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March 31, 2006



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SURFACE TRANSPORTATION  
BOARD

The Honorable W. Douglas Buttrey  
Chairman  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, DC 20423

Re: WB 456-1

Dear Chairman Buttrey:

This letter constitutes an appeal pursuant to 49 C.F.R. 1244.9(d)(4)(iii) from the March 10, 2006 denial by Director Leland L. Gardner of our January 25, 2006 request for the release of certain information from the Board's Costed Waybill Sample using unmasked revenues. A copy of our January 25 letter to Director Gardner and a copy of his March 10 letter to us are enclosed. By Decision of March 20, 2006, the date for filing this appeal was extended to April 3, 2006. Our January 25 letter to Director Gardner is incorporated in this appeal by reference.

The unmasked waybill data sought by us on behalf of the State of North Dakota is directly relevant to a "simplified" rate complaint pursuant to the Board's decision in Ex Parte No. 347 (Sub-No. 2), *Rate Guidelines - Non-Coal Proceedings*, 1 STB 1004 (1996) ("*Small Case Guidelines*"). As explained in our January 25 letter, unmasked revenues from the waybill file indisputably are essential in order for a complaint by North Dakota to fully and fairly pursue two of the "benchmarks" that must be addressed in a "simplified" rate case under the *Small Case Guidelines*; namely, the RSAM standard and the R/VCcomp standard.

First, unmasked waybill data is necessary in order adequately to address the question of whether "adjusted" or "unadjusted" RSAM data should be utilized in *Small Case Guidelines* maximum rate calculations, and/or to calculate an appropriate point between the two figures that should be used in determining a maximum reasonable rate. In the *Small Case Guidelines* decision, the Board specifically stated that "the correct [RSAM] measure lies somewhere between the [adjusted and unadjusted] figures" and that both figures would be examined in each case. *Small Case Guidelines*, 1 STB at 1030. With-

out the unmasked waybill data, it would be impossible to determine the proper RSAM measure.<sup>1</sup>

Second, the R/VCcomp benchmark "measures the markup taken on > 180 traffic that involves similar commodities moving under similar transportation conditions." *Small Rate Guidelines*, 1 STB at 1034. The Board has not identified any specific way to select a "comparable" traffic group other than to note that "the comparison traffic should involve a similar commodity handled in a similar product (and perhaps geographic) market moving similar distances at an r/vc level above 180." *Ibid*, at fn. 90. Thus, an appropriate "comp" group is not necessarily confined to traffic of the defendant railroad(s). Moreover, whether or not a comparison group is confined to the defendant railroad, access to unmasked waybill data would be necessary to accurately compare the revenue to variable cost ratio of the issue traffic (whose revenue by definition is not masked) with the revenue to variable cost ratio of a comp group based on the waybill sample (whose actual revenue, absent a reversal of Director Gardner's decision, is masked).

In denying our January 25 request for access to unmasked waybill data, it is most significant that Director Gardner does not challenge our contention that the requested waybill data is relevant and essential in order for North Dakota fully to pursue its arguments and make the best presentation possible under the *Small Case Guidelines*. Instead, Director Gardner relies centrally on language from the *Small Case Guidelines* decision sustaining an AAR objection "to the release of confidential and commercially sensitive information absent an actual rate complaint" and also noting that "data from the Waybill Sample is not needed for the information that must be included in the initial complaint ... pre-complaint access to the confidential Waybill sample ... would be ... inappropriate [for] use in rate negotiations between shippers and carriers," citing *Small Case Guidelines* at 1054-55. Director Gardner also asserts that the "unmasked revenue information [requested by us] is far more confidential and commercially sensitive than the masked Waybill information discussed by the Board in" *Small Case Guidelines*.

To the extent that Director Gardner's denial rests on the suggestion that our request is premature because there is no pending complaint and because unmasked waybill data is unnecessary in order to prepare a complaint, Director Gardner did not give consideration to the restraints that are likely to apply to waybill data access once a complaint is filed and to the consequences of denying access to unmasked waybill data at this time.

First, under the Board's decision in *BP Amoco*, it is not even clear that any post-complaint opportunity would be provided to seek or utilize unmasked waybill data from the Board's files. Although the *BP Amoco* decision contemplates the use of "traffic data

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<sup>1</sup> In STB Docket No. 42093, *BP Amoco Chemical Company v. Norfolk Southern Railway Company* (June 6, 2005) ("*BP Amoco*"), the Board proposed to use only the RSAM unadjusted figure in such cases. Use of only the unadjusted RSAM figure can have the effect of raising a maximum lawful rate by substantial amounts. That decision, which was confined to that proceeding, cannot bind the State of North Dakota. Should the Board propose a similar rule in any complaint brought on behalf of the State, we would regard it as unlawful. On behalf of the State of North Dakota, we intend to challenge any alteration of *Small Case Guidelines* reflected in *BP Amoco*, and access to unmasked waybill data is necessary to fully implement and support that position for reasons set forth in our January 25 letter.

from the rail industry Waybill Sample" for the preparation of an R/VCcomp analysis "after a shipper files a rate complaint" (*BP Amoco*, slip op. at 3), no provision is made in the *BP Amoco* procedural schedule to request waybill file data from the Board pursuant to 49 C.F.R. § 1244.9.

