, particularly tank car traffic; and (2) the effects of various regulatory changes affecting equipment standards and uses that have been or may be proposed. These analyses will permit Mr. Krick to report to Trinity regarding the types of railcars required by U.S. fleets, particularly with respect to freight movements of commodities for which safety and security are key concerns.

These studies permit Trinity to enhance its understanding of the numerous types of railcars in use in the rail system as well as the range of specific uses to which this equipment is applied. These studies enhance its ability to design equipment and services that address the needs of the shipping and carrier communities more efficiently and directly, and in that way create a safer operating environment for these parties and the general public, as well.⁴⁶

⁴⁵ *Director's Decision re Trinity* at 1.

⁴⁶ *Id.*

These purposes are consistent with those described by the ICC in the 1987 *Waybill Procedures* as legitimate uses of data from the CCWS, *i.e.*, a request for such data by a “freight car builder” in order to conduct “analyses of rail traffic flows and patterns, ... studies of movements of hazardous materials, coal and other commodities, ... [and] development of freight car manufacturing plans.”⁴⁷ As referenced *supra*, in November 2019, the Director reviewed the same description of the research and analysis that Trinity proposed to conduct using data from the same fields from the 2018 CCWS that were identified in Trinity’s *2020 Request*, and approved access to these data “[b]ased on the complete and sufficiently detailed explanations and justifications contained in” Trinity’s request.⁴⁸

In his denial of Trinity’s *2020 Request*, the Director did not state or indicate that Trinity had not, once again, provided “complete and sufficiently detailed explanations and justifications” for release of the specific data it identified. Nor did the Director identify any aspect of Trinity’s stated uses of and purposes for the requested non-revenue, non-cost, non-contract CCWS data that was remotely comparable to the uses proposed by USW. As the Board summarized, the “commercial use” for which USW sought the “detailed revenue, shipment, and contract data” identified in its request was “to obtain information that would assist a particular group of U.S. wheat producers in obtaining a competitive advantage over other producers.”⁴⁹ In contrast, as the studies performed by Trinity’s consultant using the narrowly-tailored list of fields from the CCWS have no such anti-competitive purposes nor do they pose the potential for such effects.

⁴⁷ *Waybill Procedures* at 195-196 and nn.2 and 3.

⁴⁸ Letter to John B. Totaro, Jr. from William Brennan, Re: Waybill Request WB19-58 (November 20, 2019).

⁴⁹ *Board Decision re USW* at 2.

The list of data fields identified in Attachment A to Trinity's *2020 Request* is limited to those data fields which are essential for its consultant to conduct the analyses described *supra* – the extent of its “commercial use” of these data. The limited scope of confidential data requested by Trinity also substantially limits – indeed, essentially eliminates – the potential for competitive harm to shippers and railroads in the release of these data to Trinity. We note as well that the limited range of data included in Trinity's request also essentially eliminates the potential for competitive harm to competing railcar builders and other industry suppliers.

F. Appropriate Measures Are in Place to Safeguard the Confidentiality of the Data to Which Trinity Has Requested Access

Because the data from the CCWS identified in Attachment A to Trinity's *2020 Request* contains confidential information provided by shippers and railroads, if the Board were to grant this appeal, Trinity understands that its proposed use of this portion of the 2019 CCWS would be conditioned upon an agreement that the confidentiality of the data released would be maintained. Further, Mr. Krick, Trinity's economic consultant, would be the sole person to have access to the CCWS data on Trinity's behalf, his use of the data will be limited to the purposes set forth in its request, and any information Mr. Krick generates from the CCWS data for Trinity's use will conform to the aggregation requirements the Board has set forth as effective protection of confidentiality. Trinity and Mr. Krick are prepared to sign confidentiality agreements to this effect prepared by the STB, as they have done for many years.

Trinity understands that “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,”⁵⁰ and it is not suggesting otherwise. Rather, Trinity

⁵⁰ Board Decision *re USW* at 2.

submits that its compliance with these requirements, in combination with the limited range of data fields it has requested, the use of which would be limited to the purposes identified in that request, the constitute appropriate safeguards of the confidentiality of these data and further reduce the potential for competitive harm posed by the proposed release to Trinity's consultant.

