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January 16, 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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January 16, 2018
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RE: WB17-44-10/20/17 -- Release of Waybill Data

Dear Acting Chairman Begeman:

I. Introduction

Pursuant to 49 C.F.R. § 1244.9(d)(4)(iii), Thompson Hine LLP hereby appeals the December 27, 2017 decision of the Acting Director of the Office of Economics ("Decision"), which granted in part and denied in part Thompson Hine's October 20, 2017 "Request for Release of 2006-2015 Confidential Waybill Data" ("Waybill Request").¹ Thompson Hine submitted the Waybill Request on behalf of itself, Economists, Inc., and L.E. Peabody & Associates, Inc., in their capacities as counsel or consultants to the American Chemistry Council ("ACC"). The Waybill Request sought the release of all fields and records included in the Confidential Carload Waybill Sample ("CWS"), with masking factors, for calendar years 2006-2015, and for 2016 when it becomes available. The Association of American Railroads ("AAR") filed objections to the Waybill Request on November 22, 2017 ("AAR Reply").² The Decision granted the Waybill Request only from 2006-2013 and denied the request for unmasked revenues. Thompson Hine accepts the date restrictions in the Decision but appeals the Decision's denial of unmasked revenues to the Acting Chairman of the Surface Transportation Board ("STB" or "Board").

The Decision rejected the request for unmasked revenue on two grounds: "that release of contract rates in the unmasked waybill sample is not necessary for a 'proof of concept' of a new alternative to SAC [Stand-Alone Cost], and that the release of contractual rates in this circumstance could be detrimental to shippers and railroads." Decision, p. 2. The first reason miscomprehends the fundamental nature of the analysis Thompson Hine intends to develop,

¹ The Waybill Request and Decision are enclosed with this appeal as Attachments A and B, respectively. By decision dated December 29, 2017, the Acting Director granted Thompson Hine's unopposed request to extend the deadline for filing an appeal until January 16, 2018.

² The AAR Reply is enclosed as Attachment C.

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which is more than a “proof of concept,” and the second reason does not explain why the Board’s confidentiality rules are insufficient to protect shippers and railroads in this case, but have been sufficient in other comparable circumstances.

II. Unmasked Revenue Data is Necessary for Thompson Hine to Develop and Present a Meaningful Rate Benchmarking Alternative to SAC.

Thompson Hine requested access to the CWS “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.” Waybill Request, p. 3. More specifically, Thompson Hine requires the CWS “to demonstrate the functionality and feasibility of a rate benchmarking standard as an alternative to SAC” through “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.” *Id.* at 4. The econometric model that Thompson Hine intends to develop would expand upon the model developed by the Transportation Research Board (“TRB”) of the National Academy of Sciences in its report, “Modernizing Freight Rail Regulation,” which TRB presented to the STB in Docket No. EP 722, *Railroad Revenue Adequacy* (“TRB Report”). *Id.* Because the very purpose of rate benchmarking is to predict competitive rate levels for captive movements based upon the factors that influence the rates for competitive movements, Thompson Hine requires access to actual, not masked, revenue. *Id.* at 6.

The Decision dismisses the request for unmasked revenue as “not necessary for a ‘proof of concept’ of a new alternative to SAC....” Decision, p. 2. But the Waybill Request does not describe Thompson Hine’s intent as the development of a “proof of concept.” The AAR Reply, at pp. 8-9, employed the phrase “proof of concept” in a mischaracterization of the stated purpose in the Waybill Request. Furthermore, the TRB Report already presented a “proof of concept.” See TRB Report, App. B. TRB, however, developed its econometric model as a replacement for market dominance, rather than SAC, in conjunction with various assumed modifications to existing statutes that would (among other things) “[e]nd annual revenue adequacy determinations and require periodic assessments of industrywide economic and competitive conditions.” TRB Report at 8. In contrast, a rate reasonableness standard founded strictly upon competitive rate levels does not account for revenue adequacy as required by current law.³ In addition, the TRB Report, at p. 5, observed that its analysis merely “holds sufficient promise to warrant a concerted

³ See, *Burlington N. R.R. Co. v. ICC*, 985 F. 2d 589, 597-98 (D.C. Cir. 1993) (overturning a benchmark rate standard for failure to address the role of differential pricing in achieving revenue adequacy).

