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August 4, 2021

William Brennan, PhD
Director
Office of Economics
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001Re: Revised Request for Permission to Use Data from STB Carload Waybill Sample

Dear Dr. Brennan:

On behalf of Trinity Industries, Inc. ("Trinity"),¹ and pursuant to 49 C.F.R. §1244.9(c), we hereby request that the Surface Transportation Board ("STB") grant access to Trinity and its consultant,² pursuant to the modified confidentiality agreements described herein, to use the specific data fields of the STB confidential Carload Waybill Sample ("CCWS") for 2019 identified at Attachment A to this letter. Please note that Attachment A identifies a far more limited list of data fields than Trinity included in its October 13, 2020 request for access to data from the 2019 CCWS;³ As explained herein, Trinity has excluded numerous data fields in order to address the concerns you raised in your December 2020 denial of Trinity's earlier request and those raised by the STB in its June 2021 denial of Trinity's subsequent appeal.⁴

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

² Trinity's consultant, Patrick J. Krick, is an experienced, independent transportation economist who has been retained by Trinity to conduct research regarding trends in rail freight traffic and equipment usage; the scope of that research is described in more detail herein.

³ Letter from John B. Totaro, Jr. to William Brennan (October 13, 2020) ("*Trinity 2020 Request*").

⁴ Letter from William Brennan, PhD to John B. Totaro, Jr. (December 4, 2020) (Waybill Request WB 20-50) ("*Director's 2020 Decision re Trinity*"); Request for Waybill Data (Trinity Industries), WB 20-50 (STB served June 17, 2021) ("*Trinity Industries*").

In addition, while its consideration of the instant request is pending, we request that the STB permit Trinity to refrain from taking any action regarding the prior confidentiality agreements under which the STB has granted access to CCWS data to Trinity over the past several years: 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 WB19-58.⁵ If the STB grants Trinity's instant request for a more limited scope of data fields for the 2019 CCWS than the STB has released to Trinity under these prior agreements, we would follow your instructions regarding the proper treatment of these prior years' data, including, as appropriate, the return or destruction of portions of those data.

I. Trinity Is an "Other User" Which May Request Data from the CCWS, Subject to the Requirements which Apply to all "Other Users" to Explain and Justify Their Need for the Requested Data

The STB's regulations at 49 C.F.R. §1244.9(c) place no restriction on the type of entity which may request access to the CCWS as an "other user," except that it is a user other than those described in paragraphs (b)(1) through (b)(5).⁶ In particular, the STB's regulations do not exclude entities that are engaged in "commercial" activities from the category of parties which can request permission to use, and under appropriate circumstances receive, data from the CCWS under 19 C.F.R. §1244.9(c). Similarly, the STB's regulations at 19 C.F.R. §1244.9(e) require that an "other user" requesting data from the CCWS must include a "complete and detailed explanation of the purpose for which the requested data are needed," and a "detailed justification as to why the specified waybill data are needed;" but these regulations do not state that such a purpose must be unrelated to the operations of a "commercial" entity, nor do they state that a "commercial" firm cannot present a "need" that would support permission to use data from the CCWS. The absence of such exclusions supports Trinity's request.

In this regard, it is significant that in its 1987 explanation of the development of the procedures for release of data from the CCWS, the Interstate Commerce Commission noted that among the non-government entities which "sometimes seek access to waybill sample data," most fall into five groups, including "freight car builders" and that the purposes for which such entities

⁵ 49 C.F.R. §1244.9(c). The Director emailed the undersigned on July 12, 2021 and explained that in light of the STB's June 2021 denial of Trinity's December 2020 appeal, he did not have discretion to grant an extension of these confidentiality agreements "that would permit Trinity to continue to use the data in its possession for the private, commercial purposes specified in its request." However, we request that the Director reconsider that position in light of this instant revised request for access to data from the 2019 CCWS, as the filing of such requests normally stays the expiration of prior years' confidentiality agreements.

