

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

Office of Economics

ENTERED
Office of Proceedings
April 30, 2021
Part of
Public Record

April 27, 2021

Ms. Sophia A. Vandergrift
Sullivan & Cromwell LLP
1700 New York Avenue, N.W.
Suite 700
Washington, D.C. 20006

Re: Waybill Request WB21-31 & FD36514

Dear Ms. Sophia A. Vandergrift:

The Surface Transportation Board (STB or Board) has received your request under 49 C.F.R. § 1244.9(b)(4) dated April 26 2021 for permission to access the confidential Carload Waybill Sample (CCWS) with unmasked revenues in connection with FD 36514, Canadian National Railway Company et al.-Control-Kansas City South, et al., on behalf of the Canadian Pacific Applicants in FD 36500, Canadian Pacific Railway Limited, Et al. – Control – Kansas City Southern, et al. Specifically, you request the use of data already in your possession from FD 36500 for use in FD 36514. This includes the unmasked 2015-2020 CCWSs for all records and fields.

Based on the explanations and justifications contained in your request, you will be authorized to use the data already in your possession from FD 36500 in the FD36514 proceeding. Specifically, I will grant you, in accordance with 49 C.F.R. § 1244.9(b)(4), access to the 2015-2019 unmasked costed waybill samples. You may use the copy of the data that you received from the STB Office of Economics or obtain a new copy. The 2020 costed waybill sample will be released to you once it becomes available. The access granted by this letter may be used only for purposes of the proceedings identified above. See 49 C.F.R. § 1244.9(b)(4)(v).

The approval for FD36514 becomes effective when signed agreements from the individuals listed below are received by the STB:

- a) Mr. David L. Meyer – Law Office of David L. Meyer*
- b) Ms. Sophia Vandergrift – Sullivan & Cronwell LLP*
- c) Mr. W. Robert Majure – Cornerstone Research*
- d) Mr. James B. Boswell – Cornerstone Research*
- e) Mr. Brad T. Howells – Cornerstone Research*
- f) Mr. Charis Katsiardinis – Cornerstone Research*
- g) Mr. Lorenzo Michelozzi – Cornerstone Research*
- h) Ms. Julia Y. Reinhold – Cornerstone Research*
- i) Ms. Ashley B. Vissing – Cornerstone Research*

- j) *Mr. Joseph Young – Cornerstone Research*
- k) *Mr. Michael Baranowski – FTI Consulting*
- l) *Mr. Benton Fisher – FTI Consulting*
- m) *Mr. Naga Sai Achyuth Kundeti – FTI Consulting*
- n) *Mr. Prabakaran Ponnuthurai – FTI Consulting*
- o) *Mr. Shane Vyskocil – FTI Consulting*
- p) *Mr. Nathan Zebrowski – FTI Consulting*
- q) *Mr. Bengt Muten – IHS Markit*
- r) *Mr. Paul Ciannavei – IHS Markit*
- s) *Mr. Paul Bingham – IHS Markit*
- t) *Ms. Mania Flaskou – IHS Markit*
- u) *Mr. Karlis Pujats – IHS Markit*
- v) *Mr. Jing K. Goh – Cornerstone Research*
- w) *Mr. Gang Lyu – Cornerstone Research*

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 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 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

Waybill Agreement WB21-31

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 any 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 **\$1,603** (\$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

Waybill Agreement WB21-31

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: David L. Meyer



Signature

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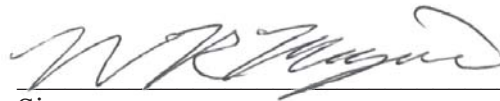
By: Sophia Vandergrift

Sophia Vandergrift
Signature

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By: ~~Robert W. Majure~~
W. Robert Majure

A handwritten signature in cursive script, appearing to read 'WR Majure', written over a horizontal line.

Signature

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By: James B. Boswell

Blake Boswell

Signature

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By: Brad T. Howells

Brad Howells

Signature

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By: ~~Charis Katsiardis~~
Charalampos ("Charis") Katsiardis

Charalampos Katsiardis

Signature

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By: Lorenzo Michelozzi

A handwritten signature in cursive script, reading "Lorenzo Michelozzi", written in black ink.

