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DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

49 CFR Part 1244

[STB Ex Parte No. 385 (Sub-No. 4)]

Modification of the Carload Waybill Sample and Public Use File Regulations

AGENCY: Surface Transportation Board

ACTION: Notice of Proposed Rulemaking

SUMMARY: Modifications to the existing regulations at 49 CFR Part 1244 are proposed that would require all railroads to identify contract movements in the annual carload waybill sample. A 30-year limit on the confidentiality of the "Waybill Sample" is also proposed.

DATES: Comments are due [45 days from the date of publication in the Federal Register].

ADDRESSES: Send comments (an original and 10 copies) referring to STB Ex Parte No. 385 (Sub-No. 4) to: Surface Transportation Board, Office of the Secretary, Case Control Branch, 1925 K Street, NW, Washington, D.C. 20423-0001.

FOR FURTHER INFORMATION CONTACT: Paul A. Aguiar, (202) 565-1527 or H. Jeff Warren, (202) 525-1533. [Assistance for the hearing impaired is available through TDD services (202) 565-1695.]

SUPPLEMENTARY INFORMATION: Railroads that annually terminate 4,500 or more carloads (or 5 percent of the carloads in any State) are required to report data, including revenues, on individual movements drawn from a sampling of their traffic. This "Waybill Sample" is used for a variety of purposes by the Board, by parties appearing before the agency, by other Federal and State agencies, and by the public in general. Because of the

current widespread use of confidential transportation contracts in the railroad industry,¹ the Waybill Sample reporting requirements must be revised to ensure that accurate and representative data on contract movements are reported.² At the same time, confidentiality must be maintained and the reporting burden held to a minimum.

In an Advance Notice of Proposed Rulemaking (ANPR), served May 17, 1999, we solicited comments on modifications to the existing regulations at 49 CFR Part 1244 to enhance the usefulness of the Waybill Sample and to conform to requirements of the National Archives and Records Administration (Archives) for storing historical records. We specifically requested comments on requiring all railroads to identify (flag) those shipments in the Waybill Sample that are governed by transportation contracts and to report the actual revenues for each such contract shipment. We explained that, to maintain the confidentiality of the contract rate information, we would substitute an average revenue value for the actual revenues in the version of the Waybill Sample that is made publicly available. We suggested that these changes would fulfill our need for more complete contract data, while protecting sensitive commercial contract rate information, and would allow others to conduct accurate, broad-based economic studies. Finally, we requested comments on limiting the confidentiality of the Waybill Sample records to 20 years.

¹ The Association of American Railroads (AAR) recently advised the General Accounting Office that 70% of rail traffic moves under contract. Railroad Regulation: Changes in Railroad Rates and Service Quality Since 1990 (GAO/RCED-99-93, Apr. 1999), p.23.

² Most class I railroads identify contract movements in the Waybill Sample. Some carriers, however, do not, and as a result, the accuracy and representativeness of Waybill Sample suffers.

We received comments from AAR, the U.S. Department of Transportation (DOT), the Western Coal Traffic League (WCTL), David L. Hall (Hall), and Escalation Consultants, Inc (EC).

1. Identification of Contract Shipments

AAR objects to mandatory flagging and suggests that the decision to identify contract movements should be left to the carriers. AAR questions the need to identify contract movements and argues that the flagging requirement would impose added administrative and cost burdens on the railroads.

DOT supports requiring the railroads to identify contract shipments. DOT states that this change will bring greater consistency to the Waybill Sample and improve the Board's capacity to monitor and analyze the rail industry. WCTL and Hall also support requiring railroads to identify contract shipments in the Waybill Sample, suggesting that it will increase the accuracy of the data and the sample's usefulness.

We agree that we need accurate information on the rail industry for monitoring and regulating that industry. Inaccurate information on the amount and nature of traffic moving under contract (and thus beyond our regulatory control) could affect our assessment of the potential impact of our decisions on rail transportation issues.

The collection of this contract data should place little additional burden on the industry. The proposed rule will have no impact on those carriers already flagging contract movements and, judging from the willingness of many railroads to do so voluntarily, should place only a relatively minor burden on those not currently flagging contracts.

