

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

Office of Economics

January 11, 2022

Mr. Charles A. Spitulnik
Kaplan Kirsch Rockwell LLP
1634 Eye Street, NW Suite 300
Washington, DC 20006

Re: Waybill Request WB22-05 & FD36500

Dear Mr. Spitulnik:

The Surface Transportation Board (STB or Board) has received your request under 49 C.F.R. § 1244.9(b)(4) dated November 24, 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 Commuter Rail Division of the Regional Transportation Authority (“Metra”). 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. Charles A. Spitulnik – Kaplan Kirsch & Rockwell LLP*
- b) *Mr. Christian L. Alexander – Kaplan Kirsch & Rockwell LLP*
- c) *Mr. William C. Mumby – Kaplan Kirsch & Rockwell LLP*
- d) *Ms. Sherry H. Edmonds – Kaplan Kirsch & Rockwell LLP*
- e) *Mr. Thomas D. Crowley – L.E. Peabody & Associates, Inc.*
- f) *Mr. Robert D. Mulholland – L.E. Peabody & Associates, Inc.*
- g) *Mr. William W. Humphrey – L.E. Peabody & Associates, Inc.*
- h) *Mr. Ray H. Thibault – L.E. Peabody & Associates, Inc.*

The expiration date for this agreement is January 31, 2023. 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.

Waybill Agreement WB22-05

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.

Waybill Agreement WB22-05

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.

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.

Waybill Agreement WB22-05

Sincerely,

William Brennan

William Brennan, PhD
Chief Economist & Director
Office of Economics

Waybill Agreement WB22-05

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: Charles A. Spitulnik



Signature

Waybill Agreement WB22-05

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By: Christian L. Alexander

A handwritten signature in black ink, appearing to read 'Christian L. Alexander', written over a horizontal line.

Signature

Waybill Agreement WB22-05

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By: William C. Mumby



Signature

Waybill Agreement WB22-05

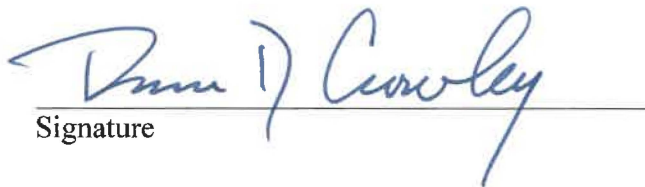
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By: Sherry H. Edmonds


Signature

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By: Thomas D. Crowley


Signature

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By: Robert D. Mulholland


Signature

Waybill Agreement WB22-05

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By: William W. Humphrey



Signature

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By: Ray H. Thibault


Signature

01/11/2022

November 24, 2021

VIA E-MAIL

Dr. William Brennan
Director/Chief Economist
Office of Economics
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001
william.brennan@STB.gov

Re: Request for Access to Confidential Carload Waybill Sample, *Canadian Pacific Railway Limited, et al. – Control – Kansas City Southern, et al.*, STB Docket No. FD 36500

Dear Dr. Brennan:

Pursuant to 49 C.F.R. § 1244.9(b)(4), Kaplan Kirsch & Rockwell LLP, which serves as outside counsel for the Commuter Rail Division of the Regional Transportation Authority d/b/a/ Metra (“Metra”), respectfully requests access to the confidential carload waybill data for the period 2015 through 2020, including all records, all fields, and confidential unmasked revenues for all traffic in all geographic areas (“Waybill Data”), in connection with the above-referenced proceeding regarding the Canadian Pacific Railway’s (“CP”) acquisition of the Kansas City Southern (“KCS”), and associated transactions. The use of the Waybill Data will be for non-commercial and public interest purposes and only specifically in connection with the above-referenced proceeding. At this time, access is being requested for the following outside counsel at Kaplan Kirsch & Rockwell LLP and outside consultants at L.E. Peabody & Associates, Inc.:

- a) Kaplan Kirsch & Rockwell LLP attorneys and support staff (outside counsel)
- b) Thomas D. Crowley – L.E. Peabody & Associates, Inc. (outside consultant)
- c) Robert D. Mulholland – L.E. Peabody & Associates, Inc. (outside consultant)
- d) William W. Humphrey – L.E. Peabody & Associates, Inc. (outside consultant)
- e) Ray H. Thibault – L.E. Peabody & Associates, Inc. (outside consultant)

If additional counsel or consultants are retained for this representation, we will amend our request to add such individuals.

