

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

Office of Economics

November 30, 2022 305853

Mr. Richard M. Couch
Thompson Hine LLP
1919 M. Street, N.W.
Suite 700
Washington, D.C. 20036-1600

ENTERED
Office of Proceedings
December 21, 2022
Part of
Public Record

Re: Waybill Request WB22-67 & FD36500

Dear Mr. Couch:

The Surface Transportation Board (STB or Board) has received your November 29, 2022 extension request, filed on behalf of the American Chemistry Council (“ACC”) and The Fertilizer Institute (“TFI”) for permission to retain access to the confidential Carload Waybill Sample (CCWS) data covered by your access letter in WB21-82. You seek approval for continued use of the data under C.F.R. § 1244.9(b)(4) in connection with FD 36500, Canadian Pacific Railway Limited, Et al. – Control – Kansas City Southern, et al. Specifically, you request extended access to the 2015-2020 unmasked.

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. I will grant you, in accordance with 49 C.F.R. § 1244.9(b)(4), access to the 2015-2020 unmasked costed waybill samples. 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 O. Moreno – Thompson Hine LLP*
- b) Mr. Jason D. 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 December 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 (see item 6 of the agreement). Any request for renewal will need to provide

a detailed explanation for why continued access to the data is necessary and demonstrate that you are continuing to actively use the data for the originally requested purpose.

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 proceedings identified above. Such purposes include any judicial review arising from the proceedings.
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 the proceedings, 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 proceedings, 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 proceedings 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 proceedings 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 proceedings, 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 proceedings 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 the extension is granted.

Sincerely,

William Brennan

William Brennan, PhD
Chief Economist & Director
Office of Economics

Waybill Agreement WB22-67

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 O. Moreno



Signature

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By: Jason D. Tutrone



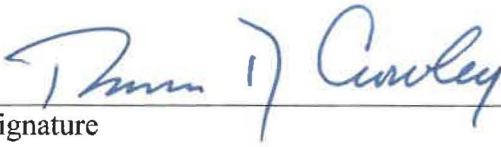
Digitally signed by: Okta MTLS -
TutroneJD@thompsonhine.com
DN: CN = Okta MTLS -
TutroneJD@thompsonhine.com
C = US O = thompsonhine
Date: 2022.12.15 09:24:24 -
0500

Signature

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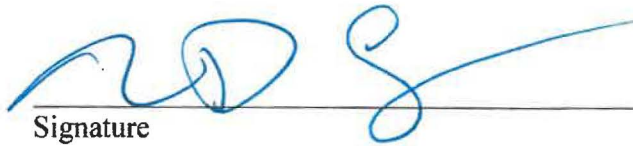
By: Thomas D. Crowley


Signature

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By: Timothy D. Crowley



Signature

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By: Michael L. Lillis


Signature

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By: Robert D. Mulholland



Signature

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By: Ray H. Thibault



Signature

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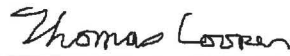
By: Allison C. Reid


Signature

12/5/2022

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By: Thomas D. Cooper

A handwritten signature in cursive script that reads "Thomas Cooper".

Signature

November 29, 2022

William Brennan, PhD
Chief Economist & Director
Office of Economics
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: WB21-82 and Docket FD 36500, *Canadian Pacific Railway Limited—Control—Kansas City Southern* - CCWS Extension Request

Dear Director Brennan:

On behalf of the American Chemistry Council (ACC) and The Fertilizer Institute (TFI), we respectfully request a one-year extension of our access under WB21-82 to the confidential Carload Waybill Sample (CCWS) with unmasked revenues for 2015 through 2020 in connection with *Canadian Pacific Railway Limited—Control—Kansas City Southern*, Docket FD 36500 (the “CPKC Merger Proceeding”).

We seek this extension because the CPKC Merger Proceeding is still active and pending a final decision by the Board. The CCWS with unmasked revenues may be necessary for additional submissions in the Proceeding, which may include petitions for reconsideration.

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

For the foregoing reasons, we respectfully request an extension of our access to the CCWS under WB21-82 to November 30, 2023.

Respectfully,

/s/ Richard M. Couch
Richard M. Couch

Richard.Couch@ThompsonHine.com Fax: 202.331.8330 Phone: 202.973.2736