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

Re: Thompson Hine LLP Request for Release of 2006-2015
Confidential Waybill Data

Dear Acting Director Brennan:

The Association of American Railroads (“AAR”) objects to Thompson Hine LLP’s¹ October 20, 2017 request (“Request Letter”) for the highly confidential Carload Waybill Sample (“CWS”), including revenue masking factors for 2006-2015. Board precedent does not permit release of this extraordinarily commercially sensitive data, which includes contract rates negotiated by railroads and a host of shippers. For the reasons set forth below, AAR urges the Office of Economics to reject Thompson Hine’s request.

I. Board Precedent Requires the Office of Economics to Reject Thompson Hine’s Extraordinary Request for the Entire CWS.

“It has been the Board’s practice not to release unmasked contract revenue information to practitioners and consultants.”² This longstanding

¹ Thompson Hine LLP states that it is seeking access for itself, for Economists, Inc., and for L.E. Peabody & Associates, Inc., all of whom are seeking access to the Carload Waybill Sample in their capacity as counsel or consultants to the American Chemistry Council. This letter will collectively refer to these requestors as “Thompson Hine.”

² *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1), at 8 (STB served Mar. 19, 2008); *see also Modification of the Carload Waybill Sample & Pub. Use File Regulations*, 4 S.T.B. 915 (2000) (“Our long-standing policy is not to release actual contract revenues reported in the

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policy flows from the highly confidential nature of the CWS. As the ICC explained, “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.” *Procedures on Release of Data From the ICC Waybill Sample* (49 C.F.R. Part 1244), 4 I.C.C.2d 194, 197 (1987) (“*Waybill Release*”).

Moreover, certain waybill data such as identification of the commodity, railroad, origin and destination of the traffic, and confidential contract rate may be commercially sensitive to shippers or manufacturers. As a result, Congress prohibited the disclosure of traffic information where “that may be used to the detriment of the shipper or consignee or may disclose improperly, to a competitor, the business transaction of the shipper or consignee.” 49 U.S.C. § 11904(b). To comply with this statutory mandate, and to prevent commercial harm to both the railroad and the shipper, the ICC declared that “[a]s a general rule, we will no longer release the complete waybill tapes to non-government users.” *Waybill Release*, 4 I.C.C.2d at 199.

Thompson Hine’s request for access to the entire CWS, including unmasked contract revenues for every Class I railroad for ten years, flies in the face of these established Board policies. The Board has correctly reasoned that CWS data—and particularly unmasked contract revenues in the CWS—have extraordinary commercial sensitivity and that release of this information is particularly problematic because “there would be no effective way to ‘unring the bell’” once a release occurred.³ Indeed, the “masking factors have never been made publicly available, not even under a protective

confidential waybill sample because of the potential for commercial harm to both the contracting railroad and shipper.”).

³ *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) (“*Conrail*”).

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order; they have been held in the strictest confidence, and, at any time, have been known only by a few members of the Board's staff."⁴

The only instances in which the Board has approved release of the unmasked CWS to a nongovernmental party⁵ have been in narrowly cabined circumstances where the use of such data was essential to the proceeding. For example, after a notice-and-comment rulemaking the Board determined that a shipper pursuing a Three Benchmark complaint needed access to the unmasked Waybill Sample of the defendant carrier "to present its case."⁶ But in the same proceeding the Board declined to allow release of the CWS 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."⁷

In the same vein, in the Ex Parte 711 proceeding the full Board determined that it would provide access to a single year of the unmasked CWS to allow commenters to that proceeding to respond to the Board's

⁴ *Id.* at 6-7; see also *Duke Energy Corp. v. Norfolk S. Ry. Co.*, STB Docket No. 42069 (STB served April 5, 2005) ("*Duke Energy*") (rejecting request for masking factors).

⁵ Under § 1244.9(b)(2) and (3), federal agencies and states can obtain waybill data so long as the government entity and any employees or contractors using the data take adequate steps to protect against unauthorized disclosure of the data. For instance, the Transportation Research Board ("TRB") was entitled to obtain the CWS under 49 C.F.R. § 1244.9(b)(2). TRB is a division of the National Research Council and is administered by the National Academies of Sciences, Engineering, and Medicine, which advises the country on issues related to science and technology. See *Modernizing Freight Rail Regulation*, at viii (2015) (describing arrangements for TRB access to the CWS).

