

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

Office of Economics

ENTERED
Office of Proceedings
June 9, 2021
Part of
Public Record

June 4, 2021

Mr. William A. Mullins
Baker & Miller PLLC
2401 Pennsylvania Avenue, NW
Suite 300
Washington, DC 20037

Re: Waybill Request WB21-41 & FD36514

Dear Mr. Mullins:

The Surface Transportation Board (STB or Board) has received your request under 49 C.F.R. § 1244.9(b)(4) dated June 3, 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 Kansas City Southern, The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company (collectively “KCS”). Specifically, you request 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 access the requested data for use 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. The 2020 costed waybill sample will be released to you once it becomes available. These datasets may only be used for purposes of this proceeding. 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) *William A. Mullins – Baker and Miller*
- b) *Crystal M. Zorbaugh – Baker and Miller*
- c) *Dr. William Huneke*
- d) *Dr. Kevin Neels – The Brattle Group*
- e) *Nicholas Powers – The Brattle Group*
- f) *John Michael – The Brattle Group*
- g) *Ivy Yang – The Brattle Group*
- h) *Misha Mubashar Khan – The Brattle Group*

The expiration date for this agreement is June 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

Waybill Agreement WB21-41

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.

Waybill Agreement WB21-41

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.

Sincerely,

William Brennan

William Brennan, PhD
Chief Economist & Director,
Office of Economics

Waybill Agreement WB21-41

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: William A. Mullins

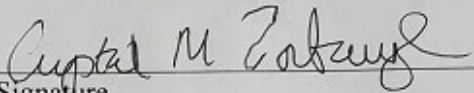
**William
Mullins**
Signature

Digitally signed by William Mullins
DN: cn=William Mullins, o=Baker &
Miller PLLC, ou=Baker & Miller PLLC,
email=wmullins@bakerandmiller.com,
c=US
Date: 2021.06.04 10:50:31 -04'00'

Waybill Agreement WB21-41

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By: Crystal M. Zorbaugh


Signature

Waiver Agreement WB21-41

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By: Dr. William Huneke

William Huneke

Signature

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By: Dr. Kevin Neels

A handwritten signature in blue ink that reads "Kevin Neels". The signature is written in a cursive style with a large, stylized 'K' and 'N'.

Signature

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By: Nicholas Powers



Signature

Waybill Agreement WB21-41

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By: John Michael



Signature

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By: Ivy Yang

Ivy Yang

Signature

Waybill Agreement WB21-41

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By: Misha Mubashar Khan

Misha Mubashar Khan

Signature

BAKER & MILLER PLLC

ATTORNEYS and COUNSELLORS

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WASHINGTON, DC 20037

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William A. Mullins

(202) 663-7823 (Direct Dial)
E-Mail: wmullins@bakerandmiller.com

June 3, 2021

By E-Mail

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

Re: Canadian National Railway Company, Grand Trunk Corporation, and CN's Rail Operating Subsidiaries – Control – Kansas City Southern, The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company, FD 36514

Dear Dr. Brennan:

I am writing on behalf of the Kansas City Southern, The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and The Texas Mexican Railway Company (collectively “KCS”) concerning KCS and Canadian National Railway Company, Grand Trunk Corporation, and CN's Rail Operating Subsidiaries (collectively “CN”)¹ intent to file an application seeking STB approval of CN's control of KCS. On April 28, 2021, the Board entered a Protective Order in this proceeding at the request of CN.

Pursuant to 49 C.F.R. § 1244.9(b)(4), we hereby request that KCS's outside counsel and consultants in the above-referenced proceeding be authorized to obtain and use certain confidential STB Waybill Sample data. Those outside counsel and consultants, none of whom is a regular employee of KCS is as follows:

1. William A. Mullins – Baker and Miller
2. Crystal M. Zorbaugh – Baker and Miller
3. Dr. William Huneke
4. Dr. Kevin Neels – The Brattle Group
5. Nicholas Powers – The Brattle Group
6. John Michael – The Brattle Group

¹ CN and KCS are collectively referred to herein as “Applicants.”

BAKER & MILLER PLLC

Dr. William Brennan

June 3, 2021

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7. Ivy Yang – The Brattle Group
8. Misha Mubashar Khan - The Brattle Group

This request seeks access to carload waybill data covering the period 2015 through 2019 (including all records, all fields, and confidential unmasked revenues) for all traffic. This request also seeks access to comparable data for 2020 when it becomes available. The purpose of this request is to allow KCS's counsel and consultants to prepare the various analyses and evidence required by 49 C.F.R. Part 1180 in support of the Applicants' planned Application. The requested data are essential to the preparation, *inter alia*, of the market and traffic impact analyses required by 49 C.F.R. §§ 1180.6(a)(2)(i) and 1180.7, as the STB Waybill Sample is the only single source of the data permitting a complete analysis of these issues.

KCS understands that access to these data will be granted pursuant to the terms of a protective order, solely for the purposes of this proceeding and any related litigation, and only after the 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 aggregated to the level of at least three shippers and will prevent the identification of an individual railroad.

The required fee of \$688.00, which includes a fixed fee of \$200 plus \$61 per person for each individual (a total of five (8) outside counsel and consultants) has been paid on pay.gov per 49 C.F.R. § 1002.2(f)(98)(i).

Should you have any questions, please contact me at (202) 663-7823 or by email at wmullins@bakerandmiller.com.

Sincerely,

/s/ William A. Mullins

William A. Mullins

Counsel for Kansas City Southern, The Kansas City
Southern Railway Company, Gateway Eastern
Railway Company, and The Texas Mexican Railway
Company

cc: Alexander Dusenberry (Alexander.Dusenberry@stb.gov)
Raymond Atkins (ratkins@sidley.com)
Matthew J. Warren (mjwarren@sidley.com)