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By Messenger

William J. Brennan, Director
Office of Economics
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423



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RE: Request for Release of 2006-2015 Confidential Waybill Data

Dear Director Brennan:

Pursuant to 49 C.F.R. § 1244.9(c), Thompson Hine LLP, on behalf of itself, Economists, Inc., and L.E. Peabody & Associates, Inc. (collectively "Requestors"), hereby requests that the Surface Transportation Board ("Board") release all fields and records included in the Confidential Waybill Sample ("CWS") for all Class I railroads, with masking factors, for calendar years 2006-2015, and for 2016 when it becomes available. This letter sets out the information required by 49 C.F.R. § 1244.9(e).

I. The Requesting Parties and Their Purpose.

Requestors are counsel or consultants to the American Chemistry Council ("ACC"). Requestors intend to use the CWS in preparing verified statements for submission to the Board in pending and/or future proceedings concerning the development of alternative rate case methodologies to Stand-Alone Cost ("SAC").

Section 15 of the STB Reauthorization Act mandated that the Board study and report to Congress on whether there are viable alternatives to SAC. Even prior to that mandate, the Board had commissioned an outside consultant, InterVISTAS, to conduct an independent assessment of SAC and possible alternatives. The Board released that study to the public on September 22, 2016 and hosted an economic roundtable discussion on October 25, 2016, to discuss the issues and conclusions presented in the study. *See, InterVISTAS Study*, Docket No. EP 736 (served Oct. 12, 2016). The Board also announced its intent to hold a hearing in EP 736 on the study for all stakeholders and interested parties to participate, but it has not yet announced a schedule. *Id.*

Furthermore, in several other proceedings, the current Board Members have expressed concerns over the efficacy of the SAC process as a regulatory standard for determining the reasonableness of rail rates for non-coal, non-unit train shipments, and expressed their belief that Docket No. EP 736 provides an appropriate forum for stakeholders to present alternatives. For example, Vice Chairman Miller observed just over a year ago that:

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After two years as a Board Member, during which time I have given considerable thought to these issues, I have serious doubts about whether the SAC test is still a valid approach to rail rate regulation. But even if it is still valid, that does not necessarily mean it is the best approach. For these reasons, I believe that now is the time for the Board to begin a major review and discussion of alternatives to SAC. In my view, a reasonable starting point would be for the Board to publicly release the report prepared by our outside consultant on SAC alternatives and conduct a hearing to obtain feedback and reaction from our stakeholders on the report's conclusions. In my meetings with shipper groups, many have expressed a desire to present the Board with their own thoughts and ideas on alternatives to SAC, and the hearing could also serve as an opportunity for them to do so.

Sunbelt Chlor Alkali Partnership v. Norfolk Southern Ry. Co., NOR 42130, slip op. at 41 (served June 30, 2016) (Miller, concurring) (emphasis added).

A few months later, Vice Chairman Miller reiterated and expanded upon her comments in the *Sunbelt* decision:

The fact that the foundational approach to the SAC test was laid out in a decision entitled Coal Rate Guidelines over 30 years ago is a clear indication that it is time to take a fresh look at the economic principles that should be applied to railroad rate regulation and the mechanics of applying those principles. The economics of railroading were very different in 1985 when Coal Rate Guidelines was issued than they are today. In addition, the focus of Coal Rate Guidelines was obviously coal shipping, which generally involves unit train shipments, and not the more complicated logistics of carload shipping that is common for the most recent cases brought before the Board. All of this raises the need to fully review Coal Rate Guidelines.

When the Board finally releases the long-delayed report on SAC alternatives that it has trumpeted for some time now, it can provide the opportunity for the Board to begin a serious consideration of alternatives to SAC. The first step should be allowing our stakeholders to provide their feedback to the report's conclusions, as well as offer their own thoughts and ideas on alternatives. It is

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my hope that that this can be the beginning of a deep and thoughtful discussion of SAC.

Total Petrochemicals & Refining USA, Inc. v. CSX Transp., Inc., NOR 42121, slip op. at 46-47 (served Sept. 14, 2016) (Miller, concurring) (emphasis added).