⁶ Those categories of users are railroads, Federal agencies, States, and transportation practitioners, consulting firms, and law firms participating in specific proceedings. 49 C.F.R. §1244.9(b)(5) explains the availability of the Public Use Waybill File and describes its contents; the regulations do not identify any category of user as one which may only access the Public Use Waybill File.

request these data are related to their operations.⁷ These references reflect the fact that in developing the rigorous standards that an “other user” must meet under the regulation now designated as 19 C.F.R. §1244.9(e) before a release of data from the CCWS can be approved, the STB’s predecessor agency did not state or suggest that these procedures were simply unavailable to “other users” such as freight car builders, or that permission for such a party to use data from the CCWS for purposes related to its operations, such as the development of freight car manufacturing plans, must be refused in all circumstances.

Trinity does not suggest, nor do these references in the *Waybill Procedures* indicate, that railcar manufacturers are a “special class entitled to preferred access” to data from the CCWS.⁸ We submit, however, that it is significant that the *Waybill Procedures* do not reflect any intention by the ICC to exclude from the category of parties eligible to request permission to use data from the CCWS as “other users” any type of entity, including a railcar manufacturer, solely because its operations could be described as “commercial.” Similarly, the *Waybill Procedures* do not suggest that the ICC intended to bar release of CCWS data to an “other user” engaged in “commercial” activities solely because the purpose for which it intended to use the data – such as conducting a freight car manufacturing plan – could be characterized as “private, commercial use” or a use “in its own business.”⁹

As referenced above, before granting a request for permission to use CCWS data received from an “other user” – a “commercial” user or otherwise, the Director must determine that the requesting party has demonstrated a “particular and legitimate need” and provided a “detailed justification” for its proposed use of the CCWS fields identified in its request.¹⁰ And, by requiring that the Director assess, for every request by an “other user,” (1) whether the request provides a “detailed explanation of the purpose for which the requested data are needed,” (2) whether the specific waybill data or fields requested are “actually required,” and (3) whether the request has presented a “detailed justification as to why the specified waybill data are needed,” as well as consider any objections to the requested release, the STB regulations at 19 C.F.R. §1244.9(d) and (e) have for decades required that the Director undertake an “inquiry into the competitive implications of each request”¹¹ for data from the CCWS by any “other user.” But

⁷ *Procedures on Release of Data from the ICC Waybill Sample*, 4 I.C.C.2d 194, 1987 ICC LEXIS 377 (1987) (“*Waybill Procedures*”) at 195-196 and n.3. Referenced uses for such data included “analyses of rail traffic flows and patterns, ... studies of movements of hazardous materials, coal and other commodities, ... [and] development of freight car manufacturing plans.” *Id.* at n.2.

⁸ *Trinity Industries*, WB20-50, slip. op. at 5.

⁹ *Director’s 2020 Decision re Trinity* at 1; *Trinity Industries*, WB20-50, slip op. at 6.

¹⁰ *Waybill Procedures* at 196 and 199.

¹¹ *Trinity Industries*, WB20-50, slip op. at 3. See also *Waybill Procedures* at 200 (“we should emphasize that the Director of OTA carefully evaluates all waybill requests and may further refine or qualify the data actually released.”) And this remains the STB’s practice. For example, just weeks ago, the Director engaged in such an inquiry, issued an initial denial, and provided a requestor an opportunity to revise its request to address these types

we submit that the ICC's references to freight car manufacturers demonstrate the agency's understanding that among the many types of entities which can request access to CCWS data as an "other user" are those which are engaged in operations like Trinity's, and that such a user can have a particular and legitimate need that relates to its operations as, for example, a freight car manufacturer and that supports a limited release of certain data from the CCWS. (In this regard, while the nature of the studies that Trinity's consultant plans to conduct using data from the CCWS are the same as those described in its October 2020 request, we ask that the Director re-evaluate Trinity's explanations in support of its request, set out *infra*, in light of the further-narrowed range of data fields included in Attachment A of the instant request.)

