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SERVICE DATE – LATE RELEASE OCTOBER 22, 2010

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 646 (Sub-No. 3)

WAYBILL DATA RELEASED IN THREE-BENCHMARK RAIL RATE PROCEEDINGS

Digest:¹ The Surface Transportation Board is asked in certain cases whether the rate a railroad charges a shipper is reasonable. To present its case, a shipper challenging the reasonableness of a railroad's rate needs to obtain from the Board confidential information regarding the rates the railroad charges to other shippers. The Board is asking the public to comment on certain aspects of how a party should be permitted to prepare its case; specifically, whether the Board should make 4 years of this confidential information available to parties and permit the parties to use any combination of the 4 years of confidential information when presenting their cases.

Decided: October 21, 2010

AGENCY: Surface Transportation Board.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Board is republishing its April 2, 2010 proposal to amend its rules with respect to the Three-Benchmark methodology used to adjudicate simplified rate case complaints, to include an expanded discussion of its rationale and regulatory objectives. This proposal provides for release to the parties to a Three-Benchmark proceeding of the unmasked Waybill Sample data of the defendant carrier for the 4 years that correspond with the most recently published Revenue Shortfall Allocation Method (RSAM) figures. The parties would then use the released Waybill Sample data to form their traffic comparison groups. The Board seeks comments concerning the amount of data that would be available under the proposed rule, and the proposal that the parties would be permitted to draw from all 4 years of waybill data to form their comparison groups.

DATES: Comments on this proposal are due by November 26, 2010; replies are due by December 27, 2010.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

ADDRESSES: Comments may be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the E-FILING link on the Board's website, at <http://www.stb.dot.gov>. Any person submitting a filing in the traditional paper format should send an original and 10 copies to: Surface Transportation Board, Attn: Docket No. EP 646 (Sub-No. 3), 395 E Street, S.W., Washington, DC 20423-0001.

Copies of written comments will be available for viewing and self-copying at the Board's Public Docket Room, Room 131, and will be posted to the Board's website.

FOR FURTHER INFORMATION CONTACT: Valerie Quinn at (202) 245-0382. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at (800) 877-8339.

SUPPLEMENTARY INFORMATION: In Simplified Standards for Rail Rate Cases (Simplified Standards), EP 646 (Sub-No. 1) (STB served Sept. 5, 2007), aff'd sub nom. CSX Transp., Inc. v. STB (CSX Transp. I), 568 F.3d 236 (D.C. Cir. 2009), and vacated in part on reh'g, CSX Transp., Inc. v. STB (CSX Transp. II), 584 F.3d 1076 (D.C. Cir. 2009), the Board modified its simplified rail rate guidelines, creating a simplified stand-alone cost approach for medium-size rail rate disputes and revising its Three-Benchmark approach for smaller rail rate disputes.

The Three-Benchmark method compares a challenged rate of the "issue traffic" to the rates of a comparison group of traffic drawn from the Waybill Sample data of the defendant carrier. The Waybill Sample is a statistical sampling of railroad waybills of the carrier's shipments that is collected and maintained for use by the Board. See 49 C.F.R. § 1244.1(c). The proposed rule in Simplified Standards would have required parties to draw their traffic comparison groups from the most recent year of Waybill Sample data of the carrier's other shipments. Simplified Standards for Rail Rate Cases, EP 646 (Sub-No. 1), slip op. at 32-33 (STB served July 28, 2006). The final rule, however, allowed parties to form comparison groups using Waybill Sample data from the 4 most recent years. Simplified Standards, slip op. at 80.

Several railroads² and the Association of American Railroads challenged the final rule in court on the basis that, under 5 U.S.C. § 553(b)(3), the Board had not provided adequate notice and opportunity to comment on the change from 1 to 4 years of data from which the parties could draw to form their proposed comparison groups. CSX Transp. I, 568 F.3d at 246. Initially, the court determined that it would not address the merits of petitioners' argument, because the issue had not been presented to the Board prior to seeking judicial review and, therefore, had been waived. Id. at 246-47.

On rehearing, however, the court reversed its waiver determination and considered the merits of petitioners' argument. The court concluded that the Board had failed to provide adequate notice of the final rule regarding the available range of Waybill Sample data.

