

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

247508

Office of Economics

ENTERED
Office of Proceedings
April 17, 2019
Part of
Public Record

April 17, 2019

Mr. Robert D. Rosenberg
Slover & Loftus LLP
1224 Seventeenth St. N.W.
Washington, D.C. 20036

Re: Waybill Request WB19-14 & EP290 (Sub-No. 4)

Dear Mr. Rosenberg:

This letter serves as a replacement for, and supersedes, my letter to you dated April 10, 2019, which granted Slover & Loftus LLP's request under 49 C.F.R. § 1244.9(b)(4) for access to the confidential Carload Waybill Sample (CCWS) on behalf of Western Coal Traffic League (WCTL) in connection with *Railroad Cost Recovery Procedures-Productivity Adjustment*, EP 290 (Sub-No.4) (*Productivity Adjustment*). In your letter dated April 8, 2019, you requested the CCWS with unmasked revenues for the past six years 2012-2017 with the carrier, routing and FSAC/SPLC fields. According to your letter, you intend to use the requested data to verify the output calculations that factor into productivity for 2012-2017 and to ascertain the impact of the change in method for determining mileage that occurred in the processing of the 2015 CCWS. The requested data is the only source available to perform these tasks.

I will grant access to a more limited set of data than you have requested. Upon further reflection, I have concluded that my original grant of access to the CCWS was broader than needed to facilitate your effort to conduct an analysis of the productivity output calculations that would be "relevant to issues pending before the Board." 49 C.F.R. § 1244.9(4)(i). In making my revised determination, I have considered the explanations and justifications contained in your letter and I have also reviewed concerns raised by the Association of American Railroads (AAR) in a filing in *Productivity Adjustment* dated April 10, 2019. In that filing, AAR was responding to WCTL's general expression of interest in receiving access to the CCWS contained in WCTL's March 21, 2019 *Productivity Adjustment* comments, not WCTL's subsequent waybill request properly submitted under § 1244.9(b)(4).

Specifically, I will grant your request for access to the 2012-2017 CCWS with unmasked revenues but will deny access to the associated serial numbers, carrier, routing, STCC codes, and FSAC/SPLC fields. The unmasked revenues are being released because the Board uses unmasked revenues to weight the values for the output index calculation that is used in *Productivity Adjustment*. But the other requested fields are not used to derive the output index and thus are not necessary for the proposed analysis.

Waybill Agreement WB19-14

Moreover, your request for carrier, routing, and FSAC/SPLC fields appears to relate solely to a secondary purpose of ascertaining “the impact of the change in the method for determining mileage that occurred in the processing of the 2015 waybill sample.” Your letter does not provide adequate explanation or justification to support access to the requested additional fields for that purpose. *See* 49 C.F.R. § 1244.9(e)(1).

The data to which this letter grants access may only be used for purposes of the *Productivity Adjustment* proceeding. ***This approval becomes effective when signed agreements from the individuals listed below are received by the STB:***

- a) *Mr. Robert D. Rosenberg – Slover & Loftus LLP*
- b) *Mr. Thomas Crowley – L.E. Peabody*
- c) *Mr. Timothy Crowley – L.E. Peabody*
- d) *Mr. Daniel L. Fapp*
- e) *Mr. Ray H. Thibault*
- f) *Ms. Allison Reid*
- g) *Mr. Thomas Cooper*

The expiration date for this agreement is April 30, 2020. Unless you seek and obtain a renewal from the STB, this agreement upon expiration obligates you to return or destroy copies of the data as described in item 7 of the agreement.

Several aspects of the CCWS limit the conclusions that may be drawn from analysis of the CCWS: 1) the CCWS is a sample, and 2) the CCWS is based on terminating shipments from relatively large carriers. Only those railroads with more than 4,500 annual terminating carloads are included in the sample. The limited sampling of small railroads may have a substantial effect on studies covering areas served predominately by non-sampled railroads. For additional information on the CCWS, *see Reference Guide @ www.stb.gov/stb/industry/econ_waybill.html* on the Board’s website.

