

BEFORE THE
SURFACE TRANSPORTATION BOARD

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STB WB17-44-10/20/17

RELEASE OF WAYBILL DATA

RESPONSE TO APPEAL FILED BY
THOMPSON HINE LLP, ECONOMISTS, INC.,
AND L.E. PEABODY & ASSOCIATES, INC.

Pursuant to 49 C.F.R. § 1244.9(d)(4)(iii), the Association of American Railroads ("AAR") submits this Response to the appeal filed by Requestors in this matter.¹ The Acting Director of the Office of Economics followed long-standing agency precedent by refusing to provide access to unmasked contract revenue information in the Confidential Carload Waybill Samples ("CCWS"). Requestors filed a timely appeal to the Acting Chairman.

The appeal should be denied. Requestors cannot meet the heightened standard on appeal, as the Acting Director made no clear error in judgment. Moreover, Requestors still offer no explanation for why they need access to unmasked contract revenue information. Finally, the railroads and their

¹ The Requestors are Thompson Hine LLP, Economists, Inc., and L.E. Peabody & Associates, Inc. Their appeal, submitted on January 16, 2018, is hereafter referred to as "Requestors Appeal."



customers will suffer irreparable harm if the Board sets aside its decades-long policy and hands over highly confidential contract information to this group of lawyers, practitioners, and consultants who routinely represent shippers in contract negotiations. If the Board does release the contract information, the AAR asks it to stay that decision pending judicial review. We elaborate on each point below.²

I. Requestors Cannot Satisfy The Demanding Standard of Review.

The Board will not lightly set aside an exercise of judgment by the Acting Director. “Appeals are not favored and will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice.” 49 C.F.R. § 1011.6(b). Here, as Requestors were asking the Acting Director to flip the Board’s long-standing policy on its head, they bear an extraordinary burden on appeal to show a “clear error of judgment” or “manifest injustice.” They cannot make that showing.

“It has been the Board’s practice not to release unmasked contract revenue information to practitioners and consultants.” *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1), at 8 (STB served Mar.

² There is ambiguity in the agency rules over who will decide these appeals. Under § 1244.9(d)(4)(iii), the appeal must be filed with the Chairman. But under § 1011.6(b), an appeal of delegated Chairman authority – which includes access to the CCWS – will be decided by the Board.

19, 2008); *see also Modification of the Carload Waybill Sample & Pub. Use File Regulations*, 4 S.T.B. 915, 917 (2000) (“Our long-standing policy is not to release actual contract revenues reported in the confidential waybill sample because of the potential for commercial harm to both the contracting railroad and shipper.”). The Board has permitted access to this commercially sensitive data only where it was essential either for a complainant to prepare its case or for parties to respond to a Board request for an empirical analysis. *See Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, STB Ex Parte No. 711, at 2 (STB served Jul. 25, 2012); *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1), at 9 (STB served March 19, 2008) (refusing to allow release of the CCWS prior to a complaint being filed, finding that release of such “sensitive commercial data” in the absence of a complaint proceeding was unnecessary and could create “litigation shopping’ spurred on by those with incentives to promote litigation.”)

The Acting Director properly followed this long-standing policy. Dr. Brennan observed that “release of the contract rates in the unmasked waybill sample is not necessary for a ‘proof of concept’ of a new alternative to SAC. . . .” Decision at 2. And he further found that “the release of contractual rates in this circumstance could be detrimental to shippers and railroads.” *Id.*

Faithfully applying the Board's precedent in this manner cannot constitute a "clear error of judgment" or a "manifest injustice."³

II. The Acting Director Did Not Err By Concluding That Requestors Failed To Show That Unmasked Revenue Information Was Needed.

In its own appeal of the Decision, the AAR objected to the release of any data because Requestors offered no theory to the Acting Director of how they could use a benchmarking approach as a viable alternative to the Stand-Alone Cost ("SAC") test. The AAR explained that this agency, the courts, and Congress have concluded that rate benchmarking is not a viable method for ratemaking in the railroad industry because it is the polar opposite of demand-based differential pricing. The AAR therefore urged the Board to overturn the Decision because of its failure to address the AAR's primary argument. Requestors, the AAR argued, must come forth with a viable theory they seek to test, not one rejected by the agency, courts, and Congress.

³ The AAR's own appeal must also satisfy Section 1011.6(b), which is why the AAR has raised only three clear legal errors. First, the Decision's conclusion that Requestors can make an end run around § 1244.9(b)(4) by obtaining masked waybill access as "other users" cannot be reconciled with the language of the Board's regulations or with precedent applying those regulations. Second, the Decision failed entirely to address the AAR's primary argument that the demand for the CCWS was fatally flawed because Requestors offered no explanation of how a "benchmarking" approach to rate reasonableness could be consistent with the statutory scheme. Third, the Decision would violate federal law by granting access to information on TIH shipments that DOT has determined to be SSI.

