

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

Office of Economics

November 8, 2023

Ms. Crystal M. Zorbaugh
Baker & Miller PLLC
2401 Pennsylvania Avenue, NW
Suite 300
Washington, DC 20037

Re: Waybill Request WB23-61 & FD36732 & FD36731 & FD36727 & FD 36730 & FD36724 & AB 1335X & AB 55 (Sub-No. 814X)

Dear Ms. Zorbaugh:

The Surface Transportation Board (STB or Board) has received your request under 49 C.F.R. § 1244.9(b)(4) dated November 6, 2023 for permission to access the confidential Carload Waybill Sample (CCWS) with unmasked revenues in connection with FD36732, FD36731, FD36727, FD 36730, FD36724, AB 1335X, and AB 55 (Sub-No. 814X) on behalf of Norfolk Southern Railway Company (“NSR”). Specifically, you request the unmasked 2004-2023 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 above proceedings. Specifically, I will grant you, in accordance with 49 C.F.R. § 1244.9(b)(4), access to the 2004-2022 unmasked costed waybill samples. The 2022 waybill sample will be released to you once it becomes available. The 2023 dataset is not ready to be requested at this time and may be requested on a later date. These datasets may only be used for purposes of these proceedings. 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) Crystal M. Zorbaugh – Baker & Miller PLLC*
- b) John V. Edwards – Baker & Miller PLLC*
- c) Rose Michele Nardi – Baker & Miller PLLC*
- d) Spencer Naake – Baker & Miller PLLC*
- e) Bill Rennicke – Oliver Wyman*
- f) David Hunt – Oliver Wyman*
- g) Jarod Hage – Oliver Wyman*
- h) Jason Kuehn – Oliver Wyman*

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The expiration date for this agreement is November 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://prod.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 that 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 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

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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.

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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.

Sincerely,

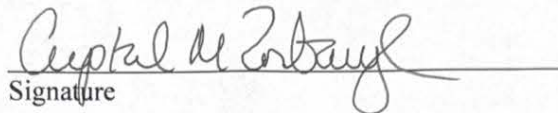
Francis X. O'Connor

Francis O'Connor
Acting Director
Office of Economics

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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.

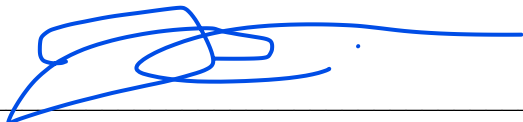
By: Crystal M. Zorbaugh


Signature

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By: John V. Edwards



Signature

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By: Rose Michele Nardi


Signature

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By: Spencer Naake

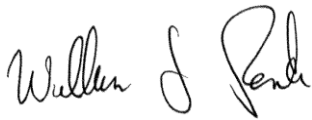


Signature

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By: William J. Rennie

A handwritten signature in black ink, appearing to read "William J. Rennie". The signature is written in a cursive style with a large, looped initial "W".

Signature

Waybill Agreement WB23-61

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By: David Hunt

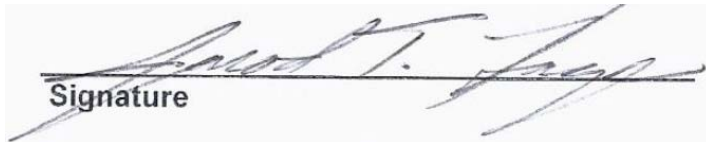
A handwritten signature in black ink, appearing to read "David Hunt", written over a horizontal line.

Signature

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By: Jarod Hage

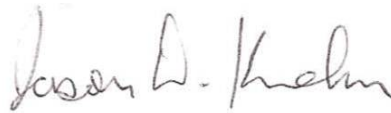


Signature

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By: Jason Kuehn

A handwritten signature in dark ink, appearing to read "Jason D. Kuehn", is written over a horizontal line.

Signature

BAKER & MILLER PLLC

ATTORNEYS and COUNSELLORS

2401 PENNSYLVANIA AVENUE, NW
SUITE 300
WASHINGTON, DC 20037

TELEPHONE: (202) 663-7820
FACSIMILE: (202) 663-7849

Crystal M. Zorbaugh

(202) 663-7831 (Direct Dial)
E-Mail: czorbaugh@bakerandmiller.com

November 6, 2023

By E-Mail

Francis O'Connor
Acting Director
Office of Economics
U.S. Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423
E-Mail: Francis.O'connor@stb.gov

