

SURFACE TRANSPORTATION BOARD PROPOSES CHANGES TO WAYBILL SAMPLE PROCEDURES, DIRECTS RAILROADS TO MAKE "RCAF" WORKPAPERS AVAILABLE

Surface Transportation Board (Board) Chairman Linda J. Morgan announced today that the Board has proposed to modify its regulations governing the annual rail Carload Waybill Sample. The changes proposed would require identification of contract movements and limit the period during which the Waybill Sample will remain confidential. Chairman Morgan announced that the Board has also issued a decision that will require railroads to make their "RCAF" (Rail Cost Adjustment Factor) workpapers available for inspection by the public.

A. The Waybill Sample Proceeding. Most large and mid-sized railroads are required to report data, including revenues, on individual movements contained in a sampling of their traffic. This Waybill Sample is used for a variety of purposes by the Board, parties appearing before the agency, and the public in general. However, the majority of railroad movements are conducted under confidential transportation contracts. Many of these contract movements are identified, or "flagged," in the carriers' samples, with the contract revenue information "masked" to protect its confidentiality. Some carriers, however, do not flag contract movements, and as a result, the Board is unable to develop complete information on contract traffic.

To ensure that it has more accurate data to carry out statutorily mandated functions, the Board issued an advanced notice of proposed rulemaking (ANPR) last May indicating that it would review its regulations to provide that all carriers identify contract movements. To protect the confidentiality of the contracts, the Board in its ANPR suggested a procedure under which, instead of providing in the final Waybill Sample actual revenues, movements would reflect average revenues for broadly aggregated movements of comparable commodities in comparable service. Finally, in light of an expression by the National Archives and Records Administration (Archives) of its interest in maintaining historic Waybill Sample records for future studies, the Board in its ANPR suggested setting a limit on the period during which waybill data will be considered confidential.

After reviewing comments filed by the Association of American Railroads (AAR), the U.S. Department of Transportation, the Western Coal Traffic League (WCTL), David L. Hall, and Escalation Consultants, Inc., the Board issued a notice of proposed rulemaking (NPR) that would move forward on the first and the third of its initial proposals. AAR in its comments had objected to a requirement that contract movements be identified, but the Board in its NPR agreed with the other commenters that flagging contract movements would enhance the accuracy of the waybill data without unduly burdening the railroads. The Board decided not to pursue the proposal to aggregate revenues in order to protect the confidentiality of contract data, and instead agreed with the commenters that carriers could develop their own procedures for shielding confidential information. Finally, the Board in its NPR proposed discontinuing the confidential treatment of contract data after 30 years.

B. The RCAF Proceeding. Under the provisions of 49 U.S.C. 10708, the Board periodically issues the RCAF, which is an index reflecting changes in railroad costs that is used in contract negotiations, among other things. The RCAF data are developed by the AAR, and are reviewed in advance by Board staff and audited by an independent accounting firm. Nevertheless, it is possible that data errors can escape detection, and so WCTL asked the Board to direct the AAR to permit private parties to review the data underlying the AAR's RCAF calculations.

The Board granted WCTL's request. The Board noted that, in 1990, its predecessor, the Interstate Commerce Commission, issued an order denying WCTL and its consultants access to the RCAF workpapers on the ground that the information is proprietary and commercially sensitive. However, the Board pointed out that, in various proceedings, it has authorized disclosure of commercially sensitive information provided the parties agreed to be bound by appropriate

protective orders. Finding no reason why the RCAF workpapers can not be similarly protected pursuant to an appropriate order, the Board granted WCTL's request and ordered the AAR to make available for inspection the confidential RCAF workpapers under the condition that the proprietary workpapers are subject to a standard protective order and treated as "Highly Confidential."

The Board's NPR on the Waybill Sample, which seeks comments by February 21, 2000, was issued today in *Modification of the Carload Waybill Sample and Public Use File Regulations*, STB Ex Parte No. 385 (Sub-No. 4). The Board's decision on the RCAF was issued today in *Railroad Cost Recovery Procedures*, STB Ex Parte No. 290 (Sub-No. 2), et al. Both decisions are available on the Board's website at www.stb.dot.gov. [STOP]