Requestors have offered a different theory on appeal, but the mystery around how they intend to use the CCWS has only deepened. Before the Office of Economics, Requestors asserted they would create a rate benchmark alternative to SAC. As described by Requestors to the Acting Director, “[r]ate benchmarking involves the development of an econometric model that measures the statistical relationship between rail rates and shipment characteristics to predict the competitive rate levels for captive rail traffic based upon the principal factors that influence the rates of competitive traffic.” Request at 4. Requestors claimed they needed the CCWS to “demonstrate the functionality and feasibility of a rate benchmarking standard as an alternative to SAC.” *Id.* Based on what was presented to him, the Acting Director quite reasonably concluded that there was no apparent reason they needed unmasked revenue to show proof of concept for the rate comparison approach, as described by Requestors themselves.

Now Requestors offer more, but also less. First, they confirm their desire to develop the relationship between “competitive” rates and movement characteristics. Second, they seek to determine how much the maximum lawful rate needs to be raised above the predicted competitive rate to provide the railroad adequate revenues. Requestors concede that they do not need

any CCWS information to show that the first step is possible, as TRB has already performed that work.⁴

Instead, Requestors muddy the water with new and unexplained claims that they need the unmasked contract information to incorporate revenue adequacy into a rate benchmarking approach. But those claims are supported only by bald assertions, not concrete explanations. Requestors “cannot incorporate revenue adequacy into a rate benchmark alternative to SAC without unmasked revenue.” Requestors Appeal at 3. They need “two data sets, aggregated financial data for each Class I railroad and accurate (*i.e.*, unmasked) CWS revenue data at the individual movement level.” *Id.* at 4. Otherwise, “there will be a disconnect between a carrier’s aggregate financial information ... and individual movement revenue. . . .” *Id.*

These unsupported claims are too vague to understand, let alone to demonstrate a “clear error of judgment” by the Acting Director. How do Requestors intend to use the unmasked contract revenue information to incorporate revenue adequacy? They offer no hint. Why do they need two data

⁴ In any event, as the AAR explained in its appeal, a naked desire to create an econometric model to seek out the relationship between market rates and shipment characteristics is not a legitimate use of the CCWS. Handing consultants who routinely advise shippers in rate negotiations with railroads a confidential dataset so they can develop a reliable statistical relationship between rates and shipment characteristics would make a mockery of the general rule that “confidential waybill data generally will not be released to other users.” *Procedures on Release of Data From the ICC Waybill Sample* (49 C.F.R. Part 1244), 4 I.C.C.2d 194, 196 (1987) (“Waybill Release”).

sets? We are left to guess. Why does it matter that there might be a disconnect between aggregated financial information and individual movement revenue? We are all in the dark. Given the heightened confidentiality concerns with this data and the demanding standard on appeal to show a “clear error of judgment,” Requestors must offer more than these vague assertions, raised for the first time on appeal.

Indeed, if Requestors need two datasets without any “disconnect between aggregated financial information and individual movement revenue” then the unmasked CCWS is useless. The agency long ago observed that there is a sizable disconnect between the aggregated revenue and cost information reported in the R1, and the aggregated revenue and cost information in the unmasked CCWS. *See Rate Guidelines – Non-Coal Proceedings*, Ex Parte No. 347 (Sub-No. 2) (ICC served Nov. 16, 1992) (Appendix II, Section 2.3). Ultimately, this disconnect forced the Board to abandon using the CCWS to incorporate revenue adequacy into its Three Benchmark Approach.

Nor is Requestors’ thinking illuminated by their reference to testimony in the *Revenue Adequacy* proceedings regarding a cryptic $R_{\max}$. Four years ago, a coalition of shipper groups urged the Board to implement a rate benchmarking approach they labeled the “Yardstick” approach.⁵ That

⁵ *See* Reply Comments of Concerned Shipper Association, *Railroad Revenue Adequacy*, STB Ex Parte No. 722 (filed Nov. 4, 2014) (“Concerned Shipper Association Reply Comments”), Reply Verified Statement of Kevin Caves and

coalition urged the Board to transform the TRB benchmark approach for finding market dominance (a statutory threshold inquiry) into an approach to set the maximum lawful rate (the endgame). Specifically, the proposal was to cap rates at the predicted competitive rate, with an upward adjustment by “some predetermined $R_{\max}$.”⁶ According to that coalition, “[w]hatever the results of the regression model ultimately adopted by the STB, $R_{\max}$ could always be calibrated to target rate relief to the subset of captive shippers that is most likely subject to unreasonably high rates, without jeopardizing a railroad’s revenue adequacy.”⁷

That is the full extent of the description of this elusive $R_{\max}$, upon which Requestors now rest their demand for access to the unmasked CCWS. Nowhere in the *Revenue Adequacy* proceeding—not in reply comments, hearing testimony, or supplemental comments—did the coalition explain how $R_{\max}$ was to be derived or, more importantly, hint that the CCWS was needed to derive it. Requestors’ assertion on appeal that the coalition was “constrained to just discussing” the $R_{\max}$ concept (for a grand total of about three sentences) because it lacked access to actual data, including unmasked

Hal Singer at 20-23, attached to Concerned Shipper Association Reply Comments; Consolidated Hearing Testimony on Behalf of Concerned Shipper Association, *Railroad Revenue Adequacy*, STB Ex Parte No. 722, at 8-14 (filed Jul. 20, 2015) (“Concerned Shipper Association Hearing Testimony”).

