

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

247961

Office of Economics

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Office of Proceedings
June 17, 2019
Part of
Public Record

June 11, 2019

Mr. Peter A. Pfohl
Slover & Loftus LLP
1224 Seventeenth St. N.W.
Washington, D.C. 20036

Re: Waybill Request WB19-27 & EP 704 (Sub-No. 1)

Dear Mr. Pfohl:

The Surface Transportation Board (STB or Board) has received your request under 49 C.F.R. § 1244.9(b)(4) dated May 29, 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 Portland Cement Association. Specifically, you request that your access to the 1988-2014 unmasked costed waybill samples granted pursuant to WB16-25A be renewed and that access to the 2015-2017 unmasked costed waybill samples be granted. You explain that the proceeding for which the data was requested remains ongoing. You further explain that the data requested will be used to confirm and update your economic analysis in preparation for possible use in planned future meetings with the Board in the proceeding. 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 1988-2017 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 WB16-25A, 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) Mr. Peter A. Pfohl – Slover & Loftus LLP
- b) Mr. Dan M. Jaffe – Slover & Loftus LLP
- c) Ms. Katherine F. Waring – Slover & Loftus LLP
- d) Ms. Jamie Heller – Hellerwork, Inc.
- e) Mr. John Schmitter – KEP LLC

The expiration date for this agreement is June 30, 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.

Waybill Agreement WB19-27

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 WB19-27

STB will provide the data by email through file transfer protocol. Prior payment of processing and mailing cost of \$430 is required. Payment can be made through the Board's electronic payment system, Pay.gov, on the STB's website. 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. Payment can also be made directly to the Board via check or money order."

Sincerely,

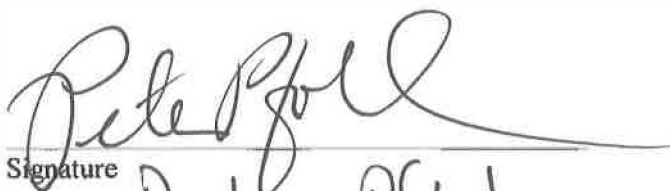


William Brennan
Director
Office of Economics

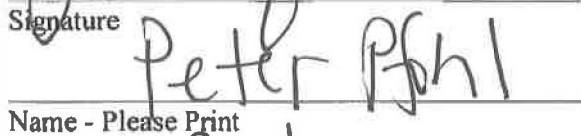
Waybill Agreement WB19-27

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 WB19-27

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By:


SignatureDaniel Jaffe
Name - Please PrintPartner
Title6/14/19
Date

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By:



Signature

JOHN SCHMITTER

Name - Please Print

PRESIDENT, KEPLLC

Title

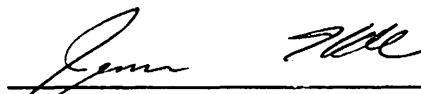
06.11.2019

Date

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By:


SignatureJAMIE HELLER
Name - Please PrintPRES HELLER WORK, INC
Title6/11/19
Date

Waybill Agreement WB19-27

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By:



Signature



Name - Please Print



Title



Date



SLOVER & LOFTUS LLP

ATTORNEYS AT LAW

PETER A. PFOHL

May 29, 2019

VIA EMAIL AND FEDEX

Mr. William Brennan
Director, Office of Economics
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

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

Dear Mr. Brennan:

Pursuant to 49 C.F.R. § 1244.9(b)(4) and (e); the Board's decisions of May 6, 2016 and March 18, 2019 in the above-referenced proceeding; and the Board's Office of Economics' authorization letter of July 13, 2016; Slover & Loftus LLP, counsel for the Portland Cement Association ("PCA"), respectfully submits this supplemental request for updated Carload Waybill Sample data, including unmasked revenue, for the years 2014 to 2017.

In response to Waybill Request WB16-25A, the Board authorized the release of unmasked carload waybill data to PCA's outside counsel and consultants for use in this proceeding, under appropriate protections.

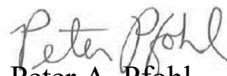
This proceeding is ongoing. In its decision of March 19, 2019, the Board invited interested parties "to have discussions with Board members so that the agency may develop a more complete record," and to provide at those meetings any additional written or electronic material and data. PCA's Comments (filed July 26, 2016) and Reply Comments (filed Aug. 26, 2016) were supported by the analysis of the Waybill Sample data provided from 1988 through 2014 (latest year of data available). The requested updated Waybill Sample information from 2015 to 2017 is necessary to permit PCA's outside counsel and consultants to confirm and update its economic analysis, as appropriate, and for possible use in planned future meetings with the Board conducted pursuant to the Board's March 19, 2019 decision.

Mr. William Brennan
May 29, 2019
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We request that access to this data be granted to Peter A. Pfohl, Dan M. Jaffe, and Katherine F. Waring of Slover & Loftus LLP, and to outside consultants Jamie Heller of Hellerwork, Inc. and John Schmitter of KEP LLC. We are prepared to sign the appropriate supplemental confidentiality undertakings for release and use of the waybill data in this proceeding.

We would be most appreciative if you would process this request at your earliest convenience. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in dark ink, appearing to read "Peter Pfohl". The signature is fluid and cursive, with the first name "Peter" and last name "Pfohl" clearly distinguishable.

Peter A. Pfohl

An Attorney for the
Portland Cement Association