

## COVINGTON &amp; BURLING

1201 PENNSYLVANIA AVENUE NW  
WASHINGTON, DC 20004-2401  
TEL 202.662.6000  
FAX 202.662.6291  
WWW.COV.COM

WASHINGTON  
NEW YORK  
SAN FRANCISCO  
LONDON  
BRUSSELS

MICHAEL L. ROSENTHAL  
TEL 202.662.5448  
FAX 202.778.5448  
MROSENTHAL@COV.COM

February 15, 2006

**BY HAND**

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 WB456-1

Dear Director Gardner:

Union Pacific Railroad Company ("UP") objects to the release of its unmasked revenue data from the Carload Waybill Sample in response to the above-referenced request by the State of North Dakota. The request was published in the Federal Register on January 31, 2006. 71 Fed. Reg. 5409 (Feb. 1, 2006).

UP's contract revenue data are highly confidential and commercially sensitive. In order to protect these data from disclosure, UP applies a proprietary masking procedure when filing Waybill Sample data with the Surface Transportation Board. See 49 C.F.R. § 1244.3.

Board precedent clearly precludes the release of unmasked revenue data under the present circumstances. North Dakota claims to need the data because it "is currently planning to bring a case under the Board's *Small Case Guidelines*."<sup>1</sup> The Board, however, has rejected suggestions that shippers should be afforded pre-complaint access to such data. See *Rate Guidelines, Non-Coal Proceedings*, 1 S.T.B. 1004, 1054 (1997). It has explained that "data from the Waybill Sample [are] not needed for the information that must be included in the initial complaint." *Id.* North Dakota offers no reason why the Board would reach a different conclusion in this case.

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<sup>1</sup> Letter from N. DiMichael & A. Goldstein to L. Gardner, dated Jan. 25, 2006, p. 2 (the "North Dakota Letter").

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In fact, UP should be entitled to even more protection against pre-complaint access to its data in this case than the generic railroad defendant addressed in *Small Case Guidelines*. First, North Dakota does not appear to be contemplating a case against UP (which does not even have any rail lines in that state). It apparently wants UP's revenue data to calculate the "R/VCcomp" benchmark. As a non-party, UP should be entitled to even greater protection from disclosure of its confidential data than a party. Second, there is no way at this point in time to assess whether UP even has any traffic that would be relevant to the R/VCcomp benchmark. North Dakota has not even identified a rate that it intends to challenge, and if a case is ever filed, UP might be able to show that the requested data do not relate to comparable traffic. See *Small Case Guidelines*, 1 S.T.B. at 1036 (discussing "railroad-specific elements" that would affect the "R/VCcomp benchmark"). North Dakota should not be granted access to UP's highly confidential and commercially sensitive data as part of a general "fishing expedition." *Duke Energy Corp. v. Norfolk Southern Ry.*, STB Docket No. 42069 (STB served July 26, 2002), slip op. at 4. It should not be granted access to such data unless it makes a strong showing of relevance and need, and the appropriate balancing of these concerns cannot be addressed in the absence of an actual case.

Finally, there is no merit to North Dakota's assertion that the confidentiality concerns in this case are less than those the Board addressed in *Small Rate Guidelines*. North Dakota claims that there is a difference between the two situations because the state is not a shipper that could use the information in negotiations.<sup>2</sup> But 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. Moreover, the state will not use the data itself, but instead will provide it to "outside counsel" and "outside consultants."<sup>3</sup> North Dakota has not provided any assurances that those counsel or consultants will not represent shippers in rate negotiations with UP.

The Board has "a longstanding policy not to release the unmasked revenues or masking factors to parties in proceedings before the Board." *Duke Energy Corp. v. Norfolk Southern Ry.*, STB Docket No. 42069 (STB served Apr. 5, 2005), slip op. at 4. North

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<sup>2</sup> North Dakota Letter, p. 8 n.4.

<sup>3</sup> North Dakota Letter, p. 8. North Dakota seeks access to the data for "outside consultants," but it does not identify its "outside consultants." *Id.*

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Dakota provides no reason to depart from that long-standing precedent here, particularly in the face of clear direction from the Board's decision in *Small Rate Guidelines*.

Sincerely,



Michael L. Rosenthal

*Attorney for Union Pacific  
Railroad Company*

cc: Nicholas J. DiMichael  
Andrew P. Goldstein