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effort to develop, test, and refine candidate methodologies for implementation.” Thompson Hine endeavors to use the CWS data for that purpose, including the development of a process that accounts for revenue adequacy, to demonstrate that the “proof of concept” that TRB presented for market dominance determinations can be applied to determine maximum reasonable rates.

It would defeat the purpose of Thompson Hine’s Waybill Request to use masked revenue data to develop, test, and refine candidate methodologies for implementation. To expand upon the TRB study, Thompson Hine requires access to the same categories of CWS data that TRB possessed, which included unmasked revenues. The masking factors may over- or under-state competitive revenue and both the magnitude and direction of these distortions could vary with the different masking factors applied by each Class I carrier. In other words, the masking factors easily could introduce so much noise to the data that the model would be unable to draw accurate statistical inferences regarding the differential between actual captive rates and the “but-for” competitive rates predicted by the econometric model.⁴ Therefore, in the absence of unmasked revenue, the econometric measurement of the differential between a potentially non-competitive rate and its competitive benchmark would (at best) be significantly less accurate and (more likely) fail to generate economically meaningful results. It undoubtedly would be *less* rigorous than TRB’s model, which undermines the purpose of Thompson Hine to build upon and expand that analysis.

Thompson Hine also cannot incorporate revenue adequacy into a rate benchmarking alternative to SAC without unmasked revenue. As noted above, a rate benchmarking methodology that does not account for revenue adequacy could be legally infirm. In EP 722, Thompson Hine, testifying on behalf of a coalition of shipper groups that included ACC, espoused rate benchmarking (which it labeled the “Yardstick” approach) as a potential alternative to SAC, including the concept of a “Competitive Threshold,” or “CT,” to account for revenue adequacy.⁵ But Thompson Hine was constrained to just discussing the “CT” concept

⁴ The statistical problems introduced by masking would be further compounded to the extent that masking introduces an artificial correlation between the masked rates and the degree of competition. For example, one railroad, which uses one masking factor, may face more competitive threats than another railroad, which uses a different masking factor, for transportation of the same commodity. Similarly, a railroad may change its masking factors over the course of time, and the degree of competition faced by that railroad may also change over time.

⁵ 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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because it lacked access to actual data, including unmasked revenue. Thompson Hine, therefore, has requested unmasked revenues to develop and apply the Competitive Threshold concept.

The CT concept would be the second step in a two-step process to determine the maximum reasonable rate for a market dominant movement. The first step is to estimate the predicted competitive rate level using an econometric model like the “proof of concept” developed in the TRB Report. The second step is to determine how much the maximum reasonable rate needs to exceed the predicted competitive rate to preserve and maintain revenue adequacy (*i.e.*, the CT). This second step requires two data sets, aggregated financial data for each Class I railroad and accurate (*i.e.*, unmasked) CWS revenue data at the individual movement level. Without accurate revenue data, there will be a disconnect between a carrier’s aggregate financial information, which is publically available, and individual movement revenue, which is not available except through unmasked CWS data or directly from the railroads themselves. Consequently, restricting the model to masked revenue data would render Thompson Hine’s analysis purely hypothetical, without providing critical insight into how the model would perform in a real-world regulatory context.

III. The Board Has Adequate Provisions To Protect The Confidentiality of Unmasked CWS Revenue.

The Decision concludes that release of unmasked revenue “could be detrimental to shippers and railroads.” Decision, p. 2. But there is no discussion of the potential for such harm, why the Board’s rules governing the release of waybill data are insufficient to prevent such harm, or why such harm warrants withholding unmasked revenues in this situation but not in other comparable past scenarios. Therefore, the underlying predicate for this conclusion presumably lies in the objections raised by the AAR.

The AAR complained that release of unmasked revenue would “interfere with marketplace contract rate negotiations;” “shippers could be particularly disadvantaged if their contract rates...became known to their competitors;” Thompson Hine “could use the data to conduct...fishing expeditions for [rate] cases against railroads,” protective orders are inadequate because they cannot excise information from memory for other purposes; and “a grant of access would open the door for any stakeholder who may want to engage in speculative, exploratory actions of any kind related to the railroad industry.” See AAR Reply, pp. 10-12.

