



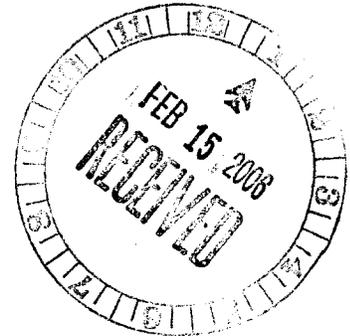
SIDLEY AUSTIN LLP
1501 K STREET, N.W.
WASHINGTON, D.C. 20005
202 736 8000
202 736 8711 FAX

thynes@sidley.com
(202) 736-8198

BEIJING GENEVA SAN FRANCISCO
BRUSSELS HONG KONG SHANGHAI
CHICAGO LONDON SINGAPORE
DALLAS LOS ANGELES TOKYO
NEW YORK WASHINGTON, DC

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February 15, 2006



HAND DELIVERY

Mr. Leland L. Gardner, Director
Office of Economics, Environmental
Analysis and Administration
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: No. WB456-1 – Request by Thompson Hine LLP and McCarthy, Sweeney & Harkaway LLP on behalf of the State of North Dakota

Dear Director Gardner:

Pursuant to the Board’s regulations at 49 C.F.R. § 1244.9(d)(3), Canadian Pacific Railway Company and its wholly-owned subsidiaries, Soo Line Railroad Company and Delaware and Hudson Railway Company, Inc. (collectively, “CPR”) hereby object to the request, submitted jointly by the law firms Thompson Hine LLP and McCarthy Sweeney & Harkaway LLP (collectively, “Requesting Counsel”) on January 25, 2006, seeking the release of certain information from the STB’s Costed Waybill Sample using unmasked revenues (the “January 25 Waybill Request”). For the reasons set forth hereinafter, access to unmasked revenues (or the corresponding “masking factors”) for the CPR traffic to which the January 25 Waybill Request is directed should be denied.

I. The Board’s Regulations at 49 C.F.R. § 1244.9 Make No Provision For the Release of A Rail Carrier’s Unmasked Revenues.

The Board’s regulations at 49 C.F.R. § 1244.9 contain procedures for various classes of users to obtain data from the STB Carload Waybill Sample under certain circumstances and subject to compliance with certain requirements. However, the regulations make no provision for the release to any class of user of “unmasked” revenues, or the “masking factors” used by individual railroads in reporting waybill information to the Board. Indeed, “those regulations do not even reference the masking factors.” Finance Docket No. 33388, *CSX Corp. and CSX Transportation, Inc., Norfolk Southern Corp. and Norfolk Southern Railway Co.—Control and Operating Leases/Agreements—Conrail Inc. and Consolidated Rail Corp.* (Decision No. 42, served October 3, 1997) (“*Conrail Waybill Decision*”) at 7, n. 24.

To the contrary, “[t]he Surface Transportation Board’s long standing policy is that the unmasked revenues and the specific masking factors . . . are highly confidential, for internal

Board use only, and not to be released to waybill users.” See Attachment 1, Letter dated February 4, 2005 from M. Redisch (acting Director) to C. M. Loftus (emphasis added). See also Attachment 2, *Waybill Request WB972*, Letter dated June 8, 2005 from L. Gardner (Director) to P. Hemmersbaugh at 1 (granting access to “only masked revenues, in conformance with standard procedures in STB waybill releases”).

“The so-called ‘masking factors’ were the solution ultimately devised to protect extremely confidential revenue data contained in the Waybill Sample itself These masking factors have never been made publicly available, not even under a protective 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.”

Conrail Waybill Decision at 6.¹ As the Board has acknowledged, “[r]elease of the masking factors would undermine the confidentiality policies underlying the maintenance of the Waybill Sample.” *Id.* For these reasons, the Board has never (to CPR’s knowledge) authorized the release of unmasked revenues, or an individual carrier’s revenue masking factors, in response to a request under 49 C.F.R. § 1244.9. The January 25 Waybill Request is inconsistent with both the Board’s regulations and long standing policy, and should be rejected.