Despite this history and the plain terms of its regulations, recent decisions indicate that it is now the STB's policy to prohibit the release of any portion of the CCWS to an "other user" for purposes that the STB characterizes as "private, commercial use."¹² While these decisions rely on this policy, the word "commercial" and the phrases "commercial use" and "private, commercial use" are not defined in those decisions, and, more importantly, they are not defined in the agency's regulations; those phrases also are not referenced in the *Waybill Procedures*. In fact, the implementation of this policy has the effect of making substantive modifications to the existing regulations at 49 CFR Part 1244, first, by limiting the scope of the "other users" category under 49 C.F.R. §1244.9(c) to exclude all "commercial" users, and second, by requiring that the Director deny any request for use of CCWS by an "other user" under 49 C.F.R. §1244.9(c) if the proposed use is a "commercial use;" as such, these modifications were effected in a manner that is inconsistent with the notice-and-comment requirements under Section 553 of the Administrative Procedure Act ("APA").¹³ Moreover, a reviewing court would likely find that the STB's implementation of a policy requiring the denial of any request under 49 C.F.R. §1244.9(c) in which the proposed use of CCWS data was by a "commercial" user or for "private, commercial use" was arbitrary and capricious, because "commercial," "commercial use," and "private, commercial use" are not defined in the agency's regulations, nor are their meanings explained in the agency's recent decisions.¹⁴

of concerns. See Waybill Request WB21-03, Decision ID 50837 (June 23, 2021) (explaining that among the Director's concerns with the original request was that it did "not adequately explain which waybill data/fields are required for each purpose or provide a detailed justification as to why the CCWS data are needed for each purpose.")

¹² U.S. Wheat, WB 20-40, slip op. at 5, Trinity Industries, WB20-50, slip. op. at 2-4.

¹³ 5 U.S.C. §553. The regulations at 49 CFR Part 1244 were enacted pursuant to APA rulemaking procedures and the STB has made substantive modifications to these regulations pursuant to such procedures. See 51 Fed. Reg. 767, 768, *Procedures on Release of Data From the ICC Waybill Sample* (Jan. 8, 1986) and 52 Fed. Reg. 12415, 12416, *Procedures on Release of Data From the ICC Waybill Sample* (Apr. 16, 1987), and, e.g., 64 Fed. Reg. 26723, *Modification of the Carload Waybill Sample and Public Use File Regulations* (May 17, 1999).

¹⁴ 5 U.S.C. § 706.

As the Director is aware, the STB has granted permission to Trinity to use portions of the CCWS on sixteen separate occasions over the past several years.¹⁵ When one of Trinity's requests was denied based on an objection in 2009, the STB explained that this denial was appropriate because Trinity's request (1) was too broad (Trinity had not explained why certain data fields were "essential" to the studies it planned to conduct), and (2) revealed shipper-specific information, not because Trinity was a "commercial" "other user" or because its studies had a "commercial" purpose.¹⁶ If Trinity is now excluded from the procedures under 49 C.F.R. §§1244.9(c) and (e) because the STB considers it to be a "commercial" entity, and therefore the STB considers Trinity's narrowly-defined studies to be "private, commercial use" of the limited number of CCWS data fields identified in Attachment A (or any portion of the CCWS), we request an explanation that addresses the APA concerns raised by the STB's recent policy as outlined above. At the very least, Trinity requests that the STB define the key terms underlying its recent policy: "commercial," "commercial use," and "private commercial use."

II. Trinity's Request for Confidential Data Excludes Numerous Data Fields, Including those Identified in the STB's Recent Decision as Creating an Impermissible Risk

As in Trinity's prior years' requests for data from the CCWS that were approved by the STB, *e.g.*, WB 19-58, and as in Trinity's 2020 request for 2019 CCWS data, the list of data fields in Attachment A to the instant request excludes fields that identify cost and revenue information, as well as fields that provide shipper-specific data and other sensitive data. However, in its recent decision, the STB explained that because Trinity's 2020 request included both origin/destination (FSAC) data and 7-digit STCC commodity information data fields, this would permit the identification of shippers and consignees, and therefore that a request that included both of these categories of fields was appropriately denied¹⁷ To address this concern, Trinity has eliminated from its current request 2019 CCWS fields pertaining to traffic FSAC origin/destination, geographic and carrier routing, and equipment identification detail.¹⁸ For the STB's reference, the following identifies the specific fields that Trinity has excluded from the instant request, and explains the rationale for each exclusion:

¹⁵ 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.

