

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

Office of Economics

January 25, 2022

Mr. Matthew J. Warren
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005

Re: Waybill Request WB22-10 & EP711 (Sub-No. 1)

Dear Mr. Warren:

The Surface Transportation Board (STB or Board) has received your request under 49 C.F.R. § 1244.9(b)(4) dated January 21, 2022 for permission to access the confidential Carload Waybill Sample (CCWS) with unmasked revenues in connection with EP 711 (Sub-No. 1), Reciprocal Switching, on behalf of the U.S. rail operating subsidiaries of Canadian National Railway Company (“CN”). Specifically, you request the unmasked 1992-2020 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 EP 711 proceeding. Specifically, I will grant you, in accordance with 49 C.F.R. § 1244.9(b)(4), access to the 1992-2020 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). ***This approval becomes effective when signed agreements from the individuals listed below are received by the STB:***

- a) Matthew J. Warren – Sidley Austin LLP*
- b) Andreas Aeppli – Cambridge Systematics*
- c) Dan Beagan – Cambridge Systematics*
- d) Megan Motamed – Cambridge Systematics*

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.

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.

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.

Waybill Agreement WB22-10

Sincerely,

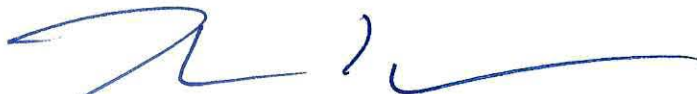
William Brennan

William Brennan, PhD
Chief Economist & Director
Office of Economics

Waybill Agreement WB22-10

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: Matthew J. Warren


Signature

Waybill Agreement WB22-10

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: Andreas Aepli

A handwritten signature in dark ink, appearing to read "Andreas Aepli", is written above a horizontal line.

Signature

Waybill Agreement WB22-10

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: Dan Beagan

Daniel Beagan

Signature

Waybill Agreement WB22-10

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By: Megan Motamed

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

Signature



SIDLEY AUSTIN LLP
1501 K STREET, N.W.
WASHINGTON, D.C. 20005
+1 202 736 8000
+1 202 736 8711 FAX

AMERICA • ASIA PACIFIC • EUROPE

+1 202 736 8996
MJWARREN@SIDLEY.COM

January 21, 2022

By Email

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

Re: Docket No. EP 711 (Sub-No. 1), Request for Access to Confidential Carload
Waybill Sample Under 49 C.F.R. § 1244.9(b)(4)

Dear Dr. Brennan:

I write on behalf of the U.S. rail operating subsidiaries of Canadian National Railway Company (collectively, “CN”) in connection with the above-referenced proceeding. Pursuant to 49 C.F.R. § 1244.9(b)(4), I am respectfully requesting access to the confidential Carload Waybill Sample (“CCWS”).

On July 27, 2016, the Board issued a notice of proposed rulemaking (NPRM) related to reciprocal switching in this proceeding. The Board recently issued a notice stating that it intends to hold a public hearing concerning the 2016 NPRM and requested the submission of written comments. Given the potential impacts of the proposal in the NPRM, and in order to respond to the Board’s request for additional comment, CN respectfully requests the release of the unmasked costed confidential Carload Waybill Sample (CCWS) from 1992 through 2020, inclusive, for all traffic.

The purpose of this request is to allow CN’s outside counsel and consultants to analyze the potential impacts of the proposed rule and to prepare comments and testimony on behalf of CN. The requested CCWS data is the only source of the data permitting a complete analysis of the issues. Access is being requested for myself and the following outside consultants: Andreas Aepli, Dan Beagan, and Megan Motamed of Cambridge Systematics.

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We understand that access to these data will be granted pursuant to the terms of a protective order, solely for the purposes of this proceeding and any related litigation, and only after execution of an appropriate confidentiality undertaking. In accordance with 49 C.F.R. § 1244.9(b)(4), any evidence drawn from the CCWS will remain confidential and will be submitted to the Board only unless the evidence is aggregated to the level of at least three shippers and will prevent the identification of an individual railroad.

The required fee under 49 C.F.R. § 1002.2(f)(98)(i) has been paid on pay.gov, and a confirmation number is enclosed.

Thank you for your consideration of this request and please do not hesitate to contact me at (202) 736-8996 if you have any questions.

Respectfully submitted,

/s/ Matthew J. Warren