II. The January 25 Waybill Request Articulates No Valid Basis For Departing From The Board’s Precedents Denying Access To Unmasked Revenue Information.

Citing *Conrail Waybill Decision* and a decision of the Board in Docket No. 42069, *Duke Energy Corporation v. Norfolk Southern Ry. Co.* (served April 5, 2005) (“*Duke Energy*”), Requesting Counsel argue that, while the Board has established “a high standard” for obtaining access to unmasked revenue information, the January 25 Waybill Request satisfies that standard “in view of the identity of the requesters; the purpose to which this information will be used; the direct relevance of the data; and efforts by the undersigned to narrow the request and the persons to whom the information will be made available.” January 25 Waybill Request at 2. Contrary to Requesting Counsel’s assertions, nothing in the January 25 Waybill Request supports a departure from the Board’s well-established precedent against disclosure of the railroads’ unmasked contract revenues.

As an initial matter, neither *Conrail Waybill Decision* nor *Duke Energy* involved a request for waybill data access pursuant to 49 C.F.R. § 1244.9. Rather, in each of those decisions, the Board considered – and denied – a request for access to unmasked revenue information during the course of discovery in an actual proceeding. Here, there is no rate case currently pending. The January 25 Waybill Request is governed by the Board’s regulations concerning requests for access to waybill data by “other users” (*see* 49 C.F.R. § 1244.9(c) and

¹ Indeed, even the contractor retained by the Board to process waybill data submitted by the carriers is not granted access to the masking factors. *Id.*, n. 22.

(e)), rather than the Board's rules regarding discovery in pending cases. As stated above, access to unmasked revenue information is not authorized by the Board's waybill regulations.

In any event, none of the factors cited by Requesting Counsel supports granting them access to CPR's extremely confidential masked revenue data, or to the "masking factors" used by CPR in reporting waybill information to the Board:

The "identity of the requesters" – STB practitioners who regularly represent shippers before the Board – militates strongly against approval of the January 25 Waybill Request. The Board's regulations contain a provision under which "transportation practitioners, consulting firms and law firms" may obtain access to the Waybill Sample (but not unmasked revenue information) in connection with formal proceedings before the Board. *See* 49 C.F.R. § 1244(b)(4). Because there is no actual case pending before the Board, Requesting Counsel cannot obtain waybill data under that provision. Instead, they seek such access under 49 C.F.R. § 1244.9(c) for the stated purposes of deciding "whether to bring a complaint" (January 25 Waybill Request at 3) and "selecting an appropriate movement for a [rate] case" (*id.* at 6). Requesting Counsel should not be permitted to circumvent the limitations placed upon practitioners by Section 1244.9(b)(4) in this manner. *See Conrail Waybill Decision* at 8 ("[w]e cannot allow discovery of extraordinarily sensitive [unmasked revenue] information simply to permit movants the ability to conduct what amounts to a 'fishing expedition'.") Indeed, as Requesting Counsel acknowledge (January 25 Waybill Request at 8, n. 4), in promulgating the *Small Case Guidelines*, the Board explicitly considered – and rejected – a proposal to make confidential Waybill Sample data available to prospective complainants prior to the filing of a formal rate complaint. *See Ex Parte No. 347 (Sub-No. 2), Rate Guidelines – Non-Coal Proceedings*, 1 S.T.B. 1004, 1050 (1996).

Requesting Counsel's assertion that they are acting on behalf of the State of North Dakota, and have been appointed "Special Assistant Attorneys General" (January 25 Waybill Request at 2), is irrelevant. As the January 25 Waybill Request makes clear, the State is not seeking access to the requested data in order to use it in connection with transportation planning or some other state-government related function. Rather, the specific purpose for the request is to assist the State (and its counsel) in "preparing to bring a case under the Board's *Small Case Guidelines*." January 25 Waybill Request at 2.² Thus, the standing of the State (and Requesting Counsel) in connection with the January 25 Waybill Request is, in substance, no different than that of any "shipper" (or shipper's counsel) seeking similar access.

