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BY ELECTRONIC FILING

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

Re: Objection to Waybill Access Request WB21-89 (December 8, 2021)

Dear Dr. Brennan:

I am writing on behalf of Canadian Pacific Railway Limited and its U.S. rail carrier subsidiaries (collectively “CP” or “Canadian Pacific”)¹ to object to the request for access to unmasked confidential waybill sample (“CWS”) data for 1984-2020 submitted by Professor Dennis Carlton on December 8, 2021 (WB21-89-12/8/21).

Although the request is styled as one on behalf of a university professor for purely “academic use,” the request is in fact one made on behalf of a highly-paid economic consulting firm that is participating actively on behalf of multiple clients in a pending Board proceeding (the *CP/KCS* control case) involving the precise issue that the request is seeking to investigate. Indeed, Professor Carlton himself has recently been engaged on behalf of Canadian National (and received CWS access) in the context of a potential acquisition of KCS. Access to waybill data has already been granted to Compass Lexecon personnel in the context of the *CP/KCS* proceeding, where any work they perform using CWS data can be tested via discovery and the adversarial process. The Office of Economics should not grant the same consulting firm access to a broader array of data outside the proceeding.

First, Professor Carlton is candid that he is “Senior Managing Director” of Compass Lexecon Economic Consulting (“Compass Lexecon”) (a firm that he founded), that two of his

¹ Canadian Pacific Railway Limited’s U.S. rail carrier subsidiaries are Soo Line Railroad Company, Central Maine & Quebec Railway US Inc., Dakota, Minnesota & Eastern Railroad Corporation, Delaware and Hudson Railway Company, Inc.

Dr. William Brennan
December 29, 2021
Page Two

“key researchers” are affiliated with Compass Lexecon, and the unnamed staff researchers who would have access to CWS data are also employed at Compass Lexecon. This is a request for access by Compass Lexecon, pure and simple.

Second, the purpose of the requested data is to analyze issues that are directly at issue in a pending Board proceeding, *not matters of mere academic interest*. As stated in the request, the “research is relevant to the appropriate regulation of railroad mergers by the [Board].” Specifically, the work seeks to use the CWS “to perform a direct measurement of whether vertical mergers led to foreclosure and increased rates.” Of course, there is one pending vertical merger case before the Board – *CP/KCS* – in which Canadian Pacific is an applicant.

Canadian Pacific is confident that its proposed combination with KCS will not have such effects, but will instead enable more intense competition with the larger Class Is that will surround the CPKC system. CP has no concern that a serious vetting of this issue by the Board in the *CP/KCS* proceeding will result in same conclusion. That vetting potentially will be informed by analyses undertaken with the benefit of access to the CWS, as outside consultants for numerous participants in that proceeding have gained such access. Whatever analyses witnesses may put forward using these data in the *CP/KCS* proceeding will, of course, be subject to discovery, including the depositions of any witnesses sponsoring economic analyses using those data, allowing the Board to reach an informed judgment on the basis of a balanced record

Canadian Pacific is concerned that the pending request by Professor Carlton on behalf of Compass Lexecon for much more extensive data (back to 1984) is an end-run around the procedures that will govern use of CWS data in the *CP/KCS* proceeding. Once granted access to the CWS, nothing will stop Compass Lexecon from releasing “preliminary findings” or draft manuscripts in a form that may find their way into the Board’s proceeding without being subject to testing via the adversarial process.

This is not a hypothetical concern. Professor Carlton’s waybill access request does not disclose that Compass Lexecon is currently actively engaged on behalf of several major railroads that have stated publicly that they intend to raise supposed vertical foreclosure concerns in the pending *CP/KCS* proceeding, exactly the same issues that Professor Carlton desires to examine.

- Three individuals affiliated with Compass Lexecon have received access to 2015-2019 unmasked waybill data pursuant to Waybill Request WB21-67 in the *CP/KCS* proceeding for work on behalf of Union Pacific Railroad Co. Letter from William Brennan, WB 21-67 (Sept. 22, 2021). That access was expanded to include data for 2004-2006. Letter from Francis O’Connor, WB 21-67 (Nov. 18, 2021). UP has been clear that its focus is on “potential for foreclosure concerns,” particularly at the Laredo gateway. Finance Docket No. 36500, UP-1 (filed Apr. 1, 2021) at 9.

Dr. William Brennan
December 29, 2021
Page Three

- Two individuals affiliated with Compass Lexecon have received access to 2015-2019 unmasked waybill data pursuant to Waybill Request WB 21-69 in the CP/KCS proceeding for work on behalf of BNSF Railway. Letter from William Brennan, WB 21-69 (Sept. 28, 2021). Like UP, BNSF is keenly focused on the need for the Board to “fully evaluate the proposed transaction, including whether the Board should impose conditions that will ensure that the Laredo, Robstown and Brownsville gateways remain open on commercially reasonable rate and service terms,” and BNSF “plans to address these substantive competitive issues in depth in the evidence and argument that BNSF submits in this proceeding.” Finance Docket No. 36500, BNSF-4 (filed Nov. 11, 2021) at 6, 9.