The rules for release of waybill data are codified at 49 C.F.R. § 1244.9. The CCWS contains confidential shipper and railroad data. As a result, the CCWS is commercially sensitive and has the potential to cause competitive harm to shippers and railroads if disclosed. Therefore, the following agreement must be signed, and a copy of the signature pages returned to the STB, before any waybill data can be used.

Your signature acknowledges your agreement to comply with the following:

1. You will use the CCWS data released to you solely for purposes of the proceeding identified above. Such purposes include any judicial review arising from that proceeding.

Waybill Agreement WB19-14

2. Absent permission from the STB, you shall make the information contained in the CCWS (including work product and analyses derived from the CCWS) available only to the individuals identified above. The STB may approve access for additional individuals for purposes of the proceeding. In general, such individuals must be outside counsel in this proceeding, transportation practitioners, and those individuals working with or assisting such counsel or practitioners who are not regular employees of the party represented, who have a need to know, review, or handle the CCWS for purposes of the proceeding, including testifying and consulting experts. Each such additional individual must review and sign this agreement and return a copy of the signature page to the STB.
3. Pleadings and evidence filed with the Board in the proceeding may contain CCWS data (including work product and analyses derived from the CCWS). Unless data in the pleadings and evidence are aggregated to the level of at least three shippers and will prevent the identification of an individual railroad, the pleadings and evidence must be filed with the Board under confidential filing procedures (both in e-filing and paper submissions). Such pleadings and evidence should be appropriately marked to indicate that they contain confidential Waybill data and, if submitted in paper or on physical media, be in a package clearly marked on the outside "Highly Confidential Material: Contains Waybill Data." Such pleadings will not be posted in the publicly available docket. A public version of the pleading and evidence that redacts unaggregated CCWS data should also be filed for posting in the public docket.
4. Pleadings and evidence (and underlying workpapers) containing CCWS data (including work product and analyses derived from the CCWS) may be disclosed only to outside counsel or other independent representatives for other parties to the proceeding who have signed an agreement with the Board that grants them access to the underlying CCWS data.
5. CCWS data may be disclosed to the reviewing court in briefs filed or oral argument made in connection with judicial review arising from the proceeding, but the party making such disclosure must take adequate steps to maintain the confidentiality of the data by filing pleadings under seal and seeking confidential treatment of the data at oral argument (and in any transcripts). Counsel who wish to access CCWS data for purposes of participating in judicial review arising from the proceeding must have signed an agreement with the Board that grants access to the data, and may be added pursuant to paragraph 2 above.
6. Except as provided in paragraph 4 above, you will refer any requests for CCWS data in your possession (including work product and analyses derived from the CCWS) to the STB for processing and will inform the requesting party of such referral to the STB. If you are compelled by law or order of a governmental or

Waybill Agreement WB19-14

judicial body to release CCWS data, you shall notify the Board in writing within three days of any determination that CCWS data must be released, and in no event later than five days before the CCWS data is scheduled to be released.

7. In order to retain access to the CCWS beyond the expiration date specified above, you must submit a written request for an annual extension of the agreement no later than thirty days prior to the expiration date and the renewal request must be approved by the Office of Economics. **If an annual agreement is not signed and approved, you must certify by no later than the expiration date that all CCWS data (including all work product and analyses derived from the CCWS) obtained under this agreement has been destroyed or returned to the STB.** Notwithstanding the foregoing, outside counsel (but not outside consultants or transportation practitioners) for each party may retain file copies of all pleadings and evidence filed with the Board and file copies of all work product. The non-disclosure requirements of this agreement shall continue to apply to such file copies for as long as they are retained.
8. Failure to request an extension (if necessary), or destroy or return CCWS data when required, may prevent any future release of CCWS data to you. Violations of this agreement may subject you to sanctions by the Board.

After all parties have signed and returned this agreement, please contact Mr. Dusenberry (202) 245-0319 to make the necessary arrangements to have a copy of the data sent to you. The STB will provide the data by email through file transfer protocol. Prior payment of processing and mailing cost of \$542 is required. Any appeal of my decision under 49 C.F.R. § 1011.6(b) must be filed within 10 days after the date of this letter.

