

CORRECTED

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

238811

Office of Economics

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Office of Proceedings
July 13, 2015
Part of
Public Record

July 10, 2015

ATTN: Raymond Atkins
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005

In Response Refer To Waybill Request WB15-69

Dear Mr. Atkins:

Re: STB Docket NOR 42142, Consumers Energy Company v. CSX Transportation, Inc.

The Surface Transportation Board (STB) has approved Sidley Austin LLP's request, on behalf of CSX Transportation, Inc. (CSXT), of July 8, 2015 for permission to access all of the 2004 through 2013 carload waybill data (including all records, all fields, and unmasked revenues) for all traffic that was originated, terminated, or bridged by CSXT. ***This approval becomes effective when the signed agreements from the ten individuals are received by the STB.***

The expiration date for this agreement is July 31, 2016. Failure to renew an agreement for any year requires you to return or destroy all copies of the data for that year (see item 4 of the agreement).

Any information or reports developed from the waybill data may be provided to any party provided only if all data items are aggregated to a level that guarantees the presence of at least three shippers. The three FSAC-rule (EX Parte 385, Sub No. 2) will be accepted as guaranteeing the presence of at least three shippers.

When using the data the parties must recognize several aspects which limit drawing general conclusions from any potential findings: 1) The waybill data are sample data, and 2) the data are based on terminating shipments from relatively large carriers. Only those railroads with more than 4,500 annual terminating carloads were included in the sample. This limited sampling of very small railroads may have a substantial effect on studies covering small areas served predominately by a non-sampled railroad.

The rules for release of waybill data [Ex Parte No. 385 (Sub-No. 2)] are codified at 49 CFR 1244.9. The waybill data contain confidential shipper and railroad data. As a result,

waybill data are commercially sensitive and have the potential for competitive harm to shippers and railroads. Therefore, the following agreement must be signed before any waybill data can be used.

Your signature acknowledges the state's agreement to comply with the following:

1. The information contained in the released waybill data shall be made available only to members of Sidley Austin and FTI Consulting participating in the analysis.
2. The waybill data released shall be used solely for the purpose requested.
3. After the proceeding, failure to return the data, or destroy the data may prevent any future release of the waybill data from the STB.
4. The organization must sign an agreement annually with the STB agreeing to these restrictions. **If an annual agreement is not signed, all waybill materials (including all copies) obtained under this agreement will be returned to the STB or the organization must certify that the data has been destroyed.**

After you sign and return 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 Surface Transportation Board will provide the organization the data on a R-CD ROM. The STB requests that you pay processing and mailing cost in the amount of \$640 (already paid 7/9/15).

Your request and this reply will be placed into NOR Docket 42142, *Consumer's Energy Co. v. CSX Transportation, Inc.*

Sincerely,



William F. Huneke
Director & Chief Economist

Each approved person must sign a copy of this agreement.

I have read and understand the conditions for release of the waybill data. I agree to comply fully with these conditions and the provision of this confidential agreement. Thirty days before the agreement expires, I will request and extension of this agreement. If no extension is requested, then I will return or destroy all waybill data and certify that I have no copies of the Data. I understand that failure to request an extension or to return or destroy the data may prevent me from receiving any future waybill data from the STB.

By:

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Name - Please Print

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 WASHINGTON, D.C. 20005
 (202) 736 8000
 (202) 736 8711 FAX

ratkins@sidley.com
 (202) 736 8889

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FOUNDED 1866

July 8, 2015



BY HAND

William F. Huneke
 Director and Chief Economist
 Office of Economics
 Surface Transportation Board
 395 E Street, SW
 Washington, D.C. 20423

Re: STB Docket No. 42142, *Consumers Energy Company v. CSX Transportation, Inc.*

Dear Dr. Huneke:

We represent CSX Transportation, Inc. (“CSXT”) as outside counsel of record in this proceeding. Pursuant to 49 C.F.R. § 1244.9(b)(1), we hereby request that Sidley Austin LLP and its employees, along with certain outside consultants (FTI Consulting, Inc.) who are not regular employees of CSXT, be authorized to obtain and use certain confidential STB Waybill Sample data.

Specifically, we request access to all waybill data (including all records and all fields, and including confidential unmasked revenue data) from the STB Waybill Sample for all traffic that was originated, terminated, or bridged by CSXT for the past ten years. We understand that access to these data will be granted pursuant to the terms of a protective order, solely for the purposes of this proceeding and any related litigation, and only after execution of appropriate confidentiality undertakings.

CSXT’s outside counsel and consultants need access to these Waybill Sample data, *inter alia*, to prepare CSXT’s evidence regarding market dominance in this proceeding. Specifically, the data would be used, *inter alia*, to develop and analyze potential refinements or alternatives to the Revenue Shortfall Allocation Method (“RSAM”) benchmark used in conjunction with the “Limit Price” test for qualitative market dominance. *See, e.g.*, STB Docket No. 42123, *M&G Polymers USA, LLC v. CSX Transportation, Inc.* (served Dec. 7, 2012); STB Docket No. 42121, *Total Petrochemicals & Refining USA, INC. v. CSX Transportation, Inc.* (served Aug. 19, 2013).

In the *M&G Polymers* case, the Board specifically invited the parties to submit evidence on whether its proposed use of the RSAM benchmark in connection with the Limit Price test represented a “reasoned and practical way” of resolving the qualitative market dominance issue. The Board also strongly encouraged the parties to comment on whether there was “a better general approach to this issue,” or “a superior benchmark that can be used to guide [the market

William F. Huneke
July 8, 2015
Page 2

dominance] inquiry,” and on whether the Board’s application of the RSAM/Limit Price approach was “somehow flawed.” *Id.* at 5. The use of the RSAM benchmark in connection with the Limit Price test was also vigorously contested in the *Total Petrochemicals* case, which remains pending before the Board.

The RSAM benchmark (and the R/VC>180 benchmark as well) are calculated from the STB’s confidential, unmasked Waybill Sample. CSXT’s outside counsel and consultants need access to these data to comment meaningfully on the RSAM benchmark, and to develop and analyze potential refinements or alternatives to the Board’s RSAM calculations. In particular, Waybill Sample data for the past ten years are essential to permit CSXT’s counsel and consultants to analyze whether the use of a longer time period would produce more consistent and reliable results than the 4-year period used in the Board’s current RSAM calculations

The STB Waybill Sample is the only available source of the data requested. As described above, the data requested are relevant to issues pending before the Board in this proceeding, including the RSAM benchmark and the qualitative market dominance issue.

In accordance with 49 C.F.R. § 1244.9(b)(1), any evidence drawn from the STB Waybill Sample will remain confidential, and will be submitted only to the Board unless the evidence is aggregated to the level of at least three shippers and will prevent the identification of an individual railroad.

Enclosed is a check for \$640.00, reflecting the fixed fee of \$150 plus \$49 per person for each individual (10 outside counsel and consultants). 49 C.F.R. § 1002.2(f)(98)(i).

Please let us know if you have any questions or need any additional information regarding this request.

Very truly yours,



Raymond A. Atkins

RAA:caj
Enclosure