

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

Office of Economics

FD 32760 (Sub-No. 46)

April 14, 2021

302035

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

ENTERED
Office of Proceedings
April 19, 2021
Part of
Public Record

Re: Waybill Request WB21-29 & FD 32760

Dear Mr. Rosenthal:

The Surface Transportation Board (STB or Board) has received your request under 49 C.F.R. § 1244.9(b)(4) dated April 13, 2021 for permission to access the confidential Carload Waybill Sample (CCWS) with unmasked revenues in connection with FD 32760, BNSF Railway Company – Terminal Trackage Rights – Kansas City Southern Railway Company and Union Pacific Railroad Company, on behalf of Union Pacific Railroad Company. Specifically, you request access to data granted pursuant to WB20-45. This agreement includes four datasets. First, the 1994-2013 unmasked costed waybill samples for UP, SP, BNSF, ATSF, and KCSR. Second, the 2014-2019 unmasked costed waybill samples for all traffic pertaining to UP, KCSR, and BNSF. Third, the 1996-2016 unmasked costed waybill samples for all terminations and originations in Lake Charles (1995 BEA #86). Fourth, a limited subset of 2017-2019 data for the entire waybill sample as shown in Attachment A of WB20-45. You state the data in your request is needed to review redacted information that was submitted by BNSF Railway as part of this proceeding.

Based on the explanations and justifications contained in your request, you will be authorized to access the requested data. Specifically, I will grant you, in accordance with 49 C.F.R. § 1244.9(b)(4), access to the 1994-2013 unmasked costed waybill samples for UP, SP, BNSF, ATSF, and KCSR, the 2014-2019 unmasked costed waybill samples for all traffic pertaining to UP, KCSR, and BNSF, the 1996-2016 unmasked costed waybill samples for all terminations and originations in Lake Charles (1995 BEA #86), and a limited subset of 2017-2019 data for the entire waybill sample as shown in Attachment A of WB20-45. ***This approval becomes effective when signed agreements from the individuals listed below are received by the STB:***

a) *Michael Rosenthal – Covington & Burling LLP*

The expiration date for this agreement is April 30, 2022. Unless you seek and obtain a renewal from the STB, this agreement upon expiration obligates you to return or destroy 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

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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 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.

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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 **\$261** (\$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 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, PhD
Chief Economist & Director,
Office of Economics

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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: Michael 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, April 13, 2021 9:09 AM
To: Brennan, William <William.Brennan@stb.gov>
Subject: Waybill request for FD 32760 (Sub-No. 46)

Dear Dr. Brennan,

I represent Union Pacific Railroad Company in the referenced proceeding. Yesterday, BNSF Railway, another party in the referenced proceeding, filed material containing confidential Carload Waybill Sample data. BNSF redacted the Waybill Sample information. I'm requesting access to the carload waybill sample so that I can review the redacted information. I've attached the letter in which the Board granted BNSF access to the Waybill Sample data. I'm willing to sign the Board's standard waybill agreement.

Regards,

Mike Rosenthal