G. The Public Use Waybill Data Is Not Sufficient

At the close of his letter denying Trinity's *2020 Request*, the Director referred Trinity to the public use summary of the Carload Waybill Sample data as an alternative to the data from the 2019 CCSW it had requested.⁵¹ Unfortunately, the public use file does not have the granularity in commodity (5-digit versus full 7-digit detail) or geographical detail (BEA regions versus FSAC/SPLC detail) that is important to Trinity's annual analyses of equipment usage. An important example of this difference in terms of commodity considerations can be seen with respect to silica sand, a significant rail traffic demand element and a vital input in natural gas extraction. A few decades ago, this product represented very minimal rail traffic volume. Since then, with the application of directional drilling technologies, natural gas extraction has increased significantly versus overall energy production in gas fields all across North America. As a result, the demand for rail shipping of silica sand, including supply of applicable equipment for its carriage, has expanded several-fold. Silica sand cannot be uniquely identified in the public use file with a 5-digit STCC scheme. Uniquely identifying it is critical in understanding the volumes being supplied to the natural gas industry. As reported in the public use file, such shipments are grouped with other types of sand unrelated to the natural gas industry. In contrast, the CCWS includes several 7-digit STCC's for silica sand breaking out several different sub-

⁵¹ *Director's Decision re Trinity* at 1.

groupings. This enables Trinity's analysis to identify any relationships between various types of covered hopper cars (the rail car type that handles this product) and various grades of silica sand.

The CCWS data that Trinity requested in its *2020 Request* and in its requests for the same data fields in previous years represents an important resource for Trinity, while the public use file does not. The commodity and geographical information in the CCWS significantly increases Trinity's ability to adapt its railcar manufacturing, management and other related operations to more effectively respond to, and in some instances anticipate, carrier and shipper needs in the North American rail industry.

III. REQUEST FOR RELIEF

For the reasons set out in this document, Trinity submits that the Director's decision to deny Trinity's *2020 Request* was inconsistent with the Board's precedent. The ICC made clear decades ago that the category of "other users" which may be approved to use data from the CCWS includes private firms engaged in commerce like Trinity, and the Board's decision in *USW* does not propose a different interpretation of this category. The applicable statute and regulations and the Board's precedent subject "other users" like Trinity to high standards before granting them permission for access to data from the CCWS, requiring them to demonstrate their particular, legitimate need for such data, and that their proposed use of that information would not be "detrimental to shippers or improperly disclose shipper business transactions to competitors of those shippers."⁵² The Board found that these standards were not met by the requesting parties in its decisions regarding *USW* and *NC Soybean*. However, the Director did not identify any aspect of Trinity's *2020 Request* that failed to meet these standards, and as discussed *supra*, the use for which Trinity requested data from the CCWS was not "of the type"

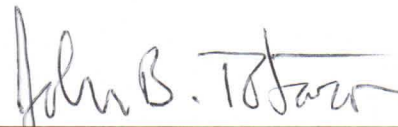
⁵² *Board Decision re NC Soybean* at 2, citing 49 U.S.C. §11904.

addressed in either of these decisions. Consequently, the Board precedent cited by the Director did not support his denial of Trinity's *2020 Request*.

For these reasons, we respectfully request that the Board grant this appeal, and instruct the Director to release the requested data from the 2019 CCWS to Trinity, and to renew Trinity's previously-granted access to data from the 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017 and 2018 CCWS. Allowing the Director's denial to stand would constitute manifest injustice to Trinity, particularly it would constitute the wholesale reversal of over a decade of approvals of substantially similar, unopposed requests by Trinity.