The procedural schedule promulgated in *BP Amoco* provides that discovery commences on the effective date of the procedural schedule and concludes 80 days thereafter. *BP Amoco*, slip op. at 5. However, initial comparison group evidence must be presented by Day 60, or 20 days prior to the conclusion of the discovery period. It is very clear, especially from the objections filed by various rail carriers to our request that, absent a ruling from the Board now, any discovery of unmasked waybill sample revenues from a defendant railroad would be met with a flat refusal. Even if "discovery" were to be construed as including efforts to obtain waybill data from the Board (as opposed to a defendant railroad), it is apparent that the type of procedural schedule favored by the Board in *BP Amoco* will not allow for effective use of any such "discovery" to obtain "comp" traffic data from the Board in a timely manner under the procedures in Section 1244 of the Code of Federal Regulations.

Indeed, the procedural schedule favored by the Board in *BP Amoco* has no provision for seeking "confidential" waybill data pursuant to 49 C.F.R. § 1244.9. The Board concluded in *BP Amoco* that the "no discovery should be needed regarding issues such as traffic movements (because ... selection of the comparison group is limited to movements included in the Waybill Sample) and managerial efficiencies [i.e., RSAM data] (because the Board will use the published RSAM benchmark in these proceedings." *BP Amoco*, slip op. at 7.

Thus, the combination of the Board's decision in *BP Amoco* to limit discovery for R/VCcomp or RSAM purposes and Director Gardner's decision that access to the Board's Waybill Sample is unavailable prior to the filing of a complaint, will result in a foreclosure of access to unmasked confidential waybill data both *before and after* a complaint is filed. Such a result would lead to an unlawful, arbitrary and capricious curtailment of a complainant's ability to pursue fundamental aspects of a "simplified" rate case. As a consequence, a rate prescription in a "simplified" case is likely to be at a level higher than otherwise could be established with access to the unmasked waybill file.

As noted in our January 25 letter request, the unmasked waybill data we seek is central to presenting evidence pertaining to the RSAM and R/VCcomp factors set forth in the *Small Case Guidelines*. The unmasked data is also essential to explore a challenge on factual grounds of conclusions reached in *BP Amoco* that contradict those previously reached by the Board in *Small Case Guidelines*, a notice and comment rulemaking. *Small Case Guidelines* plainly contemplates the introduction of evidence pertaining to the use of adjusted RSAM data, while *BP Amoco* does not. And *Small Case Guidelines* plainly permits introduction of evidence defining any appropriate "comp" traffic, while *BP Amoco* may not.<sup>2</sup>

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<sup>2</sup> Any "discovery" available pursuant to *BP Amoco* would, at best, be limited to discovery against the defendant railroad(s) and would not produce traffic data from non-defendants, even though *Small Case*

In essence, therefore, the decisions in *BP Amoco* and of Director Gardner in this proceeding in tandem will have the effect of pre-ordaining the evidentiary boundaries and outcome in a simplified rate case. To the extent that result is furthered by Director Gardner's decision, it is being reached without benefit of a Board decision on the merits.

If the Board's concern over release of unmasked waybill data pursuant to our request really is one of prematurity, the outcome reached by Director Gardner is also unjustified. On behalf of North Dakota, we do not concede that it is improper or unnecessary to make the requested data available prior to the filing of a complaint. Indeed, given the Board's stated desire to remove barriers to the filing of cases under the *Small Case Guidelines*, access to the confidential unmasked waybill sample prior to filing a complaint would permit potential complainants to better evaluate a possible complaint and thus remove one existing barrier. But, assuming *arguendo* the filing of a complaint is the *sine qua non* for the release of unmasked waybill data, Director Gardner simply could have provided that such data would be released upon the filing of a complaint if prematurity was his concern. Resolution of waybill data access is necessary before a complaint is filed since the statute requires that proceedings pursuant to *Small Case Guidelines* are intended to be not merely "simplified," but also "expedited." See 49 U.S.C. § 10701(d)(3). See, also, 49 U.S.C. § 10704(d) ("the Board shall establish procedures to insure expeditious handling of challenges to the reasonableness of railroad rates. The procedure shall include appropriate measures for avoiding delay in the discovery and evidentiary phases of such proceedings....").

