

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

ENTERED
Office of Proceedings
September 27, 2023
Part of
Public Record

Office of Economics

September 26, 2023

Mr. Benjamin J. Horwich
Munger, Tolles & Olson LLP
560 Mission Street
San Francisco, California 94105-2907

Re: Waybill Request WB23-52 & EP711 (Sub-No. 2)

Dear Mr. Horwich:

The Surface Transportation Board (STB or Board) has received your request under 49 C.F.R. § 1244.9(b)(4) dated September 18, 2023 for permission to access the confidential Carload Waybill Sample (CCWS) with unmasked revenues in connection with EP 711 (Sub-No. 2), Reciprocal Switching for Inadequate Service, on behalf of the Association of American Railroads (“AAR”). You request the unmasked 2021 CCWS along with continued access to CCWS datasets already in your possession, the 1992-2020 unmasked CCWS, pursuant to WB23-02.

You will be authorized to access the requested data for use in the EP 711 (Sub-No. 2) proceeding. Specifically, I will grant you, in accordance with 49 C.F.R. § 1244.9(b)(4), access to the 2021 unmasked costed waybill sample and continued access to the 1992-2020 unmasked CCWS datasets already in your possession. 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) Benjamin J. Horwich – Munger, Tolles & Olson LLP
- b) Erin J. Cox – Munger, Tolles & Olson LLP
- c) Aimee Feinberg – Munger, Tolles & Olson LLP
- d) Giovanni S. Saarman Gonzalez – Munger, Tolles & Olson LLP
- e) Carson J. Scott – Munger, Tolles & Olson LLP
- f) Michael R. Baranowski – FTI
- g) Nathan S. Zebrowski – FTI
- h) Gareth Bond – FTI
- i) Shane Vyskocil – FTI
- j) Jonathan Tweedy – FTI
- k) Prabakaran Ponnuthurai – FTI

The expiration date for this agreement is September 30, 2024. 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.

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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.

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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. Prior payment of processing

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and mailing cost of **\$860**(\$200 processing plus \$60 per signature) is required. Payment can be made through the Board's electronic payment system, Pay.gov. Your payment through Pay.gov will generate a unique Pay.gov transaction number, which you will need to provide with your signed agreement. Pay.gov accepts payment through bank accounts, credit cards, debit cards with a MasterCard or Visa logo, and digital wallet. Payment can also be made directly to the Board via check or money order.

Sincerely,

Francis X. O'Connor

Francis O'Connor
Acting Director
Office of Economics

Waybill Agreement WB23-52

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: Benjamin J. Horwich

A handwritten signature in dark ink, consisting of a stylized 'B' followed by a horizontal line.

Signature

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By: Erin J. Cox



Signature

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By: Aimee Feinberg

A handwritten signature in cursive script that reads "Aimee Feinberg".

Signature

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By: Giovanni S. Saarman Gonzalez



Signature

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By: Carson J. Scott

Carson Scott

Signature

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By: Michael R. Baranowski

A handwritten signature in cursive script that reads "Michael Baranowski". The signature is written in black ink and is positioned above a horizontal line.

Signature

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By: Nathan S. Zebrowski

A handwritten signature in black ink, appearing to be 'N. Zebrowski', written over a horizontal line.

Signature

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By: Gareth Bond

Gareth D Bond

Signature

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By: Shane Vyskocil

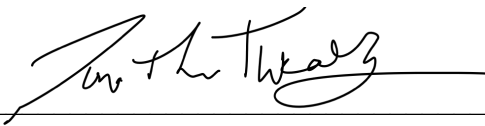


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By: Jonathan Tweedy



Signature

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By: Prabaharan Ponnuthurai



Signature

MUNGER, TOLLES & OLSON LLP

560 MISSION STREET
SAN FRANCISCO, CALIFORNIA 94105-2907
TELEPHONE (415) 512-4000
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September 18, 2023

Writer's Direct Contact
(415) 512-4066
(415) 644-6966 FAX
Ben.Horwich@mto.com

VIA E-MAIL

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

Re: STB Docket No. EP 711 (Sub-No. 2), *Reciprocal Switching for Inadequate Service*

Dear Dr. Brennan:

I write on behalf of the Association of American Railroads ("AAR") in connection with the above-referenced proceeding.