The Director did not identify the scope of the data from the 2019 CCWS that was identified in Trinity's *2020 Request* as a basis for his denial. Nevertheless, Trinity wishes to make a good faith effort to address any concerns that the Director or the Board may have with the release of certain data fields to Trinity. Consequently, if the Board determines that Trinity's *2020 Request* cannot be approved as submitted, but that excluding additional data fields from the list at Attachment A of that request would provide additional safeguards sufficient to permit release of the remaining data fields from the 2019 CCWS to Trinity, we request the opportunity to submit an amended version of Trinity's request that includes such modifications.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John B. Totaro, Jr.", written over a horizontal line.

John B. Totaro, Jr.
Counsel to Trinity Industries, Inc.

Encl.

cc: William Brennan, Director
(via Email to: alexander.dusenberry@stb.gov)

EXHIBIT 1

NEVILLE PETERSON LLP

1400 16th Street, N.W. ■ Suite 350 ■ Washington, D.C. 20036
Telephone: (202) 861-2959 ■ Fax: (202) 861-2924 and 861-6077

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Office of Proceedings
October 16, 2020
Part of
Public Record

JOHN B. TOTARO, JR.
Direct: (202) 776-1145
District of Columbia Bar
jtotaro@npwdc.com

October 13, 2020

BY EMAIL TO:

ALEXANDER.DUSENBERRY@STB.GOV

William Brennan, PhD

Director

Office of Economics

Surface Transportation Board

395 E Street, SW

Washington, DC 20423-0001

Re: Request for Permission to Use Data from STB Carload Waybill Sample

Dear Mr. Brennan:

On behalf of Trinity Industries, Inc. ("Trinity"), we hereby request that the Surface Transportation Board ("STB") take the following actions:

- grant access for Trinity and its consultant to use the specific items in the STB Carload Waybill Sample for 2019 identified at Attachment A to this letter; and
- grant an extension of Waybill Agreements WB605, WB605-1, WB605-2, WB605-3, WB605-5, WB605-6, WB605-7, WB605-8, WB605-9, WB605-10, WB605-11, WB605-12, WB17-04, WB17-51, WB18-33 and WB19-58 to permit continued access for Trinity and its consultant to data from the STB Carload Waybill Sample for 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017 and 2018.

Our request for access to the 2019 data is made pursuant to 49 C.F.R. §1244.9(c). Specifically, we request that the STB grant access to certain data from the Carload Waybill Sample for 2019 to Trinity through its consultant, Patrick J. Krick. Trinity is a manufacturer of railcars, including tank cars, hoppers, box cars, gondolas, intermodal cars and auto carriers, as well as railcar components. In addition, Trinity provides comprehensive railcar fleet management services, including railcar leasing and financing, administration, regulatory compliance, tax preparation, and maintenance and repairs.¹ Mr. Krick is an experienced,

¹ Additional information regarding Trinity's railcar businesses is available at www.trinityrail.com.

independent transportation economist who has been retained by Trinity to conduct research regarding trends in rail freight traffic and equipment usage. As discussed further herein, the studies that Mr. Krick develops for Trinity are properly aggregated to safeguard the confidentiality of the Carload Waybill Sample data he has used in those studies.

I. Trinity's Request for Confidential Data Excludes Many Highly Sensitive Fields

Trinity has excluded from the list of data fields at Attachment A numerous fields of the confidential Carload Waybill Sample data file that identify cost and revenue information. Trinity has determined that these excluded fields are not of central importance to the studies to be conducted on its behalf by Mr. Krick. Moreover, Trinity has endeavored to exclude from its request all data fields that could contain or reveal other particularly sensitive and/or shipper-specific data. The data fields that Trinity has included in this request are important to the research conducted by Trinity's consultant, and Trinity's consultant adheres strictly to the STB's aggregation and confidentiality requirements when using the confidential data it receives for the narrow purposes described herein.

II. Trinity's Request for a Limited Range of Data Fields Is Tailored to Its Research Goals

The purpose of the instant request is to permit Mr. Krick to prepare analyses of (1) trends in the uses of and handling of various combinations of rail-hauled commodities by equipment types, particularly tank car traffic; and (2) the effects of various regulatory changes affecting equipment standards and uses that have been or may be proposed. These analyses will permit Mr. Krick to report to Trinity regarding the types of railcars required by U.S. fleets, particularly with respect to freight movements of commodities for which safety and security are key concerns.