Requesting Counsel's further claim that CPR's unmasked revenue data is "directly relevant to the evidence to be presented in a complaint" (January 25 Waybill Request at 8, n. 4) is likewise insufficient to support approval of their request. It is by no means clear that a complaint brought by the State, or by one or more North Dakota grain shippers, would be

² Requesting Counsel do not invoke 49 C.F.R. § 1244.9(b)(3), under which State governments may obtain access to the STB Waybill Sample – but not unmasked revenues – subject to compliance with certain requirements.

eligible for handling under the Board's *Small Case Guidelines*. The January 25 Waybill Request does not identify the specific shippers, origin/destination points, participating carriers or traffic volumes that might be included in such a complaint. Until the parameters of the State's putative complaint are known, it cannot be determined whether such a rate proceeding would be governed by the *Small Case Guidelines* (as Requesting Counsel simply assume) or the Board's "Stand-Alone Cost" procedures. Thus, it is by no means certain at this juncture that the types of analyses for which Requesting Counsel contemplate using CPR's unmasked revenues would, in fact, be relevant to the Board's determination of the reasonableness of CPR's rates (much less that CPR's unmasked revenue information would be relevant to such analyses).

Disclosure of CPR's unmasked revenues, or the "masking factors" utilized by CPR in reporting waybill information to the Board, would be highly prejudicial to CPR's commercial interests. Requesting Counsel regularly represent shipper interests before the STB. The January 25 Waybill Request (at 7) indicates that CPR's unmasked revenue information would also be shared with "outside consultants for the State involved in such a complaint." While those consultants are not identified in the January 25 Waybill Request, a News Release issued by the North Dakota Public Service Commission announcing its recommendation that the State proceed with a challenge to rail rates on grain shipments originating in the State indicates that Requesting Counsel have been assisted by L.E. Peabody & Associates. See Attachment 3 at 2. As the Board is well aware, L.E. Peabody has presented evidence on behalf of the shipper in virtually every rate case to come before the STB in recent years. Disclosure of CPR's unmasked revenues, or the "masking factors" employed by CPR to encrypt the rates shown in the STB Waybill Sample, to Requesting Counsel and their consultants would provide them unique insights into CPR's pricing practices and strategies.³ Conferring such knowledge on lawyers and consultants who regularly represent the shipper community would be highly prejudicial to CPR in future rate negotiations and rate litigation before the STB.

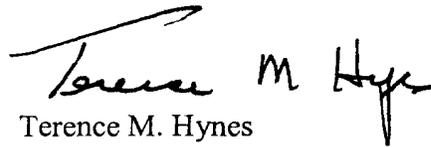
Requesting Counsel's suggestion that such concerns could be alleviated by releasing CPR's unmasked revenue information subject to a protective order is, at best, wishful thinking. Having obtained detailed (and extremely proprietary) knowledge regarding CPR's contract rates and pricing practices, Requesting Counsel (and consultants working with them) could not simply "unlearn" that information in connection with their participation in future rate negotiations or litigation involving CPR. In *Conrail Waybill Decision* (at 6-7), the Board rejected a similar request that unmasked revenue data be disclosed subject to a protective order, stating unequivocally that "[i]f movants had requested that we allow them access to the masking factors in our possession, we would have rejected their request, not for lack of a protective order, but because such masking factors have never been made available, and have never been intended to be made available, to any person not on our staff." (Emphasis added.) The Director should

³ Indeed, even if CPR were to change the "masking factors" used in reporting its revenues on grain traffic in future years, knowledge of CPR's unmasked revenues (or masking factors) for the years 2000 through 2003 would expose highly confidential information regarding the level and structure of CPR's grain rates, and could enable Requesting Counsel and L.E. Peabody to decipher CPR's contract rates on other traffic contained in the masked STB Waybill Sample.

likewise decline to release CPR's unmasked revenue information subject to a protective order here.