To the extent that Director Gardner's denial was based on his comment that the "unmasked revenue information [requested by us] is far more confidential and commercially sensitive than the masked Waybill information discussed by the Board in" *Small Case Guidelines*, we believe that he has relied on an invalid criterion. Protective orders are designed to insure that even the most "highly confidential" information will not be disseminated improperly and are utilized routinely pursuant to 49 C.F.R. 1244.9(d) and other statutes and regulations administered by the Board. The fact that unmasked waybill data may be "far more confidential and commercially sensitive than ... masked Waybill information" is not a matter of our making, as it is not parties challenging a rate who have chosen to "mask" revenue data submitted to the Board. Permission given by the Board to railroads to "mask" revenue data for waybill reporting purposes should not trump the ability of a complainant to obtain evidence necessary to determine a reasonable and lawful rate.

The highly confidential nature of information has never been a barrier to its release where a protective order is in place, as one certainly can be in this instance. In ex-

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*Guidelines* permits "comp" traffic to be defined without strict geographic or carrier limits. If only that waybill file data that masks actual carrier revenue is made available to a complainant, rather than all "confidential" data, the ability to identify "comp" traffic will be compromised because among other things, it will be impossible to identify "comparable" revenues, since the revenue of the issue traffic will be "unmasked" while the revenue from the comp group will be "masked," thus making an accurate comparison impossible.

pressing concern that unmasked waybill data would be utilized by the State for negotiating purposes, Director Gardner apparently overlooked the fact that our request was expressly for release of the sought data only to ourselves as outside counsel and outside consultants, and could not be used for any purposes other than in a proceeding before the Board. The Board's protective orders uniformly allow for data to be classified as "highly confidential," in which case the data may be reviewed only by outside counsel and consultants. Were the release of the sought data subject to such provisions, it would not be available to officers and employees of the State for negotiating purposes, and could not be used by outside counsel and consultants for negotiating purposes.

The Board regularly provides access in Board proceedings to information as confidential –or even more confidential – than the masking factors in the confidential waybill sample. For example, in major rail rate cases, the Board provides for protective orders that permit a rail carrier to provide the very text of and rates contained in highly confidential rail transportation contracts to outside counsel and outside consultants of a complainant – the very information that is "masked" in the aggregate in the waybill sample. Such outside counsel and consultants may not use such information in negotiations with any rail carrier. In merger proceedings, the Board's protective orders give outside counsel and consultants access to the most sensitive business information related to one of the most sensitive business decisions of a carrier (or indeed any business), whether to merge or not, and under what conditions. It would be arbitrary and capricious for the Board to elevate its permission to "mask" certain revenue data in the waybill sample above all other information that regulated rail carriers must provide to the Board in Board proceedings.

Accordingly, the Board should reverse Director Gardner's denial, and should grant immediate access to the unmasked waybill sample so that the State of North Dakota can properly prepare a rate complaint under the *Small Case Guidelines*. At minimum, the Board should reverse Director Gardner's denial, and permit access to the unmasked waybill sample immediately upon the filing of a Complaint by the State of North Dakota under the *Small Case Guidelines*.

Respectfully submitted,



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cc: All parties via email or hand delivery and first class mail

January 25, 2006

By Messenger

Mr. Leland L. Gardner, Director  
Office of Economics, Environmental Analysis and  
Administration  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423

RE: Request for Release of Waybill Data

Dear Director Gardner:

This letter is a request under 49 C.F.R. §1244.9(c) for the release of certain information from the STB's Costed Waybill Sample using unmasked revenues. Under Section 1244.9(c), a potential "other user" may request permission to use data from the STB Waybill Sample by submitting information in accordance with Section 1244.9(e). See, *Procedures on Release of Data from the ICC Waybill Sample*, 1985 ICC Lexis 66 (release of waybill data to other users may be "essential to meet a particular and legitimate need."). That section requires a potential other user to provide: (1) a complete and detailed explanation of the purpose for which the requested data are needed; (2) a description of the specific waybill data or fields actually required (including pertinent geographic areas); and, (3) a detailed justification as to why the specific waybill data are needed. See, 49 C.F.R. §1244.9(e). This letter sets out the information required by Section 1244.9(e).

As the Board knows, the Waybill Sample, a weighted random sample of carload waybills, is a comprehensive database on rail carload traffic flows and characteristics. The Waybill Sample contains such information as the number of cars, the commodity, the freight revenue, and other information of the sampled movements. The primary purpose of the Waybill Sample is regulatory oversight, and rail carriers that meet certain criteria are required to submit Waybill Sample information to the Board. See, 49 C.F.R. §1244.2. The Waybill Sample, for example, is used to calculate the revenue-to-variable cost benchmark figures used as starting points under the Board's decision in Ex Parte 347 (Sub-No. 2), *Rate Guidelines-Non-Coal Proceedings*, dated December 27, 1996, 1 S.T.B. 1004 (1996) [*Small Case Guidelines*"]. The Waybill Sample is also very frequently used in regulatory proceedings, as a basis for information in verified statements submitted to the Board. As the Board has noted, the Waybill Sample is "the only known source from which reasonably reliable and comprehensive information can be obtained on rail carload freight traffic flow and its characteristics." 46 Fed. Reg. 26781 (May 15, 1981). It is intended to serve the needs of the agency, as well as the traffic data needs of "other Federal, State and local governments, the transportation industry . . ." and other persons. *Id.*