² Canadian Pacific Railway Co., Soo Line Railroad Company, Delaware & Hudson Railway Company, CSX Transportation, Inc., Norfolk Southern Railway Company, and Union Pacific Railroad Company.

Accordingly, the court vacated that portion of Simplified Standards. CSX Transp. II, 584 F.3d at 1078. As a result, there is currently a gap in the Board's rules; *i.e.*, there is no defined period for which unmasked Waybill Sample data is to be released in a Three-Benchmark proceeding.

On April 2, 2010, the Board, through a notice of proposed rulemaking, proposed to provide for release to the parties in Three-Benchmark proceedings of the unmasked Waybill Sample data of the defendant carrier for the 4 years that correspond with the most recently published RSAM figures. The parties would then draw their comparison groups in any combination they choose from the released Waybill Sample data. The Board solicited comments on this proposal.

The Board received comments from shippers, railroads, the U.S. Department of Agriculture, and other interested organizations. Some commenters expressed concern that the Board did not provide the rationales and regulatory objectives behind the proposed rules. In response, this decision will provide the Board's rationales and regulatory objectives. This notice of proposed rulemaking proposes rules that are identical to those proposed on April 2, 2010.

The use of multiple years of data for the Waybill Sample would be consistent with the Board's current practice in other contexts in Three-Benchmark cases. The Board already uses a 4-year averaging period to determine the other two benchmark components used in a Three-Benchmark case: the RSAM and R/VC_{>180} benchmarks. See Rate Guidelines—Non-Coal Proceedings, (Rate Guidelines) 1 S.T.B. 1004, 1032-33 (1996). The reason for using this 4-year averaging period is to "smooth out annual variations and minimize the impact of any year that may have been aberrational for that carrier." Rate Guidelines, 1032-33.

A similar rationale applies to the rule proposed here. The availability of 4 years of Waybill Sample data would allow parties more flexibility to choose a comparison group that is a reasonable reflection of the traffic at issue and to avoid having to use data that may be aberrational. Giving the option to choose movements over a multi-year period would provide the parties with more data from which to choose, which should assist the parties in selecting a comparison group that more closely resembles the issue traffic. At the same time, limiting the pool of data to the 4 years that correspond with the most recently published RSAM figures would prevent the use of data that are too old to be reliable. By contrast, a shorter period, such as the 1-year time span envisioned earlier, could cause the comparison groups to be too small.

If the proposed rules are adopted, parties would not have incentive to specifically choose only the most favorable data from the 4-year data set because the Board will choose the comparison group that more closely resembles the traffic at issue. Thus, if a party selects a group that heavily favors its position at the expense of a reasonable comparison, then it is less likely that the Board would choose that comparison group.

The Board will now provide an opportunity for additional input regarding the rules proposed here. While we will consider the comments and replies previously submitted in this proceeding, interested parties (whether or not they have already participated in this proceeding) may file additional comments and replies.

The Board has authority to promulgate rules to meet statutory objectives. See 49 U.S.C. § 721(a). The Board is issuing this notice of proposed rulemaking pursuant to the mandate to “establish a simplified and expedited method for determining the reasonableness of challenged rail rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case.” 49 U.S.C. § 10701(d)(3). This proposed rule, if implemented, will be part of the framework for the simplified and expedited method of challenging rail rates.

Under the Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601-612, a notice of proposed rulemaking must either include an initial regulatory flexibility analysis, 5 U.S.C. § 603(a), or a certification that the proposed rule will not have a “significant economic impact on a substantial number of small entities,” 5 U.S.C. § 605(b). The proposed rule fills in a gap in the Three-Benchmark rate complaint framework by specifying the number of years of Waybill Sample data that will be made available to the parties in those cases. By providing clarity on that issue, the proposed rule would have a positive economic effect on small entities because it would allow Three-Benchmark rate cases to proceed more efficiently. Moreover, while the proposed rule delineates the range of data that would be made available, it does not require the parties to use any particular quantum of data. Accordingly, pursuant to 5 U.S.C. § 605(b), the Board certifies that the regulations proposed herein would not have a significant impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

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

It is ordered:

1. Comments on this proposal are due by November 26, 2010; replies are due by December 27, 2010.
2. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Nottingham.