⁶ Concerned Shipper Association Hearing Testimony at 10.

⁷ *Id.*

revenue, finds no support in the testimony in the *Revenue Adequacy* proceeding.

The Acting Director exercised his judgment based on the arguments presented to him. Requestors on appeal disavow any desire to develop a “proof of concept,” perhaps because they offer no sound concept to prove. Requestors Appeal at 2. But in any event, they represented to the Acting Director a desire to “facilitate the development, evaluation, and proposal of alternatives to SAC” (Request at 3), and the Acting Director reasonably concluded that they had failed to justify the need for unmasked revenue information for that endeavor. Requestors assert (through arguments of counsel) that the masking factors will introduce noise so that the econometric model would be less accurate. Yet they also disavow any intention to use the dataset to bring an actual rate case, where precision would be required. They seek instead to develop and propose a benchmarking alternative to SAC, where “proof of concept” would be important. In that context, the Acting Director, who manages the agency’s staff of economists and econometricians, reasonably concluded that the competitive harms outweighed any perceived benefits to the precision of the econometric model. Requestors offer no reason for the Board to rule that the Acting Director committed a clear error in judgment or otherwise imposed a manifest injustice on Requestors.

III. The Acting Director Correctly Determined that Shippers and Railroads Will Suffer Irreparable Harm If the Unmasked Contract Information is Released.

Requestors challenge the finding that the release of unmasked revenue “could be detrimental to shippers and railroads.” Decision at 2. In their appeal, Requestors protest that the Acting Director should have discussed “the potential for such harm, why the Board’s rules governing the release of the waybill data are insufficient to prevent such harm, or why such harm warrants withholding unmasked revenues in this situation but not in other comparable past scenarios.” Requestors Appeal at 4. These three arguments lack any merit.

First, the potential for harm is obvious. The ICC long ago observed that “release of data contained in the waybill sample could reveal originating and terminating freight stations, names of railroads participating in movements, significant customers and confidential contract rates. Taken together, release of this information could cause a rail carrier harm by providing competitors with insights into its markets and operational methodologies.” *Waybill Release* at 197. The risk of harm is particularly acute for the release of “confidential contract rates,” which are outside the Board’s jurisdiction and which implicate the most sensitive commercial interests of both railroads and their contracting customers.

These general risks are compounded in this case by Requestors’ specific circumstances. For example, one of the requestors is L.E. Peabody &

Associates, Inc. (“Peabody”), which advertises its participation in contract negotiations for its clients.⁸ Granting a participant in rate negotiations access to years of unmasked revenue data for each Class I carrier would significantly impact future negotiations. The Board has expressed precisely this concern about the harms from giving this highly sensitive data to lawyers and consultants who make a living negotiating and litigating freight rates.⁹ This is why there is a more exacting standard governing the release of data to transportation law firms, practitioners, and consultants; a heightened standard the Decision correctly found that Requestors failed to meet. Decision at 2 (“Requestors sought to make broader use of the CCWS than is contemplated under section 1244.9(b).”)

Requestors, however, argue that the concerns voiced by the industry and embraced by this agency are “more boogeyman than reality.” Requestors Appeal at 5. They claim an inability to discern any confidential information about the railroads’ contracting practices because they would “only” get contract information for the years 2006 to 2013, and the CCWS is a random sample. The later argument is ironic, as Requestors simultaneously seek to

⁸ See Peabody, *Contract Negotiations*, <http://lepeabody.com/OurServices/NegStrategies>.

⁹ See, e.g., *Rate Guidelines – Non-Coal Proceedings*, 1 S.T.B. 1004, 1054-55 (1996) (“We agree with AAR that pre-complaint access to the confidential Waybill Sample is not only unnecessary, but would be an inappropriate use of the Waybill Sample for a non-regulatory purpose if we were to foster its use in rate negotiations between shippers and carriers.”).

use statistical tools and the same random sample to discern a relationship between rates and movement characteristics. And as the Board is well aware, contract terms vary in duration. The release of slightly dated contract information for all Class I railroads would provide valuable insight into the railroads' pricing, marketing, and service strategies across market segments and over time. These lawyers and consultants may discover trends in how the contract revenue change over time; how the terms and difference between tariff rates and contracts differ by commodity, railroad, the geographic region; and how rates change on average when they come off-contract and whether that differs by railroad or commodity. Such information would have obvious value in contract negotiations, which is why the Board has adopted, through notice and comment rulemaking, a 30-year confidentiality period for the proprietary contract data.¹⁰

Second, the existing confidentiality agreements are plainly insufficient. Even assuming absolute good faith by the Requestors, once the shipper-specific and movement-specific revenue information is seen, it cannot be unseen. The Board has correctly reasoned that the unmasked contract revenues in the CCWS have extraordinary commercial sensitivity and that

¹⁰ *Modification of the Carload Waybill Sample & Pub. Use File Regulations*, 4 S.T.B. at 917 ("While recognizing that most transportation contracts are for a term of less than 20 years, we nevertheless must exercise caution in sanction the release of data that may contain proprietary information. For that reason, we will adopt the confidentiality period of 30 years.").

release of this information—even under protective orders—is particularly problematic because “there would be no effective way to ‘unring the bell’” once a release occurred. *CSX Corp. and CSX Transp. Inc., Norfolk S. Corp. and Norfolk S. Ry. Co.—Control and Operating Leases/Agreements—Conrail, Inc. and Consol. Rail Corp.*, STB Fin. Docket No. 33388, at 3 (STB served Oct. 3, 1997). This is not a “red herring” (Requestors Appeal at 5), but a well-grounded concern articulated by the Board itself.