Under Board procedures involving the Waybill Sample, rail carriers required to submit Waybill Sample information to the Board have been allowed to alter the revenues for contract traffic through the use of "masking factors," for confidentiality purposes. We understand that the masking factors are selected by individual carriers and thus are different from carrier to carrier. Moreover, we understand that these factors can be different for different commodities or commodity groups carried by each carrier; and can



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be either positive or negative. Railroads apply masking factors to the revenue appearing on the Waybill Sample and provide these masking factors to the Board. The factors given to the Board have been applied to the Waybill Sample by Board staff to unmask the revenues used by the agency in calculating the revenue-to-variable cost benchmarks used in the initial *Small Case Guidelines* decision and in the annual updates to those benchmarks published by the Board.

The undersigned recognize that the Board has established a high standard for the release of Costed Waybill Data using unmasked revenues. See, STB Finance Docket No. 33388, *CSX Corporation and CSX Transportation Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company – Control and Operating Leases/Agreements – Conrail, Inc. and Consolidated Rail Corporation*, Decision No. 42, served October 3, 1997 ("*CSX/NS Waybill Decision*"); and STB Docket No. 42069, *Duke Energy Corporation v. Norfolk Southern Railway* and consolidated cases, served April 5, 2005 ("*Duke Energy Waybill Decision*"). However, as explained in detail below, the undersigned assert that the standards established by the Board have been met in this case, in view of the identity of the requesters; the purpose to which this information will be used; the direct relevance of the data; and the efforts by the undersigned to narrow the request and the persons to whom the information will be made available.

#### Identity of Requesting Parties

The undersigned have been retained by the State of North Dakota as outside counsel to investigate and provide guidance to the State for the possible filing of a Complaint under the *Small Case Guidelines*. Under this retention, the undersigned have been appointed Special Assistant Attorneys General in the Office of the Attorney General of the State of North Dakota. As set forth in more detail below, the request for the Costed Waybill Sample using unmasked revenues is directly related to analyses that the undersigned are performing as Special Assistant Attorneys General for the State. Thus, unlike the requesters in both the *CSX/NS Waybill Decision* and the *Duke Energy Waybill Decision*, the requester in this case is not a shipper, but the government of a State of the United States. Thus, there is no danger in this case that the requester will use the data in its commercial dealings with any rail carrier, such as in contract negotiations. Compare, *CSX/NS Waybill Decision*, slip op. at 7-8. Moreover, as set forth below, the strict confidentiality agreement proposed for this release of this data will preclude the use of this data by any other person or persons in their commercial dealings with any rail carrier.

#### Purpose for Which the Requested Data Are Needed

As noted above, the State of North Dakota is currently preparing to bring a case under the Board's *Small Case Guidelines* on the transportation of wheat from the State. This is not a speculative matter or an idle inquiry. The seriousness of this effort is shown by the fact that the North Dakota State Legislature has appropriated \$900,000 for the litigation of such a case, and the State is currently investigating the parameters of such a complaint. This request is filed to obtain access to the Costed Waybill Sample using unmasked revenues, for the purpose of obtaining information directly relevant to the standards that the Board has enunciated in its *Small Case Guidelines*.

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Justification as To Why the Requested Data Are Needed

Under the Board's *Small Case Guidelines* decision, the Board adopted "simplified evidentiary guidelines to be used in proceedings to determine the reasonableness of challenged rail rates charged on captive traffic where the Constrained Market Pricing guidelines cannot practicably be applied." *Id.* at 1004. Thus, the investigation of whether to bring a complaint necessarily involves an analysis of those guidelines to determine whether a complaint is justified; the chances for success; and the necessary evidence that would need to be submitted. That analysis, in turn, requires access to data that is directly relevant to the *Small Case Guidelines*, a matter discussed in detail below.

In addition, should the State determine to file a complaint under the Board's *Small Case Guidelines*, the requested Costed Waybill data using unmasked revenues would be used in developing evidence to the Board under the *Small Case Guidelines*. The agency's *Small Case Guidelines* employ three revenue-to-variable cost benchmarks as starting points for use in a reasonableness analysis. *Id.* at 1020, 1022. As the Board noted, "in making their respective benchmark r/vc presentations, we expect both shipper-complainants and defendant-railroads to present whatever additional information is available that bears on the reasonableness of the pricing of the traffic at issue." Significantly, the Board declared that "[t]his could include a distribution analysis of the component numbers that produced the average figure [citation omitted] . . . ." as well as "an analysis of any relevant subset of numbers that more closely compares with the traffic at issue. . . ." *Id.* at 1022 [emphasis added].