2. Masking of Contract Revenues

Under current procedures each carrier that flags contract shipments is permitted to encrypt (mask) the revenues associated with such shipments so long as it provides us with the necessary information to develop the actual contract revenues. In an attempt to provide a more useful method of masking all revenue information in the Waybill Sample, we suggested developing an average revenue per ton-mile by Standard Transportation Commodity Code within broad geographic areas that we would substitute for actual revenues in the publicly available Waybill Sample. The commenting parties uniformly oppose this proposal. AAR is concerned that the submission of unmasked contract revenues (even though the revenues would be masked prior to any public release) would increase the risk of inadvertent release of confidential information. DOT, EC, WCTL and Hall are concerned that the use of broad geographic aggregations would result in worse, rather than better, information being available. Given the parties' universal opposition to this proposal, we will not pursue it further.

Under the proposed regulations, railroads will be allowed to continue to develop their own procedures to mask contract revenues, provided that those procedures are disclosed to us. However, if carriers do not want to develop their own masking procedures, we will, upon request, mask the revenues once the waybill information is submitted or provide a masking procedure for the carriers to apply.

3. Waybill Confidentiality Time Limit

Finally, to conform to requirements for storage of the Waybill Sample by the Archives, the ANPR requested comment on limiting the confidential treatment of contract revenue information contained in the Waybill Sample to a 20-year period. We selected 20 years because most rail contracts do not exceed a 20-year term. Thus, we believed this period would be adequate to protect commercially sensitive shipper and railroad data.

AAR argues that the confidential information should never be made public and should be destroyed at the end of the period for which the Board normally maintains these records. WCTL and Hall support the proposed 20-year confidentiality limit, while EC regards the 20-year period as excessive and suggests a time limit of no more than 5 to 7 years.

The Archives, however, has concluded that the Waybill Sample is a permanent Board record and, as such, must be retained.³ Therefore, our task here is not to determine whether the Waybill Sample should be kept, but rather how long it should remain confidential. We are concerned about the premature release of information that continues to have proprietary commercial value. For that reason, we now propose a confidentiality period of 30 years, a period significantly longer than the term of any rail contract of which we are aware. We also propose that the Waybill Sample be sent to the Archives as we maintain it--the contract flags will be included, but the contract revenue will remain masked.

³ In accordance with the National Archives and Records Administrations Act of 1984, Pub. L. 98-497, 44 U.S.C. 101 *note*, the Waybill Sample was appraised by the Archives and determined to be a permanent record of the Board (Request to Transfer, Approval, and Receipt of Records to National Archives of the United States Job Number NN3-134-094-001). Permanent records must be transferred to the Archives under 44 U.S.C. 2107.

This action will not significantly affect either the quality of the human environment or energy conservation.

Pursuant to 5 U.S.C. 605(b), we conclude preliminarily that our action will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

AUTHORITY: 49 U.S.C. 11145

Decided:

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams

Secretary

APPENDIX

For the reasons set forth in the preamble, title 49, part 1244 of the Code of Federal Regulations is proposed to be amended as follows:

1. The authority citation for Part 1244 continues to read as follows:

AUTHORITY: 49 U.S.C. 721, 10707, 11144, 11145.

2. Amend the table of contents of Part 1244 to read as follows:

PART 1244 - WAYBILL ANALYSIS OF TRANSPORTATION OF PROPERTY - RAILROADS

Sec.

- 1244.1 Definitions
- 1244.2 Applicability
- 1244.3 Reporting contract shipment waybills
- 1244.4 Date of filing
- 1244.5 Sampling of waybills
- 1244.6 Retention of files
- 1244.7 Special studies
- 1244.8 Analysis of waybill data
- 1244.9 Procedures for the release of waybill data

3. Redesignate §1244.3 through §1244.8 as §1244.4 through §1244.9

4. Add new §1244.3 to read as follows:

§1244.3 Reporting contract shipment waybills

(a) All railroads shall identify (flag) contract shipment waybills.

(b) The revenue associated with contract shipments may be encrypted (masked) to safeguard the confidentiality of the contract rates.

(1) Upon written request, the Board will provide a masking procedure for a railroad's use or will mask the contract revenues when the waybill sample is filed with the Board.

(2) When a railroad intends to use its own proprietary masking procedure, those procedures, and any changes in those procedures, must be approved by the Board thirty (30) days prior to their use.

(3) All railroads that use a proprietary masking procedure, and intend to continue to use the same procedure, must certify, by letter to the Board, prior to January 31 each year, that the contract revenue masking procedures are unchanged.

(4) All correspondence and certifications concerning masking procedures should be

addressed to: Director, Office of Economics, Environmental Analysis, and Administration,
Surface Transportation Board, Washington, D.C. 20423-0001, ATTN: WAYBILL
COORDINATOR.