⁶ *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1), at 79 (STB served Sept. 5, 2007).

⁷ *Simplified Standard for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1), at 9 (STB served March 19, 2008).

request for “empirical analyses” of the potential rate, service, and financial impacts of the reciprocal switching proposal at issue.⁸

Simply put, the Board has only allowed access to this commercially sensitive data where it was necessary either for a complainant to prepare its case or for parties to respond to a Board request for an empirical analysis. Otherwise, it has never approved a sweeping request like Thompson Hine’s for 10 years of the entire unmasked CWS dataset for every Class I railroad.

Thompson Hine’s request plainly does not fall within the only narrow exceptions that the Board has recognized to its general policies against (1) disclosing the entire waybill sample and (2) disclosing unmasked contract revenue. The Office of Economics, acting under delegated authority from the Board, does not have authority to create a new exception or otherwise depart from the Board’s precedents in this area.⁹

II. Thompson Hine Does Not Meet The Regulatory Requirements for CWS Release.

Even if the Office of Economics concludes it can create a new exception to longstanding Board policy against the release of unmasked contract revenue, there is no reason to do so here. Thompson Hine’s request does not satisfy the regulatory requirements for waybill data requests filed by “[t]ransportation practitioners, consulting firms and law firms.” 49 C.F.R. § 1244.9(b)(4). Thompson Hine cannot be considered an “other user” under subsection (c), and even if it were, Thompson Hine cannot satisfy that subsection’s requirements either.

⁸ See *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, STB Ex Parte No. 711, at 2 (STB served July 25, 2012).

⁹ See *Duke Energy Corp.*, at 4 (“In any event, the staff’s decision is controlled here by the *Conrail* decision.”).

A. Thompson Hine Does Not Meet § 1244.9(b)(4)’s Requirements for CWS Disclosure to Transportation Practitioners.

Under 49 C.F.R. § 1244.9(b)(4), “[t]ransportation practitioners, consulting firms and law firms” may request waybill data for use in “preparing verified statements to be submitted in formal proceedings” before the Board. Such use is authorized only if the data desired are relevant to issues in a “pending formal proceeding” and only if the scope of data requested is “narrowly tailored to what is ‘absolutely essential’ to the preparation of testimony.”¹⁰

Thompson Hine has not identified any “pending formal proceeding” in which it plans to use requested waybill data, and it certainly has not established that the CWS is “absolutely essential” to such testimony. Rather, it seeks to use waybill data “to develop a proposal or proposals for designing alternatives to SAC around rate benchmarking” for submission in “pending and/or future proceedings.”¹¹ Thompson Hine indicates that it might seek to submit such a proposal in Ex Parte 736 or in “such other proceeding(s) the Board may designate for that purpose.”¹² But there is no procedural schedule for comments in Ex Parte 736, and the Board has not indicated that it intends to allow the submission of comments regarding SAC alternatives in that proceeding or in any other pending proceeding. Indeed, § 1244.9(b)(4)’s limitation of waybill access to “formal proceedings before the STB” suggests that it ordinarily cannot be invoked to obtain the CWS for use in informal proceedings under the Administrative Procedure Act such as rulemakings.¹³

¹⁰ *Simplified Standards For Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1), at 32, (STB served July 28, 2006) *citing* *Waybill Release*, 4 I.C.C.2d at 200; 49 CFR 1244.9(b)(4).

¹¹ Request Letter at 1, 4.

¹² *Id.* at 4.

¹³ *Cf. Ex Parte Communications in Informal Rulemaking Procedures*, at 8, STB Ex Parte No. 739 (STB served Sept. 28, 2017) (recognizing important APA distinction between informal rulemakings and formal rulemaking and adjudicatory proceedings).

Plainly then, Thompson Hine cannot demonstrate that use of waybill data is “absolutely essential” to the preparation of testimony in a “pending formal proceeding.” The assertion that it *might* submit such evidence in “pending and/or future proceedings” is entirely speculative and insufficient.

B. Thompson Hine Is Not an “Other User” Under § 1244.9(c), and Regardless Does Not Meet the Requirements for CWS Disclosure to “Other User.”

