

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

Office of Economics

ENTERED
Office of Proceedings
July 10, 2019
Part of
Public Record

June 28, 2019

Ms. Cynthia Richman
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

Re: Waybill Request WB19-35 & EP 704 (Sub-No. 1)

Dear Ms. Richman:

The Surface Transportation Board (STB or Board) has received your request under 49 C.F.R. § 1244.9(b)(4) dated June 27, 2019 for permission to access the confidential Carload Waybill Sample (CCWS) with unmasked revenues in connection with EP 704 (Sub-No. 1), Review of Commodity, Boxcar, and TOFC/COFC Exemptions, on behalf of the Association of American Railroads (AAR). Specifically, you request that your access to the 1987-2014 unmasked costed waybill samples granted pursuant to WB16-17A be renewed and that access to the 2015-2017 unmasked costed waybill samples be granted. You explain this data is needed in order to consider new assertions submitted by other parties in recent *ex parte* meetings, to review your own analysis to reflect any changed competitive conditions for the commodities at issue, and to assess whether new exemptions might be appropriate. The requested data is the only source available to perform this task.

Based on the complete and sufficiently detailed explanations and justifications contained in your request, you will be authorized to access the requested data. Specifically, you will have access to the 1987-2017 CCWS with unmasked revenues. Because you have already been granted access to waybill data with unmasked revenues for purposes of this ongoing proceeding pursuant to WB16-17A, you will be granted continued and updated access to that information. This data may only be used for purposes of this proceeding. ***This approval becomes effective when signed agreements from the individuals listed below are received by the STB:***

- a) Ms. Cynthia Richman – Gibson, Dunn & Crutcher LLP*
- b) Mr. Benton Fisher – FTI Consulting*
- c) Mr. Michael Matelis – FTI Consulting*
- d) Ms. Catherine Barron – FTI Consulting*
- e) Mr. Mark Israel – FTI Consulting*
- f) Mr. Jonathan Orszag – FTI Consulting*

The expiration date for this agreement is July 31, 2020. Unless you seek and obtain a renewal from the STB, this agreement upon expiration obligates you to return or destroy 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* @ www.stb.gov/stb/industry/econ_waybill.html 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.

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.

Waybill Agreement WB19-35

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. As stated by email, the Board will be refunding you the appropriate amount regarding payment for this request.

Sincerely,

A handwritten signature in blue ink that reads "William Brennan". The signature is fluid and cursive, with the first name "William" and last name "Brennan" clearly distinguishable.

William Brennan
Director
Office of Economics

Waybill Agreement WB19-35

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.

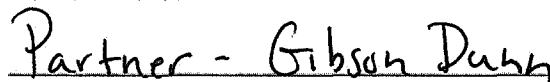
By:



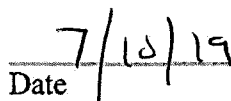
Signature



Name Please Print



Title

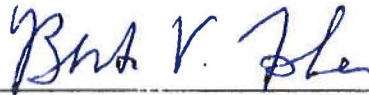


Date

Waybill Agreement WB19-35

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By:



Signature

BENTON V. FISHER

Name - Please Print

SENIOR MANAGING DIRECTOR

Title

7/8/2019

Date

Waybill Agreement WB19-35

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By:

Michael Matelis

Signature

Michael matelis

Name - Please Print

Economist

Title

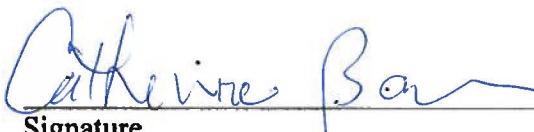
7/8/19

Date

Waybill Agreement WB19-35

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By:


Signature

CATHERINE BARRON

Name - Please Print

MANAGING DIRECTOR

Title

7/8/2019

Date

Waybill Agreement WB19-35

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By:



Signature

Mark A. Israel

Name - Please Print

SMD

Title

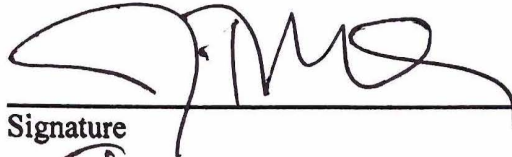
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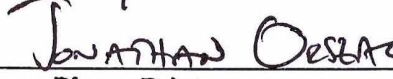
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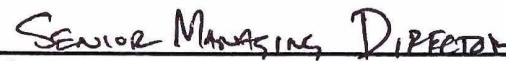
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By:



Signature

Name - Please Print

Title

Date

June 27, 2019

Dr. William Brennan
Director/Chief Economist
Office of Economics
U.S. Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

Re: Re: EP 704 (Sub-No. 1), Review of Commodity, Boxcar, and TOF/COFC Exemptions

Dear Dr. Brennan:

I write on behalf of the Association of American Railroads ("AAR") in connection with the above-referenced proceeding. On March 23, 2016, the Surface Transportation Board ("STB" or "Board") served a Notice of Proposed Rulemaking in the above captioned proceeding proposing to revoke exemptions for five commodities. On April 8, 2016, Gibson Dunn & Crutcher LLP requested, on behalf of AAR, access to the unmasked costed Waybill Sample data for years 1987 through 2014, for all commodities in the requested years (Waybill Request WB16-17A). That request was approved on April 22, 2016 (*see* Attachment A), subject to certain confidentiality undertakings, and the data was provided to Gibson Dunn and AAR's consultants at FTI Consulting. On July 26, 2016, AAR submitted opening comments on the proposed rule changes. It submitted reply comments on August 26, 2016.

Almost three years have passed since AAR submitted its comments in EP 704 (Sub-No. 1). As AAR explained then, it is critically important that any revocation (or exemption) decision by the Board be informed by *current* competitive conditions for a given commodity. *See, e.g., AAR Opening Cmt.* at 40-41 (July 25, 2016). In order to consider new assertions submitted by other parties in recent *ex parte* meetings, to review our own analysis to reflect any changed competitive conditions for the commodities at issue in EP 704 (Sub-No. 1), and to assess whether new exemptions might be appropriate, AAR requests the release of unmasked costed Waybill Sample data for the most recent years, 2015 through 2017, inclusive, for all commodities.

As before, we ask that the requested information be furnished to Gibson Dunn and FTI Consulting (which was retained for this proceeding). AAR's counsel and consultants will scrupulously respect the confidentiality of the Waybill Sample and abide by the conditions placed on its use by the Board.

GIBSON DUNN

Dr. William Brennan
June 27, 2019
Page 2

Please do not hesitate to contact me at (202) 955-8234 if you have any questions regarding this request.

Sincerely,

A handwritten signature in black ink, appearing to read "Cynthia Richman". The signature is fluid and cursive, with the first name "Cynthia" written in a larger, more prominent script than the last name "Richman".

Cynthia Richman