Access to the Costed Waybill Sample using unmasked revenues is necessary if the State of North Dakota is to undertake the "more particularized analysis" (*id.* at 1020) that the Board required in its *Small Case Guidelines* decision, in at least three respects.

First, one of the benchmarks which the Board has developed is the Revenue Shortfall Allocation Methodology, or "RSAM," which measures the uniform markup above variable cost that would be needed from every shipper of potentially captive traffic in order for the carrier to recover all of its URCS fixed costs. In its *Small Case Guidelines* decision, and in a June 22, 2005 decision which published the latest RSAM calculations, the Board published two RSAM figures, a figure with and a figure without an "efficiency adjustment" designed to account for traffic carried at less than URCS variable cost. The two RSAM figures were developed by the Board by analyzing the Costed Waybill Sample using unmasked revenues. In its *Small Case Guidelines* decision, the Board stated that "the correct measure lies somewhere between the two figures" and that it would look at both figures "and treat them as the relevant starting range for our consideration." *Small Case Guidelines*, 1 S.T.B. at 1030.

But, without access to the Costed Waybill Sample using unmasked revenues, it is impossible to develop an analysis that would determine *which* point between the two figures the Board should adopt as the "correct measure" within the "relevant range" by, for example, making a distribution analysis suggested by the Board in its *Small Case Guidelines* decision. Unless the unmasked revenues are known, it is impossible to know *how much* traffic is *actually* carried at less than a compensatory level; and the distribution of such less-than-variable-cost traffic. For example, if the carrier's masking factors increased contract revenues for a certain commodity by twenty percent, then the actual amount of traffic carried at

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less than a compensatory level could be substantially higher than if the analysis were performed using the Costed Waybill Sample data with masked revenues. Moreover, if the carrier's masking factor increased contract revenues by twenty percent, the actual proportion of traffic contributing only marginally to the carrier's fixed costs could be significantly higher than the Costed Waybill Sample data with masked revenues show. Moreover, without the actual, unmasked revenue for movements within the Waybill Sample, it will be impossible to analyze the below-variable-cost traffic to recommend to the Board a point within the "relevant starting range." It would be arbitrary and capricious for the Board to require parties to present "additional information" including a distribution analysis, without giving parties the means to do so.

Moreover, the Board noted that the range between the adjusted and unadjusted RSAM figures is quite broad for some carriers, while narrower for others, reflecting the extent to which a carrier handles traffic at rates that produce r/vc ratios below 100%. *Id.* at 1033. This in turn, noted the agency, is based on the composition of the carrier's traffic and its pricing practices. *Id.* The Board declared that the parties "can and should address any specific efficiency considerations that apply to the particular carrier defendant(s) that would serve to narrow that range." *Id.* at 1030. But without receiving the Costed Waybill Sample using unmasked revenue, it is impossible to address any "specific efficiency considerations" for a particular carrier defendant. Indeed, the Board's *own* analysis in *Small Case Guidelines* specifically pointed to below-variable-cost *contract* revenues as an explanation for a specific carrier's RSAM figures – a matter which can only be tested if contract revenues are unmasked. See, *id.* at 1033, fn. 86.

We are aware that in the Board's decision in STB Docket No. 42093, *BP Amoco Chemical Company v. Norfolk Southern Railway Company* ("*BP Amoco*"), served June 6, 2005, the Board proposed to use only the RSAM Unadjusted figure in that proceeding. We do not believe it is proper for Board to unilaterally change, in a procedural order, the standards set out in the *Small Case Guidelines*. Moreover, the Board must, in any rate reasonableness determination, consider the factors set out in 49 U.S.C. §10701(d)(2), including the amount of traffic carried at levels which do not contribute to the going concern value of the carrier and the amount of traffic which contributes only marginally to fixed costs. Indeed, the RSAM figure adjusted for efficiency was *specifically* intended to develop information related to these so-called "Long-Cannon-1" and "Long-Cannon-2" managerial efficiency tests. See *Small Case Guidelines*, 1 S.T.B. at 1020; see also, Ex Parte 347 (Sub-No. 2), *Rate Guidelines – Non-Coal Proceedings*, decision served December 1, 1995, slip op. at 18 ("*through its efficiency adjustment, [the RSAM] gives effect to the first two 'Long-Cannon' factors . . .*" [emphasis added]). The Board cannot simply choose to ignore traffic carried at less than a compensatory level or traffic that contributes only marginally to the carrier's fixed costs without any analysis whatsoever.<sup>1</sup>

Since the Board must consider the Long-Cannon-1 and the Long-Cannon-2 factors, the Board must have evidence – accurate evidence – as to amount of traffic carried at levels which do not contribute to the going concern value of the carrier and the amount of traffic which contributes only marginally to fixed

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<sup>1</sup> The extreme nature of the Board's decision in *BP Amoco* is underlined by the fact that in the *Small Case Guidelines* proceeding, not even the Association of American Railroads proposed eliminating all traffic shown by the Waybill Sample to be carried at less than variable cost, but that an appropriate adjustment would be to eliminate traffic carried at less than directly variable costs ("DVC"). See, *Small Case Guidelines*, 1 S.T.B. at 1028 and fn. 70.