The Board’s rules governing the release of waybill data clearly contemplate the preservation of confidentiality by restricting the use and dissemination of the CWS through regulatory restrictions, a confidentiality agreement, and complaint procedures in the event of misuse. See 49 C.F.R. §§ 1244.9(a)(4)(iv-v), (f) and (g). Furthermore, Thompson Hine and L.E. Peabody are lawyers and consultants with a long history of practice before the Board, which

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makes them especially sensitive to the confidential nature of the CWS and how any misuse could jeopardize their own professional interests. At various times over the past several decades, these firms have had access to unmasked revenue in the CWS without a single alleged incident of impermissible use or disclosure, either deliberate or inadvertent, much less any resulting harm to shippers or railroads.⁶

The notion that Thompson Hine cannot “excise information from memory for other purposes” is a red-herring because that could be said of any information provided pursuant to a protective order. Moreover, it presumes that Thompson Hine could learn commercially-sensitive information from individual movement revenue data in the CWS. But, the Decision only grants Thompson Hine access to the CWS from 2006-2013, instead of through 2016 as sought in the Waybill Request. Thompson Hine has accepted that restriction, which means that it will have access to only 8 years of data instead of 10, and that the most current revenue data that would be released, from 2013, already is five years old. Thus, the age of that data renders it less likely to be competitively sensitive to any shipper or railroad, even if there were an impermissible use or disclosure or an inability to “forget” the data.

It also is important to recognize that the CWS data is a random sample, the movements in the sample vary annually, and the data does not indicate the year in which the contract rates were negotiated. As such, the ability of Thompson Hine to piece together sufficient information about any individual movement over any extended time period (even if inclined to do so, which it is not), and to use that information in a manner that would be detrimental to a shipper or railroad, is more boogeyman than reality.

Moreover, Thompson Hine and L.E. Peabody have had access to, and preserved the confidentiality of, even more sensitive railroad traffic, revenue, and movement data in various STB proceedings, most notably in three SAC cases covering virtually the entire network of the defendant railroads.⁷ The information produced by the railroads in those cases (which have included revenues for nearly every movement on those railroads over several of the most current years), and every other SAC case for the past 30 years, have been subject to a protective order that restricts disclosure and use comparable to the protections afforded the CWS data. Despite the production of such commercially-sensitive information in dozens of rate cases, there have been no claims that access to that information has been detrimental to any shippers or railroads.

⁶ The most recent such release of unmasked CWS revenue to Thompson Hine occurred in 2012 in EP 711, *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*.

⁷ STB Docket NOR 42125, *E.I. du Pont de Nemours and Company v. Norfolk Southern Ry. Co.*; STB Docket NOR 42121, *Total Petrochemicals and Refining USA, Inc. v. CSX Transp., Inc.*; STB Docket NOR 42123, *M&G Polymers USA v. Norfolk Southern Ry. Co.*

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Thus, to say that such protections are sufficient for rate cases but not this Waybill Request is illogical.

Nor would providing unmasked revenue in response to this Waybill Request “open the door for any stakeholder who may want to engage in speculative, exploratory actions....” In the Waybill Request, at pp. 1-4, Thompson Hine has detailed a very specific and current foundation for its purpose that is predicated upon the statute and several recent and pending Board proceedings as well as the TRB Report, namely, the need and desire for an economically defensible alternative to SAC that would provide non-coal, non-unit train, shippers with cost-effective and timely rate regulatory protections. Indeed, Acting Chairman Begeman has described this as “a top Board priority.”⁸ Thus, there is no plausible objection that Thompson Hine is engaged in a speculative or exploratory action, and hence, granting Thompson Hine access to unmasked revenue cannot constitute precedent for future waybill requests that lack a comparable foundation.

Finally, the STB released unmasked waybill revenues to TRB to perform its analysis. There is no reason to treat Thompson Hine differently as to its Waybill Request.