Perhaps in an attempt to avoid the strictures of § 1244.9(b)(4), Thompson Hine instead invokes the “other user” provision in Section 1244.9(c). But this catchall provision is unavailable to Thompson Hine. Subsection (c) allows for requests by “Users *other than* those described in paragraphs (b)(1) through (b)(5).” 49 C.F.R. § 1244.9(c) (emphasis added). As Thompson Hine is described in paragraph (b)(4), it is not eligible to use the catchall provision. And this plain reading of the regulation is confirmed by agency precedent. When a railroad sought information under the “other user” provision, the Board’s Office of Economics has opined that the specific requirements of Section 1244.9(b) take precedence over the more general provisions of subsection (c).¹⁴ It would be arbitrary, capricious, and inequitable to deny a railroad the ability to seek the CWS under this “other user” provision yet permit Thompson Hine to do so.

In any event, entities seeking access to the CWS under the “other user” provision face an equally demanding standard. *Waybill Release*, 4 I.C.C.2d at 199 (“[C]onfidential waybill data generally will *not* be released to other users. However, because there may be instances in which these data are *essential* to meet a *particular* and *legitimate* need, OTA will consider requests by other users.”) (emphasis added). This is entirely logical. It would make no sense to make it harder for Thompson Hine to obtain the CWS for use in an active proceeding than for it to obtain the CWS as an “other user.”

¹⁴ See, e.g., Letter from W. Huneke, STB, to D. Smith, Sidley Austin LLP, at 1 (Feb. 29, 2012) (“Waybill Request WB484-2”) (waybill request filed on behalf of rail carrier was governed by 49 C.F.R. § 1244.9(b)(1)).

Under *Waybill Release*, the Board only grants access to the CWS where the “other user” has (1) made a strong showing of a particular and legitimate need and (2) no reasonable alternatives to using CWS data. *Waybill Release*, 4 I.C.C.2d at 199. Neither prong is satisfied here.

1. Thompson Hine seeks an extraordinary amount of highly confidential data to pursue a pipedream.

Thompson Hine has no legitimate need for the CWS. It declares that it needs access to “demonstrate the functionality and feasibility of a rate benchmarking standard as an alternative to SAC” and suggests that it needs CWS access comparable to that obtained by the TRB to prepare its study *Modernizing Freight Rail Regulation*. Request Letter at 4. But the amorphous inquiry envisioned by Thompson Hine is nothing more than a mere fishing expedition.

First, the STB already has a “rate benchmarking standard as an alternative to SAC.” It is called the Three-Benchmark test. Over the objection of the railroads, that test was adopted and modified through two different rulemakings to meet the Congressional directive to provide an alternative to SAC where the value of the case cannot justify the expense of pursuing relief under that rate standard. Thompson Hine ignores the existing “rate benchmarking standard alternative to SAC” entirely.

Second, the loosely defined inquiry proposed by Thompson Hine is contrary to court and agency precedent. The D.C. Circuit long ago struck down a “rate benchmarking standard” alternative to SAC, noting several “fundamental conceptual problems” to the use of a comparison approach to determine maximum lawful rates. *Burlington N. R.R. Co. v. ICC*, 985 F.2d 589, 597 (D.C. Cir. 1993). Thompson Hine offers no hint of how it would address the well-known conceptual problems with a “rate benchmarking standard.” For example, the Board has recognized that rate comparisons to shipments with R/VCs less than 180% are inconsistent with established

transportation policy.¹⁵ Yet Thompson Hine seeks highly confidential information for hundreds of thousands of movements that fall below that threshold. A desire to explore a rate reasonableness proposal that is inconsistent with fundamental congressional policies set forth by the courts and this agency is not a legitimate justification for this sweeping request.

Third, the TRB report offers no legitimacy to this request. The TRB report never proposed benchmarking as an alternative rate reasonableness methodology, but rather as an alternative to the statutory market dominance test. *See* TRB, *Modernizing Freight Rail Regulation*, at 141-142.¹⁶ As the Board is aware, to replace the existing statutory market dominance test, as explored by TRB, would require an act of Congress. The economists and statistician who wrote this report and were charged by Congress with exploring out-of-the-box ways to modernize rail regulation plainly understood the limitations of using benchmarking to set maximum lawful rates. Thompson Hine's attempt to add legitimacy to its extraordinary request by seeking shelter behind the TRB report must therefore fail.