Access to the Waybill Data is necessary for these individuals to analyze the impact of the proposed merger in the above-referenced proceeding on Metra's commuter rail service, and to verify the claims of the applicants and other parties of record in the proceedings. Metra, a party of record in these proceedings, is a public entity operating commuter rail service in the Chicago metropolitan area. Metra operates one of the busiest commuter rail systems in the country, providing service that normally serves hundreds of thousands of passengers every weekday. Metra's service runs on the same rail lines that also provide freight rail service, including CP's Chicago-area service. Indeed, in some cases CP operates over lines owned by Metra.

Chicago serves as a crucial focal point for freight rail traffic from around the country, one that over the years has faced significant challenges in navigating the combined needs of both freight and passenger rail users. Because of the interconnected nature of the national rail network, changes on one route or area may have significant consequences on other routes or areas of the network. Indeed, one of the main aspects of the proposed merger in these proceedings is that changes in traffic and routing far away from the Chicago area will avoid or reduce congestion in the Chicago area. However, it is Metra's responsibility to assess whether and how these proposed changes may directly or indirectly impact Metra's operations, both on the lines it owns and other lines over which it operates. Accordingly, the above-named individuals require all of the data contained in the requested Waybill Data.

According to the Board's docket for FD 36500, the Board has granted the Waybill Data to outside counsel and consultants for the applicants Canadian Pacific Railway ("CP") and Kansas City Southern ("KCS"), as well as for a number of other parties, including Norfolk Southern Railway Company and CSX Transportation, Inc. Metra will be at a significant disadvantage in responding to the claims and statements made in these proceedings if its outside counsel and outside consultants do not have access to the same information, and if Metra's outside counsel is not able to independently assess the merits of the proposed transaction and its impact on public transportation on CP and KCS's routes, as well as connecting carriers, to the same level of detail as the applicants and other parties of record with access to the data. As noted, in order to assess the claimed impacts on the Chicago-area rail network, analysis of the broader network is necessary.

Pursuant to the requirements of 49 C.F.R. § 1244.9(b)(4)(i)-(v), the above-named individuals understand that the Waybill Data requested must be used exclusively in order to prepare verified statements to be submitted for these specific proceedings. They furthermore understand that the Waybill Data must be returned to the Board, and that copies may not be kept. Any evidence drawn from the Waybill Data will be submitted to the Board only if the evidence is aggregated to the level of at least three shippers and will prevent the identification of an individual railroad. Non-aggregated evidence submitted to the Board will be made part of the public record only if the Board finds that it does not reveal competitively sensitive data. The above-named individuals also understand and agree that they must sign a confidentiality agreement agreeing to the above restrictions, and that this agreement will permit the use of the released data for a period of one year from the date that the agreement is signed. If the data is

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required for an additional period of time because a proceeding is still pending before the Board, the above-named individuals must sign a new confidentiality agreement covering the data needed for each additional year the proceeding is open.

Along with this letter I will be arranging payment of \$938.00 to the STB through the electronic payment system at pay.gov, reflecting the fixed fee of \$450 plus \$61 per person for each individual (four for outside counsel attorneys and staff for Kaplan Kirsch & Rockwell and four outside consultants for L.E. Peabody & Associates, Inc., for a total of 8 individuals), pursuant to 49 C.F.R. § 1002.2(f)(98)(ii).

If you have any questions regarding this filing, please feel free to contact me. Thank you very much for your attention to this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Charles A. Spitulnik", with a long horizontal flourish extending to the right.

Charles A. Spitulnik
Counsel for the Commuter Rail Division of
the Regional Transportation Authority d/b/a/
Metra