¹⁶ Letter to Herbert E. Harris II and John B. Totaro, Jr. from Charles D. Nottingham, Chairman (March 11, 2009). It is worth noting that the party which objected to Trinity's original request (a shipper) did not object to Trinity's revised request, which addressed both bases for the STB's March 2009 denial by excluding several data fields of the CCWS; this suggests that Trinity's revision satisfied this party's concerns, and the STB's approval of that revised request demonstrates the agency's determination that Trinity had satisfied the requirements of 49 C.F.R. 1244.9(e). See Letter to Leland L. Gardner from John B. Totaro, *Revised Request for Permission to Use Data from STB Carload Waybill Sample* (May 5, 2009) and Letter to John B. Totaro, Jr. from Leland L. Gardner, *In Response Refer to Waybill Request WB605-5* (July 1, 2009).

¹⁷ Trinity Industries, WB20-50, slip. op. at 2 and 4.

¹⁸ See *id.* at 4.

The data fields identified in Attachment A are fundamental to Trinity's primary use of the CCWS data, which is to match detailed equipment types (AAR 4-digit alpha numeric codes, Field 70) with detailed commodity type (7-digit STCC codes including hazardous commodities, Field 76), and as such are essential to the scope of work that Trinity describes in Section III, *infra*. The data fields that Trinity eliminated from its October 2020 request to prepare the list at Attachment A also ensures that these data are anonymous. Trinity believes that this culling of its list of requested data is overbroad, inconsistent with longstanding STB practice, and impugns the integrity of the commitments to maintain the confidentiality of released data that Trinity and its consultant have made to the STB for more than a decade, implying that these parties and their commitments can no longer be trusted. Nevertheless, we have limited our request in this manner to address the concerns articulated in the STB's June 2021 decision. With these additional safeguards, the direct relationship between the requested data and the studies Trinity proposes to conduct, as well as the modifications to the STB's confidentiality agreements proposed, *infra*, we request that the STB release this limited list of data fields to Trinity.

The CCWS data fields struck through (~~struck~~) in the list at Attachment A were included in Trinity's October 2020 request for data from the 2019 CCWS but are not included in Trinity's current request. The following describes the four sections of fields that Trinity has eliminated from its previous request and explains how these deletions address the concerns raised by the STB.

- Trinity's revised request has eliminated Fields 6 through 11, which provide specific rail car or equipment identification numbers. This addresses directly the Board's stated concerns that release of unique equipment identification data presents too high a risk that confidentiality of specific shippers, carriers, or car owners could be compromised, despite the sworn statements of Trinity's consultant and a representative of Trinity to uphold the confidentiality of these data as per the STB's aggregation requirements and the defined scope of use set out in the STB's confidentiality agreement.
- Trinity's revised request has eliminated Fields 30 through 52 and Fields 77 through 86, which provide information regarding waybill reporting and carrier railroads involved in sampled traffic. Such elimination addresses directly the Board's stated concerns that release of data identifying which rail carriers are involved in any given CCWS record presents too high a risk that the confidentiality of specific shippers, carriers, or car owners could be compromised, despite the sworn statements of Trinity's consultant and a representative of Trinity to uphold the confidentiality of these data as per the STB's aggregation requirements and the defined scope of use set out in the STB's confidentiality agreement.
- Trinity's revised request has eliminated Fields 113 through 122 and 124 through 134, which provide information regarding the geographical and distance descriptions of moves. This addresses directly the Board's stated concerns that release of such data

presents too high a risk that the confidentiality of specific shippers, carriers, or car owners could be compromised, despite the sworn statements of Trinity's consultant and a representative of Trinity to uphold the confidentiality of these data as per the STB's aggregation requirements and the defined scope of use set out in the STB's confidentiality agreement.

