

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

49 CFR Part 1244

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

Waybill Data Released in Three-Benchmark Rail Rate Proceedings

AGENCY: Surface Transportation Board, DOT.**ACTION:** Notice of proposed rulemaking.

SUMMARY: The Board proposes 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 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 in any configuration they see fit to form their 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 could draw from all 4 years of waybill data to form their comparison groups.

DATES: Comments on this proposal are due by May 3, 2010. Replies are due by June 1, 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 Web site, 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: STB Ex Parte No. 646 (Sub-No. 3), 395 E Street, SW., 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 Web site.

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 1-800-877-8339.)

SUPPLEMENTARY INFORMATION: In *Simplified Standards for Rail Rate Cases*, STB Docket No. 646 (Sub-No. 1) (*Simplified Standards*) (STB served Sept. 5, 2007), *aff'd sub nom. CSX Transp., Inc. v. STB*, 568 F.3d 236 (D.C.

Cir. 2009) (*CSX Transp. I*), and vacated in part on reh'g, *CSX Transp., Inc. v. STB*, 584 F.3d 1076 (D.C. Cir. 2009) (*CSX Transp. II*), 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 to the rates of a comparison group drawn from the Waybill Sample data. The Waybill Sample is a statistical sampling of railroad waybills that is collected and maintained for use by the Board. See 49 CFR 1244. The proposed rule in *Simplified Standards* would have required parties to draw their comparison groups from the most recent year of Waybill Sample data. 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 years that corresponded with the most recently published RSAM figures. *Simplified Standards*, slip op. at 18, 80 (STB served Sept. 5, 2007).

Several railroads¹ and the Association of American Railroads (collectively, petitioners) challenged the aforementioned 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 expansion 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. Accordingly, the court vacated that portion of *Simplified Standards*. *CSX Transp. II*, 584 F.3d at 1083.

For Three-Benchmark proceedings, the Board now proposes to release to the parties the unmasked Waybill Sample data of the defendant carrier for the 4 years that correspond with the most recently published RSAM figures. The Board also proposes to permit the parties to draw their proposed

comparison groups in any combination they choose from the released Waybill Sample data. The Board will consider comments on both of these proposals.

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601-612, generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. In drafting a rule an agency is required to: (1) Assess the effect that its regulation will have on small entities; (2) analyze effective alternatives that may minimize a regulation's impact; and (3) make the analysis available for public comment. 5 U.S.C. 601-604. In its notice of proposed rulemaking, the agency must either include an initial regulatory flexibility analysis, 5 U.S.C. 603(a), or certify that the proposed rule will not have a "significant impact on a substantial number of small entities," 5 U.S.C. 605(b). The impact must be a direct impact on small entities "whose conduct is circumscribed or mandated" by the proposed rule. *White Eagle Coop. Ass'n v. Conner*, 553 F.3d 467, 480 (7th Cir. 2009).

The rule proposed here would be permissive, not mandatory; *i.e.*, it would provide a rate complainant and the defendant railroad (possibly small entities) the option of using more data, but the proposed rule would not force them to use all of that 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.

Decided: March 29, 2010.

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

Kulunie L. Cannon,

Clearance Clerk.

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¹ Canadian Pacific Railway Co., Soo Line Railroad Company, Delaware & Hudson Railway Company, CSX Transportation, Inc., Norfolk Southern Railway Company, and Union Pacific Railroad Company.