For all of the foregoing reasons, CPR respectfully urges the Director to deny Requesting Counsel's request for access to the Costed Waybill Sample including CPR's unmasked revenue information (or the "masking factors" used by CPR in reporting waybill information to the Board).

Very truly yours,



Terence M. Hynes

Attorney for Canadian Pacific
Railway Company

TMH:aat
Enclosures

cc: Nicholas J. DiMichael
Andrew P. Goldstein

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

Office of Economics, Environmental Analysis, and Administration

February 4, 2005

Mr. C. Michael Loftus
Slover & Loftus
Attorneys At Law
1224 Seventeenth Street NW
Washington, DC 20036-3003

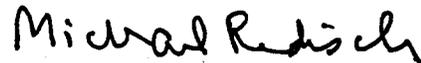
Dear Mr. Loftus:

This responds to your recent request for access to the 2001, 2002, and 2003 Costed Waybill Sample files for Norfolk Southern Railway Company and CSXT Transportation, Inc. You requested that the Board provide either unmasked revenues for each revenue field or the revenue masking factors for each railroad for each unique commodity group.

The Office of Economics, Environmental Analysis & Administration (OEEAA) has disapproved your request. The Surface Transportation Board's long standing policy is that the unmasked revenues and the specific masking factors that you request are highly confidential, for internal Board use only, and not to be released to waybill users.

Any further questions concerning this matter should be addressed to Dr. William Huneke at (202) 565-1538.

Sincerely,



Michael A. Redisch
(Acting) Director

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

Office of Economics, Environmental Analysis, and Administration

June 8, 2005

Mr. Paul A. Hemmersbaugh
Sidley Austin Brown & Wood LLP
1501 K Street, NW
Suite 300
Washington, DC 20005

In Response Refer To Waybill Request WB972

Dear Mr. Hemmersbaugh:

The Surface Transportation Board (STB) has approved your request of May 31, 2005 for access to specific data items in the 2003 STB Carload Waybill Sample for "comparative analysis of rail movements that are relevant to" STB Docket NOR 42093." Use of this waybill data is limited to this proceeding. ***This approval becomes effective for each approved person when their signed agreement is received by the STB.***

The waybill data that will be provided to you contains the following information:

- 1) consistent with the purpose of your request, all movements of STCC code 28 (chemicals) with a ratio of revenue to variable cost greater than 180, as calculated by Board staff using unmasked revenues;
- 2) only masked revenues, in conformance with standard procedures in STB waybill releases; and
- 3) elimination of the "contract flag," in conformance with standard procedures in STB waybill releases.

The following are approved for access to waybill data:

- a) Sidley Austin Brown & Wood LLP., and
- b) FTI Consulting.

In addition, information or reports developed from the waybill data may be provided to certain individuals, *except those engaged in marketing rail service*¹, at Norfolk Southern (NS) provided all data items are aggregated to a level that guarantees the presence of at least three shippers. The three Freight Station Accounting Code (FSAC) rule, as described in Ex Parte 385 (Sub No. 2), will be accepted as guaranteeing the presence of at least three shippers. Each of these approved employees is to limit access to waybill data to the minimum possible number of individuals on their immediate staffs. Approved NS employees must maintain a file of agreements signed by all immediate staff members who have been permitted access to waybill information, and to make this file available when requested.

NS employees are to keep no reports containing waybill data when this agreement expires.

Because contract information is privileged, the revenue field of the waybill sample may not represent the true revenue for contract movements. Railroads are permitted, under certain conditions, to replace the contract revenue with a calculated "masked" figure. The masked revenue figures are typically larger than actual contract revenues, but need not be. Further, there are often end-of-year adjustments provided for in contract rates, typically calling for rebates or discounts once minimum volume commitments are met, that may not always be included in the masked or actual waybill revenue figures.