Sincerely,



William Brennan
Director
Office of Economics

Waybill Agreement WB19-14

I have read and understand the conditions for release of the CCWS data. I agree to comply fully with these conditions and the provisions of this confidentiality agreement. No later than thirty days before the agreement expires, I will request an extension of this agreement, if necessary. If no extension is requested, I will return or destroy all CCWS data and certify that I have done so. I have the authority to sign this agreement.

By:

Signature

Name - Please Print

Title

Date

Waybill Agreement WB19-14

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Signature

Name - Please Print

Title

Date

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By:

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Date

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By:

Signature

Name - Please Print

Title

Date

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By:

Signature

Name - Please Print

Title

Date

**Surface Transportation Board**

395 E Street, SW
Washington, DC 20423-0001

PAYMENT FORM

Please indicate method of payment for the amount of \$542

- ☐ Check (Check or money order to be made payable to SURFACE TRANSPORTATION BOARD)
- ☐ Money Order
- ☐ Credit Card
- ☐ VISA ☐ MasterCard ☐ DiscoverCard ☐ American Express

Name on Credit Card _____

Credit Card No. _____

Security Code (3 digit on back of card) _____

Expiration Date _____

Signature _____

(My signature indicates my desire to (Date)
have this transaction charged to the
credit card listed above.)

Cardholder's Name _____

Cardholder's Billing Address _____

NOTE: If payment is to be credited to an established STB account or statement of charges, please indicate the number assigned to your account/invoice. _____

If payment is to be credited for a docket filing, please indicate the docket number. _____

For office use only: Docket No. WB19-14
Description of services provided: Waybill Request

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

Office of Economics

April 10, 2019

Mr. Robert D. Rosenberg
Slover & Loftus LLP
1224 Seventeenth St. N.W.
Washington, D.C. 20036

Re: Waybill Request WB19-14 & EP290 (Sub-No. 4)

Dear Mr. Rosenberg:

The Surface Transportation Board (STB or Board) has received your request under 49 C.F.R. § 1244.9(b)(4) dated April 8, 2019 for permission to access the confidential Carload Waybill Sample (CCWS) with unmasked revenues in connection with EP290 (Sub-No. 4) on behalf of Western Coal Traffic League. Specifically, you requested the past six years (2012-2017) unmasked costed waybill samples with the carrier, routing and FSAC/SPLC fields. The data requested will be used to verify the output calculations that factor into productivity for 2012-2017 and to ascertain the impact of the change in method for determining mileage that occurred in the processing of the 2015 CCWS. The requested data is the only source available to perform these tasks.

Based on the complete and sufficiently detailed explanations and justifications contained in your request, you will be authorized to access the requested data. Specifically, you will have access to the 2012-2017 CCWS with unmasked revenues. The unmasked revenues are being released because the Board uses unmasked revenues to weight the values for the output calculation that is used in EP290 (Sub-No. 4). In addition, the DAT file and the EP290 (Sub No. 4) spreadsheet used in the 2017 calculations will be provided. This data may only be used for purposes of this proceeding. ***This approval becomes effective when signed agreements from the individuals listed below are received by the STB:***

- a) Mr. Robert D. Rosenberg – Slover & Loftus LLP*
- b) Mr. Thomas Crowley – L.E. Peabody*

The expiration date for this agreement is April 30, 2020. Unless you seek and obtain a renewal from the STB, this agreement upon expiration obligates you to return or destroy copies of the data as described in item 7 of the agreement.

Several aspects of the CCWS limit the conclusions that may be drawn from analysis of the CCWS: 1) the CCWS is a sample, and 2) the CCWS is based on terminating shipments from relatively large carriers. Only those railroads with more than 4,500 annual terminating carloads are included in the sample. The limited sampling of small railroads may have a substantial effect

Waybill Agreement WB19-14

on studies covering areas served predominately by non-sampled railroads. For additional information on the CCWS, *see Reference Guide @ www.stb.gov/stb/industry/econ_waybill.html* on the Board's website.

