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SERVICE DATE – NOVEMBER 12, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 385 (Sub-No. 6)

WAYBILL SAMPLE

Decided: November 3, 2008

The Board is adopting a rule requiring all carriers that submit carload-waybill-sample information (Waybill Sample) to report fuel surcharge revenue separately in a Waybill Sample field established for that purpose. The Board is revising the waybill-file-record layout to reflect this change. To keep reporting consistent within each calendar year, the new field will be established for Waybill Samples commencing with the Waybill Sample filed for January 2009. In addition, for consistency and administrative convenience, carriers are asked to include fuel surcharge revenue as part of total freight revenue in the “Freight Revenue” field, as previously directed. Notice of this new rule will be published in the Federal Register.

BACKGROUND

A carload waybill is a document describing the characteristics of an individual rail shipment: originating and terminating freight stations, the names of all railroads participating in the movement, the points of all railroad interchanges, the number of cars, the car types, movement weight in hundredweight, the commodity, and the freight revenue. Under 49 CFR Part 1244, a railroad is required to file a Waybill Sample for all line-haul revenue waybills terminating on its lines if, in any of the three preceding years, the railroad terminated 4500 or more carloads, or it terminated at least 5% of the total revenue carloads that terminate in a particular state.

The Waybill Sample is the Board’s primary source of information about freight rail shipments terminated in the United States. Of particular importance, the Board relies on the data in the “Total Freight LH Revenue” field¹ to compute its “Revenue Shortfall Allocation Method” (RSAM) benchmarks. The RSAM benchmarks, which are used in adjudicating certain rate disputes, measure how much a carrier would need to charge its potentially captive traffic in order to obtain adequate revenues overall.

¹ Field 15 is referred to interchangeably as the “Freight Revenue” field and the “Total Freight LH Revenue” field. See Statement No. 81-1, Procedure for Sampling Waybill Records by Computer, at 13, 17. LH is the acronym for “Line Haul.”

In the last few years, the Board found that certain railroads were reporting fuel surcharge revenue in the “Miscellaneous Charges” field of the Waybill Sample, even though most were reporting this revenue in the “Total Freight LH Revenue” field.² To provide for consistency in the reporting of fuel surcharge revenue in the Waybill Sample and thereby improve the accuracy and utility of the Board’s RSAM calculations, on December 19, 2007, in Waybill Sample, STB Ex Parte No. 385 (Sub-No. 6) (Clarification) (published at 72 FR 72000 on December 19, 2007), the Board served a notice clarifying that all railroads that are required to submit a Waybill Sample under 49 CFR Part 1244 should report fuel surcharge revenue in the “Freight Revenue” field in the waybill-file-record layout.

Reconsideration Petition. On December 31, 2007, the National Industrial Transportation League (NITL) sought reconsideration of the Clarification. NITL noted that the Board had previously expressed the “hope to bring some transparency to the use of fuel surcharges by rail carriers,” NITL Petition, at 1 (quoting Rail Fuel Surcharges, STB Ex Parte 661 (Sub-No. 1), at 12 (STB served Jan. 26, 2007)), and argued that the Board’s Clarification, “instead of promoting transparency, would make it impossible to identify fuel surcharge revenue in the Waybill Sample, and thereby to use the Waybill Sample to analyze fuel surcharge revenue, and to match fuel costs to fuel surcharge revenue,” Petition, at 1. NITL asked the Board to require all carriers submitting a Waybill Sample to report fuel surcharge revenue “separately in a Waybill Sample field established for that purpose.” Petition, at 2. On January 3, 2008, the National Grain and Feed Association (NGFA) joined in the NITL petition. Subsequently, 11 additional statements supporting the petition were filed, primarily by shippers and shipper interest groups.³ A letter of support was also filed by the Office of the Governor of the State of Montana, on behalf of 17 supporting agricultural interest groups.⁴ No rail carrier objected or even responded to NITL’s petition.