IV. Conclusion.

The Board may release the CWS when the “data are essential to meet a particular and legitimate need.”⁹ The Decision finds that the Waybill Request has demonstrated a legitimate need for CWS data, except for unmasked revenue factors, and that no reasonable alternatives exist. Decision, pp. 1-2. The confidential nature of the CWS revenue factors, however, is insufficient reason by itself to deny the Waybill Request for unmasked revenue when there is a legitimate need for that data. This appeal demonstrates that Thompson Hine has a legitimate

⁸ STB Docket NOR 42121, *Total Petrochemicals and Refining USA, Inc. v. CSX Transp., Inc.*, slip op. at 49 (served Sept. 14, 2016) (Begeman, dissenting in part). In addition, in a rate case decision served only days ago, Acting Chairman Begeman lamented the cost, length, and unpredictability of the SAC process; expressed her belief that “the Board must establish an alternative to SAC;” and noted the establishment of an internal Rate Reform Task Force to “reform and streamline” the rate review process. STB Docket NOR 42142, *Consumers Energy Co. v. CSX Transp., Inc.*, slip op. at 74 (served Jan. 11, 2018) (Begeman commenting). Vice Chairman Miller expressed similar sentiments in the same decision and expressly identified “competitive market-rate benchmarking” as “an idea worth exploring.” *Id.* at 74-75 (Miller commenting).

⁹ *Procedures on Release of Data From the ICC Waybill Sample* (49 C.F.R. Part 1244), 4 I.C.C.2d 194, 196 (1987) (“Waybill Release”).

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need for unmasked revenue, and that the confidentiality protections for the release of waybill data, along with the date restrictions that the Decision has imposed, are sufficient to prevent harm to shippers and railroads.

The STB rules on the release of the CWS recognize the legitimate need of consultants and outside counsel “to prepare timely and sound analyses” in formal STB proceedings.¹⁰ That need is deemed so basic that the STB has exempted such waybill requests from the notice and protest procedures that apply to requests outside of a formal proceeding.¹¹ In creating that exception, the agency noted that consultants and outside counsel “serve as a protective buffer between the confidential data and the rail or shipper clients they represent.”¹²

The principal difference between this Waybill Request, pursuant to 49 C.F.R. §1244.9(c), and a request pursuant to §1244.9(b)(4), is that Thompson Hine intends to present its analysis based on the CWS in an informal proceeding rather than a formal proceeding. But the Board recently has authorized the release of even more current CWS data with unmasked revenues in an informal proceeding (*i.e.*, EP 711). Because Thompson Hine, Economists, Inc., and L.E. Peabody are consultants and outside counsel who have demonstrated a legitimate need for unmasked CWS revenue data to prepare “timely and sound analyses” on a subject that is a “top priority” for the Board, the Board should have the same confidence that they will protect unmasked revenue from improper use or disclosure that the Board’s rules would place in them in a formal proceeding. Thompson Hine, therefore, respectfully requests that the Acting Chairman grant this appeal by providing unmasked CWS revenue data from 2006 through 2013.

Sincerely,



Jeffrey O. Moreno

Attachments

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

¹⁰ See, *Waybill Release* at 205; 49 C.F.R. § 1244.9(b)(4).

¹¹ See, *Waybill Release* at 205-06.

¹² *Waybill Release* at 205

Attachment A

October 20, 2017

By Messenger

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

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

Attachment B

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

Office of Economics

December 27, 2017

Jeffrey O. Moreno
Thompson Hine LLP
1919 M Street N.W.
Suite 700
Washington DC 20036

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

Dear Mr. Moreno:

On October 20, 2017, I received a request from Thompson Hine LLP, on behalf of itself, Economists, Inc., and L.E. Peabody & Associates, Inc. (Requestors) for access as an “other user” under 49 C.F.R. § 1244.9(c) to the Confidential Carload Waybill Samples (CCWS) for 2006-2015 and 2016 when available. Following publication of the notice of the request in the Federal Register, the Association of American Railroads (AAR) filed a letter objecting to the requested release on November 22, 2017.

Requestors seek access to the unmasked CCWS “to facilitate the development, evaluation, and proposal of alternatives” to the Board’s Stand-Alone Cost (SAC) methodology. Requestors assert that they have the skill and expertise needed to identify and advance such alternatives, and argue that CCWS data is necessary to develop an econometric model “that measures the statistical relationship between rail rates and shipment characteristics to predict the competitive rate levels.” Requestors indicate that their objective is to submit a rate benchmarking alternative to the Board in *InterVISTAS Study*, Docket No. EP 736, or “such other proceeding(s) the Board may designate for that purpose.”

AAR objects to the release of the CCWS for this purpose, arguing that: (1) there is no showing of the CCWS is essential to meet a particular and legitimate need; (2) release of commercially sensitive data would be detrimental to shippers and railroads; (3) Requestors do not qualify as an “other user” and therefore are not entitled to the data; and (4) Requestors are not entitled to receive Sensitive Security Information (SSI) in the CCWS without approval from the U.S. Department of Transportation.