Because it would not receive a "combination of origin/destination and commodity data," unique car initial and number data, or any data describing the detailed geographical and carrier route characteristics of traffic the revised subset of CCWS data fields would not provide "detailed shipment-by-shipment information that could reveal shipper traffic volumes and commodities, detailed origin/destination and routing information, and the identities of the serving railroads;" nor would the requested data "permit identification of a shipper and consignee" or possibly "disclose a railroad's significant customers and also the rate (including confidential contract rates) at which it transports the traffic."¹⁹ Moreover, limiting the list of data fields in this way would eliminate any potential risk that release of the identified data fields to Trinity would create a "competitive advantage" for Trinity.²⁰

The STB's recent decisions suggest that the agency's position may now be that any release of any CCWS data to a "commercial" "other user" would create an impermissible risk that the requesting party would gain a "competitive advantage" relative to other, similarly placed entities, because the requesting party would then have information that its competitor would not. This position is inconsistent with the STB's regulations, which include no such criterion for denying the release of data to an "other user."²¹ In any case, to the extent that any such risk remains in Trinity's current request, it would be small (due to the limited number of data fields requested) and limited in duration (as any competitor with a similar need for these data could file its own request). Moreover, we request that the STB weigh any such risk against the substantial benefit to shippers, and indeed to the entire U.S. rail transportation system, of providing access to limited portions of data from the CCWS, aggregated to protect confidentiality, to a manufacturer and supplier of railcars, and thereby to improving that manufacturer's ability to produce the types of railcars that are needed by shippers in the United States. These benefits include increased safety and reduction in congestion, as shippers of commodities (in some cases hazardous) that require particular types of railcars will have more efficient access to that equipment.

¹⁹ *Id.* at 2-4; CSX Corp.—Control & Operating Leases/Exemptions—Conrail Inc. (Conrail), FD 33388, slip. op. at 6 (STB served Oct. 3, 1997).

²⁰ See *Trinity Industries*, WB20-50, slip. op. at 4.

²¹ Moreover, the *Waybill Procedures* indicate that the rigorous procedures that must be followed before the release of CCWS is authorized are intended to safeguard against the potential for "competitive harm to carriers and shippers," not competitive harm between similarly placed "other users" which are neither carriers nor shippers. *Waybill Procedures* at 198.

Trinity's request for a narrow range of data for use in a focused analysis contrasts starkly with the broad requests for confidential data that the Board analyzed in its U.S. Wheat and InterVISTAS Study decisions. In the latter decision, the Western Coal Traffic League (WCTL) sought "certain workpapers underlying the study performed by InterVISTAS Consulting LLC (InterVISTAS Report)," some of those workpapers included data from the CCWS.²² The STB described the InterVISTAS Report as "general subject matter study," and the purpose for which the WCTL sought the confidential workpapers was to allow it to "'replicate' specified calculations" in that general subject matter study.²³ The STB refused to permit this broad release of confidential information because the purpose for which WCTL sought this data – "'because it believes that the information might facilitate review of'" the InterVISTAS Report – was not a "compelling rationale for disclosure."²⁴

Similarly, in U.S. Wheat, the scope of CCWS data requested was extremely broad: it covered nearly the entire CCWS, for a 36-year period,²⁵ and the request by USW sought "disclosure of confidential rail contract, rate, and other information" for the specific purpose of identifying "'time and costs associated with all of the relevant components of the rail shipments form the U.S. to Mexico.'"²⁶ Indeed, USW stated that "confidential contract revenues are a critical component" of the analysis it planned to conduct using the CCWS.²⁷ In upholding the Director's denial of USW's request, the STB noted that USW's "request emphasizes that obtaining confidential contract information [(including revenues)] is one of its core purposes;" the STB explained that while it collects 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."²⁸

As discussed above, in addition to excluding all cost and revenue data, the data fields identified in the instant request eliminates FSAC origin and destination and car identification information, and thus will not reveal the identity of shippers or railroads. Consequently, if it were to release these data to Trinity, the STB would not be acting contrary to its "responsibility

²² InterVISTAS Study, EP 736, slip op. at 1.

²³ *Id.* at 1-2.