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costs. The Costed Waybill Sample is the only practical source of information as to the amounts and levels of those categories of traffic,<sup>2</sup> and unmasked revenues are necessary if that information is to be accurate. Finally, the Board made clear that its decision in *BP Amoco* was limited to that proceeding, and that it "may revisit" some of the determinations made in that decision. *Id.* at 2. Thus, the Board's decision in *BP Amoco* cannot justify any change in its *Small Case Guidelines* for future complainants.

Second, the Board established a second benchmark, the "R/VCcomp" benchmark, which was to measure the markup taken on >180 traffic that involves similar commodities moving under similar transportation conditions. *Small Case Guidelines, id.* at 1034. The "comparative group" must be taken from the Costed Waybill Sample using *masked* revenues. See, *Guidelines*, 1 S.T.B. at 1055. As noted above, the masking factors are chosen by each carrier to mask contract revenues, can be different for different commodities or commodity groups, and can be either positive or negative. In contrast, the RSAM and R/VC>180 benchmarks are calculated using *unmasked* revenues

Unless the revenues in the Costed Waybill Sample are unmasked, it will be impossible to make an accurate analysis using the three factors established by the Board under the *Small Case Guidelines*. Indeed, there are insoluble problems in utilizing the "comp" factor whether a complainant uses either the "landscape" approach or the "formula" approach under the *Guidelines*. If the formula approach is used, the *Guidelines* indicate that a "markup" should be applied to the variable cost of the issue traffic. That "markup" is derived by dividing the RSAM by the R/VC>180 factor (both of which are calculated using unmasked revenues) and multiplying the resulting fraction by the R/VCcomp (which would be calculated using masked revenues, unless the Board provided the masking factors). The *Guidelines* decision expresses this formula as follows:

$$\text{Markup} = \frac{\text{RSAM}}{\text{R/VC}>180} \times \text{R/VCcomp}$$

*Guidelines*, at 1040. But if, for example, the rail carrier has inflated Waybill Sample contract revenues by twenty percent, then the R/VCcomp factor will be significantly higher than the actual (unmasked) revenues would show. The RSAM / R/VC>180 fraction will be multiplied by this inaccurately high "comp" figure, thus producing an inaccurately high maximum reasonable rate. Similarly, if the "landscape" method is used, the revenue to variable cost ratio of the issue traffic is to be directly compared to the RSAM, R/VC>180 and the R/VCcomp figure. *Guidelines*, at 1039-1040. But again, if the rail carrier has inflated Waybill Sample contract revenues by twenty percent, then the R/VCcomp figure (derived using masked revenues) will be higher than an R/VCcomp figure using the actual (unmasked) revenues, and will not produce a valid comparison to the issue traffic. And, worst of all, because the carriers can choose the masking factors, a carrier could significantly influence the final answer by choosing a "favorable" masking factor for the Waybill Sample.

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<sup>2</sup> The Board has already rejected in its *Small Case Guidelines* decision the possibility of obtaining the defendant railroad's traffic tapes, which would be the only other source for obtaining information on the Long-Cannon-1 and Long-Cannon-2 factors. *Small Case Guidelines*, 1 S.T.B. at 1055.

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Thus, access to Costed Waybill Sample using unmasked revenues is necessary to know the *actual* "markup on >180 traffic that involves similar commodities moving under similar transportation conditions." *Id.* It would be arbitrary and capricious for the Board to require complainants to develop a comparative benchmark, while making it impossible to make that comparison on the basis of factually correct data. Indeed, the Board has for many years regularly warned parties obtaining access to masked data that use of revenue data from the Carload Waybill Sample in any type of comparison could lead to wrong or misleading results. See e.g., STB letter dated June 6, 2005 in response to WB456-1.

Third, even if the Board would decide, in any future case, to limit the RSAM analysis only to the RSAM figure unadjusted for managerial efficiency, the Board has made clear in its *Small Case Guidelines* that the three r/vc benchmarks "only provide the starting point for a rate reasonableness analysis, not the end result . . ." *Small Case Guidelines*, 1. S.T.B. at 1022, and that a complainant is entitled to supplement its evidence with more particularized analyses. The Board has recognized that, since the *Small Case Guidelines* were developed, the rail system no longer has significant excess capacity. See, *BP Amoco*, slip op. at 10. In such a capacity-constrained environment, there is even *less* justification for rates that return to the carrier less than their long-run variable cost, and a complainant would be entitled, if not expected, to present to the Board evidence that a carrier has failed to maximize its revenue from a portion of its traffic base, and that the consequences of such a failure should not be borne by the carrier's captive shippers.

