



ASSOCIATION OF
AMERICAN RAILROADS

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226941

May 3, 2010

Honorable Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E St., S.W.
Washington, DC 20423

Re: Ex Parte No. 646 (Sub-No.3), Waybill Data Released in Three-Benchmark Rail Rate Proceedings

Dear Ms. Brown:

Pursuant to the Board's Notice of Proposed Rulemaking served April 2, 2010, attached please find the comments of the Association of American Railroads (AAR) for filing in the above proceeding.

Respectfully submitted,

Louis P. Warchot
Attorney for the Association of
American Railroads

Attachment

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 646 (Sub-No. 3)

WAYBILL DATA RELEASED IN THREE-BENCHMARK RAIL RATE
PROCEEDINGS

COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

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Dated: May 3, 2010

BEFORE THE SURFACE TRANSPORTATION BOARD

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Introduction

In a Notice of Proposed Rulemaking (“NPR”) served April 2, 2010 in the above proceeding, the Surface Transportation Board proposed to amend its rules with respect to the Three-Benchmark methodology used to adjudicate rate complaints. The proposed rule would provide for the release to the parties of the unmasked Waybill Sample data of the defendant carrier for the four years that correspond with the most recently published Revenue Shortfall Allocation Method (RSAM) figures.¹ The proposal would also permit the parties to draw their proposed comparison groups in any combination they choose

¹ The most recent RSAM and R/VC>180 ratio calculations were released by the Board in STB Ex Parte No. 689, Simplified Standards for Rail Rate Cases—2007 RSAM and R/VC.180 Calculations (served May 12, 2009) and cover the four-year period 2004-2007.

from all four years of the released Waybill Sample data. NPR at 1-2. The Board sought comment concerning “the amount of data that would be available under the proposed rule and the proposal that the parties could draw from all 4 years of waybill data to form their comparison groups.” NPR at 1. The Association of American Railroads (“AAR”), on behalf of its member railroads, hereby submits these comments in response to the NPR.

The AAR has serious concerns about the adequacy of the NPR under the Administrative Procedure Act. In essence, the AAR is left to attempt to comment on a proposed rule without knowing what issue the Board seeks to address.

Discussion

At the outset the AAR notes that the NPR does not include the Board’s rationale for adopting the proposed methodology, including the regulatory objectives to be served by the proposed rules or why the proposed rules are the most appropriate means of achieving those objectives. The NPR provides at most a summary discussion of the procedural history giving rise to this proceeding under the “notice and opportunity for comment” provisions of 5 U.S.C. 553(b)(3) of the Administrative Procedure Act.² Accordingly, the AAR’s comments are necessarily limited in scope at this time without a clear understanding of the Board’s underlying reasoning for its proposal. In that context, the NPR raises two issues that are of fundamental concern to the AAR.

² NPR at 1-2 (referencing the Board’s prior Three-Benchmark rulemaking proceeding and noting the D.C. Circuit’s decision on reconsideration vacating, because of failure to comply with the APA’s notice and comment requirements, the portion of the Board’s final rule that makes four years of data available for comparison groups. See Simplified Standards for Rail Rate Cases, STB Docket No. 646 (Sub-No. 1) (STB served Sept. 5, 2007) (“Simplified Standards”), aff’d sub nom. CSX Transp., Inc. v. STB, 568 F.3d 236 (D.C. Cir. 2009) (“CSX Transp. I”), vacated in part on reh’g, CSX Transp., Inc. v. STB, 584 F.3d 1076, 1083 (D.C. Cir. 2009) (“CSX Transp. II”).

First, although the Board's underlying reasoning in the NPR is not articulated, if the Board is proposing to allow parties to a Three-Benchmark proceeding to use four years of Waybill Sample data "in any configuration they see fit" (NPR at 1) because the Board believes that all Waybill Sample data in this four-year range is of comparable value with respect to the parties' choice of comparison groups, the AAR must strongly disagree with such an assumption. The most recent Waybill Sample data currently available to-date is for the year 2008. However, because the most recently published RSAM is for the period 2004-2007, under the Board's proposal the comparison groups in a Three Benchmark proceeding today would reach back to 2004. The AAR submits that to allow parties to a Three Benchmark proceeding to have free rein to use six-year old data to challenge a carrier's existing rate would have little or no economic rationale in the context of current market conditions and would "increase[e] the 'likelihood of distorted comparisons and results.'" See CSX Transp. II, 584 F. 3d at 1083. Setting rates today on such antiquated data (without any adjustment) would be arbitrary.