2. The Confidential Waybill Sample is not essential.

Even if a search for yet another "rate benchmarking standard" alternative to SAC were reasonable, access to 10 years of the unmasked CWS for every Class I railroad is hardly essential to that search. Thompson Hine has not met its burden of demonstrating why use of the Public Use Waybill

¹⁵ *See, e.g., Rail Transportation of Grain, Rate Regulation Review*, STB Ex Parte No. 665 (Sub-No. 2), at 13 (STB served Aug. 31, 2016) ("Although the shipper community presented arguments in favor of including traffic below 180% R/VC in comparison groups, the Board is concerned that including shipments below 180% R/VC may be contrary to the principle of demand-based differential pricing.").

¹⁶ In fact, Board Member Miller recognized at the *Revenue Adequacy* hearing that the TRB came well short of recommending that price benchmark comparisons be used as a method for establishing the reasonableness of rates. *See* Public Hearing Transcript, *Railroad Revenue Adequacy*, STB Ex Parte No. 722, at 162-66 (Jul. 22, 2015).

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for its proposed “proof of concept” would be insufficient. Thompson Hine asserts that it needs more disaggregated data, but it provides no support for that claim. *See* Request Letter at 4. Indeed, assuming for the sake of argument that a benchmarking methodology as loosely explained by Thompson Hine could ever be a lawful or economically sound substitute for the SAC test (and there is no reason to believe it could be), such a methodology could be developed and presented using masked revenues just as easily as it could be developed and presented using actual revenues.

Indeed, other consultants have relied on the Public Use Waybill Sample. The Yardstick approach Thompson Hine invokes is discussed in the Caves and Singer Verified Statement submitted in the Board’s *Revenue Adequacy* proceeding. *See* Request Letter at 4. That verified statement references a study done by Escalation Consultants to illustrate the “yardstick method” that relied on the Public Use Waybill Sample.¹⁷ There is no reason why Thompson Hine could not similarly use the Public Use Waybill Sample to develop its rate reasonableness alternative.

But even if Thompson Hine is able to demonstrate that it needs access to the disaggregated CWS, it has not provided adequate support for the extraordinary claim that it needs unmasked revenue just to develop a conceptual alternative to SAC. *See Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1), at 2 (STB served Oct. 20, 2006) (“NITL has not shown why it needs access to the unmasked Waybill sample in order to comment on the proposal in the rulemaking.”).

¹⁷ *See* Reply Comments of Concerned Shipper Associations, Reply Verified Statement of Kevin Caves and Hal Singer, *Railroad Revenue Adequacy*, STB Ex Parte No. 722 (Sub-No. 1), at 22 (filed Nov. 4, 2014) (“Escalation analyzed nearly 50,000 chemical records in the Public Use Waybill Sample”).

III. Release of the CWS and Masking Factors Would Cause Substantial Harms.

The information sought by Thompson Hine is not relevant to a legitimate purpose, but even if that were not the case, the harms of a grant of access far outweigh any benefit.¹⁸

One significant risk of granting access to the full CWS is that it will interfere with marketplace contract rate negotiations. One of the requestors in the Request Letter is L.E. Peabody & Associates, Inc. (“Peabody”), which advertises its participation in contract negotiations for its clients.¹⁹ Access to ten years of unmasked revenue data for each Class I carrier to a participant in rate negotiations would significantly impact future negotiations. The Board has expressed concern about that precise harm in prior proceedings.²⁰ Giving Thompson Hine access to highly confidential rates for contract traffic is particularly troubling in light of the Board’s lack of jurisdiction over this traffic. *See* 49 U.S.C. § 10709. The Board should not allow its processes to be used for shipper representatives to access revenue information for contracts over which the Board has no jurisdiction.

Both railroads and shippers are at risk of competitive harm from the proposed release. Shippers, like railroads, do not want their confidential contract rates to be disclosed; shippers could be particularly disadvantaged if their contract rates (and thus information about their transportation costs) became known to their competitors or their competitors’ representatives. That is precisely the danger that is posed by giving broad CWS access to

¹⁸ *See Conrail*, at 7 (harm of releasing unmasking factors “tips the scales against a finding of relevance.”).

¹⁹ *See* L.E. Peabody & Associates, Inc., *Contract Negotiation*, <http://lepeabody.com/OurServices/NegStrategies>.

²⁰ *See, e.g., Rate Guidelines – Non-Coal Proceedings*, 1 S.T.B. 1004, 1054-1055 (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.”).