Signature

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By: Julia Y. Reinhold



Signature

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By: Ashley B. Vissing

A handwritten signature in cursive script that reads "Ashley Vissing". The signature is written in black ink and is positioned above a horizontal line.

Signature

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By: Joseph Young



Signature

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By: Michael Baranowski

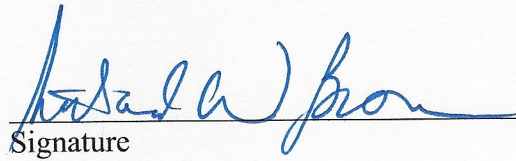
A handwritten signature in cursive script that reads "Michael Baranowski". The signature is written in black ink and is positioned above a horizontal line.

Signature

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By: Richard Brown


Signature

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By: Alex Ledoux

Jamieson Alexander Ledoux
Signature

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By: Prabaharan Ponnuthurai

A handwritten signature in black ink, appearing to read 'Prabaharan', written over a horizontal line.

Signature

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By: Shane Vyskocil

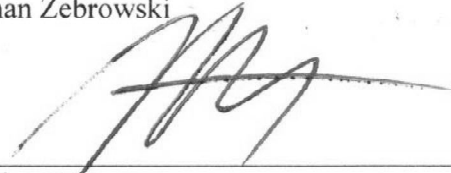
A handwritten signature in dark ink, appearing to read 'Shane Vyskocil', is written above a horizontal line.

Signature

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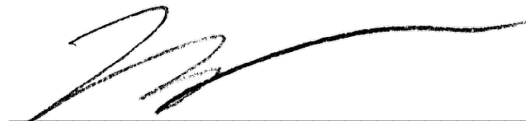
By: Nathan Zebrowski



Signature

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By: Bengt Mutén

A handwritten signature in black ink, appearing to be 'Bengt Mutén', written over a horizontal line.

Signature

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By: Paul Ciannavei

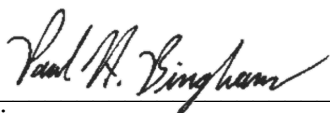
A handwritten signature in cursive script that reads "Paul Ciannavei". The signature is written in black ink and is positioned above a horizontal line.

Signature

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By: Paul Bingham

A handwritten signature in cursive script, reading "Paul H. Bingham", written in black ink.

Signature

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By: Mania Flaskou

Mania Flaskou

Signature

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By: Karlis Pujats



Signature

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By: Jing K. Goh

Jing Kun Goh

Signature

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By: Gang Lyu

A handwritten signature in cursive script that reads "Gang Lyu".

Signature

SULLIVAN & CROMWELL LLP

TELEPHONE: 1-202-956-7500
FACSIMILE: 1-202-956-7676
WWW.SULLCROM.COM

*1700 New York Avenue, N.W.
Suite 700
Washington, D.C. 20006-5215*

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MELBOURNE • SYDNEY

April 26, 2021

EXPEDITED CONSIDERATION REQUESTED

BY EMAIL

Dr. William Brennan [william.brennan@stb.gov]
Director/Chief Economist
Office of Economics
U.S. Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

Re: *Finance Docket No. 36514, Canadian National Railway Company, et al. – Control –
Kansas City Southern, et al.*

Dear Dr. Brennan:

I write on behalf of the Canadian Pacific Applicants in Finance Docket No. 36500¹ to request confirmation that we may use the confidential waybill sample data to which we were provided access for purposes of CP's participation in Finance Docket 36514, in which CP today noticed its intent to participate. *See Canadian Pacific's Notice of Intent to Participate*, Finance Docket No. 36514 (Apr. 26, 2021).