²⁴ *Id.* at 3-4, *quoting* its previous Decision in that proceeding (STB served February 28, 2018), slip op. at 2

²⁵ Letter from Daniel R. Elliott from William Brennan Re: Waybill Request WB20-40 (September 4, 2020) at 1.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Request for Waybill Data (U.S. Wheat), WB 20-40 (STB served Nov. 20, 2020) at 2-3 and 5 (*emphasis added*).

to maintain the confidentiality of waybill data, [or to] the interest of shippers and railroads in maintaining the confidentiality of data relating to their shipments.”²⁹ The remaining fields are essentially an anonymous pool of data that identifies only the commodity shipped and the type of car in which it was shipped. With respect to the commodity-shipped data fields containing data that is reported at the 7-digit Standard Transportation Commodity Code (“STCC”) level, Trinity’s request with respect to these fields should be acceptable, as the STB makes information at the 7-digit STCC level available on its web site.³⁰ If this is not the case, please explain why Trinity’s proposed use for these data does not support the limited release it has requested.

III. 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 or from other information that the STB makes available to the public. 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.

As the Director is aware, information on the commodity shipped in rail freight traffic is reported in waybill data according to STCC numbers. The CCWS presents information on commodity shipped at the 7-digit STCC level, as well as information on car type by alpha-plus-four-digit code. However, the Public Use Waybill file contains only 5-digit STCC numbers, and while other reports available on the STB’s website include some commodity-shipped information at the 7-digit STCC level, both of these public sources of data contain car-type information only at the alpha car-code level. For many commodities, the 5-digit STCC defines a

²⁹ *Id.* at 5.

³⁰ See the STB’s 7-digit commodity revenue stratification reports, available at <https://prod.stb.gov/reports-data/economicdata/>.

heterogeneous combination of products which may require significantly different equipment and features in the equipment used to transport them, and the alpha car-type code identifies only the broad category of car (e.g., covered hopper car, tank car), and does not permit the user to identify the features and characteristics of the different types of equipment used to transport specific types of commodities.

The importance of commodity specificity combined with car-type specificity to Trinity is particularly pronounced in its study of chemical traffic. For example, several 5-digit STCC's for chemicals encompass a mix of 7-digit STCC's for products that are toxic by inhalation hazards (TIH), products that are environmentally sensitive commodities (ESC), or products with no specific designation. Selected examples of such chemical STCC's are presented in Attachment B to this letter. In addition to 5-digit STCC's often being highly heterogeneous, 5-digit STCC nomenclature can be misleading as to the range of 7-digit products included within that group. This is also plainly shown in the examples in Attachment B. The nature of the chemicals classified in a 7-digit STCC determine the critical designs and features of the tank cars required to carry those products safely. These different products require different types of rail equipment. As such, Trinity's understanding of market trends (both what type of product is being transported and in what type of car the product is transported) and overall demand from shippers is greatly enhanced by this more specific knowledge which is unavailable from the Public Use Waybill file and other information available to the public on the STB's website. This knowledge improves Trinity's ability to produce the types of railcars that are needed by shippers in the United States, which in turn benefits the entire North American freight rail system by increasing its safety and reducing congestion, as shippers of commodities that require particular types of railcars will have more efficient access to that equipment.

IV. Trinity Proposes that the Board Modify its Standard Confidentiality Agreement to Reflect the Additional Confidentiality Procedures that Trinity Has and Continues to Apply in its Handling of Released Data

The confidentiality agreements that Trinity and its consultant, Patrick Krick, have signed in connection with the STB's release of CCWS data to them in prior years has included the following paragraph:

You acknowledge that, in addition to the restrictions described in paragraphs 1 and 2 above, you are bound by the STB's rules governing use and disclosure of CCWS data. These include the confidentiality provisions of 49 C.F.R. §§ 1244.9(f)(1)-(3), which require that "[a]ny shipper data obtained from the Waybill Sample shall not be publicly released unless the data are aggregated to include at least three shippers." In addition, you agree not to disclose CCWS data that permits identification of an individual railroad.³¹

³¹ Waybill Agreement WB19-58 at 2 (*emphasis added*).