After considering the request and the objections, I have determined that, pursuant to 49 C.F.R. §1244.9(d)(4)(i), the request will be granted in part as discussed below.

In seeking the CCWS to develop an alternative rate reasonableness methodology based on benchmarking that will be submitted in an STB proceeding, Requestors have sufficiently demonstrated a legitimate need for some CCWS data. Many elements of the CCWS would

appear to be highly relevant to the Requestors' planned submission to the Board, and no reasonable alternatives to the CCWS exist for this specific use. In particular, the CCWS has much more granular level data than does the Public Use Waybill Sample, and thus use of the CCWS should prove helpful in attempting to establish a reliable statistical relationship between rates and shipment characteristics.

Several of AAR's objections, however, warrant limitations on the breadth of the CCWS data Requestors may obtain. In particular, I agree that release of contract rates in the unmasked waybill sample is not necessary for a "proof of concept" of a new alternative to SAC, and that the release of contractual rates in this circumstance could be detrimental to shippers and railroads. Likewise, the STB does not release the waybill masking factors due to their highly confidential nature, and I will not do so here.

I will also modify the period of CCWS data to be released to address AAR's concerns about the harm that could be caused to shippers and railroads if more contemporaneous data were released. Eight years of historical data, ending with 2013, should be sufficient to enable Requestors to explore alternatives to SAC while avoiding the risk associated with releasing a large amount of more contemporaneous data.

AAR has also objected to release on the ground that the Requestors are transportation practitioners and thus, AAR argues, may *only* seek access to CCWS under 49 C.F.R. § 1244.9(b)(4). But the Board's regulations do not foreclose an applicant for access who does not satisfy all of the requirements of user categories addressed in sections 1244.9(b)(1)-(4) from seeking access under section 1244.9(c). Here, Requestors sought to make broader use of the CCWS than is contemplated under section 1244.9(b). Requestors therefore appropriately sought access under 1244.9(c).

Finally, AAR objects to release of the CCWS because it contains SSI data. AAR has failed to establish that the cited Federal Railroad Administration regulations and memorandum it cites preclude the Board from releasing the waybill here, pursuant to the Board's longstanding regulations and confidentiality safeguards.

Accordingly, it is my determination to release the CCWS, with masked revenues, for the period of 2006-2013, subject to a confidentiality agreement that limits dissemination of the data to employees of the Requestors working on the project for which the data was requested. The Board will require the Requestors, as it does all "other users," to agree to allow the Board to review and approve any results intended for public release so that the Board can ensure compliance with the waybill aggregation regulations. (In this context, "public release" means any disclosure to an individual or entity other than one that has signed the confidentiality agreement with the Board, including disclosure to clients of the Requestors.) Requestors will be bound by the confidentiality provisions of 49 C.F.R. § 1244.9(f)(1-3), which require that "[a]ny shipper data obtained from the Waybill Sample shall not be publicly released unless the data are aggregated to include at least three shippers," and will also be required to comply with the prohibition imposed on users under 49 C.F.R. §§ 1244.9(b)(2), (3), and (4) against disclosing data that permits identification of an individual railroad. The confidentiality agreement shall also require that Requestors certify by no later than one year from the date of the agreement that all

CCWS data received and all work product generated from that data has been destroyed or returned to the Board. This last requirement may be modified in the event that Requestors elect to file results of their analysis with the Board in a proceeding.

Pursuant to 49 C.F. R. § 1244.9 (d)(4)(iii), any appeals of this determination must be filed with the STB's Chairman with 10 days of the date of this letter. The filing of an appeal will automatically stay the effect of the Director's decision. If no appeal is filed, the Board will provide waybill access to Requestors on or after January 8, 2018.

Sincerely,

A handwritten signature in cursive script that reads "William Brennan". The signature is written in black ink and includes a horizontal flourish at the end.

William Brennan
Acting Director

cc: Raymond A. Atkins (counsel to AAR)

Attachment C



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November 22, 2017

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).

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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.”).

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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).

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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)).

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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/Vs less than 180% are inconsistent with established

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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”).

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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.

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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 dark ink, appearing to read 'Raymond A. Atkins', with a stylized flourish at the end.

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.