

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

Office of Economics

June 28, 2019

248065

Mr. David E. Benz
Thompson Hine LLP
1919 M. Street, N.W.
Washington, D.C. 20036

ENTERED
Office of Proceedings
July 1, 2019
Part of
Public Record

Re: Waybill Request WB19-36 & EP 704 (Sub-No. 1)

Dear Mr. Benz:

The Surface Transportation Board (STB or Board) has received your request under 49 C.F.R. § 1244.9(b)(4) dated June 28, 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 American Forest & Paper Association (AF&PA). Specifically, you request that your access to the 1987-2014 unmasked costed waybill samples granted pursuant to WB16-20A be renewed and that access to the 2015-2017 unmasked costed waybill samples be granted. You explain this data is needed to respond to new evidence, which is based on 2017 data, regarding forest and paper commodities that was included in recent memoranda to the Board. Also, the data will permit AF&PA's outside counsel and consultants to respond to this new evidence based on current waybill data and to focus your economic analysis on the most rail dependent traffic identified in the *ex parte* meetings. 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 WB16-20A, 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. Karyn A. Booth – Thompson Hine LLP*
- b) *Mr. David E. Benz – Thompson Hine LLP*
- c) *Mr. Henry Julian (Jay) Roman – Escalation Consultants, Inc.*

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.

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

Waybill Agreement WB19-36

STB will provide the data by email through file transfer protocol. Prior payment of processing and mailing cost of \$318 is required. Payment can be made through the Board's electronic payment system, Pay.gov. Your payment through Pay.gov will generate a unique Pay.gov transaction number, which you will need to provide with your signed agreement. Pay.gov accepts payment through bank accounts, credit cards, debit cards with a MasterCard or Visa logo, and digital wallet. For fee type number please use WB19-36. Payment can also be made directly to the Board via check or money order."

Sincerely,

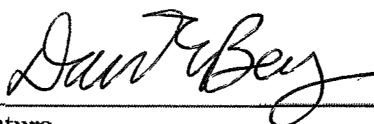
A handwritten signature in blue ink that reads "William Brennan". The signature is fluid and cursive, with the first name "William" and last name "Brennan" clearly distinguishable.

William Brennan
Director
Office of Economics

Waybill Agreement WB19-36

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

DAVID E. BENZ

Name - Please Print

OUTSIDE COUNSEL THOMPSON HINE LLP

Title

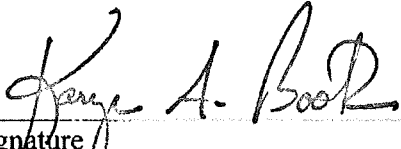
28 June 2019

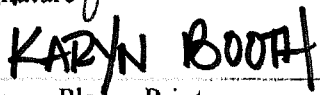
Date

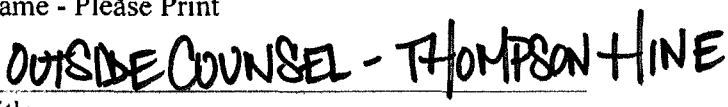
Waybill Agreement WB19-36

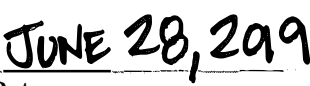
I have read and understand the conditions for release of the CCWS data. I agree to comply fully with these conditions and the provisions of this confidentiality agreement. No later than thirty days before the agreement expires, I will request an extension of this agreement, if necessary. If no extension 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 WB19-36

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

Jay Roman

Name - Please Print

President

Title

07/01/2019

Date

via e-mail at william.brennan@stb.gov and Federal Express

June 28, 2019

Mr. William Brennan
Director, Office of Economics
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

RE: Waybill Request, STB Ex Parte No. 704 (Sub-No. 1), Review of
Commodity, Boxcar, and TOFC/COFC Exemptions

Dear Mr. Brennan:

Thompson Hine LLP, outside counsel for The American Forest & Paper Association (“AF&PA”), hereby respectfully submits this supplemental request for updated Carload Waybill Sample data, including unmasked revenue, for the years 2015 to 2017, pursuant to 49 CFR §§ 1244.9(b)(4) and (e), the Board’s decisions of May 6, 2016 (n. 2) and June 19, 2019 in this proceeding, and the Office of Economics’ authorization letter of May 6, 2016.

The Board previously authorized the release of unmasked carload waybill data for the years 1987 through 2014 to AF&PA’s outside counsel, Thompson Hine LLP, and outside consultants for use in this proceeding, with appropriate protections. AF&PA utilized the unmasked carload waybill data in its comments filed July 26, 2016 and August 26, 2016.

This proceeding remains ongoing. In a decision issued on March 19th of this year, the Board temporarily waived its prohibition on *ex parte* communications, and invited parties to schedule meetings with Board members “so that the agency may develop a more complete record.”¹ The Board directed the parties to file memoranda of each *ex parte* meeting, and invited written comment on the memoranda once published on the Board’s website. The deadline for written comments was extended in a decision served on June 20, 2019, and AF&PA is requesting today an additional extension of time due to new evidence submitted regarding forest and paper products commodities in mid-June 2019.²

AF&PA requests access to the updated Waybill Sample information from 2015 to 2017 in order to permit a response to the new evidence, which is based on 2017 data, regarding forest and paper commodities that was included in recent memoranda to the Board. As part of its comments, AF&PA also plans to narrow the scope of its previous revocation request to focus on

¹ Board decision at 2 (served March 19, 2019).

² See AF&PA Motion for Extension of Time (filed June 28, 2019), referring to the new evidence included in the Summary of Ex Parte Meeting Between the American Iron and Steel Institute (AISI) and the Steel Manufacturers Association (SMA) and STB Chairman Ann Begeman, STB Ex Parte No. 704 (Sub-No. 1).

June 28, 2019

Page – 2 –

the most rail dependent traffic identified in the *ex parte* meetings, which will simplify this proceeding by eliminating certain issues in dispute. Access to the updated Waybill Sample will permit AF&PA's outside counsel and consultants to respond to this new evidence based on current Waybill data and to focus their economic analysis on the most rail dependent traffic identified in the *ex parte* meetings.

We request that access to this data be granted to Karyn A. Booth and David E. Benz of Thompson Hine LLP and to outside consultant Henry Julian (Jay) Roman of Escalation Consultants, Inc. We are prepared to sign the appropriate supplemental confidentiality undertakings for release and use of the waybill data in this proceeding.

Given the tight time frame that applies, we would appreciate expedited treatment of this request if at all possible. Thank you for your attention to this matter.

Respectfully submitted,



Karyn A. Booth
David E. Benz
THOMPSON HINE LLP

*Attorneys for The American Forest & Paper
Association*
