

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

Office of Economics

February 24, 2022

Dr. Dennis W. Carlton
The University of Chicago
Booth School of Business
5807 S. Woodlawn Avenue
Chicago, Illinois 60637

Re: Waybill Request WB21-89

Dear Dr. Carlton:

The Surface Transportation Board (STB) has received your request under 49 C.F.R. § 1244.9(c) of December 8, 2021 for permission to access the unmasked 1984-2020 confidential Carload Waybill Sample (CCWS). Your request explained that the CCWS data would be used solely for academic research purposes. (Req. at 3.) According to your letter, you and your team hope to investigate “the impact of vertical mergers in the railroad industry with careful attention to the circumstances under which vertical foreclosure might arise.” (*Id.* at 1.) Your letter explains that the particular data requested are required to test whether the predictions of the theory of vertical foreclosure are borne out in the railroad industry and, more generally, would permit “detailed analysis of economic theories of vertical foreclosure and the circumstances in which such effects may or may not be of concern.” (*Id.* at 2.) You represent that the data in the CCWS cannot be obtained anywhere else and that the unmasked revenue data from the CCWS is needed to conduct your analysis. You state that your intention is to publish the results of your research in a scholarly journal and represent that your proposed research “is not being supported by or performed on behalf of any sponsor or client.” (*Id.* at 1.)

Notice of your request was published in the Federal Register on December 15, 2021 (86 Fed. Reg. 71,314). Two objections to your request were received: The Law Office of David L. Meyer, on behalf of Canadian Pacific Railway Limited and its rail carrier subsidiaries (CP), filed an objection on December 29, 2021, and Slover & Loftus LLP, on behalf of The Western Coal Traffic League (WCTL), filed an objection on December 30, 2021.

CP expresses a general overall concern that the requested data will not be used for academic research but will instead be used for consulting work associated with the pending proceeding involving the merger of CP and Kansas City Southern (KCS), Canadian Pac. Ry.—Control—Kan. City S., FD 36500. CP points out that Dr. Carlton was retained by Canadian National Railway (CN), and obtained access to a subset of CCWS data, in connection with CN’s proposed acquisition of KCS. CP further points out that consultants at the firm Compass Lexecon, with which Dr. Carlton is affiliated, represent other railroads in the CP/KCS proceeding and have been granted access to the CCWS there. CP objects that the proposed research is not simply a matter of academic interest because “the purpose of the requested data is to analyze issues that are directly at issue in a pending Board proceeding.” (CP Obj. at 2.) CP

characterizes the request as an “end-run” around “procedures” in the CP/KCS merger proceeding and speculates that “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.” (*Id.*)

WCTL similarly questions whether the request is actually for academic research purposes given the consulting work Dr. Carlton and Compass Lexecon perform for railroads in other contexts. WCTL argues that Dr. Carlton should be required to provide “further clarification regarding the separation of his academic and other professional activities.” (WCTL Obj. at 1.) WCTL also questions whether all individuals who will work on the research project have been identified.

Having considered your request, and the objections from CP and WCTL, I will grant access to the requested data subject to the confidentiality provisions contained in the standard access letter that all “other users” who gain access to the CCWS must sign. The subject matter of the proposed research is related to general consolidation issues within the Board’s jurisdiction and would appear to also be of interest to the public more generally. Dr. Carlton and the key researchers identified in his request are credentialed economists who could make a contribution to the study of the economic effects of vertical mergers.

Although the objections raised by CP and WCTL raise some issues worthy of consideration, I am not persuaded that they warrant denying the requested access. First, although both CP and WCTL question whether the request is for academic research, the request specifically states that the data requested will be used solely for the academic research purpose specified and that the research is not being supported by or performed on behalf of a sponsor or client. Neither CP nor WCTL has provided any evidence to indicate that these statements are false. Further, the representations regarding the intended use of the data will be reinforced by language in the Board’s access letter agreement, which Dr. Carlton and his colleagues will be required to sign before obtaining access to the CCWS, that provides the CCWS data “may only be used for the academic purpose detailed” in the request “and may not be used for any other purpose such as private, commercial consulting.” The fact that Dr. Carlton and his colleagues may have access to more than one subset of the CCWS at a time does not suggest that they will be unable to properly segregate each dataset and use it only for allowed purposes. The request indicates that Dr. Carlton and his colleagues have a clear understanding that the requested data may not be used in conjunction with their consulting work for the railroads, so no clarification, as requested by WCTL, is required.

Second, CP expresses concern that granting the request would erode CP’s ability to challenge evidence presented in the CP/KCS merger proceeding. As an initial matter, CP is incorrect that “nothing will stop” Dr. Carlton and his colleagues from disclosing CCWS data they obtain for academic research purposes. The standard language of the Board’s access letter prohibits disclosure of CCWS data to anyone who has not signed the access letter and also prohibits public release of research based on the CCWS “until the STB has had the opportunity

to review the materials proposed for disclosure to ensure confidentiality.” Such confidentiality reviews are routinely conducted by Office of Economics staff and would not, even if performed during the pendency of the proposed CP/KCS merger, function as a back-door mechanism for Dr. Carlton and his colleagues to provide evidence in the CP/KCS proceeding. Moreover, given the timeline for the CP/KCS proceeding, it appears unlikely that Dr. Carlton and his colleagues would be in a position to present pre-publication materials from their research to the STB before the record closes in that proceeding.

Third, prohibiting qualified academics and economists from concurrently conducting research and preparing evidence for the Board on related topics could unduly inhibit the Board’s ability both to gather evidence in proceedings and to benefit from more general academic inquiries. At any given time, the Board has many open proceedings that involve issues that span the scope of its regulatory responsibilities. Pausing research until a particular issue is not being considered in any open proceeding could impair the Board’s ability to hear evidence from individuals with particular expertise in relevant areas or prevent research on important issues from being conducted in the first place.

Finally, to the extent that WCTL questions whether all of the researchers have been identified, Dr. Carlton’s letter adequately identifies the key researchers who will participate in the project. The Board’s standard access letter provides a process for seeking approval to add additional individuals who need access at a later time.

Pursuant to 49 C.F. R. § 1244.9 (d)(4)(iii), any appeal of this determination must be filed with the STB’s Chairman with 10 days of the date of this letter. The filing of an appeal will automatically stay the effect of this decision. If no appeal is filed, an access letter will be provided to you for signature on or after March 11, 2022. Once fees due have been paid and the letter has been signed by the required individuals, the requested data will be made available to you.

Sincerely,

William Brennan

William Brennan, PhD
Chief Economist & Director,
Office of Economics

cc: David L. Meyer (counsel for Canadian Pacific)
Robert D. Rosenberg (counsel for Western Coal Traffic League)