Parties using waybill data must recognize these additional limitations: 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 385 (Sub-No. 2)] are codified at 49 CFR 1244.9. The waybill data contain confidential shipper and railroad data. As a result, the non-

¹If any of the named individuals are engaged in marketing rail service, they may not have access to any waybill data.

For these purposes, a railroad employee is assumed to be engaged in marketing rail service if one or more of the following conditions are met:

1. The employee deals directly with current or potential rail shippers.
2. The employee is responsible for identifying potential rail shippers.
3. The employee is responsible for setting rates for the movement of rail traffic.
4. The employee is responsible for negotiating contracts for the movement of rail traffic.
5. The employee supervises any person in item 1 through 4 above.

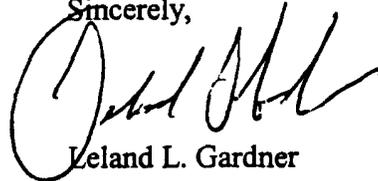
aggregated waybill data are commercially sensitive and have the potential for competitive harm to shippers and railroads. Therefore, the following agreement must be signed before any waybill data can be released.

Your signature acknowledges your agreement to comply with the following:

1. The information contained in the released waybill data shall be made available only to members of your staff engaged in preparing verified statements to be submitted to the STB in the above named proceeding [49 C.F.R 1244.9(b)(4)].
2. The waybill data released shall be used solely for the purpose requested.
3. Any evidence or data drawn from the Carload Waybill Sample must be submitted to the STB only. Evidence or data drawn from the Carload Waybill Sample submitted to the Board will be made a part of the public record if requested by the party submitting the information and the STB finds that it does not reveal competitively sensitive data. It is understood that evidence found to be sensitive may be provided to counsel or other independent representatives of other parties subject to the restrictions of Ex Parte 385 (Sub-No. 2) {49 CFR 1244.9}.
4. No data or analyses extracted from the released waybill files may be shared with NS marketing employees, and only data that are sufficiently aggregated may be shared with other approved NS employees.
5. Use of the waybill data is permitted through June 30, 2006 [49 C.F.R 1244.9(b)(4)(v)]. If the waybill data are needed for an additional period of time because the proceeding is still pending before the STB, you must request an extension of the agreement at least 30 days before expiration of this agreement. Absent such a request, you agree to return to the STB all materials (including any and all copies) obtained under this agreement.
6. This agreement and any extension of this agreement expire twenty days after the STB's final written decision. When the agreement expires, the STB must receive certification that the requestors have no copies of data or reports developed from the Carload Waybill Sample except as may be permitted by other confidentiality agreements signed with the STB. Failure to request an extension or to return the data may prevent any future release of waybill data from the STB

We would appreciate the return of the signed agreement as soon as possible.

Sincerely,

A handwritten signature in black ink, appearing to read "Leland L. Gardner". The signature is written in a cursive style with a large initial "L" and "G".

Leland L. Gardner
Director

Each approved railroad employee 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 provisions of this confidential agreement. I am not an employee engaged in marketing activities. Thirty days before the agreement expires, I will request an extension of this agreement. If no extension is requested, then all waybill data will be returned. I will certify that neither I nor my company has any copies of data or reports developed from the Carload Waybill Sample except as may be permitted by other confidentiality agreements I have signed with the STB (see items 5 and 6 of agreement). I understand that failure to request an extension or to return the data may prevent me or my company receiving any future waybill data from the STB.

Norfolk Southern

By:

Signature

Name - Please Print

Title

Date

For STB use only:

Signed Agreement Returned: _____

Expiration Date: 6/30/ 2006

Each approved consultant or attorney 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 provisions of this confidential agreement. Thirty days before the agreement expires, I will request an extension of this agreement. If no extension is requested, then I will return all waybill data and certify that I have no copies of the data. I understand that failure to request an extension or to return the data may prevent my company receiving any future waybill data from the STB (see items 5 and 6 of the agreement). I have the authority to sign this agreement for my company.