Indeed, the absence of any coherent theory that Requestors seek to test only exacerbates these concerns. Requestors offer no clue how they plan to use this data to incorporate revenue adequacy into a competitive benchmarking alternative to SAC. What is clear is that they will be poring over eight years of data with a fine-toothed comb seeking to unearth a viable theory buried within the data. Having torn the dataset apart, Requestors expect the railroads and shippers whose confidential data they have dissected to rest peacefully with their promise that the knowledge gleaned from that analysis will never be used in any current or future contract negotiations (inadvertently or otherwise).

Requestors’ position contravenes the Board’s established policy. Without exception, anyone granted access to the CCWS must agree to protect the confidential information contained therein. That has always been the case. Yet notwithstanding those agreements, the Board has repeatedly declared its “long-standing policy is not to release actual contract revenues

reported in the confidential waybill sample because of the potential for commercial harm to both the contracting railroad and shipper.” *Modification of the Carload Waybill Sample & Pub. Use File Regulations*, 4 S.T.B. at 917. The reason for that strict policy is that those confidentiality agreements are *insufficient to prevent the competitive harm* from releasing the unmasked contract information. It is impossible for people to forget what they have learned. Granting access to the unmasked contract revenue simply because a requestor will sign a confidentiality agreement would represent a dramatic departure from long-standing agency policy. By the same token, refusing to do so cannot constitute a clear error in judgment.

Requestors also dismiss the concern that granting them access to the contract information as an “Other User” would open the floodgates for members of the public who want access to the same sensitive commercial data. Requestors Appeal at 6. Requestors claim they should be granted access because they have “a very specific and current foundation” for their requests, namely “a desire for an economically defensible alternative to SAC.” But any law firm, any consulting firm, any individual shipper, any state, any student or professor, any trade association, literally anyone could file the same request with the Acting Director and demand the same access to the same contract information to undertake the same inquiry. The Board has already shifted from an absolute prohibition on the sharing of unmasked data to complaint-specific access. Granting access to competitive contract information

absent a specific complaint would be a large step towards wide-scale disclosure, the Acting Director was completely right in declining to take that step, and that aspect of the decision is nothing resembling clear error.

Finally, Requestors object to not being treated the same as the TRB, which was granted access to the unmasked contract data. Requestors Appeal at 6. However, the TRB is a division of the National Research Council and is administered by the National Academies of Sciences (NAS), which advises the Nation on issues related to science and technology. In the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users of 2005, Congress called on the Secretary of Transportation to enter into an arrangement with the TRB to conduct a comprehensive study of the Nation's railroad transportation system since the enactment of the Staggers Rail Act of 1980. Congress then appropriated funds for the study and DOT contracted with NAS to undertake the Congressional inquiry. Requestors and the TRB are not remotely similar.

In sum, Requestors seek access to highly confidential rates for contract traffic over which the Board has no jurisdiction. *See* 49 U.S.C. § 10709. When the ICC sought to collect contract revenue information, and the industry objected, a compromise was struck where the railroads would provide information on these non-jurisdictional movements, but the ICC permitted the carriers to mask the contract revenues. Railroad have relied on that promise of confidentiality for decades. The Board should not abandon its

commitment to protect that contract information from disclosure (even under confidentiality agreements) to law firms and consultants who routinely represent shippers in contract negotiations.

IV. If The Board Releases The Unmasked Contract Information, It Should Stay That Decision Pending Judicial Review.

AAR submits that there is no basis to depart from “the Board’s practice not to release unmasked contract revenue information to practitioners and consultants.” *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1), at 8 (STB served Mar. 19, 2008). If the Board disagrees, however, and chooses to release the unmasked contract information, the AAR asks that it stay its decision pending judicial review.

In addressing a stay pending judicial review, the Board will consider the traditional factors: whether (1) the petitioner is likely to prevail on the merits of the appeal; (2) the petitioner will be irreparably harmed in the absence of a stay; (3) issuance of a stay would substantially harm other parties; and (4) issuance of a stay would be in the public interest. *Nken v. Holder*, 556 U.S. 418, 426 (2009).