While these agreements and the underlying regulations would require that the referenced aggregation be performed before CCWS data or reports created therefrom is released to the public, in practice, Trinity's procedures regarding these data have been far more conservative. That is, for the many years that Trinity and Mr. Krick have been receiving these data, the raw CCWS data released by the STB have been transmitted directly to Mr. Krick, not to Trinity, and remain in Mr. Krick's possession.³² Moreover, Mr. Krick does not present any analysis of the CCWS to Trinity unless that analysis reflects the three-FSAC aggregation required under 49 C.F.R. §§ 1244.9(f). While Trinity has explained these procedures to the STB in its previous requests and offered to sign agreements to this effect, the confidentiality agreements provided by the STB permitted the same access to the CCWS data to Trinity and Mr. Krick.³³

Thus, while the requested data from the CCWS is essential to the analyses that Mr. Krick performs for Trinity, all of the work product that Trinity has access to is aggregated to a level that the STB has deemed sufficient for release to the public. These procedures eliminate the confidentiality and competitive harm concerns that the Director and the STB have raised with respect to Trinity's 2020 request, and we propose that the STB formalize these procedures in the confidentiality agreements prepared in connection with the instant request. That is, we propose that the agreement which is prepared for Mr. Krick specify that his disclosure of CCWS data or reports or other information derived therefrom to Trinity are also bound by the aggregation provisions of 49 C.F.R. §§ 1244.9(f)(1)-(3); we also propose that the agreement that is prepared for Trinity acknowledge that the raw CCWS data will be released to and maintained by Mr. Krick, and that Trinity will only have access to data, reports or other information derived from the CCWS to which Mr. Krick has applied the aggregation provisions of 49 C.F.R. §§ 1244.9(f)(1)-(3).³⁴ Of course, since Trinity's current, revised request for data from the 2019 CCWS eliminates FSAC origin and destination information, the three-FSAC aggregation requirement referenced in these modified agreements would apply with respect to prior-years' CCWS data previously released to and maintained by Mr. Krick.

³² See, e.g., Trinity's October 29, 2019 request for access to data from the 2018 CCWS at n.2 ("Assuming that the STB grants the access to the 2018 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.")

³³ See, e.g., *id.* at 3 ("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.") *and* Waybill Agreement WB19-58 at 2.

³⁴ 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.

Trinity's proposal in this regard is different than those the STB reviewed in its U.S. Wheat and InterVISTAS Study decisions, where the requesting parties argued that the STB should authorize release of a broad range of cost, revenue and other particularly sensitive and shipper- and railroad-identity-revealing data from the CCWS, without presenting a legitimate justification for release, because the parties would pledge not to reveal such data in confidentiality agreements.³⁵ Trinity is not arguing that entering into the agreements described *supra* are a "justification for release of the data in the first place;"³⁶ rather, Trinity believes that it has presented a legitimate need for the limited scope of data in its request, and that the limited nature of its request alone constitutes an adequate safeguard to protect shippers' and railroads' interests in the confidentiality of their data. We propose these modified agreements and the commitments therein simply as a further layer of assurance to the STB that any remaining risk of disclosure and competitive harm posed by Trinity's request has been addressed.

Trinity submits that these procedures and commitments, in addition to 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),³⁷ 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 C.

³⁵ U.S. Wheat, WB 20-40, slip op. at 3; InterVISTAS Study, EP 736, slip op. at 4.

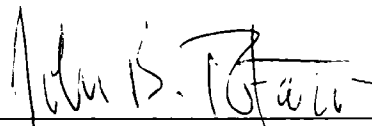
³⁶ U.S. Wheat, WB 20-40, slip op. at 3.

³⁷ 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).

William Brennan, PhD
August 4, 2021
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We appreciate your consideration of this request. Please contact the undersigned if you require any additional information.

Respectfully submitted,



John B. Totaro, Jr.

Counsel to Trinity Industries, Inc.

Encl.

ATTACHMENT A

ATTACHMENT A

Trinity requests that only its consultant be provided access to 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 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 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

The CCWS fields struck through (~~struck~~) in the list above were included in Trinity's October 2020 request for data from the 2019 CCWS but are not included in Trinity's current request. The following describes the four sections of fields that Trinity has eliminated from its previous request and explains how these deletions address the concerns raised by the STB.

Trinity's revised request has eliminated Fields 6 through 11, which provide specific rail car or equipment identification numbers. This addresses directly the Board's stated concerns that release of unique equipment identification data presents too high a risk that confidentiality of specific shippers, carriers, or car owners could be compromised, despite the sworn statements of Trinity's consultant and a representative of Trinity to uphold the

ATTACHMENT A to Trinity Request (cont.)

confidentiality of these data as per the STB's aggregation requirements and the defined scope of use set out in the STB's confidentiality agreement.

