

BEFORE THE SURFACE TRANSPORTATION BOARD

STB Docket No. WB25-33

Waybill Request

309988

Motion for Leave to File a Surreply

ENTERED
Office of Chief Counsel
August 21, 2025
Part of
Public Record

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Dated: August 21, 2025

Thompson Hine LLP, on behalf of itself and Escalation Consultants, Inc. (collectively “Requestors”), as outside counsel and consultants for the American Chemistry Council (ACC), respectfully requests leave to file the attached surreply in this proceeding. The attached surreply addresses incorrect factual and legal arguments that the Association of American Railroads (AAR) made in the reply it filed in this proceeding on August 11, 2025. Granting this request will help ensure that the Board has a full and accurate record on which to decide Thompson Hine’s appeal in this proceeding.

I. The Board routinely allows surreplies where they will assist in reaching a just determination.

Although the Board’s rules generally prohibit a reply to a reply (49 C.F.R. § 1104.13(c)), the Board has consistently construed its rules liberally to allow a party to file a surreply when it will contribute to the just determination of the issues presented, does not prejudice any party, and will not unduly prolong the proceeding. 49 C.F.R. § 1100.3 (stating that the Board’s rules “will be construed liberally to secure just . . . determination of the issues presented”); *R.R. Ventures, Inc.—Abandonment Exemption—Between Youngstown, OH, and Darlington, PA*, AB-556 (Sub-No. 2X), slip op. at 1 (STB served July 30, 2003); *Reading Blue Mountain & N. R.R.—Lease & Operation Exemption—Norfolk S. Ry.*, FD 34048, slip op. at 1 n.2 (STB served Aug. 1, 2001). The Board has routinely found good cause to allow a surreply if it will complete the record, clarify arguments, or allow a party to respond to new arguments that it could not have anticipated. *E.g., Canadian Nat’l Ry.—Control—EJ&E W. Co.*, FD 35087, slip op. at 4 (STB served Apr. 26, 2017)

(granting a reply in the interest of a more complete record); *BNSF Ry.*—*Discontinuance of Trackage Rights Exemption—In Peoria & Tazewell Counties, Ill.*, AB 6 (Sub-No. 470X), slip op. at 1 (STB served June 4, 2010) (granting a reply that would provide a more complete record and clarify the arguments); *R.R. Ventures, Inc.*—*Abandonment Exemption—Between Youngstown, OH, and Darlington, PA*, AB-556 (Sub-No. 2X), slip op. at 1 (STB served July 30, 2003) (granting a reply to complete the record); *SF&L Railway, Inc.*—*Acquisition & Operation Exemption—Toledo, Peoria & W. Ry.*, FD 33996, slip op. at 2 (STB served Feb. 1, 2002) (granting a reply to allow a response to new arguments); *Reading Blue Mountain & N. R.R.*—*Lease & Operation Exemption—Norfolk S. Ry.*, FD 34048, slip op. at 1 n.2 (STB served Aug. 1, 2001) (granting a reply that addresses new factual issues because it is in the interest of developing a complete record); *Cross Oil Refining & Marketing, Inc. v. Union Pac. R.R.*, FD 33582, slip op. at 1 (STB served Oct. 27, 1998) (granting a reply to respond to a new assertion).

II. The surreply is necessary to provide a clear and complete record.

In its reply, the AAR incorrectly characterizes the Requestors' request for CCWS access in this proceeding (the Request) and the law. It contends that the Request is for commercial purposes (Reply 2-3), ignoring its direct connection to an active Board initiative and that the Request aims to produce an analysis with results that are so aggregated that they do not have any commercial value. It also contends that the Board's regulations prohibit release of the Confidential Carload Waybill Sample (CCWS) absent a formal proceeding (Reply 2-3), recycling an argument that the Board has previously rejected and overlooking precedent

granting CCWS access absent a formal proceeding. Additionally, AAR contends that granting the Request will open the floodgates for CCWS access to pursue commercial purposes. (Reply 4, 5.) Yet AAR overlooks the procedural requirements for obtaining CCWS access and the narrow regulatory purpose of the Request.