Given the discussion above, the AAR submits it has a strong likelihood of success should the Board depart from its decade-long precedent. However, the Board will stay its own order without opining on the likelihood of success on the merits “when the equities of the case suggest that the status quo should be maintained.” *Stagecoach Grp. PLC & Coach USA, Inc., et al.—Acquisition of Control—Twin America, LLC*, STB Docket No. MC-F-21035,

slip op. at 3 (STB served Mar. 9, 2011) (quoting *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844-45 (D.C. Cir. 1977)). Where irreparable harm, the balance of harms, and the public interest weigh in favor of a stay, the Board will issue a stay pending appeal even if it believes that it is “unlikely that petitioners would prevail on the merits.” *N.Y. City Econ. Dev. Corp.—Adverse Abandonment—N.Y. Cross Harbor R.R. in Brooklyn, NY*, STB Docket No. AB-596, slip op. 7 at n.17 (STB served Aug. 28, 2003); *see also W. Tex. Utils. Co. v. Burlington N. & Santa Fe Ry. Co.*, STB Docket No. 41191 (STB served June 25, 1996).

Here, the second, third, and fourth factors all overwhelming support a stay pending judicial review. The railroads would be irreparably harmed, as explained above and as demonstrated by the attached carrier declarations.¹¹ These declarations explain that disclosure of information on confidential contract movements would cause serious commercial harm by providing insight into overall pricing strategies.¹² This harm would be suffered not only by railroads, but by shippers whose confidential contract information would be revealed to consultants who often represent the contracting shippers’

¹¹ *Cf. Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Ariz.*, 881 F.2d 1486, 1491 (9th Cir. 1989) (noting “the irreparable harm a party likely will suffer if erroneously required to disclose privileged materials or communications. . .”).

¹² *See, e.g.*, Declaration of Michael Rutherford at ¶ 9, Declaration of Chris Sanford at 1, Declaration of John Friedmann at ¶¶ 5-6; Declaration of Brian Hancock at ¶¶ 7, 10.

competitors.¹³ And they explain that protective orders are not sufficient, because the knowledge gained by access to the full unmasked CCWS data set could not be simply “unlearned” by shipper representatives who regularly advise clients in commercial negotiations.¹⁴

As for the third factor, Requestors would not be substantially harmed by any delay, as they waited four years to ask for the data since first advocating their Yardstick approach.

Finally, the public interest favors a stay, as Congress gave the Board explicit instructions to protect “information about the contents of a contract authorized under section 10709 of this title, that may be used to the detriment of the shipper or consignee or may disclose improperly, to a competitor, the business transactions of the shipper or consignee.” 49 U.S.C. § 11904(b).¹⁵

¹³ See, e.g., Declaration of Michael Rutherford at ¶¶ 5, 10-11; Declaration of Chris Sanford at 2-3, Declaration of John Friedmann at ¶ 7; Declaration of Brian Hancock at ¶ 8.

¹⁴ See, e.g., Declaration of Michael Rutherford at ¶ 5; Declaration of Chris Sanford at 2, Declaration of John Friedmann at ¶ 8; Declaration of Brian Hancock at ¶¶ 10-11.

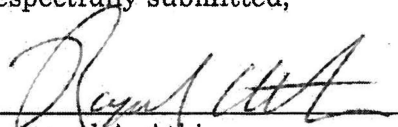
¹⁵ See *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1), at 8 (STB served Mar. 19, 2008) (noting that “railroads may encrypt (or ‘mask’) revenue information associated with contract shipments to safeguard the confidentiality of the contract rates, *as required by* 49 U.S.C. § 11904”) (emphasis added).

Moreover, granting a stay pending appeal would be consistent with the agency's treatment of appeals of the Director's decisions. During the rulemaking to create rules for the release of the CCWS, the AAR requested that the agency treat the filing of the appeal as ground for an automatic stay of the Director's decision. The industry observed that "if an automatic stay did not result, irreparable injury would occur in all cases where the Commission failed to impose a stay but nevertheless reversed the Director's disclosure decision on appeal." *Waybill Release*, 4 I.C.C.2d at 208. The ICC agreed, and observed that "as a practical matter, an automatic stay would be most beneficial as it would reduce paperwork, eliminate the need for the ICC to engage in two separate deliberations (the appeal and the stay) and serve as a further safeguard against premature release of confidential data." *Id.* The same logic justifies a stay pending an appeal to federal court.

CONCLUSION

The appeal by Requestors should be denied. If not, then the Board should stay its decision pending judicial review.

Respectfully submitted,



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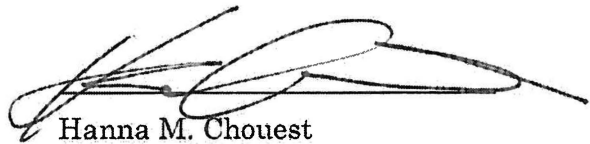
Counsel for Association of American Railroads

January 26, 2018

CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2018, I caused the foregoing
Response to be served by first class mail or more expedient method upon the
following:

Jeffrey O. Moreno
Thompson Hine LLP
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Washington, DC 20036



Hanna M. Chouest

DECLARATION OF JOHN H. FRIEDMANN

I, John H. Friedmann, hereby declare and state as follows:

1. I am over 18 years of age. I have personal knowledge of the facts stated herein and, if called as a witness, could competently testify to the following.
2. I currently serve as Vice President Network Operations and Strategic Planning for Norfolk Southern Corporation ("NS"). I have served as Vice President Strategic Planning since 2008, added my role as Vice President Network Operations on January 1, 2018, and have been employed by NS since 1994. I hold a BS in Industrial Management from Carnegie Mellon University and an MBA from the University of Pennsylvania.
3. During my nearly 24 years with NS, I have held a variety of planning, operating, and commercial positions, including Assistant Vice President Short Line Marketing. In these roles, I have had occasion to work with the Surface Transportation Board's Confidential Waybill Sample ("CWS") for a variety of railroad purposes and I understand the information included therein. I also have extensive experience negotiating various issues with NS rail customers and understand the ways in which a customer could use the CWS against NS in those negotiations.
4. NS would be disadvantaged in negotiations with a customer that had direct or indirect access to unmasked CWS data for the years 2006 through 2013, which would reveal negotiated contract rates between NS and its other customers.
5. NS keeps its contract rates highly confidential because their disclosure would harm NS's competitive position vis-à-vis other railroads and other competing transportation modes.
6. In addition to revealing individual contract rates, the release of the entire unmasked CWS for the years 2006 to 2013 would provide insight into NS's overall pricing

trends and strategies and operating methodologies across various commodity types and time periods.

7. NS's customers have a similar interest in keeping contract rates confidential from their competitors. And a broad release of unmasked CWS data would reveal trend data that would be even more harmful to the customer than a more narrow release.

8. Even if rail customers do not have direct access to the unmasked CWS data, the firms requesting the data are in the business of representing rail customers in many situations that are adverse to NS, including contract negotiations with NS and rate and service disputes before the STB. Although these firms may have no actual intent to use information gleaned from the unmasked CWS data against NS in the course of representing NS customers, and even with a protective order in place, these firms cannot simply wall-off or forget what they learn from their various studies of the unmasked CWS data and cannot provide any assurances that the information will not find its way into representations that are adversarial to NS. Accordingly, granting access to these firms inevitably will impact NS.

9. The unmasked CWS also includes U.S. Department of Transportation designated Sensitive Security Information regarding the movement of hazardous materials. NS safeguards and restricts access to this information in the CWS in accordance with federal regulation. Revealing this information in the broad manner contemplated by the pending request would be inconsistent with those regulatory purposes.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on Jan. 24, 2018, in Atlanta, Georgia.



John H. Friedmann
Vice President Strategic Planning
Norfolk Southern Corporation
1200 Peachtree St, NE
Atlanta, Georgia 30309

Hancock

DECLARATION OF BRIAN D. HANCOCK

I, Brian D Hancock, hereby declare and state as follows:

1. I am over 18 years of age. I have personal knowledge of the facts stated herein and, if called as a witness, could competently testify to the following.

2. I am Executive Vice President and Chief Marketing Officer of The Kansas City Southern Railway Company (KCS). I have served in this position with KCS since I joined KCS in August 2015. Broadly stated, I am responsible for all commercial functions for KCS, including management of our sales force and our sales and marketing operations, customer service and market development. Because of my position, I am knowledgeable about KCS's contracting and pricing practices with its customers.

3. Immediately prior to joining KCS, I served as Senior Vice President of Supply Chain for Family Dollar Stores, Inc. (Family Dollar). I was responsible for all supply chain functions of Family Dollar, a \$10 billion company.

4. Prior to Family Dollar, I served as President – North America for The Martin – Brower Company, L.L.C., a food distributor for McDonald's restaurants. There I was responsible for all strategic and operational functions in North America, involving \$8 billion in sales. From 2005 to 2011, I served as Vice President – Global Supply Chain for Whirlpool Corporation, managing a total transportation spend of about \$1.2 Billion. In all of these positions, I was involved with strategic planning for and execution of our contracting strategies with carriers, including railroads.

5. I understand that a law firm and two economic consulting firms are seeking access to several years' data from the Surface Transportation Board's Confidential Carload Waybill Sample ("CWS"). I understand that those years of CWS data contain shipment-specific

information on hundreds of thousands - if not millions - of rail shipments. I further understand that the request seeks access to actual contract rates between the railroads and their customers.

6. I am also aware that the law firm and one of the economic firms seeking access to this data have participated on behalf of a number of shippers in one or more rate complaints at the Surface Transportation Board. Furthermore, one of the economic firms advertises on its website that its "comprehensive understanding of the marketplace," in conjunction with "diversified databases and benchmarking techniques, has been used to the demonstrable advantage of our clients," and "enhance[s] and facilitate[s] negotiations."

7. I believe that disclosure to the law firm and consultants of actual contract rate information in the CWS would be extremely harmful, both to KCS and to many of its customers.

8. Approximately 89 % of KCS's traffic moves under contracts, rather than published rates. Many of those contracts contain confidentiality clauses under which the shipper and KCS agree not to disclose contract information such as rates, unless compelled to do so under a legal requirement. These confidentiality provisions are sometimes suggested during contract negotiation by the shipper or by KCS, or both. My experience leads me to believe that both sides see a benefit in keeping the terms of their business dealings confidential.