In her partial dissent to the very same *Total Petrochemicals* decision, Acting Chairman Begeman expressed her agreement with Vice Chairman Miller “that the Board must focus its attention on finding SAC *alternatives*.” *Id.* at 48 (Begeman, dissenting in part) (emphasis in original). The Acting Chairman further declared:

We need to ensure that the Board’s rate complaint procedures are accessible to all captive shippers of all types of commodities—whether large or small and whether shipped by unit train or carload. It may not be easy (or very fast) to ultimately develop a new approach, but it has to be a top Board priority. We finally are seeking comment on procedures that could create a new rate reasonableness methodology for use in very small disputes. We should next seek public comment on ideas for SAC alternatives, and I agree with Vice Chairman Miller that we should do so as soon as the report the Chairman commissioned in 2014 to examine alternatives for rate regulation is made public. Doing so would enable us to best fulfill the Reauthorization Act’s mandate to study and report to Congress on whether there are viable alternatives to SAC. Stakeholder input is needed in this effort.

Id. (emphasis added). *See also, Sunbelt Chlor Alkali Partnership v. Norfolk Southern Ry. Co.*, NOR 42130, slip op. at 32 (served June 20, 2015) (Begeman, dissenting); *E.I. du Pont de Nemours & Co. v. Norfolk Southern Ry. Co.*, NOR 42125, *reconsideration denied* (served Dec. 23, 2015) (Begeman, dissenting).

The purpose of this request to obtain access to the CWS is to facilitate the development, evaluation, and proposal of alternatives to SAC, consistent with the objectives expressed by both current Board members, the intent of EP 736, and the mandate of the STB Reauthorization Act. Both Board Members have identified the exploration of SAC alternatives as a high priority for the Board and the EP 736 docket as the vehicle through which stakeholders should present their ideas for such alternatives. Because the type of analysis Requestors intend to perform on the CWS is complex and time-consuming, they require access to the CWS now to be able to submit comments to the Board in a timely manner. As Acting Chairman Begeman has observed, “It may not be easy (or very fast) to ultimately develop a new approach, but it has to be a top Board

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priority.” *Total Petrochemicals*, slip op. at 49. Consistent with that mantra, Requestors require access to the CWS now so as to avoid unnecessary delays to this “top Board priority.”

II. Justification for Access to the Requested Data

Requestors need the CWS to demonstrate the functionality and feasibility of a rate benchmarking standard as an alternative to SAC. Rate 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. Requestors plan to use the CWS to develop a proposal or proposals for designing alternatives to SAC around rate benchmarking and to present those proposals to the Board in EP 736 or such other proceeding(s) the Board may designate for that purpose.

In the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users of 2005, Congress called on the Secretary of Transportation to requisition a comprehensive study, to be conducted by the Transportation Research Board (“TRB”) of the National Academy of Sciences, regarding, among other issues, rail rates, balancing the railroads’ need to earn adequate revenues and shippers’ needs for reasonable rates, and the STB’s role in regulating rates particularly as railroads become revenue adequate. The TRB presented its report, titled “Modernizing Freight Rail Regulation,” to the STB in Docket No. EP 722, *Railroad Revenue Adequacy*. A central component of that report was a rate benchmarking proposal, which TRB illustrated in Appendix B using 13 years of CWS data obtained from the Board. In that same proceeding, Requestors, testifying on behalf of a coalition of shipper groups that included ACC, espoused rate benchmarking (which they labeled the “Yardstick” approach) as a potential alternative to SAC.¹ But at the time, they were constrained to addressing solely the conceptual framework of rate benchmarking due to the lack of actual data. To develop, test, and evaluate their proposal(s), Requestors require access to the CWS that is comparable to the access afforded the TRB.