Pursuant to 49 C.F.R. § 1244.9(b)(4), CP Applicants' outside counsel and consultants in Finance Docket 36500—the proceeding related to CP's proposed acquisition of KCS—were granted access to certain confidential STB Waybill Sample data for use in the CP/KCS proceeding. *See Waybill Request WB21-24 & FD36500 Authorization Letter*, STB Office of Economics (Mar. 25,

¹ Canadian Pacific Applicants are Canadian Pacific Railway Ltd., Canadian Pacific Railway Company, and their U.S rail carrier subsidiaries Soo Line Railroad Company, Central Maine & Quebec Railway US, Inc., Dakota, Minnesota & Eastern Railroad Corporation, and Delaware and Hudson Railway Company, Inc. (collectively "CP").

2021). CP has an obvious interest in the newly-pending proceeding to address CN's proposed take over of KCS (Finance Docket No. 36514), and CP requires expedited access to the same STB Waybill Sample data for purposes of its participation in that proceeding, including any Board consideration of CN's proposed use of a voting trust notwithstanding substantial competitive overlap between CN and KCS.

Accordingly, under 49 C.F.R. § 1244.9(b)(4), CP respectfully request authorization for its outside counsel and consultants to use the STB Waybill Sample data *already in its possession* for the specific purpose of CP's participation in Finance Docket 36514. CP understands that – other than the proceeding limitation – the terms of that access will be the same as those governing access in Finance Docket No. 36500. CP's outside counsel and consultants, none of whom is a regular employee of CP Applicants, are the following:

1. Law Office of David L. Meyer and supporting contractors
2. Sullivan & Cromwell LLP and its employees
3. Robert W. Majure (affiliated with Cornerstone Research)
4. Selected employees of Cornerstone Research (see Attachment A)
5. Selected employees of FTI Consulting (see Attachment B)
6. Bengt Mutén selected employees of IHS Markit (see Attachment C)

Specifically, CP Applicants request authorization to use the same dataset to which we have already received access and authorization in Finance Docket No. 36500 for purposes of the Finance Docket No. 36514 proceeding. This includes the carload waybill data covering the period 2015 through 2019 (including all records, all fields, and confidential unmasked revenues) for all traffic and comparable data for 2020 when it becomes available. The purpose of this request is to allow CP Applicants' counsel and consultants to prepare various analyses and evidence relating to the impact of CN's proposed acquisition of KCS.

We understand that the Board grants access to these data pursuant to the terms of a protective order and solely for the purposes of a particular proceeding and any related litigation, and only after execution of appropriate confidentiality undertakings. In accordance with 49 C.F.R. § 1244.9(b)(1), any evidence drawn from the STB Waybill Sample will remain confidential, and will be submitted only to the Board unless the evidence is appropriately aggregated.

We will be submitting payment of \$1,603.00 to the STB's electronic payment system at pay.gov, reflecting the fixed fee of \$200 plus \$61 per person for each individual (a total of 23 outside counsel and consultants). 49 C.F.R. § 1002.2(f)(98)(i).

Please do not hesitate to contact me at (412) 889-1927 if you have any questions regarding this request.

Sincerely,

/s/ Sophia A. Vandergrift
Sophia A. Vandergrift
Counsel for Canadian Pacific

cc: Alexander Dusenberry [alexander.dusenberry@stb.gov]

Attachments

ATTACHMENT A
SELECTED PERSONNEL AT CORNERSTONE RESEARCH

1. James B. Boswell (principal data scientist)
2. Brad T. Howells (principal)
3. Charis Katsiardis (associate)
4. Lorenzo Michelozzi (senior manager)
5. Julia Y. Reinhold (analyst)
6. Ashley B. Vissing (associate)
7. Joseph Young (analyst)
8. Jing K. Goh (analyst)
9. Gang Lyu (analyst)

ATTACHMENT B
SELECTED PERSONNEL AT FTI CONSULTING

1. Michael Baranowski
2. Benton Fisher
3. Naga Sai Achyuth Kundeti
4. Prabaharan Ponnuthurai
5. Shane Vyskocil
6. Nathan Zebrowski

ATTACHMENT C
SELECTED PERSONNEL AT IHS MARKIT

1. Bengt Mutén
2. Paul Ciannavei
3. Paul Bingham
4. Mania Flaskou
5. Karlis Pujats