

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

ENTERED
Office of Proceedings
November 23, 2021
Part of
Public Record

Office of Economics

November 18, 2021

Mr. Jason Tutrone
Thompson Hine LLP
1919 M Street, N.W.
Washington, DC 20036-3537

Re: Waybill Request WB21-82 & FD36500

Dear Mr. Tutrone:

The Surface Transportation Board (STB or Board) has received your request under 49 C.F.R. § 1244.9(b)(4) dated November 10, 2021 for permission to access the confidential Carload Waybill Sample (CCWS) with unmasked revenues in connection with FD 36500, Canadian Pacific Railway Limited, Et al. – Control – Kansas City Southern, et al, on behalf of the American Chemistry Council (“ACC”) and The Fertilizer Institute (“TFI”). 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 FD 36500 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 FD36500 becomes effective when signed agreements from the individuals listed below are received by the STB:

- a) Mr. Jeffrey Moreno – Thompson Hine LLP*
- b) Mr. Jason Tutrone – Thompson Hine LLP*
- c) Mr. Thomas D. Crowley – L.E. Peabody & Associates*
- d) Mr. Timothy D. Crowley – L.E. Peabody & Associates*
- e) Mr. Michael L. Lillis – L.E. Peabody & Associates*
- f) Mr. Robert D. Mulholland – L.E. Peabody & Associates*
- g) Mr. Ray H. Thibault – L.E. Peabody & Associates*
- h) Ms. Allison C. Reid – L.E. Peabody & Associates*
- i) Mr. Thomas D. Copper – L.E. Peabody & Associates*

The expiration date for this agreement is November 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://www.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 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 WB21-82

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 **\$722** 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,

Francis X. O'Connor, Jr.

Francis O'Connor
Acting Director
Office of Economics

Waybill Agreement WB21-82

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: Jeffrey Moreno



Signature

Waybill Agreement WB21-82

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By: Jason Tutrone

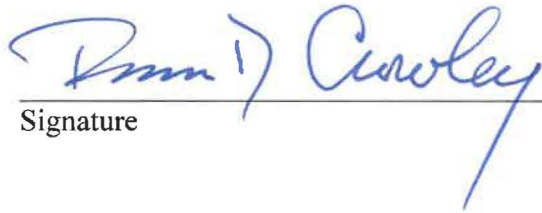
A handwritten signature in black ink, appearing to read 'J. Tutrone', written over a horizontal line.

Signature

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By: Thomas D. Crowley

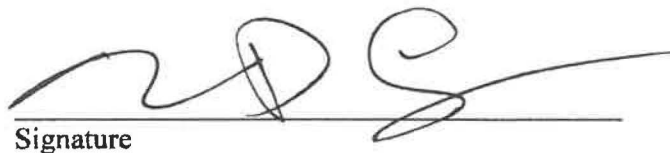


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By: Timothy D. Crowley



Signature

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By: Michael **E.** Lillis


Signature

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By: Robert D. Mulholland



Signature

Waybill Agreement WB21-82

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By: Ray H. Thibault


Signature

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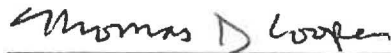
By: Allison C. Reid

Allison Reid
Signature

Waybill Agreement WB21-82

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By: Thomas D. Cooper

A handwritten signature in dark ink, appearing to read "Thomas D. Cooper", is written over a horizontal line.

Signature

November 10, 2021

William Brennan, PhD
Chief Economist & Director
Office of Economics
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

Re: FD 36500, *Canadian Pacific Railway Limited—Control—Kansas City Southern*, Waybill Request

Dear Mr. Brennan:

Pursuant to 49 C.F.R. § 1244(b)(4), Thompson Hine LLP respectfully requests access on behalf of the American Chemistry Council (ACC) and The Fertilizer Institute (TFI) to the confidential Carload Waybill Sample (CCWS) with unmasked revenues for 2015 through 2020 for use in connection with *Canadian Pacific Railway Limited—Control—Kansas City Southern*, Docket FD 36500 (the “CPKC Merger Proceeding”). We seek this access for the following outside counsel and outside consultants of ACC and TFI:

- a) Jeffrey Moreno – Thompson Hine LLP
- b) Jason Tutrone – Thompson Hine LLP
- c) Thomas D. Crowley – L.E. Peabody & Associates
- d) Timothy D. Crowley – L.E. Peabody & Associates
- e) Michael L. Lillis – L.E. Peabody & Associates
- f) Robert D. Mulholland – L.E. Peabody & Associates
- g) Ray H. Thibault – L.E. Peabody & Associates
- h) Allison C. Reid – L.E. Peabody & Associates
- i) Thomas D. Cooper – L.E. Peabody & Associates

Under 49 C.F.R. § 1244.9(b)(4), consulting firms and law firms may use data from the CCWS to prepare verified statements for submission in formal proceedings before the Surface Transportation Board subject to certain conditions, including that they must submit a written waybill request that complies with 49 C.F.R. § 1244.9(e). In the CPKC Merger Proceeding, the Board has already granted multiple such requests for access to the CCWS for 2015 through 2020.¹ We are seeking access to the CCWS that is consistent with those grants.

¹ *E.g.*, Letter from William Brennan, PhD, Chief Economist & Director, Office of Economics, Surface Transportation Board, to Daniel Baquet, Weil, Gotshal & Manges LLP (Sept. 10, 2021); Letter from William Brennan, PhD, Chief Economist & Director, Office of Economics, Surface Transportation Board, to David L. Meyer, Law Office of David L. Meyer (Mar. 25, 2021).

Jason.Tutrone@ThompsonHine.com Fax: 202.331.8330 Phone: 202.263.4143

William Brennan, Ph. D.

November 10, 2021

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As indicated above, we seek access to the CCWS for analyzing the submissions of various parties in the CPKC Merger Proceeding, including the application of Canadian Pacific and Kansas City Southern filed on October 29, 2021. We also seek access for preparing submissions and evidence of ACC and TFI in the CPKC Merger Proceeding.

Our request is for all CCWS data covering 2015 to 2020, including all records, all fields, and confidential unmasked revenues.

This requested access to the CCWS is necessary for ACC and TFI to fully participate in the CPKC Merger Proceeding. As you know, the Board's merger rules require applicants Canadian Pacific and Kansas City Southern to identify the impact that the proposed merger will have on competition.² To evaluate these and other aspects of proposed merger and to identify any necessary merger conditions, ACC and TFI's outside attorneys and consultants will need data on existing and historic traffic patterns and revenues, which is contained in CCWS. Also, the national scope of the proposed merger requires access to the full range of data in CCWS.

We understand that access to the data will be subject to the conditions at 49 C.F.R. § 1244.9(a)(4)(i)-(v), which include a requirement that CCWS data recipients execute a confidentiality agreement with the Board. We also understand that are limitations on the conclusions that may be drawn from the CCWS data.

If you have any questions about this request, please contact me at 202-603-3109 or Jason.Tutrone@ThompsonHine.com.

Very truly yours,



Jason Tutrone

² See 49 C.F.R. § 1180.6(a)(2), 1180.7.