The agency's decisions in *CSX/NS Waybill Decision* and *Duke Energy Waybill Decision* do not preclude release of the Costed Waybill Sample using unmasked revenues that is requested here. The *CSX/NS Waybill Decision* makes clear that a decision to release or not release the masking factors depends upon the Board's evaluation of the balance between the carrier's need for confidentiality and the relevance of the information to the inquiry. The Board noted in the *CSX/NS Waybill Decision* that the confidentiality policy underlying the maintenance of the Waybill Sample "tips the scales against a finding of relevance" in that case, "because the standard against which the relevance of commercially sensitive information is judged is necessarily higher than the standard against which the relevance of less sensitive information is judged." *Id.*, slip op. at 8. In that case, the proposition that the movements were seeking to prove with the unmasked revenues was "highly questionable," since it challenged a "basic principle of economics, that firms will generally attempt to maximize their profits," and amounted to essentially a "fishing expedition." *Id.* Thus, the Board found that the higher standard of relevance had not been met in that case, given the potential uses to which the information would be put.

In the present case, in contrast, the need for the Costed Waybill Sample using unmasked revenue is far from highly questionable, because it is directly relevant to the accurate measure of the factors that the Board has *specifically* prescribed in the *Small Case Guidelines* decision, which are at the foundation of any proceeding prescribing a maximum reasonable rate under those guidelines. Instead of a "fishing expedition", the undersigned are seeking, on behalf of the State of North Dakota, information that will enable the State to meet the standards for small cases enunciated by the Board, select an appropriate movement for a case, and to present evidence if a complaint is brought.

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Similarly, in the *Duke Energy Waybill Decision*, the Board noted that the complainant's intended use for the unmasked Waybill Sample in a phasing proceeding was "unclear." *Id.*, slip op. at 3. The complainants in those consolidated cases desired to analyze individual rate increases between 2001 and 2004 using the unmasked Costed Waybill Sample. But, the agency noted, the Waybill Sample is only a small sampling of individual shipments, so that a movement in the 2001 sample is not likely to appear in the sample each year from 2001 to 2004. Thus, the time-series analysis contemplated by the complainant in that case was not possible. Therefore, the Board denied the request, because the higher standard of relevance had not been met.

In this case, on the other hand, no time-series analysis is contemplated, but the use of the unmasked revenues will be used to accurately calculate the R/VComp, as well as adjustments to the RSAM that would directly relate to the appropriate point within the relevant range denominated by the RSAM with and without the efficiency adjustment, including proper accounting for managerial efficiency under the Long-Cannon factors.

Description of the Waybill Data Required and Proposed Limiting Conditions

In light of the high standard that the Board has adopted for release of the Costed Waybill Sample using unmasked revenues, this request is limited to the minimum information necessary to evaluate the Board's requirements under the RSAM, including the Long-Cannon factors, and a comparison group under the R/VComp. The following data are requested from the Costed Waybill Sample using unmasked revenues:

- (1) All movements on the Burlington Northern Santa Fe Railway ("BNSF") with a revenue to variable cost ratio of less than 100 for the years of the most recently released RSAM ratios (currently 2000 – 2003) and the year or years (if later) of any more recent annual Costed Waybill Samples<sup>3</sup>; and,
- (2) All movements of wheat on the BNSF, the Union Pacific Railroad Company, and the Canadian Pacific Railway Company with revenue to variable cost ratios greater than 180 percent for the years 2000-2003 (and the year or years, if later, of any more recent annual Costed Waybill Samples).
- (3) The undersigned on behalf of the State of North Dakota would be willing to enter into a protective order restricting the use of this information to preparations for and use in a Complaint involving the State of North Dakota under the Board's *Small Case Guidelines* solely by outside counsel and outside consultants for the State involved in such a complaint. Any data submitted to the Board when such a complaint is filed that would

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<sup>3</sup> We understand that the 2004 Costed Waybill Sample is currently available.

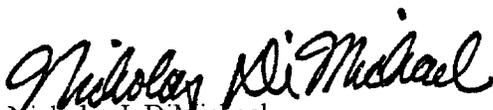
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otherwise reveal the masking factors would be filed under seal, and all evidence would conform to the requirements of 49 C.F.R. §1244.9(b)(4).<sup>4</sup>

The undersigned would be willing to discuss with the Board further restrictions on the data as long as such restrictions would enable the undersigned and outside consultants to evaluate data needed under the Board's *Small Case Guidelines* decision and to present such data to the Board in the context of a complaint under those guidelines.