As a general matter, the AAR urges that the Board expressly recognize in this proceeding that, if the information available to the parties in a Three Benchmark proceeding is to be strictly confined solely to that available from the Waybill Sample (and include a time period antedating the most current year), as the NPR proposes, more current rate data should be strongly favored over historic data and that the parties should be encouraged to use the most recent waybill data available in selecting comparison groups.

Second, although it is again conjecture, if the Board's proposed rule is premised on Board supposition that four years of Waybill Sample data -- even stale Waybill

Sample data -- must be required because this is the best (or only practical) means available to provide the parties with sufficient information from which to select useful comparison groups, the Board needs to assess other available options that have far better potential to meet the Board's and the parties' needs for more useful current waybill data and that have their root in the Board's own previous proposals regarding the Three Benchmark methodology.

For example, in its *Simplified Standards* decision, the Board itself recognized (albeit limited to what it called "unique movements")³ a potential solution to address the "insufficient useful waybill data" issue: the Board could on a case-by-case basis "entertain a reasonably tailored request for comparable movements from the defendant's own traffic tapes." *Simplified Standards*, Slip Op. at 83. The Board also noted the option of expanding the Waybill Sample (which it summarily dismissed in a one-sentence "cost/benefit analysis" in *Simplified Standards* as "not justified at this time"). *Id.*

In a later Board proceeding both available options noted by the Board in *Simplified Standards* were again squarely placed on the table. In Ex Parte No. 385 (Sub-No. 7), *Waybill Data Reporting for Toxic Inhalation Hazards* (served January 28, 2010), the Board proposed to expand the TIH Waybill Sample to include all TIH traffic movements (commencing with the January 2011 Waybill Sample collection). That proposal was made to address what the Board perceived as an inadequate sample size for TIH traffic from the four years' worth of data used in the initial small rate cases brought under the new rules (and before the D.C. Circuit struck down the use of four years' worth

³ The Board essentially characterized a "unique" movement in *Simplified Standards* as a movement for which "there is insufficient comparable movements in the Waybill Sample." *Id.* The AAR submits that there is no apparent reason why *any* movement for which there is insufficient data in the Waybill Sample to permit the parties to form useful comparison groups—as judged by the parties-- should not qualify for the case-by-case approach endorsed by the Board in *Simplified Standards* for "unique" movements.

of historic data for APA violations by the Board). The AAR responded to the Board's proposal for use of expanded TIH waybill data by proposing that, consistent with the need for strict confidentiality protections for sensitive security information pertaining to TIH movements, a far better solution (and comparable to the Board's case-by-case suggestion in *Simplified Standards*) would be for a railroad defendant in a Three Benchmark proceeding to simply make available for use by the parties all of its TIH waybills for the most current period.⁴ In fact, no shipper or other party opposed the AAR's case-by-case proposal (or the Board's expanded Waybill Sample proposal).⁵ Indeed, the pendency of Ex Parte No. 385 (Sub-No. 7), in part, makes it more difficult to read the Board's mind regarding the purpose of the NPR because Ex Parte No. 385 (Sub-No. 7) addresses at least one possible rationale for the NPR.

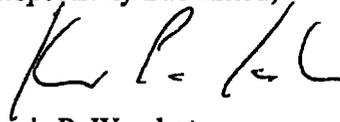
Assuming the Board's goal is to improve the amount and usefulness of waybill data available to the parties' to select comparison groups in Three Benchmark proceedings, there is no reason to believe using historic data will solve that concern in view of the Board's decision to initiate Ex Parte No. 385 (Sub-No. 7) after finding that using four years' worth of data was still insufficient in *US Magnesium L.L.C. v. Union Pacific Railroad Company*, STB Docket No. 42114 (served Jan. 28, 2010) ("*US*

⁴ In proposing to make all TIH traffic available in a Three Benchmark proceeding challenging a rate for a TIH commodity, the AAR noted that its members reserve their right to argue in individual cases that only the shipments of the same TIH commodity are suitable for inclusion in a comparable group. March 4, 2010 AAR Comments at 7, n 10. The AAR notes the same reservation of rights applies generally to all Three Benchmark proceedings.

⁵ As a clear, available and useful option in this proceeding, a railroad defendant could simply be required to make available for use in a Three Benchmark proceeding, on a case-by-case basis, all of its waybills for the most current period relating to the specific commodity (or specific class of commodities) for which the rate is challenged. Alternatively, the statistical Waybill Sample could be expanded to provide more useful current information on potentially challengeable traffic under the Three Benchmark methodology.

Magnesium"), appeal docketed, No. 10-1019, *Union Pacific Railroad Company v. Surface Transportation Board* (D.C. Cir. Feb. 2, 2010).

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'L P Warchot', written in a cursive style.

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