Pursuant to 49 CFR § 1244.9(b)(4), we respectfully request that AAR's outside counsel and consultants be authorized to obtain and use certain confidential Surface Transportation Board ("STB" or "Board") Waybill Sample data. Those outside counsel and consultants, none of whom is a regular employee of AAR, are the following:

Munger, Tolles & Olson LLP and its employees:

1. Benjamin J. Horwich
2. Erin J. Cox
3. Aimee Feinberg
4. Giovanni S. Saarman González
5. Carson J. Scott

FTI Consulting:

1. Michael R. Baranowski
2. Nathan S. Zebrowski
3. Gareth Bond
4. Shane Vyskocil
5. Jonathan Tweedy
6. Prabakaran Ponnuthurai

We respectfully request access to carload waybill data covering the period 1992 through 2021 (including all records, all fields, and confidential unmasked revenues) for all traffic. 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

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appropriate confidentiality undertakings. In accordance with 49 CFR § 1244.9(b)(4)(iv), any evidence drawn from the STB Waybill Sample will remain confidential and will be submitted only to the Board unless the evidence is aggregated to the level of at least three shippers and will prevent the identification of any individual railroad.

The purpose of this request is to allow AAR's outside counsel and consultants to accurately analyze certain aspects of the Board's proposed rule on reciprocal switching under consideration in this proceeding and to prepare comments and verified statements on behalf of AAR. The Board recently issued a Notice of Proposed Rulemaking and requested the submission of written comments by October 23, 2023 and reply comments by November 21, 2023. In light of the potentially broad scope of the proposed rule, AAR seeks access to all records and fields of the 1992–2021 unmasked costed Waybill Samples for all reported geographic areas. The scope of AAR's request here is necessary to assess aspects of the proposed rule that concern traffic patterns that may not be evident from a limited sample. The STB Waybill Sample data is the most readily available source of the data permitting a complete analysis of such issues.

Similar access to these data was previously granted in Docket No. EP 711 (Sub-No. 1) to certain outside counsel and consultants for AAR, but new authorization is necessary in light of the Board's recent action closing Docket No. EP 711 (Sub-No. 1) and opening Docket No. EP 711 (Sub-No. 2).

Access is being requested for the parties listed above at this time. If additional consultants or counsel are retained, we will amend our request to add such individuals. Any strategic reports generated by outside counsel or consultants will not be disclosed to any party unless aggregated to at least the three-FSAC Rule in accordance with 49 CFR § 1244.9(f).

We understand the limitations of the Waybill files regarding revenues and accuracy. We also understand that the data includes confidential shipper and carrier information. We will treat these data as highly confidential, and we will make the data available only to certain of our attorneys and members of our staff in accordance with 49 CFR § 1244.9(f). Any waybill data disclosed to any other party not specifically covered herein, however, will be aggregated to at least the three-FSAC Rule according to 49 CFR § 1244.9(f).

We will undertake all efforts to ensure that those with access to the STB Waybill Sample data comply with the confidentiality requirements established in the regulations. We also understand that we will be required to sign an agreement before any waybill data may be used. We will comply with the Board's confidentiality requirements, and no person, other than those listed here (or authorized through an amended request), will be entitled to access and review the raw data contained within the STB Waybill Sample data.

Once access is granted, the required fees will be paid through the STB's electronic payment system at pay.gov.

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Please do not hesitate to contact me at (415) 512-4066 if you have any questions regarding this request.

Respectfully submitted,

/s/ Benjamin J. Horwich

Benjamin J. Horwich

Counsel for the Association of American Railroads