These studies permit Trinity to enhance its understanding of the numerous types of railcars in use in the rail system as well as the range of specific uses to which this equipment is applied. These studies enhance its ability to design equipment and services that address the needs of the shipping and carrier communities more efficiently and directly, and in that way create a safer operating environment for these parties and the general public, as well. As discussed herein, the insights that Trinity gains from these studies would be impossible to develop from the Public Use Waybill file. Consequently, the selected fields identified in Attachment A provide essential information that permits Trinity's consultant to perform studies that in turn permit Trinity to better serve the U.S. freight rail industry.

III. The Board's Standard Measures Will Safeguard the Confidentiality of Released Data

Trinity is aware that the STB Carload Waybill Sample data identified in Attachment A to this request contain confidential shipper and railroad data. Consequently, Trinity understands

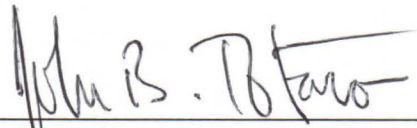
that the use of this portion of the 2019 STB Carload Waybill Sample data would be conditioned upon an agreement that the confidentiality of the data released would be maintained. Further, it is understood that Mr. Krick will be the sole person to have access to the Carload Waybill Sample data on Trinity's behalf, his use of the data will be limited to the purposes set forth in this letter, and that any information Mr. Krick generates from the sample for Trinity's use will conform to the aggregation requirements the Board has set forth as effective protection of confidentiality. Both Trinity and Mr. Krick are prepared to sign agreements to this effect prepared by the STB.²

Trinity submits that these procedures and commitments including the limited range of data fields identified in Attachment A, the use of which is limited to the purposes identified in this request, constitute an appropriate safeguard and effectively eliminate the potential for competitive harm posed by the release of data to Trinity's consultant.

Pursuant to 49 C.F.R. §1002.2(f),³ in connection with this letter, the undersigned has submitted a payment via Pay.gov for \$572.00, which covers the fee for processing the paperwork related to this request (\$450) and the fees for access to data from the 2019 STB Carload Waybill Sample for Mr. Krick (\$61) and for an officer of Trinity (\$61). A copy of the receipt from Pay.gov regarding this payment is enclosed at Attachment B.

Please contact the undersigned if you require any additional information.

Sincerely,


John B. Totaro, Jr.

Encl.

² Assuming that the STB grants the access to the 2019 Carload Waybill Sample data requested in this letter, Trinity requests that the STB release these data directly to Mr. Krick. Mr. Krick's street address is 312 Willow Ridge Road, Fort Worth, TX 76103, and his email address is pjkrick@charter.net.

³ Revised by *Regulations Governing Fees for Services Performed in Connection With Licensing and Related Services—2020 Update*, 85 Fed. Reg. 47099, 47102 (August 4, 2020).

ATTACHMENT A

ATTACHMENT A

Trinity Industries, Inc., requests permission for its consultant to use the following data fields from the STB Carload Waybill Sample for 2019:

<u>Item</u>	<u>Name</u>
1	Unique Serial Number
2	Waybill Number
3	Waybill Date
4	Accounting Period
5	Number of Carloads
6	Car Initial
7	Car Number
8	Intermodal TOFC/COFC Service Code
9	Number of TOFC/COFCs
10	TOFC/COFC Initial
11	TOFC/COFC Number
12	Commodity Code (STCC)
13	Billed Weight
14	Actual Weight
18	Inter/Intra State Code
19	Transit Code
20	All Rail/Intermodal Code
21	Type Move (import/export)
22	Type Move Via Water
23	Substituted Truck for Rail
24	Shortline Miles
25	Rebill Code
26	Stratum Identification
27	Subsample Code
28	Intermodal Equipment Flag
30	Waybill Identifier (MRI only)
31	Reporting Railroad
32	Origin FSAC
33	Origin Railroad
34	Interchange #1 Rule 260
35	First Bridge RR
36	Interchange #2 Rule 260
37	Second Bridge RR
38	Interchange #3 Rule 260
39	Third Bridge RR
40	Interchange #4 Rule 260
41	Fourth Bridge RR
42	Interchange #5 Rule 260
43	Fifth Bridge RR

ATTACHMENT A to Trinity Industries, Inc. Request (cont.)