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consultants that regularly represent a variety of entities in contract negotiations. Exposing these confidential rates could put many rail shippers at a disadvantage vis-à-vis their competitors, in violation of 49 U.S.C. § 11904.

The use of protective orders and assurances by requestors that the CWS data will only be used for limited, appropriate purposes are not adequate protection for railroads and shippers. Even assuming absolute good faith by the requestors, once the shipper-specific and movement-specific revenue information is seen, it cannot be excised from memory for other purposes.²¹ Access to the CWS and masking factors would inevitably influence rate negotiations and other competitive contexts in which the requestors are involved.

Another harm is that requestors could use the data to conduct their own fishing expeditions for cases against railroads. That would be an improper—but perhaps unavoidable—use of the data. In the proceeding that modified the Three Benchmark methodology, the Board specifically rejected calls to grant pre-complaint access to the CWS.²² What amounts to the same request should be rejected here.

A grant of access here will make it far more difficult for the Board to limit future access. If Thompson Hine obtains access for purposes of this proceeding, then numerous other parties will also need to request access. Furthermore, if Thompson Hine is able to cobble together some type of rate reasonableness proposal out of this data and petitions the Board for a rulemaking, other parties may also seek CWS access in that proceeding to understand and evaluate that proposal. In short order, there could be almost universal access to “confidential” revenue figures. Indeed, even if Thompson Hine is unsuccessful in creating a rate reasonableness proposal based on the data, a grant of access would open the door for any stakeholder who may

²¹ See *Conrail* at 3 (“[T]here would be no effective way to ‘unring the bell’” once disclosure is made).

²² See *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1), at 80.

want to engage in speculative, exploratory actions of any kind related to the railroad industry. The Board has already shifted from an absolute prohibition on the sharing of unmasked data to complaint-specific access. A grant of non-complaint-specific access to a decade of competitive traffic information is another step towards wide-scale disclosure. The Board has wisely been concerned about proceeding down that slippery slope.²³

IV. The Board Is Prohibited From Releasing Sensitive Security Information In These Circumstances.

A final reason why Thompson Hine's request should be rejected is that the CWS contains Sensitive Security Information ("SSI"), which has protections and strict limitations on its release for security purposes. The Department of Transportation ("DOT") has previously found that data of the type in the CWS constitutes SSI. For example, DOT has explained that information on hazardous materials traffic such as "origin and destination of each shipment," "the shipper and receiver," "the rail car initial and number," and "the type and quantity of the commodity in the rail car" is information that "could be of particular use and interest to a terrorist" and thus constitutes SSI. *See* SSI Order 2011-06-FRA-01 at 3 (Jul. 29, 2011).

Congress has required DOT to protect SSI for all modes, including rail. *See* 49 U.S.C. § 40119(b). DOT has promulgated regulations regarding the release of SSI and the need to protect such information. *See, e.g.*, 49 C.F.R. § 15.9. Under authority granted by DOT, the Federal Railroad Administration ("FRA") issued a memorandum in which it determined that

²³ *See, e.g.*, Waybill Request WB484-2, at 1 ("I am concerned that, if I allowed your request but limited it to [a rail carrier's] non-employee advisors to do strategic studies and litigation analysis, I would also need to provide the same data to non-employee advisors of firms with significant railroad transportation requirements. That would not be consistent with the public policy purpose of the confidential waybill sample data.").

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SSI may be shared in STB Administrative Proceedings.²⁴ But FRA only allows SSI to be disclosed “in administrative proceedings before the STB” where a party has “a need to know [the SSI] in order to advocate a case before the STB.”²⁵ Thompson Hine has not met this heightened federal standard. Therefore, there is no legal authority that allows the STB to disclose SSI to Thompson Hine outside the context of a particular STB proceeding. Data in the CWS that relates to hazardous materials shipments is SSI. The Board is prohibited from a release of SSI to Thompson Hine because that release has not been authorized by DOT.

* * *

For the reasons stated above, AAR respectfully requests that the Office of Economics deny the Request Letter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Raymond A. Atkins', written in a cursive style.

Raymond A. Atkins
Counsel for AAR

cc: Jeffrey O. Moreno, Thompson Hine LLP

²⁴ See FRA Memorandum, Authorization to Share Sensitive Security Information (SSI) With Complainants and Other Parties Involved in Surface Transportation Board (STB) Administrative Proceedings (July 29, 2011).

²⁵ *Id.* at 2.