Trinity's revised request has eliminated Fields 30 through 52 and Fields 77 through 86, which provide information regarding waybill reporting and carrier railroads involved in sampled traffic. Such elimination addresses directly the Board's stated concerns that release of data identifying which rail carriers are involved in any given CCWS record presents too high a risk that the confidentiality of specific shippers, carriers, or car owners could be compromised, despite the sworn statements of Trinity's consultant and a representative of Trinity to uphold the confidentiality of these data as per the STB's aggregation requirements and the defined scope of use set out in the STB's confidentiality agreement.

Trinity's revised request has eliminated Fields 113 through 122 and 124 through 134, which provide information regarding the geographical and distance descriptions of moves. This addresses directly the Board's stated concerns that release of such data presents too high a risk that the confidentiality of specific shippers, carriers, or car owners could be compromised, despite the sworn statements of Trinity's consultant and a representative of Trinity to uphold the confidentiality of these data as per the STB's aggregation requirements and the defined scope of use set out in the STB's confidentiality agreement.

ATTACHMENT B

Attachment B**5-digit & 7-digit STCC Examples**

<u>Description</u>	<u>Hazard Class</u>	<u>TIH/ESC/ND*</u>	<u>STCC</u>
Industrial gases NEC, solid or liquified			28139
Methyl Mercaptan	Poison Gas	TIH	2813950
Vinyl Chloride Monomer	Flammable Gas	ND	2813966
Crude products from coal tar, natural gas, or petroleum			28141
Benzene	Flammable Liquid	ESC	2814116
Toluene	Flammable Liquid	ND	2814167
Xylene	Flammable Liquid	ESC	2814170
Isobutane	Flammable Gas	ND	2814175
Cyclic Intermediates-Benzene,Toluene, Napthalene, Anthracene			28151
Phenol	Poisonous Material	ESC	2815111
Maleic Anhydride	Corrosive	ND	2815141
Toluene Diisocyanate	Poisonous Material	ND	2815166
Misc. Acyclic Organic Chemicals			28181
Acrylonitrile	Flammable Liquid	ESC	2818102
Acetaldehyde	Flammable Liquid	ESC	2818103
Acetone	Flammable Liquid	ESC	2818105
Methylmethacrylate monomer	Flammable Liquid	ESC	2818112
Butyl Acrylates	Flammable Liquid	ESC	2818115
Ethanolamine	Corrosive	ND	2818127
Ethyl Acetate	Flammable Liquid	ESC	2818136
Ethylene Dichloride	Flammable Liquid	ND	2818140
Formaldehyde	Corrosive	ND	2818144
Hexamethylenediamine	Corrosive	ND	2818169
Misc. Acyclic Organic Chemicals			28182
Ethylene Oxide-TIH	Poison Gas	TIH	2818239
Propylene Oxide	Flammable Liquid	ND	2818265
Misc. Cyclic Organic Chemicals			28183
Styrene Monomer -ESC	Flammable Liquid	ESC	2818342
Cyclohexane-ESC	Flammable Liquid	ESC	2818370
Alcohols			28184
Ethanol	Flammable Liquid	ESC	2818419
Alcohols, NOS	Flammable Liquid	ESC	2818420
Methanol	Flammable Liquid	ESC	2818426
Isopropanol	Flammable Liquid	ESC	2818429
Organic Acids or Salts			28186
Acetic Acid	Corrosive	ND	2818610
Acetic Anhydride	Corrosive	ESC	2818644
Vinyl Acetate	Flammable Liquid	ESC	2818668
Acrylic Acid	Corrosive	ESC	2818692

***NOTES:**

TIH - Toxic by Inhalation Hazard

ESC - Environmentally Sensitive Commodity

ND - No Designation

ATTACHMENT C

John Totaro

From: notification@pay.gov
Sent: Wednesday, August 4, 2021 4:31 PM
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: 26SUDSIP
Agency Tracking ID: 76133396148
Transaction Type: Sale
Transaction Date: 08/04/2021 04:30:59 PM 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