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January 30, 2018

Via E-mail Alexander.Dusenberry@stb.gov

Ann D. Begeman
Acting Chairman
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

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RE: WB17-44-10/20/17 -- Release of Waybill Data

Dear Acting Chairman Begeman:

Thompson Hine LLP, on behalf of its client the American Chemistry Council ("ACC"), requests that the Board accept this letter as a narrowly-focused reply to the Association of American Railroads' ("AAR") "Response To Appeal Filed By Thompson Hine LLP, Economists, Inc., and L.E. Peabody & Associates, Inc." ("AAR Reply"), which AAR submitted on January 26, 2017 in the above-referenced docket. Although the Board's rules do not ordinarily permit a reply to a reply, Thompson Hine requests leave to do so in this instance for the limited purpose of responding to AAR's request for a stay pending judicial review in Part IV of the AAR Reply based upon claims of irreparable harm and verified statements from four Class I railroad employees. Stay requests are not ordinarily filed unless and until the Board issues a final decision adverse to the requesting party. Nor is it usual to submit verified statements as part of an appeal. Furthermore, AAR could have submitted its stay request as part of its separate appeal of the Acting Director's decision to which Thompson Hine could have replied. Waiting to do so until AAR replied to Thompson Hine's appeal is "sandbagging." Thompson Hine, therefore, requests leave to submit this reply which is narrowly limited to the AAR's claims of irreparable harm.

AAR alleges irreparable harm based upon Part III of the AAR Reply and verified statements from four Class I Railroad employees. In Part III, AAR expresses the following specific concerns:

- "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." AAR Reply, p. 12.

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- “[T]he 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.” *Id.*, p. 12.
- “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). * * * [C]onfidentiality 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.” *Id.*, pp. 13-14 (italics in original).

The Verified Statements from four Class I railroad employees repeat the foregoing allegations and add concerns over contract negotiations.¹

But none of these alleged harms can occur merely by releasing the CWS data to Thompson Hine for the purpose of developing a rate benchmarking alternative to SAC. Thompson Hine requires CWS movement data for one purpose only: to develop an econometric model capable of predicting competitive rate levels for captive movements and determining whether, and to what extent, adjusting captive rates toward the predicted competitive levels would adversely affect a railroad’s revenue adequacy. This requires applying external information to the CWS data to split the population of movements into captive and competitive groups; developing a regression model to capture key factors that predict rates for competitive movements; and, using the model to determine the potential impact upon revenue adequacy of adjusting captive rates towards competitive levels by calculating the “Competitive Threshold” or “R_{Max}” multiplier, which would govern the extent to which captive rates would be permitted to exceed competitive rates.

Even if one were to assume that a random sample representing approximately three percent of all shipments² from four or more years ago could provide the “valuable insight[s]” alleged by AAR, Thompson Hine cannot extract any of the foregoing information of concern to AAR without performing studies and analyses upon the CWS data to mine that information. For example, Thompson Hine cannot learn trends, patterns, or changes associated with specific movements, shippers, railroads, commodities, or geographic areas without filtering and analyzing the CWS data for those purposes. And even then, there would be no way to analyze

¹ See Freidman V.S., ¶¶ 4, 6, 8; Hancock V.S., ¶¶ 10-11; Rutherford V.S., ¶¶ 4, 5, 9-11; and Sanford V.S., pp. 1-2.

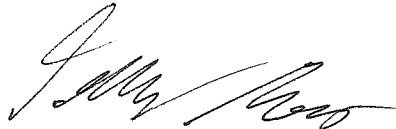
² See “2016 Carload Waybill Sample Reference Guide,” Appendix A, p. 185.

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trends for specific shipments, since a different random sample is drawn every year. Because this is not information that Thompson Hine requires to develop a rate benchmarking model, it is beyond the scope of the purpose expressed in the Waybill Request and the performance of any such analyses would violate the Board's standard confidentiality agreement.

Thus, although the AAR stops short of accusing Thompson Hine, Economists, Inc., and L.E. Peabody of intending to act in bad faith, that is the only scenario in which the irreparable harm concerns expressed actually could occur. Absent extraneous analyses by these lawyers and consultants, AAR has not identified any information that Thompson Hine might see in the CWS data that could cause irreparable harm to railroads or shippers simply because Thompson Hine cannot "forget" or "unlearn" such information. For the irreparable harm identified by AAR to occur, Thompson Hine first would have to violate the confidentiality agreement by performing extraneous analyses upon the CWS data that would reveal the potentially harmful information. The Board, therefore, should reject AAR's claims that railroads and shippers would suffer irreparable harm absent a stay of any decision to release the CWS with unmasked revenue to Thompson Hine.

Sincerely,



Jeffrey O. Moreno

cc: William J. Brennan, Acting Director, Office of Economics
Raymond A. Atkins, Counsel to Association of American Railroads