

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

Office of Economics

ENTERED
Office of Proceedings
November 16, 2023
Part of
Public Record

November 13, 2023

Mr. Peter W. Denton
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036-1795

Re: Waybill Request WB23-62 & FD36732 & FD36731 & FD36727 & FD 36730 & FD36724 & AB 1335X & AB 55 (Sub-No. 814X)

Dear Mr. Denton:

The Surface Transportation Board (STB or Board) has received your request under 49 C.F.R. § 1244.9(b)(4) dated November 9, 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 CSX Transportation, Inc. (“CSXT”). 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) Peter W. Denton – Steptoe & Johnson LLP*
- b) Anthony J. LaRocca – Steptoe & Johnson LLP*
- c) Sally Mordi – Steptoe & Johnson LLP*
- d) Louis E. Gitomer – Law Offices of Louis E. Gitomer, LLC*
- e) William P. Byrne – Holland & Knight*
- f) Jameson B. Rice – Holland & Knight*
- g) Dr. David Reishus – Compass Lexecon*
- h) Meade Atkeson – Compass Lexecon*
- i) Jerry Wang – Compass Lexecon*
- j) Ziyu Fan – Compass Lexecon*

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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 those 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: Peter W. Denton

/s/ Peter W. Denton

Signature

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By: Anthony J. LaRocca

/s/ Anthony J. LaRocca
Signature

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By: Sally Mordi

/s/ Sally Mordi

Signature

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By: Louis E. Gitomer

/s/ Louis E. Gitomer

Signature

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By: William P. Byrne

/s/ William P. Byrne

Signature

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By: Jameson B. Rice

/s/ Jameson B. Rice
Signature

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By: David Reishus

/s/ David Reishus

Signature

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By: Meade Atkeson

/s/ Meade Atkeson

Signature

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By: Jerry Wang

/s/ Jerry Wang

Signature

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By: Ziyu Fan

/s/ Ziyu Fan
Signature

Peter W. Denton
202 429 6445
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November 9, 2023

VIA-E-MAIL

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

Re: STB Docket Nos. FD 36727, CSX Transportation, Inc.—Acquisition and Operation—Rail Line of Meridian & Bigbee Railroad, L.L.C.; FD 36724, Alabama & Gulf Coast Railway—Trackage Rights Exemption—CSX Transportation, Inc.; AB 1335X, Meridian & Bigbee Railroad—Discontinuance of Incidental Overhead Trackage Rights—in Lowndes & Montgomery Counties, Ala.; FD 36732, 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, Miss., and Choctaw And Marengo Counties, Ala.; AB 55 (Sub-No. 814X), CSX Transportation, Inc.—Discontinuance of Trackage Rights Exemption—in Marengo & Choctaw Counties, Ala. & Lauderdale County, Miss.; FD 36731, Alabama & Gulf Coast Railway—Trackage Rights Exemption—Kansas City Southern Railway d/b/a Canadian Pacific Kansas City; and FD 36730, CSX Transportation, Inc.—Trackage Rights Exemption—Kansas City Southern Railway

Dear Acting Director O'Connor:

I write on behalf of CSX Transportation, Inc. ("CSXT"), which filed on October 6, 2023 an application in Docket No. FD 36727 seeking approval from the Surface Transportation Board ("STB" or the "Board") for CSXT to reacquire from Meridian & Bigbee Railroad, L.L.C. ("MNBR") the assets comprising a line of railroad that runs approximately 93.68 miles in the State of Alabama between the cities of Burkeville and Myrtlewood, and for CSXT to resume operating that line in place of MNBR (the "CSXT Transaction"). By a decision served on November 3, 2023, the Board accepted for consideration CSXT's application. *CSX Transportation, Inc.—Acquisition & Operation—Rail Line of Meridian & Bigbee Railroad, L.L.C.*, FD 36727 (STB served Nov. 3, 2023).¹

¹ The Board's decision embraces Docket Nos. FD 36724 and AB 1335X.

By a decision served on November 3, 2023, the Board also accepted for consideration the application filed on October 6, 2023 in Docket No. FD 36732, by Canadian Pacific Kansas City Limited, on behalf of itself and its wholly owned subsidiary, The Kansas City Southern Railway Company d/b/a CPKC (collectively, "CPKC"), seeking Board approval for CPKC to acquire from MNBR and to operate approximately 50.4 route miles of rail line between Meridian, MS, and Myrtlewood, AL (the "CPKC Transaction"). *Canadian Pac. Kansas City Limited & The Kansas City S. Ry. Co., d/b/a CPKC—Acquisition & Operation—Certain Rail Line of Meridian & Bigbee R.R., L.L.C. in Lauderdale County, Miss., & Choctaw & Marengo Counties, Ala.*, FD 36732 (STB served Nov. 3, 2023).²

Pursuant to 49 C.F.R. § 1244.9(b)(4), we hereby request that CSXT's outside counsel and consultants be authorized to obtain and use certain confidential STB Waybill Sample data. Those outside counsel and consultants, none of whom is a regular employee of CSXT, are the following:

1. Peter W. Denton – Steptoe & Johnson LLP
2. Anthony J. LaRocca – Steptoe & Johnson LLP
3. Sally Mordi – Steptoe & Johnson LLP
4. Louis E. Gitomer – Law Offices of Louis E. Gitomer, LLC
5. William P. Byrne – Holland & Knight
6. Jameson B. Rice – Holland & Knight
7. Dr. David Reishus – Compass Lexecon
8. Meade Atkeson – Compass Lexecon
9. Jerry Wang – Compass Lexecon
10. Ziyu Fan – Compass Lexecon

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.

On November 6, 2023, outside counsel and consultants for Norfolk Southern Railway Company and Norfolk Southern Corporation (collectively, "Norfolk Southern") requested access to this same data in connection with the above-referenced proceedings. By a letter dated November 8, 2023, the Board granted Norfolk Southern's request. The purpose of CSXT's request is to allow CSXT's outside counsel and consultants to evaluate and respond to any evidence submitted in these proceedings by Norfolk Southern that is based on the requested data.

We understand that access to these data will be granted pursuant to the terms of a protective order, solely for the purposes of these proceedings 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 The Board's decision embraces Docket Nos. AB 55 (Sub-No. 814X), FD 36731, and FD 36730.

Acting Director Francis O'Connor

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At this time, access is being requested for the parties listed above. 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 C.F.R. § 1244.9(f).

The required fee of \$820.00, which includes a fixed fee of \$200.00 plus \$62.00 per person for each individual (a total of ten (10) outside counsel and consultants) has been paid on pay.gov per 49 C.F.R. § 1002.2(f)(98)(i).

Please contact me with any questions.

Respectfully submitted,

/s/ Peter W. Denton

Peter W. Denton

Anthony J. LaRocca

Sally Mordi

Attorneys for CSX Transportation, Inc.