Re: Canadian Pacific Kansas City Limited and the Kansas City Southern Railway Company, D/B/A CPKC – Acquisition and Operation – Certain Rail Line of Meridian & Bigbee Railroad, L.L.C., in Lauderdale County, Mississippi and Choctaw and Marengo Counties, Alabama, FD 36732, Alabama & Gulf Coast Railway LLC – Trackage Rights Exemption – The Kansas City Southern Railway Company D/B/A Canadian Pacific Kansas City, FD 36731, CSX Transportation, Inc. – Acquisition and Operation – Rail Line of Meridian & Bigbee Railroad, L.L.C., FD 36727, CSX Transportation, Inc. – Trackage Rights Exemption – Kansas City Southern Railway Company, FD 36730; Alabama & Gulf Coast Railway LLC – Trackage Rights Exemption – CSX Transportation, Inc., FD 36724, Meridian & Bigbee Railroad, L.L.C. – Discontinuance of Incidental Overhead Trackage Rights – In Lowndes and Montgomery Counties, AL, AB 1335X; CSX Transportation, Inc. – Discontinuance of Trackage Rights Exemption – in Marengo and Choctaw Counties, AL and Lauderdale County, MS, AB 55 (Sub-No. 814X)

Dear Acting Director O'Connor:

I am writing on behalf of Norfolk Southern Railway Company (“NSR”) and Norfolk Southern Corporation (“NSC”) (collectively “Norfolk Southern”), which is evaluating potential traffic diversions and anticompetitive impacts related to (1) CPKC’s potential acquisition from Meridian & Bigbee Railroad, L.L.C. (“MNBR”) and operation over an approximately 50.4 route miles of rail line between Meridian, Miss. and Myrtlewood, Ala. (the “Western Line”) in FD 36732;¹ (2) CSXT’s acquisition and operation of the assets comprising the rail line of MNBR that

¹ The proceeding embraces AB 55 (Sub-No. 814X), FD 36731, and FD 36730

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runs approximately 93.68 miles between the cities of Burkeville, Ala. and Myrtlewood, Ala. (the "Eastern Line") in FD 36727, as well as certain trackage rights-related filings in AB 1335X and FD 36724. The closely linked minor applications (and related transactions) purportedly are being undertaken to create a more efficient routing for CSXT-CPKC Eastern US – Western US/Mexico traffic. On October 11 and 12, 2023, the Board entered a Protective Order in five of the above proceedings.²

Pursuant to 49 C.F.R. § 1244.9(b)(4), we hereby request that Norfolk Southern's outside counsel and consultants in the above-referenced proceedings be authorized to obtain and use certain confidential STB Waybill Sample data. None of the named outside counsel and consultants is a regular employee of Norfolk Southern:

1. Crystal M. Zorbaugh – Baker & Miller PLLC
2. John V. Edwards – Baker & Miller PLLC
3. Rose Michele Nardi – Baker & Miller PLLC
4. Spencer Naake - Baker & Miller PLLC
5. Bill Rennie – Oliver Wyman
6. David Hunt – Oliver Wyman
7. Jarod Hage – Oliver Wyman
8. Jason Kuehn – Oliver Wyman

This request seeks access to carload waybill data covering the period 2004 through 2022 (including all records, all fields, and confidential unmasked revenues) for all traffic. This request also seeks access to comparable data for 2023 when it becomes available. The purpose of this request is to allow Norfolk Southern's counsel and consultants to review the various analyses and evidence required by 49 C.F.R. Part 1180 in support of the CSXT and CPKC applications, as well to prepare and submit any evidence in response thereto. The requested data are essential to the review of the applicants' preparation, *inter alia*, of the market and traffic impact analyses required by 49 C.F.R. §§ 1180.6(a)(2)(i) and 1180.7, as well as Norfolk Southern's response thereto, as the STB Waybill Sample is the only single source of the data permitting a complete analysis of these issues.

Norfolk Southern understands 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 the execution of appropriate confidentiality undertakings. In accordance with 49 C.F.R. § 1244.9(b)(1), 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 an individual railroad.

² FD 36724, 36727, FD 36730, FD 36732, and FD 36731.

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The required fee of \$696.00, which includes a fixed fee of \$200 plus \$62 per person for each individual (a total of eight (8) outside counsel and consultants) has been paid on pay.gov per 49 C.F.R. § 1002.2(f)(98)(i).

Should you have any questions, please contact me at (202) 663-7831 or by email at czorbaugh@bakerandmiller.com.

Sincerely,

/s/ ***Crystal M. Zorbaugh***

Crystal M. Zorbaugh

Attorney for Norfolk Southern Railway Company and
Norfolk Southern Corporation (collectively "Norfolk
Southern")

cc: Alexander Dusenberry (Alexander.Dusenberry@stb.gov)
Bill Rennie – Oliver Wyman