44	Interchange #6 Rule 260
45	Sixth Bridge RR
46	Interchange #7 Rule 260
51	Termination Railroad
52	Termination FSAC
53	Population Count
54	Stratum Count
55	Reporting Period Length
58	Car Capacity
59	Nominal Car Capacity
60	Tare Weight of Car
61	Outside Length
62	Outside Width
63	Outside Height
64	Extreme Outside Height
65	Type of Wheel Bearings and Brakes
66	Number of Axles
67	Draft Gear
68	Number of Articulated Units
69	Pool Code Number
70	AAR Equipment Type
71	Mechanical Designation
72	Licensing State (TOFC)
73	Maximum Weight on Rail
76	STCC w/o Hazardous (49) Codes
77	Origin Railroad Alpha
78	First Interchange RR Alpha
79	Second Interchange RR Alpha
80	Third Interchange RR Alpha
81	Fourth Interchange RR Alpha
82	Fifth Interchange RR Alpha
83	Sixth Interchange RR Alpha
86	Termination Railroad Alpha
87	Junction Frequency
88	Theoretical Expansion Factor
89	Routing Error Flag
90	STB Car Type
92	AAR/RAILINC Error Codes
93	Car Ownership
94	AAR TOFC/COFC Unit Type
95	Deregulation Date
96	Deregulation Flag
97	Service Type
98	Expanded Carloads

ATTACHMENT A to Trinity Industries, Inc. Request (cont.)

99	Billed Weight in Tons
100	Expanded Tons
101	Expanded Trailer/Container Count
113	First Railroad Distance
114	Second Railroad Distance
115	Third Railroad Distance
116	Fourth Railroad Distance
117	Fifth Railroad Distance
118	Sixth Railroad Distance
119	Seventh Railroad Distance
122	Termination Railroad Distance
123	Total Distance
124	Origin State Alpha
125	First Junction State Alpha
126	Second Junction State Alpha
127	Third Junction State Alpha
128	Fourth Junction State Alpha
129	Fifth Junction State Alpha
130	Sixth Junction State Alpha
131	Seventh Junction State Alpha
134	Termination State Alpha
135	Origin BEA Area
136	Termination BEA Area
156	State Through Indicators
157	International Harmonized Code
158	Standard Industrial Classification
159	International S. I. C.
160	Dominion of Canada Code
161	CS54 Group Code
182	Exact Expansion Factor
193	Transborder Flag

ATTACHMENT B

John Totaro

From: notification@pay.gov
Sent: Tuesday, October 13, 2020 9:17 AM
To: John Totaro
Subject: Pay.gov Payment Confirmation: Surface Transportation Board User Fees



An official email of the United States government



Your payment has been submitted to Pay.gov and the details are below. If you have any questions regarding this payment, please contact STB Finance at (202) 245-0349 or Finance.Staff@stb.gov.

Application Name: Surface Transportation Board User Fees
Pay.gov Tracking ID: 26Q6E08C
Agency Tracking ID: 76041166107
Transaction Type: Sale
Transaction Date: 10/13/2020 09:17:17 AM EDT
Account Holder Name: John Totaro
Transaction Amount: \$572.00
Card Type: Visa
Card Number: *****

Payer Name: John Totaro
Fee Type: Waybill
Fee Type Number: WB20-50
Additional Comments:

THIS IS AN AUTOMATED MESSAGE. PLEASE DO NOT REPLY.



Pay.gov is a program of the U.S. Department of the Treasury, Bureau of the Fiscal Service