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By E-filing

Dr. William Brennan
Director, Office of Economics
Surface Transportation Board
395 E St., SW
Washington, DC 20423

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Re: Waybill Request 21-50

Dear Dr. Brennan:

The Western Coal Traffic League (“WCTL”) strongly opposes the request that the Association of American Railroads (“AAR”) submitted on July 28, 2021, for permission to use the AAR’s 1972-2019 waybill sample “for its educational and advocacy purposes.”

The AAR’s request is highly problematic in multiple respects and should be denied. First, the AAR seeks access to the full waybill sample, all elements except for the masking factors. Access to such commercially sensitive information is rarely granted for broad private, commercial, or stakeholder advocacy purposes outside of a specific proceeding as the AAR requests here. For example, the Board denied WCTL access to waybill data in *Intervistas Study*, EP 736 (STB served June 25, 2018), for purposes of reviewing a study that the Board itself had commissioned on the grounds that “access to the data itself is ... subject to a rigorous needs-based analysis.” *Id.* at 4. The AAR itself regularly submits vigorous oppositions when others request far more limited portions of the waybill data for specifically-identified purposes.

Second, AAR requests this information in its capacity as an “other user” under 49 C.F.R. § 1244.9(c), but then asserts that it is “simply requesting the information our members own and which our members are otherwise entitled.” This sleight-of-hand is problematic. While an individual railroad may obtain access to its own waybill records, “[t]he railroad shall not have access to waybill data pertaining to traffic in which it did not participate.” *Id.* § 1244.9(b)(1). Furthermore, “other users” are defined as “[u]sers other than those described in paragraphs (b)(1) through (b)(5), including individual railroads. *Id.* § 1244.9(c). Nothing in the Board’s regulations contemplate any collective entitlement or preferential access to the data of individual railroads, especially

for open-ended purposes. As explained *infra*, the request for collective use does not reduce the complications, but instead increases them.

Third, the purposes for which the AAR seeks to utilize data, which spans a period of almost fifty years, are defined very broadly and vaguely – “for its educational and advocacy purposes.” Virtually no use would be off limits. The request is not even confined to a specific proceeding, as in *Intervistas Study, supra*. The AAR enumerates various examples, but the listing appears to be illustrative, rather than comprehensive. Even if viewed as comprehensive, it is still highly problematic in terms of its broad scope and inclusion of matters that are of deep importance to WCTL members and other captive shippers. For example, the AAR’s first enumerated item encompasses measurement of productivity, class and service exemptions, interlined and rebilled traffic, freight flows, capacity and traffic projections, rate regulation and other (not more specifically defined) STB rulemakings, measurement of traffic affected by (again, unspecified) safety regulation, and measurement of the amount to traffic subject to economic regulation, as quantified by R/VC factors and other indicators (thus indicating that the AAR intends to go beyond the waybill’s masking factors in some undisclosed way). This list covers the gamut of the Board’s regulatory activities as well as a significant portion of those of the Federal Railroad Administration and Pipeline and Hazardous Materials Safety Administration, not to mention the interests of states and localities regarding the local movement of freight, including hazardous materials.

Fourth, neither the Board nor the public would have any notice as to where and how the AAR would present or rely on the data. The AAR would have carte blanche to rely, or purport to rely, on the data whenever doing so furthered its purposes at the time, without any accountability. The AAR can be expected to use or invoke the data to support its preferred position as to any number of contested matters involving policy for rail economics, rail capacity, railroad rate and service regulation, rail safety, and preemption of local, state, and federal regulation, among other issues. The AAR would have and be able to exploit data that no other party has, which would create or worsen an already skewed playing field in general and in individual proceedings before the Board and elsewhere where the railroads already enjoy a substantial advantage due to the abundant information they already possess.

It can be expected that AAR would use its depiction of the data, to which only it would enjoy such preferred access, to create a self-reinforcing loop: the AAR could freely use and present the data or analyses thereof to suit its purposes in various forums and to various selected allies and would-be influencers, even in secret and without notice to others; few, if any, other stakeholders would be able to verify and test the underlying data, even if they somehow become aware that the data has been utilized and have access to the receivers; some receivers of the information may, as the AAR intends,

adopt the AAR's preferred view of the data, especially as those receivers, who may also receive undisclosed compensation from the railroads, would not and could not receive contrasting presentations or analyses of the data; and the AAR or its supporters would then assert that those with railroad-friendly views are correct and well-informed and those conflicting views should be regarded as uninformed and incorrect.

The AAR and its allies already deploy such tactics on a frequent basis in regulatory proceedings and for influencing public perception. Preferential access to the confidential waybill sample should not become another yet another tool in those efforts.

Finally, granting such broad access also carries adverse ramifications for competition. Allowing the AAR to present waybill data on such matters as rates, interline and rebilled traffic, commodities, traffic flows, and capacity has ample potential to enable AAR-member railroads to learn more about the activities of their fellow member railroads that are also their ostensible competitors. The railroad industry is already highly concentrated, nationally and even more so regionally and locally. The railroad-controlled dissemination of waybill data thus has ample potential to facilitate increased coordination among the individual railroads so as to restrain competition by providing information about their competitors' traffic flows, traffic changes, and at least relative rates, better enabling railroads to seek to minimize "retaliation," otherwise known as competition, from their fellow railroads. The availability and use of the information will also make it more difficult to detect when the interaction has transgressed into collusion. These problems can arise even if the information is initially used for seemingly permissible purposes, particularly as, again, the AAR's request is framed so that there will be no general disclosure as to when, where, and how the data has been utilized and for what purpose. As the Board observed in *Intervistas Study*, *supra*, "limiting dissemination of sensitive data decreases the likelihood that the information will be improperly used or disclosed." *Id.* at 4. It also bears noting in that regard that the AAR's activities have been implicated in the pending fuel surcharge antitrust litigation.

There is no sound reason to give the AAR any preferential access to the data. Its request should be denied.

Respectfully submitted,

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League