9. KCS treats contract rate information confidentially. Our processes are designed to limit access to information about our contracts to those within the company who negotiate and implement the agreements. We consider information about our contract rates to be sensitive, proprietary information.

10. I believe that revealing KCS's confidential contract shipping rates with its customers for study by lawyers and consultants that represent and counsel shippers in rate complaints and rate negotiations risks disclosures that will damage KCS and its customers.

Making one KCS shipper's rates available to a law firm and economists that may represent or counsel the KCS shipper's competitor could be damaging to KCS's shipper. Making all KCS contract rates over a period of years available to a law firm and economists to study relationships between those rates and facts about the shipments to which they apply could reveal factors or patterns about how KCS sets its confidential contract rates. No matter how well-intentioned the economists or law firm may be, I believe that it would be impossible for them to expunge from their minds the patterns and relationships that they seek to mine from studying the CWS data.

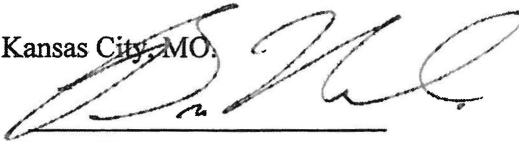
11. These concerns about commercial harm to both KCS and its customers are not hypothetical. It is my understanding that the law firm (and maybe the economics firms) requesting access to the actual contract rates in the CWS has represented multiple customers of KCS in proceedings before the STB. Those companies are mostly in the chemical and petrochemical industries. These past representations of multiple KCS customers in the same industry support my concern that the confidential KCS rate information that the law firm and economists are requesting to study in depth will inevitably affect the representation and counsel provided to KCS customers in rate negotiations.

12. Finally, it is my understanding that the requested data includes data on the origin, destination, shipper, receiver and other facts about toxic-by-inhalation shipments. It is my belief that federal security regulations are designed to prevent the disclosure of such information, and that the STB should not be releasing that information absent compliance with federal security regulations.

[Remainder of page intentionally left blank.]

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 24, 2018, in Kansas City, MO.

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

Brian D. Hancock
Executive Vice President & Chief Marketing Officer
The Kansas City Southern Railway Company
427 West 12th Street
Kansas City, MO 64105

DECLARATION OF MICHAEL RUTHERFORD

I, Michael Rutherford, hereby declare and state as follows:

1. I am over 18 years of age. I have personal knowledge of the facts stated herein and, if called as a witness, could competently testify to the following.
2. I currently serve as Vice President – Merchandise at CSX Transportation Inc. (CSXT). In this role, I am responsible for overseeing the Sales & Marketing functions within the Industrial, Automotive, and Agricultural & Mineral Products business units. I have served in CSXT's sales and marketing department for ten (10) years. In both my current and former roles, I have engaged closely with customers on contract and service matters and am familiar with the commercial sensitivity – to both railroads and customers – of confidential waybill data and contract terms.
3. The proposed release of data from the Surface Transportation Board's Confidential Waybill Sample ("CWS") to consulting and law firms who regularly practice in rail transportation-related litigation would be harmful both to CSXT and its customers, which include shippers and receivers.
4. 49 U.S.C. § 11904(b) prohibits the disclosure by a rail carrier of "information about the nature, kind, quantity, destination, consignee, or routing of property tendered or delivered to that rail carrier for transportation provided under this part, or information about the contents of a contract authorized under section 10709 of this title, that may be used to the detriment of the shipper or consignee or may disclose improperly, to a competitor, the business transactions of the shipper or consignee." The CWS, even in masked form, contains data about individualized movements which identify the commodity (STCC), railroad, origin and destination of the traffic. This information, particularly as it pertains to routes and commodities,

is commercially sensitive and could be used to the detriment of a shipper or a receiver, in violation of 49 U.S.C. § 11904(b). It may also provide insight, across market segments and over time, into shippers' market strategies with respect to individual shipments and receivers' market strategies with respect to suppliers.

5. It is my understanding that the firms requesting access to the CWS are also in the business of providing assistance in rate negotiations, cost studies, and related services for clients, including individual shippers and receivers. Once the requestors' staff has access to and studies the confidential traffic information described above, it will inevitably be used in providing those related services, even if unintentionally. The next time the requesting firms are consulting for a client, they will be doing so with knowledge of competing shippers' movements, or competing receivers' suppliers. Given such knowledge, there is a real risk of harm to any number of those competing entities. A protective order is inadequate because the knowledge acquired from the CWS dataset, even in masked form, cannot be unlearned.

6. Release of *unmasked* CWS data would exponentially increase the harm to both CSXT and its customers.

7. In addition to the concerns expressed above, the unmasked data would reveal the confidential contract shipping rates negotiated between CSXT and its customers, which account for a significant share of all CSXT traffic.

8. Those negotiated rates are kept highly confidential because of the potential for serious commercial harm to CSXT if they became known to competing carriers, including non-railroad carriers.

9. The release of eight years of the entire unmasked CWS would be particularly harmful to CSXT because it would provide valuable insight into CSXT's overall pricing strategies and operating methodologies across market segments and over time.