Still more troubling, the waybill access request does not disclose that *Professor Carlton himself* along with two of his “key researchers” have been retained by another active participant in the CP/KCS proceeding – Canadian National Railway. As recently as late August 2021, Professor Carlton, Steven Peterson, and Georgi Giozov (each of whom is listed in Professor Carlton’s December 8 letter request) were granted access to 2015-2019 unmasked waybill data in the CN/KCS proceeding. *See* Letter from William Brennan in WB21-30 (Aug. 25, 2021) (expanding roster of individuals with access to the data granted to CN on April 27, 2021 pursuant to Waybill Request WB21-30 in CN/KCS).

As the Office of Economics is likely well aware, Canadian National was actively seeking to acquire KCS itself until it withdrew its bid following the Board’s rejection of CN’s proposed voting trust and KCS’s subsequent decision to accept CP’s acquisition bid. Canadian National nonetheless vowed that “CN will participate actively in [the CP/KCS] proceeding to ensure that all regulatory rules are applied fairly and that any Board proceeding in connection with the CP-KCS combination ensures that it will be pro-competitive and in the public interest.” Finance Docket No. 36514, CN-28 (Sept. 16, 2021) at 2. CN knows full well that its own CN-IC merger was procompetitive, and that a CP-KCS combination would be as well, so it cannot sponsor testimony by Professor Carlton and Compass Lexecon purporting to suggest the opposite. But as paid consultants to CN (past or present), Professor Carlton and his team at Compass Lexecon would labor under no similar inhibition were the Office of Economics to allow the waybill access sought here.

Board precedent is clear that release of the unmasked confidential waybill data outside Board proceedings or use by governmental bodies is disfavored. *See Procedures on Release of Data From the ICC Waybill Sample (49 C.F.R. Part 1244)*, 4 I.C.C.2d 194, 196 (1987).² The

² Board “policy limits access to the Waybill Master File (Master File), or total sample, to the Commission and other Federal agencies. States are entitled to any waybill data pertaining to traffic that moved in its State. Transportation consulting firms may also use data from the Master File that are needed for the preparation of verified statements in formal ICC proceedings. With these exceptions, confidential

Dr. William Brennan
December 29, 2021
Page Four

Office of Economics and the Board have routinely denied access for any commercial purposes outside of a specific proceeding. *See, e.g., Request for Waybill Data*, Docket No. WB 20-50 (STB served June 17, 2021) at 3. On the other hand, the Office of Economics has in the past granted access when the purpose is strictly limited to “academic research” and use would be for that purpose only. *E.g., Waybill Request WB21-40*, Letter to Miami University Farmer School of Business professors (June 23, 2021).

Professor Carlton’s request should be rejected under these principles. Although presented as a request on behalf of several professors, it is overtly seeking access by an economic consulting organization – Compass Lexecon, of which Professor Carlton is Senior Managing Director – that is actively engaged on behalf of numerous clients in the railroad industry in proceedings that raise precisely the “vertical merger” issues that this analysis seeks to address using an extraordinarily broad grant of confidential waybill data. Use of the data in this context is not only “commercial” rather than academic, it risks circumventing the safeguards and procedures that will govern analysis of the same issues, potentially using CWS data, in the pending *CP/KCS* proceeding. The request should therefore be denied.

If the Office of Economics nonetheless decides to authorize the grant of waybill access, that grant should be conditioned on the following minimum conditions necessary to avoid its misuse in the pending *CP/KCS* proceeding:

- (1) All individuals who desire to have access to the data must first confirm to the Office of Economics and Canadian Pacific that:
 - (a) they are not receiving (and do not anticipate ever receiving) any compensation, directly or indirectly, for any of the work being undertaken in connection with this “academic study”;
 - (b) they are not working on behalf of any party participating in the *CP/KCS* proceeding, including CN, BNSF, and UP; and
 - (c) they are not receiving any financial benefit, directly or indirectly, from work performed by Compass Lexecon in the *CP/KCS* proceeding.
- (2) All individuals who obtain access to the data shall be prohibited from disclosing (directly or indirectly) any preliminary or other results of any work that is undertaken using the CWS data to any party in the *CP/KCS* proceeding, including

waybill data *generally will not be released to other uses*. However, because there may be instances in which these data are essential to meet a particular and legitimate need, OTA will consider requests by other users.” *Id.* (emphasis in original).

Dr. William Brennan
December 29, 2021
Page Five

in the form of a manuscript or other work product that has not been formally published in a peer-reviewed academic journal.

Thank you for your consideration of this objection. Please do not hesitate to contact me with any questions.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "David L. Meyer", with a stylized flourish at the end.

David L. Meyer

Attorney for Canadian Pacific

cc: Alexander Dusenberry