The attached surreply directly and narrowly responds to these issues, adding important clarity regarding the context and nature of the Request and correcting legal errors in AAR's argument. Accepting the surreply will, thus, facilitate a fully informed decision.

III. The surreply will not unduly delay this proceeding.

Filed just 10 days after AAR's reply, the surreply will not materially lengthen this proceeding. Further, any delay would be prejudicial to the Requestors since they intend to use the CCWS data to inform active inquiries into the Board's regulations.

IV. Conclusion

For the foregoing reasons, we respectfully ask the Board to grant this motion and accept the attached surreply.

Respectfully submitted,

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BEFORE THE SURFACE TRANSPORTATION BOARD

STB Docket No. WB25-33

Waybill Request

Surreply on Appeal of the Director's Decision

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Dated: August 21, 2025

The Association of American Railroads (AAR) contends that granting the request in this proceeding (the Request) would allow commercial fishing expeditions within the Confidential Carload Waybill Sample (CCWS), upending Board precedent respecting the confidentiality of the CCWS data. This objection rests on mischaracterizations of the Request's purpose, a misreading of the CCWS access pathways under 49 C.F.R. § 1244.9, and speculative fears that are inconsistent with the Board's procedural protections and the very nature of the Request. Because the Request is tied to an active Board regulatory initiative with specific goals, Board regulations and precedent do not require a formal proceeding for CCWS access, and the Board's procedural safeguards and specific nature of the Request eliminate the risk of competitive harm or opening the floodgates for CCWS access, the Board should grant the Request.

I. The Request is policy-driven, not commercial.

AAR repeatedly brands the Request as being for a "commercial purpose" (Reply 2-3, 5), but that does not make it so. An objective review of the facts demonstrates that the Request serves a purely regulatory purpose.

Thompson Hine, on behalf of itself and Escalation Consultants (collectively, Requestors), and as outside counsel and economic consultants to the American Chemistry Council (ACC), made the Request to obtain access to the CCWS for a cost-disadvantage analysis that will inform the Board's own Policy Review Team and ongoing Executive Branch efforts to identify and remove existing regulations that stifle rail competition and disadvantage American producers. That is classic regulatory policy work.

Additionally, Requestors will aggregate the results at the 2-digit STCC level, effectively scrubbing the results of any commercial value. With results at that level, a shipper of polyethylene, for example, would not be able to determine whether any cost-disadvantage relates to its commodity or another commodity under the same 2-digit STCC, like pharmaceuticals. Simply put, no shipper could use the analysis to identify a competitor's pricing or movements.

Ignoring these facts, AAR misconstrues the Request as similar to the requests that the Board denied in *Request for Waybill Data (Trinity)*, WB 20-50 (STB served June 17, 2021), and *Request for Waybill Access (U.S. Wheat)*, WB 20-40 (STB served Nov. 20, 2020). (Reply 5.) *Trinity* involved a request by a rail equipment manufacturer for CCWS data that would enable it to compete more effectively in the market. *Trinity*, WB 20-50, slip op. at 1-2 (STB served June 17, 2021). *U.S. Wheat* involved a request from a trade association for CCWS data involving a single commodity type—wheat—to provide transit time and freight cost information to U.S. wheat farmers to help them “understand fully how best to compete” for sales to Mexican millers. Appeal 2, 6, 7, *U.S. Wheat*, WB 20-40 (STB served Nov. 20, 2020). These requests sought to arm individual firms with market intelligence to enable them to compete more effectively. In contrast, the Request aims to provide an analysis aggregated at such a high level that individual firms could not use it to compete.

ACC's members certainly hope to benefit from improved regulation that the Board may adopt through Chairman Fuchs's policy-review initiative and informed

by Requestors’ proposed analysis. However, that does not convert the Request to a private, commercial use. Nearly every regulatory effort has commercial costs and benefits. Such impacts do not transform the regulatory process into a commercial one, especially here, where Congress has established a clear policy to ensure “a sound rail transportation system with effective competition . . . to meet the needs of the public and the national defense.” 49 U.S.C. § 10101(4).