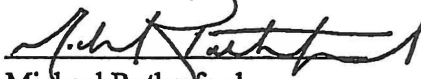
10. CSXT's customers similarly view negotiated contract rates as information that is highly commercially sensitive because knowledge of transportation costs would be valuable to their own competitors. As is the case for CSXT, the release of many years of data would be particularly harmful to our customers because it would reveal long-term cost trends and a more complete picture of expenses than a highly tailored, narrower release.

11. These concerns about commercial harm to both CSXT and its customers are not hypothetical. The requesting law firm's access to this confidential and competitive information would inevitably influence rate negotiations in which that firm is involved. Thus the proposed release will almost certainly affect contract negotiations and other business activities, and cause the competitive harms to customers and carriers described above. For example, a shipper using the requestor's services would have greater bargaining power in contract negotiations than an otherwise similarly situated competitor negotiating without the benefit of the information in the CWS. Similarly, carriers would be at an artificial disadvantage when negotiating with customers using a consultant who is familiar with the railroad's pricing strategies, and when competing for business with other carriers with that same knowledge.

12. Additionally, the CWS includes detailed information on the movement of hazardous materials which the U.S. Department of Transportation has designated as Sensitive Security Information. Consistent with federal regulations, CSXT carefully safeguards and restricts access to the SSI in the CWS. The disclosure of the full, unmasked CWS is inconsistent with the purpose of those regulations.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 24, 2018, in Jacksonville, Florida

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

Michael Rutherford

Vice President – Merchandise

CSX Transportation, Inc.

500 Water St.

Jacksonville, FL 32202

VERIFIED STATEMENT

OF

CHRIS SANFORD

My name is Chris Sanford. I am Manager, Interline Marketing for Union Pacific Railroad Company. I began my railroad career with Chicago & North Western Railroad, where I worked for 12 years, until Chicago & North Western merged with Union Pacific. I have been employed by Union Pacific for 22 years. For the past 20 years, I have worked in Union Pacific's Network Economic and Industrial Development Department. As a result of my responsibilities within the Network Economic and Industrial Development Department, I have a strong working knowledge of the information Union Pacific submits to the Surface Transportation Board ("Board") for the Confidential Carload Waybill Sample ("CCWS"), including the revenue masking factors used to mask confidential contract rates negotiated between Union Pacific and our customers.

I understand a law firm has requested access for itself and two consulting groups to the CCWS, including the revenue masking factors, for 2006-2016. The Board should deny the request because the release of unmasked CCWS data would harm Union Pacific and our customers.

The release of unmasked CCWS data would reveal confidential contract rates negotiated between Union Pacific and our customers. A significant share of Union Pacific's traffic moves under confidential contracts. Union Pacific keeps contract rates highly confidential because of the potential for serious commercial harm to Union Pacific if they became known to competing carriers, including non-railroad carriers. The release of multiple years of unmasked CCWS data would be particularly harmful to Union Pacific because it would provide valuable insight into our pricing, marketing, and service strategies across market segments and over time.

I have been involved in Board proceedings involving the potential releases of contract rate information, so I know Union Pacific's customers also view negotiated contract rates as highly commercially sensitive information. Knowledge of our customers' transportation costs would be valuable to our customers' own competitors.

Because information regarding contract rates is extremely sensitive, access to contract information is tightly controlled, even within Union Pacific. Union Pacific's waybill masking factors are known to very few people at the railroad. Union Pacific restricts internal access to confidential rate information to personnel with a business need to know the information. For example, Union Pacific marketing personnel in one business group with responsibility for a subset of customer's products do not have access to contracts covering the customer's other products that fall under the responsibility of other business groups.

I am especially concerned by the request for access to unmasked CCWS data in this case because I understand some of the firms seeking access are in the business of providing assistance in rate negotiations, costs studies, and related service for clients, including individual shippers. Even if the unmasked CCWS data were released pursuant to a protective order, knowledge acquired from the data cannot be erased. The knowledge will inevitably be used in providing services to clients, which would affect contract negotiations and other business activities.

I am also concerned by the possibility the Board could release multiple years of CCWS data with *masked* contract revenues. Several years ago, we learned a firm advising shippers in rate negotiations had apparently attempted to reverse-engineer Union Pacific's masking factors using information from the public version of the Carload Waybill Sample. Union Pacific shared our concerns with the Board, which took additional steps to mask the rate information provided in the public waybill sample. However, the CCWS contains much more detailed data than the

public waybill sample, and I am concerned a firm could use that detailed data, especially if it also had access to multiple years of data, to perform a similar reverse-engineering of masking factors. Even apart from my concern about confidentiality of rate data, there is a reason the Board's public waybill sample contains much less detail than the CCWS: access to years of CCWS data, even with masked contract revenues, would provide our competitors valuable insights about our business and our evaluation of markets in which we compete, and it would provide our customers' competitors valuable insights about our customers' businesses and evaluations of the markets in which they compete.

VERIFICATION

I, Chris Sanford, declare under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on January 24, 2018.

/s/ Chris Sanford