Company

By:

Signature

Name - Please Print

Title

Date

For STB use only:

Signed Agreement Returned: _____

Expiration Date: 6/30/2006

**PUBLIC SERVICE COMMISSION
STATE OF NORTH DAKOTA**

NEWS RELEASE

Monday, August 30, 2004

Commissioners Clark, Cramer, and Wefald

****For Immediate Release****

Phone 701-328-2400

PSC Recommends State Move Forward with Rate Case Against Railroad

The North Dakota Public Service Commission is recommending the state move forward with a formal challenge of grain rail shipping rates before federal regulators. The recommendation stems from key findings released today from a recently completed legal report and analysis of the rail rates charged to state grain shippers.

Among the report's key findings:

- ✓ **Market Dominance:** Before a case can be brought before the federal Surface Transportation Board, a party challenging rail rates must prove captivity to a railroad. A typical STB benchmark is 70 percent rail market share. In many cases, the report details locations in North Dakota shipping over 90 percent of their grain over a single railroad.
- ✓ **Unreasonable Rates:** By law, the STB can only find rates to be unreasonable if they yield revenues in excess of 180 percent of the railroad's variable cost associated with providing the service. Many of the specific locations reviewed as part of the study revealed rates yielding well over 300 percent revenue to variable cost. In other words, some captive shipping locations in North Dakota are generating well over \$3 in revenue for every \$1 in the railroad's variable cost, far exceeding the \$1.80 benchmark set in statute.
- ✓ **Methods for filing a case:** There are two STB procedures under which the state could file a case on behalf of aggrieved shippers: The traditional "stand alone cost" method, and the newer "simplified" method. The stand alone method is well-tested and has been used successfully by large shippers, typically coal-hauling utility companies. The estimated cost of a stand alone case is \$3.5 to \$4 million and proceedings could take over three years to complete. The major advantage of this type of case is that it could lower rates at a number of shipping locations along a fairly lengthy segment of line, generating a significant return to North Dakota. The simplified method would be smaller in geographic scope and is yet untested, but offers much lower costs. More importantly, a successful precedent-setting simplified case may open a new avenue of relief that shippers could utilize on their own in the future. A first simplified case is estimated to cost \$950,000 and take 18-24 months to complete. Subsequent cases would likely be much less expensive and time consuming.

"Up to this point, only large industrial shippers have been able to take advantage of federal rate relief, but for the sake of our farmers and country elevators, that has to change," said Commissioner Tony Clark. "We have among the most captive shippers in the nation paying

-more-

some of the very highest rates in the nation. If a successful case can't be brought here, it won't work anywhere."

"The study helps confirm what we have felt was true for a long time, that North Dakota shippers are overcharged on their rail rates," said Commissioner Susan Wefald. "Even more importantly, the work of the legal counsel and technical experts in this report forms the core data and analysis that can be used to begin a successful formal rate case."

"Depending on the type of case that is filed and the willingness of the STB to lower rates, a successful rate complaint could return millions of dollars each year to North Dakota farmers and grain elevators," said Commissioner Kevin Cramer. "They would see the return either through a direct reduction in transportation costs or through increased market competitiveness. This case is an investment worth making."

State law gives the PSC the authority to represent state shipping interests before the federal government. The investigation of rail rates is the result of action initiated by the PSC in the last legislative session. With the support of the Governor and the legislature, the PSC was granted \$250,000 spending authority to investigate the feasibility of challenging rail rates before federal regulators. \$225,000 came from state funds; the remainder was contributed by the North Dakota Wheat Commission, Grain Dealers Association, Farmers Union and Farm Bureau. Legal counsel retained by the state for the investigation were the Washington, DC law firms of Thompson Hine, LLP and McCarthy, Sweaney & Harkaway, PC. Technical rail costing work was performed by L.E. Peabody & Associates of Alexandria, VA.

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