II. Precedent and regulation do not require a specific proceeding before granting CCWS access.

Nothing in statute or the Board’s regulations conditions CCWS access to “other users” under 49 C.F.R. § 1244.9(c) on a specific existing proceeding. AAR bases its contention that a specific proceeding is necessary on a completely different user category with different access rules under 49 C.F.R. § 1244.9(b)(4)—transportation practitioners, consulting firms, and law firms in specific proceedings. (Reply 3 n.13.) That category applies only to requests by those users only when made in the context of a specific proceeding, but it does not prevent those users from seeking access under a different category. In fact, the Board rejected an identical argument by AAR in *Request for Waybill Data (Thompson Hine)*, WB17-44 (Mar. 23, 2018), stating “nothing in the text of the regulations mandates AAR’s conclusion that a user from a category identified in [49 C.F.R. § 1244.9](b)(1)-(4) may only seek access to the CCWS under those sections.” *Id.*, slip op. at 3.

Further, STB has granted CCWS access to “other users” under 49 C.F.R. § 1244.9(c) without a specific proceeding. In *Thompson Hine*, the Board granted CCWS access to facilitate development of a rate benchmarking alternative to the

Board's stand-alone cost test that ACC could present to the Board. *Id.* at 1. At the time, the Board had no specific proceeding seeking public input on an alternative rate reasonableness methodology. Instead, it had merely formed an internal rate reform task force to explore SAC alternatives. *Id.* at 5.

Also, denying CCWS access just because it is not related to a specific proceeding would create a procedural Catch-22 that the Board should avoid. Stakeholders would not have access to the CCWS until a proceeding starts, but the Board might not start a proceeding without CCWS data showing it is needed.

III. Existing safeguards address AAR's access concerns.

AAR contends that granting the Request would mean that anyone could obtain CCWS data by promising to aggregate it or to use it under the pretense of developing a regulatory proposal. (Reply 4, 5.) It also contends that granting the Request would condone use of the CCWS for fishing expeditions. (Reply 5.) These contentions misapprehend the Request and the standards for release of the CCWS.

Under the Board's precedent, promising to aggregate CCWS data or use it to develop a regulatory proposal is not enough to justify release. A non-academic requester seeking CCWS data for a regulatory proposal still must link its request to a particular regulatory initiative. *Waybill Request*, WB24-45, slip op. at 2 (STB Director's Decision Oct. 22, 2024). Here, the Request is related to an active Board initiative—the regulatory review by the Policy Review Team—and active initiatives of the Department of Justice and other federal agencies that squarely target Board regulation.

Also, the Request is not a fishing expedition. A fishing expedition involves casting about for unknown facts, not knowing what you might catch. Here, the Request seeks specific data to calculate a specific metric—the nationwide rail-cost difference between domestic and import goods—to answer a live regulatory question: Do Board rules on freight-rail competition impact the global competitiveness of American products? Further, the calculation methodology prevents cherry-picking data to produce a specific result.

Moreover, AAR ignores that the Board evaluates requests for CCWS access on a case-by-case basis, and requesters must provide a “complete and detailed” explanation of the purpose of the request, a description of the “specific” waybill data required, and a “detailed justification” of the need for the data. 49 C.F.R. § 1244.9(e)(1). This process allows the Board to distinguish requests seeking CCWS access for genuine, valid regulatory purposes from requests to fish CCWS data or use the data for private gain. Granting the Request will not undermine these safeguards.

IV. Conclusion

Requestors seek access to the CCWS to measure how the Board’s current regulation of rail competition affects the global competitiveness of American products. The Chairman, and the President, have invited stakeholders to help answer this question, including through engagement with the Board’s policy review team. Thus, the Request is not commercial, fits squarely within the scope of access that 49 C.F.R. § 1244.9(c) envisions, and does not erode the robust procedural safeguards that apply to CCWS access, which would prevent AAR’s speculative

flood of CCWS requests for private gain. For these reasons, the Board should reject AAR's arguments and grant the Request.

Respectfully submitted,

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Dated: August 21, 2025

Certificate of Service

I certify that I have this August 21, 2025, served copies of this document upon all parties of record in this proceeding by email.

/s/ Jason D. Tutrone
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