Sincerely,

  
Nicholas J. DiMichael  
Thompson Hine LLP

  
Andrew P. Goldstein  
McCarthy, Sweeney, and Harkaway LLP

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<sup>4</sup> In its decision in *Small Case Guidelines*, the Board declined to grant general access to the Waybill Sample prior to the filing of a complaint, on the grounds that data from the sample was not needed in information that must be included in the initial complaint, and that it would be an inappropriate use of the Waybill Sample for a non-regulatory purpose if it would be used in rate negotiations between shippers and carriers. *Small Case Guidelines*, at 1050. But in this case, the State of North Dakota is not a shipper, and the data will not be used in rate negotiations. Moreover, the State has shown that the information requested is in fact directly relevant to the evidence to be presented in a complaint. Finally, the State is not requesting that the Board provide general access, but is using existing procedures to show that access to the Waybill Sample is justified in the specific circumstances presented in this letter.

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**SURFACE TRANSPORTATION BOARD  
WASHINGTON, DC 20423-0001**

OFFICE OF ECONOMICS, ENVIRONMENTAL ANALYSIS, AND ADMINISTRATION

March 10, 2006

Mr. Nicholas J. DiMichael  
Thompson Hine LLP  
1920 N Street, NW, Suite 800  
Washington, DC 20036-1600

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Part of  
Public Record

Mr. Andrew P. Goldstein  
McCarthy, Sweeney, and Harkaway LLP  
2175 K Street, NW, Suite 600  
Washington, DC 20037-1828

Dear Mr. DiMichael and Mr. Goldstein:

I have given full consideration to your request of January 25, 2006 for access, under 49 CFR 1244.9(c), to the Board's 2000-2004 Costed Carload Waybill Samples using unmasked revenues. You state that your request is related to analyses that you are performing as Special Assistant Attorneys General for the State of North Dakota, and is limited to certain specified movements on BNSF Railway, Union Pacific Railroad Company, and Canadian Pacific Railway Company. You further state that these analyses involve an "investigation of whether to bring a complaint," sponsored by the State of North Dakota, under the Board's Small Rate Case Guidelines, and that the information you request is necessary to "select an appropriate movement for a case, and to present evidence if a complaint is brought."

Your request was published in the Federal Register on February 1, 2006 (71 FR 5409). I received comments from four parties objecting to the release of the requested information: the Association of American Railroads (AAR); Canadian Pacific Railway Company (CP); Union Pacific Railroad Company (UP); and BNSF Railway Company (BNSF).

As explained below, your request is denied.

Authority to grant or deny access to the Board's Carload Waybill Sample is delegated to me by the Board's Chairman. 49 CFR 1011.6(e). In exercising this authority, I must always be mindful of the Board's precedents and guidelines.

The Board, in promulgating its Small Rate Case Guidelines via notice and comment rulemaking, addressed the issue of whether *any* confidential Waybill information is to be released prior to the filing of a rate complaint:

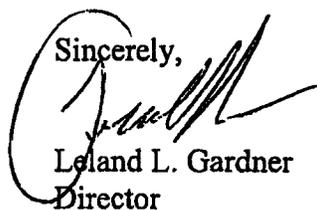
AAR rightly objects to the release of confidential and commercially sensitive information absent an actual rate complaint. . . We note that data from the Waybill Sample is not needed for the information that must be included in the initial complaint. We agree with AAR that pre-complaint access to the 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.

Ex Parte No. 347 (Sub-No.2), *Rate Guidelines -- Non-Coal Proceedings*, 1 S.T.B. at 1054-55.

Here, the unmasked revenue information that you request is far more confidential and commercially sensitive than the masked Waybill information discussed by the Board in its Small Rate Case Guidelines. I am not persuaded by your argument (in footnote 4, at page 8 of your request) that the Board's clearly enunciated proscription of any pre-complaint release of Waybill information applies only to "shippers," and not to States such as North Dakota. While you state that "the State of North Dakota is not a shipper, and the data will not be used in rate negotiations," UP notes that, "if a state can bring a rate case, we fail to see why it could not negotiate rates to settle a case or avoid the need to bring one in the first place." CP states that, since the purpose of the North Dakota request is to assist the State in preparing a case under the Board's Small Rate Case Guidelines, "the standing of the State . . . is, in substance, no different than that of any 'shipper' (or shipper's counsel) seeking similar access." BNSF states that "the State of North Dakota has been an active participant in negotiations with BNSF over rates for grain shipments in North Dakota," as discussed in referenced testimony of the President of the Public Services Commission of North Dakota.

In accordance with the provisions of 49 CFR 1244.9(d)(4)(iii), you may appeal this decision to the Chairman of the Surface Transportation Board within 10 days from the date of this correspondence.

Sincerely,



Leland L. Gardner  
Director

cc: Louis P. Warchot  
G. Paul Moates  
Terrence M. Hynes  
Samuel M. Sipe, Jr.  
Michael L. Rosenthal