The CWS is the only readily available and reliably consistent source for many of the explanatory variables needed to develop a rate benchmarking proposal. Critical information such as origin and destination pairs, traffic volumes, rates, and railroads participating in the movement are not available from any other single source. The public use waybill sample lacks sufficient details, such as detailed origin and destination information or fuel surcharges. The

¹ See, Reply Comments of Concerned Shipper Associations, EP 722 (Sub-No. 2), Reply Verified Statement of Kevin Caves and Hal Singer at 20-23 (dated Nov. 4, 2014); Consolidated Hearing Testimony on Behalf of Concerned Shipper Associations, EP 722 (Sub-No. 2), at 8-14 (dated July 20, 2015);

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relevant CWS data fields for each movement that are needed to develop an econometric model include, but are not necessarily limited to:

1. Number of carloads (CWS Field 5);
2. Intermodal service code (CWS Field 8);
3. Standard Transportation Commodity Code ("STCC") (CWS Field 12);
4. Freight revenue (CWS Field 15);
5. Transit charges (CWS Field 16);
6. Miscellaneous Charges (CWS Field 17);
7. Miles (CWS Field 24);
8. Rebill code (CWS Field 25);
9. Intermodal equipment flag (CWS Field 28);
10. Reporting railroad (CWS Field 31);
11. Origin Freight Station Accounting Code ("FSAC") (CWS Field 32);
12. Origin railroad (CWS Field 33);
13. Bridge railroads (CWS Fields 35 to 45);
14. Terminating railroad (CWS Field 51);
15. Terminating FSAC (CWS Field 52);
16. AAR equipment type code (CWS Field 70);
17. Origin standard point locator code ("SPLC") (CWS Field 74);
18. Destination SPCL (CWS Field 75);
19. STCC without hazardous codes (CWS Field 76);
20. Theoretical expansion factor (CWS Field 88);
21. STB car type (CWS Field 90);
22. Car ownership category (CWS Field 93);
23. Deregulation flag (CWS Field 96);
24. Service type (CWS Field 97);
25. Expanded carloads (CWS Field 98);
26. Expanded total revenue (CWS Field 102);
27. Railroad revenue splits (CWS Fields 103 to 112);
28. Railroad distances (CWS Fields 113 to 122);
29. Origin grain flag (CWS Field 172);
30. Destination grain flat (CWS Field 173);
31. Origin automatable ramp facility code (CWS Field 175);
32. Destination automatable ramp facility code (CWS Field 175); and
33. Fuel surcharge (CWS Field 202).

The foregoing list is not intended to be exclusive, as Requestors seek access to all fields in the CWS to ascertain their relevance as variables in an econometric model.

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Requestors require access to multiple years of real-world data on rail rates and transportation characteristics to design and construct a rate benchmarking model with a statistically significant population of competitive rail rates across all commodities and to demonstrate that the model produces meaningful and reasonable results. Whereas the TRB used 13 years of CWS data in its econometric, Requestors seek the most recent 10 years of CWS data, from 2006-2015, and are requesting 2016 data when it becomes available.

It is particularly imperative that Requestors have access to the revenue masking factors. The Board permits rail carriers to alter the revenues for contract traffic in the CWS through the use of "masking factors," for confidentiality purposes. These masking factors may be different from carrier to carrier and for different commodities or commodity groups transported by each carrier. In addition, a masking factor may be either positive or negative (or not applied at all). Railroads apply masking factors to the revenue appearing in the CWS and provide these masking factors to the Board. As the very purpose of rate benchmarking is to predict competitive rate levels, Requestors require access to actual, not masked, revenue. The masked revenue will skew the results by exaggerating or understating the differential between competitive and captive rates and will render it impossible to assess their accuracy in the real world.

III. Confidentiality Representations

Requestors agree to adhere to all the confidentiality requirements set forth at 49 C.F.R. §§ 1244.9(b)(4) and (f) and to execute the usual Confidentiality Agreement associated with release of the CWS. Requestors will not reveal any CWS data to their client, ACC, that is prohibited.

Sincerely,



Jeffrey O. Moreno
Thompson Hine LLP

Cc: Anne Begeman, Acting STB Chair
Deb Miller, STB Member
