

STB EX PARTE NO. 385 (SUB-NO. 4)

MODIFICATION OF THE  
CARLOAD WAYBILL SAMPLE  
AND PUBLIC USE FILE REGULATIONS

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*Decided June 12, 2000*

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AGENCY: Surface Transportation Board

ACTION: Final Rules

SUMMARY: The existing regulations at 49 CFR Part 1244 are modified to require all railroads to identify contract movements in the annual carload waybill sample and establish a 30-year limit on the confidentiality of the "Waybill Sample."

EFFECTIVE DATE: January 1, 2001.

FOR FURTHER INFORMATION CONTACT: James Nash, (202) 565-1542 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,<sup>1</sup> we are revising the Waybill Sample reporting requirements to ensure that accurate and representative data on contract movements are reported.<sup>2</sup> At the same time, our rule will

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<sup>1</sup> 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), at 23.

<sup>2</sup> While most Class I railroads identify contract movements in the Waybill Sample, some do not and no non-Class I carriers identify contract movements. As a result, the accuracy and (continued...)

continue to protect the confidentiality of the Waybill Sample and keep the reporting burden 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.<sup>3</sup> 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 contract shipment. We suggested that we could protect (mask) the confidentiality of the contract revenues by reporting average revenue figures in the Waybill Sample. We also suggested a 20-year confidentiality period to meet the requirements of the Archives.

We received comments from the Association of American Railroads (AAR), the U.S. Department of Transportation (DOT), the Western Coal Traffic League (WCTL), David L. Hall (Hall), and Escalation Consultants, Inc. (EC). After considering the parties' comments, we issued a Notice of Proposed Rulemaking (NPR) served January 5, 2000. In the NPR we dropped the universally opposed suggestion to use an averaging method to mask actual contract revenues in the Waybill Sample and instead proposed only to require railroads to identify (flag) contract movements. Under the proposed regulations, railroads would be free to continue to choose a masking method of their own (so long as the masking procedure is submitted to and approved by the Board) or ask us to develop one for them. We also raised the proposed limit on the confidentiality of the Waybill Sample from 20 years to 30 years.

We received comments on the NPR from WCTL and NITL. AAR, DOT, Hall, and EC, which had commented on the ANPR, did not comment on the NPR.

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<sup>2</sup>(...continued)

representativeness of the Waybill Sample suffers.

<sup>3</sup> 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.

*Identification of Contract Shipments*

Both WCTL and NITL support the proposed contract reporting rule and agree that it will provide more precise information concerning the volume and revenue of contract traffic while placing little additional reporting burden on the railroad industry. Because our proposal to require railroads to flag contract rates and mask the revenue associated with contract traffic is unopposed, we will adopt it without change.

WCTL also suggested that we should (1) subject to appropriate protective conditions, make the contract revenues available to shipper and other parties in rate and rulemaking cases, and (2) impose a user fee for Board masking of waybill sample revenues. Our long-standing policy is not to release actual contract revenues reported in the confidential waybill sample because of the potential for commercial harm to both the contracting railroad and shipper. WCTL argues that such commercially sensitive data may be needed by shippers for use in Board proceedings. However, WCTL provides no compelling reason to make a change to this general policy. We note that, through the discovery process, shippers have obtained information on some contract rates in rate complaint proceedings. We believe that it is best to address the issue of access to contract information on a case-by-case basis. Indeed, we note that neither the ANPR nor the NPR proposed such a change to our general policy on access to contract information and, therefore, it would be inappropriate to address that issue in this proceeding. For this same reason, it would be inappropriate in this proceeding to adopt a fee for masking a railroad's contract revenues. We will consider adopting a fee for this function after we have gained some experience under the new rule.

*Waybill Confidentiality Time Limit*

WCTL supports the 30-year limit, but NITL argues that 30 years is excessive. NITL argues that there is no need to go beyond our original proposal of 20 years because the large majority of rail contracts have terms of less than 20 years and because the competitive value of rail contract rates negotiated 20 years ago is negligible.

While recognizing that most transportation contracts are for a term of less than 20 years, we nevertheless must exercise caution in sanctioning the release of data that may contain proprietary information. For that reason, we will adopt the confidentiality period of 30 years. We will also adopt the unopposed proposal that the Waybill Sample be sent to the Archives as we maintain it—*i.e.*, the contract flags will be included, but the contract revenue will remain masked.

The modifications to Title 49, Part 1244 of the *Code of Federal Regulations* is contained in the Appendix to this *Federal Register* Notice.

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 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

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

#### APPENDIX

For the reasons set forth in the preamble, Title 49, Part 1244 of the Code of Federal Regulations is 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.