The rules for release of waybill data are codified at 49 C.F.R. § 1244.9. The CCWS contains confidential shipper and railroad data. As a result, the CCWS is commercially sensitive and has the potential to cause competitive harm to shippers and railroads if disclosed. Therefore, the following agreement must be signed, and a copy of the signature pages returned to the STB, before any waybill data can be used.

Your signature acknowledges your agreement to comply with the following:

1. You will use the CCWS data released to you solely for purposes of the proceeding identified above. Such purposes include any judicial review arising from that proceeding.
2. Absent permission from the STB, you shall make the information contained in the CCWS (including work product and analyses derived from the CCWS) available only to the individuals identified above. The STB may approve access for additional individuals for purposes of the proceeding. In general, such individuals must be outside counsel in this proceeding, transportation practitioners, and those individuals working with or assisting such counsel or practitioners who are not regular employees of the party represented, who have a need to know, review, or handle the CCWS for purposes of the proceeding, including testifying and consulting experts. Each such additional individual must review and sign this agreement and return a copy of the signature page to the STB.
3. Pleadings and evidence filed with the Board in the proceeding may contain CCWS data (including work product and analyses derived from the CCWS). Unless data in the pleadings and evidence are aggregated to the level of at least three shippers and will prevent the identification of an individual railroad, the pleadings and evidence must be filed with the Board under confidential filing procedures (both in e-filing and paper submissions). Such pleadings and evidence should be appropriately marked to indicate that they contain confidential Waybill data and, if submitted in paper or on physical media, be in a package clearly marked on the outside "Highly Confidential Material: Contains Waybill Data." Such pleadings will not be posted in the publicly available docket. A public version of the pleading and evidence that redacts unaggregated CCWS data should also be filed for posting in the public docket.
4. Pleadings and evidence (and underlying workpapers) containing CCWS data (including work product and analyses derived from the CCWS) may be disclosed only to outside counsel or other independent representatives for other parties to

Waybill Agreement WB19-14

the proceeding who have signed an agreement with the Board that grants them access to the underlying CCWS data.

5. CCWS data may be disclosed to the reviewing court in briefs filed or oral argument made in connection with judicial review arising from the proceeding, but the party making such disclosure must take adequate steps to maintain the confidentiality of the data by filing pleadings under seal and seeking confidential treatment of the data at oral argument (and in any transcripts). Counsel who wish to access CCWS data for purposes of participating in judicial review arising from the proceeding must have signed an agreement with the Board that grants access to the data, and may be added pursuant to paragraph 2 above.
6. Except as provided in paragraph 4 above, you will refer any requests for CCWS data in your possession (including work product and analyses derived from the CCWS) to the STB for processing and will inform the requesting party of such referral to the STB. If you are compelled by law or order of a governmental or judicial body to release CCWS data, you shall notify the Board in writing within three days of any determination that CCWS data must be released, and in no event later than five days before the CCWS data is scheduled to be released.
7. In order to retain access to the CCWS beyond the expiration date specified above, you must submit a written request for an annual extension of the agreement no later than thirty days prior to the expiration date and the renewal request must be approved by the Office of Economics. **If an annual agreement is not signed and approved, you must certify by no later than the expiration date that all CCWS data (including all work product and analyses derived from the CCWS) obtained under this agreement has been destroyed or returned to the STB.** Notwithstanding the foregoing, outside counsel (but not outside consultants or transportation practitioners) for each party may retain file copies of all pleadings and evidence filed with the Board and file copies of all work product. The non-disclosure requirements of this agreement shall continue to apply to such file copies for as long as they are retained.
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Waybill Agreement WB19-14

After all parties have signed and returned this agreement, please contact Mr. Dusenberry (202) 245-0319 to make the necessary arrangements to have a copy of the data sent to you. The STB will provide the data by email through file transfer protocol. Prior payment of processing and mailing cost of \$262 is required.

Sincerely,

A handwritten signature in black ink that reads "William Brennan". The signature is written in a cursive style with a horizontal line at the end.