² As noted in Freight Railroads: Updated Information on Rates and Other Industry Trends, Government Accountability Office (GAO) Report No. 08-218T, at 9 (Oct. 2007), by 2005, revenue reported in the Waybill Sample as “Miscellaneous” had increased ten-fold over 2000 levels. In 2005, 20% of all tonnage moved in the United States generated revenue reported as “Miscellaneous.” Id. GAO recommended that the STB ensure consistent and accurate reporting by railroads of all revenues, including miscellaneous revenue. Id. at 24.

³ Grain Processing Corporation; Pioneer Oil LLC; Searles Valley Minerals; Freight Resources Network, LLC; Fertilizer Institute; International Paper Company; Taminco; Vulcan Materials Company; Bayer Cropscience; Total Petrochemicals; and Rhodia Inc.

⁴ Montana Wheat & Barley Committee, Colorado Wheat Administrative Committee, Colorado Association of Wheat Growers, Idaho Barley Commission, Idaho Wheat Commission, Idaho Grain Producers Association, Montana Grain Growers Association, Nebraska Wheat Board, Nebraska Wheat Growers Association, Oklahoma Wheat Commission, South Dakota Wheat Commission, South Dakota Wheat Inc., Texas Wheat Producers Board, Texas Wheat

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By decision served June 16, 2008, the Board instituted a rulemaking proceeding to require all carriers that submit a Waybill Sample to report fuel surcharge revenue separately in a Waybill Sample field established for that purpose. A notice seeking comments was published in the Federal Register on June 26, 2008. No comments were received.

As the Board explained in its June decision, an express revision to the Code of Federal Regulations (CFR) is not triggered by this new requirement.⁵ Rather, the Board is designating a separate field for fuel surcharge revenue in the Waybill Sample by modifying Statement No. 81-1, Procedure for Sampling Waybill Records by Computer, to which the CFR refers.⁶ Carriers submitting a Waybill Sample will be required to proceed in accordance with the revised Statement No. 81-1, commencing with the Waybill Sample for January 2009. For consistency and administrative convenience, in addition to reporting in Field 33, carriers are asked to include fuel surcharge revenue as part of total freight revenue in the Total Freight LH Revenue field (Field 15), as directed in Clarification.

The Director of the Federal Register has approved this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.⁷ Interested persons may inspect or obtain a copy of Statement No. 81-1 at the Surface Transportation Board, 395 E Street, SW, Washington, DC 20423-0001, or by contacting Paul Aguiar at (202) 245-0323. The revised Statement No. 81-1 will also be placed on the Surface Transportation Board website at www.stb.dot.gov. In addition, interested persons may inspect a copy at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741-6030, or go to: http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html

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Producers Association, Washington Wheat Commission, National Association of Wheat Growers, and National Barley Growers Association.

⁵ The Waybill Sample fields are not dictated in the CFR itself. Rather the CFR references Statement No. 81-1, Procedure for Sampling Waybill Records by Computer, which is, as noted, issued by the STB and “may be revised from time to time.” 49 CFR 1244.4(c).

⁶ The new field (Field 33) will be a 9-byte record, increasing the computerized Waybill Sample reported by the railroads from a 228-byte record layout to a 237-byte record layout.

⁷ Given the new requirements to seek incorporation-by-reference approval for Statement No. 81-1 from the Director of the Federal Register, the Board did not use the expedited rulemaking procedures that would otherwise be available for adopting non-controversial rules. Section 49 CFR 1244.4 will be amended to reflect the Director’s approval of this incorporation by reference.

Pursuant to 5 U.S.C. 605(b), the Board certifies that this action will not have a significant economic effect on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

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

It is ordered:

1. Commencing with the Waybill Sample filed for January 2009, carriers that are required to submit a Waybill Sample under 49 CFR 1244 will report fuel surcharge revenue in the separate waybill field (Field 33) created by the Board for that purpose.
2. Carriers will include fuel surcharge revenue in the Total Freight LH Revenue field (Field 15), as previously directed.
3. The Board will revise Statement No. 81-1 to reflect this change.
4. Section 49 CFR 1244.4 is amended to reflect the Director of the Federal Register's approval of the incorporation by reference of Statement No. 81-1.
5. Notice of this decision will be published in the Federal Register.
6. This decision is effective on January 1, 2009.

Decided: November 3, 2008.

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

Anne K. Quinlan
Acting Secretary