

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

Office of Economics

ENTERED
 Office of Proceedings
 September 28, 2023
 Part of
 Public Record

September 19, 2023

Ms. Allison C. Davis
 Sidley Austin LLP
 1501 K Street, N.W.
 Washington, D.C. 20005

Re: Waybill Request WB23-48 & EP711 (Sub-No. 2)

Dear Ms. Davis:

The Surface Transportation Board (STB or Board) has received your request under 49 C.F.R. § 1244.9(b)(4) dated September 8, 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 U.S. rail operating subsidiaries of Canadian National Railway Company (“CN”). You request the unmasked 2021 CCWS along with continued access to CCWS datasets already in your possession, the 1992-2020 unmasked CCWSs pursuant to WB22-72.

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 (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) *Matthew J. Warren – Sidley Austin LLP*
- b) *Allison C. Davis – Sidley Austin LLP*
- c) *Andreas Aeppli – Cambridge Systematics*
- d) *Dan Beagan – Cambridge Systematics*
- e) *Kurt Lehmann – Cambridge Systematics*
- f) *Megan Motamed – Cambridge Systematics*
- g) *David Hunt – Oliver Wyman*
- h) *William Rennie – Oliver Wyman*
- i) *Jarod Hage – Oliver Wyman*
- j) *Andrew Jennings – Oliver Wyman*
- k) *Jason Kuehn – Oliver Wyman*
- l) *Julia Robinson – Oliver Wyman*
- m) *Joseph Towers – Oliver Wyman*
- n) *Bill Harsh – Oliver Wyman*

o) Rebekah Bartlett – Oliver Wyman

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.

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 Agreement WB23-48

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.

Waybill Agreement WB23-48

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 and mailing cost of **\$1,100** (\$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 WB23-48

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

/s/ Matthew Warren

Signature

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By: Allison C. Davis

/s/ Allison Davis

Signature

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By: Andreas Aepli

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

Signature

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By: Dan Beagan

/s/ Dan Beagan

Signature

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By: Kurt Lehmann


Signature

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By: Megan Motamed

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

Signature

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By: David Hunt

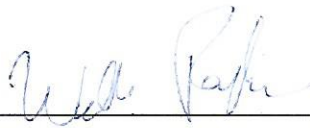
A handwritten signature in cursive script, appearing to read "David Hunt", written in black ink.

Signature

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By: William Rennie

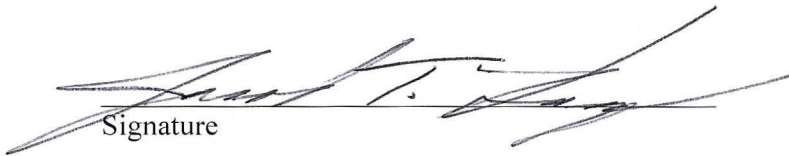
Signature

A handwritten signature in blue ink, appearing to read "William Rennie", is written over a horizontal line.

Waybill Agreement WB23-48

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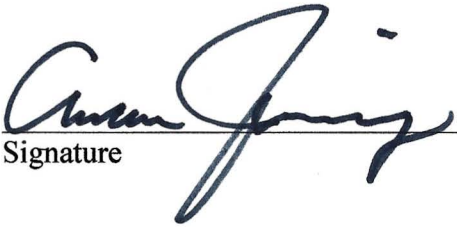
By: Jarod Hage


Signature

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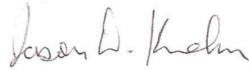
By: Andrew Jennings


Signature

Waybill Agreement WB23-48

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By: Jason Kuehn

A handwritten signature in cursive script, appearing to read "Jason D. Kuehn", written in dark ink.

Signature

Waybill Agreement WB23-48

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By: Julia Robinson

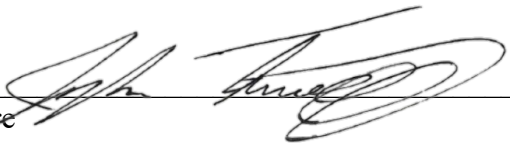


Signature

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By: Joseph Towers

Signature 

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By: Bill Harsh

A handwritten signature in black ink, appearing to read "William C. Harsh", written over a horizontal line.

Signature

Waybill Agreement WB23-48

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By: Rebekah Bartlett

Rebekah E. Bartlett

Signature



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ALLISON.DAVIS@SIDLEY.COM

September 8, 2023

By Email

Francis O'Connor
Acting Director, Office of Economics
Surface Transportation Board
395 E Street S.W.
Washington, D.C. 20423

Re: Docket No. EP 711 (Sub-No. 2), WB22-72 Access Request

Dear Mr. O'Connor:

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 continued access to the confidential Carload Waybill Sample ("CCWS") in WB22-72, and that additional access for 2021 be granted.

Access to the unmasked 1992–2020 CCWSs for all commodities was approved in connection with *Reciprocal Switching*, Docket No. EP 711 (Sub-No. 1) in WB22-10. Access to the unmasked 1992–2020 CCWSs was renewed in WB22-72 on December 14, 2022 in connection with that docket. On September 7, 2023, the Board issued a decision closing Docket No. EP 711 (Sub-No. 1) and opening a new, related proceeding in *Reciprocal Switching for Inadequate Service*, Docket No. EP 711 (Sub-No. 2).

The purpose of this request is to allow CN's outside counsel and its consultants to evaluate relevant issues in the Board's new proceeding at Docket No. EP 711 (Sub-No. 2). The requested CCWS data is the only source of the data permitting a complete analysis of the issues. Access to the unmasked 1992–2021 CCWS for all commodities is being requested for the following outside counsel and consultants: Andreas Aeppli, Dan Beagan, Kurt Lehmann, and Megan Motamed of Cambridge Systematics; David Hunt, William Rennie, Jarod Hage, Andrew Jennings, Jason Kuehn, Julia Robinson, Joseph Towers, Bill Harsh, and Rebekah Bartlett of Oliver Wyman; and myself and my colleague, Matthew J. Warren.

CN's counsel and consultants will scrupulously respect the confidentiality and commercially sensitive nature of the CCWS data and abide by the conditions placed on its use by the Board and by the terms of 49 C.F.R. § 1244.9.

SIDLEY

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Thank you for your consideration and please do not hesitate to contact me at (202) 736-8251 if you have any questions regarding this request.

Best regards,

/s/ Allison C. Davis

Allison C. Davis