William Brennan
Director
Office of Economics

Waybill Agreement WB19-14

I have read and understand the conditions for release of the CCWS data. I agree to comply fully with these conditions and the provisions of this confidentiality agreement. No later than thirty days before the agreement expires, I will request an extension of this agreement, if necessary. If no extension is requested, I will return or destroy all CCWS data and certify that I have done so. I have the authority to sign this agreement.

By:

Signature

Name - Please Print

Title

Date

Waybill Agreement WB19-14

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By:

Signature

Name - Please Print

Title

Date

**Surface Transportation Board**

395 E Street, SW
Washington, DC 20423-0001

PAYMENT FORM

Please indicate method of payment for the amount of \$262

- ☐ Check (Check or money order to be made payable to SURFACE TRANSPORTATION BOARD)
- ☐ Money Order
- ☐ Credit Card
- ☐ VISA ☐ MasterCard ☐ DiscoverCard ☐ American Express

Name on Credit Card _____

Credit Card No. _____

Security Code (3 digit on back of card) _____

Expiration Date _____

Signature _____
(My signature indicates my desire to (Date)
have this transaction charged to the
credit card listed above.)

Cardholder's Name _____

Cardholder's Billing Address _____

NOTE: If payment is to be credited to an established STB account or statement of charges, please indicate the number assigned to your account/invoice. _____

If payment is to be credited for a docket filing, please indicate the docket number. _____

For office use only: Docket No. WB19-14
Description of services provided: Waybill Request



SLOVER & LOFTUS LLP

ATTORNEYS AT LAW

April 8, 2019

BY EMAIL

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

Re: Waybill Request

Dear Dr. Brennan:

Pursuant to 49 C.F.R. § 1244.9(b)(4) and (e), Slover & Loftus LLP (“Slover & Loftus”), as counsel for the Western Coal Traffic League (“WCTL”), and in connection with Docket No. 290 (Sub-No. 4), *Railroad Cost Recovery Procedures--Productivity Adjustment* (STB served March 11, 2019), respectfully requests copies of all fields of the costed waybill sample that the Board utilized to make its output calculations, and the Board’s analyses of that data, for the past six years (2012-2017). We request that access to this data be granted to Slover & Loftus and to the outside consulting firm of L.E. Peabody & Associates, Inc. (“L.E. Peabody”).

We request all of the specific fields utilized in calculating the growth in the output index for those years, although it may be more convenient or expeditious for the Board to produce the costed waybill samples in their entirety. Because the Board utilizes revenues to weight the values in the 189-cell output matrix, we require and request access to the unmasked costed waybill sample. Further, we require and request access to the carrier, routing, and FSAC/SPLC fields in order to be able to ascertain the impact of the change in the method for determining mileage that occurred in the processing of the 2015 waybill sample.

We recognize that the period for filing comments on the 2017 RCAF productivity decision has passed. While WCTL did submit comments on that decision,

Dr. William Brennan
April 8, 2019
Page 2

those comments noted the inability to verify the output calculation without access to the waybill data. The 2013-2017 data will persist in subsequent annual output calculations, and the Board has restated past RCAF productivity calculations previously. It is thus appropriate that WCTL have the opportunity and ability to verify the 2012-2017 output calculation at this time. Furthermore, if WCTL were to wait until next year's proceeding to request the 2013-2018 data, it is highly doubtful that WCTL could obtain and review all the data in time to conduct a meaningful review within the comment period that the Board usually allows. For those reasons, we are requesting the 2012-2017 data at this time.

We represent that, absent other authorization from the Board, the data will be used only for purposes of reviewing the productivity calculations, and we agree to adhere to all the confidentiality requirements stated at 49 C.F.R. § 1244.9(b)(4) and (f), including limiting access only to Slover & Loftus and L.E. Peabody personnel with a need for the data, using the data only for the purpose requested, and releasing only aggregated data to the public. We agree to execute any appropriate acknowledgment or undertaking to that effect.

Sincerely,



Robert D. Rosenberg
An Attorney for the Western
Coal Traffic League

cc: Mr. Thomas Crowley, L.E. Peabody & Associates, Inc.