

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 385 (Sub-No. 8)

WAYBILL SAMPLE REPORTING

REPLY COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

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Pursuant to the schedule established by the Surface Transportation Board (“STB” or “Board”) in the Notice of Proposed Rulemaking in this proceeding served on November 29, 2019 (“NPRM”), the Association of American Railroads (“AAR”) respectfully submits these reply comments.

As noted in our opening comments, AAR supports the Board’s desire to create a more robust Carload Waybill Sample (“CWS”).¹ To that end, AAR proposed one modification that would, if adopted, increase the sampling size over the Board’s proposal. Specifically, AAR proposed that the Board adopt the NPRM proposal with a modification to retain the current sample rate for non-intermodal carloads in the 16-to-60 carload strata, the 61-to-100 carload strata, and the 101-and-over carload strata (“larger carload strata”).² In AAR’s view, the Board’s proposal with this one modification would meet the Board’s desire to have a more robust CWS.³

¹ See Comments of the Association of American Railroads at 1.

² *Id.*

³ See NPRM at 5.

To varying degrees, other commenters also expressed support for the Board’s proposal with several modifications of their own.⁴ First, two commenters request that the Board require the inclusion of service-related data in waybills, including demurrage charges, and accessorial charges.⁵ These suggestions are both beyond the scope of this proceeding and incongruous with the nature of waybills. The purpose of this proceeding is to “simplify the sampling rate for non-intermodal carload shipments and specify separate sampling strata and rates for intermodal shipments.”⁶ To that end, the Board invited comments on its proposal to change sampling rates and strata.⁷ So, to the extent other commenters suggest changes to what is contained in the waybill itself to include “service metrics and demurrage and accessorial charges”⁸ or “information on service quality”,⁹ such changes are beyond the scope of the proceeding and should be disregarded.¹⁰

Further, these suggestions fail to recognize the nature and purpose of the waybill as a commercial document. The waybill is defined as “the document or instrument prepared from the bill of lading contract or shipper’s instructions as to the disposition of the freight, and used by the

⁴ See Comments of American Fuel & Petrochemical Manufacturers at 1 (stating “AFPM is encouraged by this effort to ensure the STB has the most accurate and robust data available”); Comments of the United States Department of Agriculture at 2 (calling the proposal a “step in the right direction”); Comments of RSI Logistics at 1 (noting it “supports the STB’s recommendation to change the sampling rate”); Comments of the National Grain and Feed Association at 2 (referring to the NPRM as a “demonstrable, positive action by the STB to update and improve its processes”); Comments of CSX Transportation, Inc. at 1 (“CSX generally supports an increase in the waybill sampling rates”); Comments of the Western Coal Traffic League at 2 (calling the goal of the NPRM “laudable,” but the benefits of it “speculative”).

⁵ See Comments of American Fuel & Petrochemical Manufacturers at 5; Comments of the United States Department of Agriculture at 4.

⁶ NPRM at 2.

⁷ NPRM at 11.

⁸ Comments of the United States Department of Agriculture at 4.

⁹ Comments of American Fuel & Petrochemical Manufacturers at 5.

¹⁰ See, e.g., *CSX Transp., Inc. v. STB*, 584 F.3d 1076, 1081 (D.C. Cir. 2009); *Idaho Conservation League v. Wheeler*, 930 F.3d 494, 508 (D.C. Cir. 2019).

railroad(s) involved as the authority to move the shipment and as the basis for determining the freight charges and interline settlements.”¹¹ Thus, the Board’s rules give effect to the longstanding industry practice of using waybills as commercial documents generated before the transportation is completed. Requiring additional, unrelated data to be included in waybills would require changes to industry practice and pose significant challenges. First, information related to service, demurrage charges, and accessorial charges are not known until the transportation is completed and would take significant time to compile.¹² Second, inclusion of service-related data would present significant sampling challenges, as service, demurrage, and accessorial charges vary greatly by movement and condition, and is not representative of how all shippers in the origin or destination identified by the Standard Point Location Code (“SPLC”) are served or switched. Third, waybills for interline movements are reported by the terminating carrier based on information generated by the originating carrier. The reporting carrier frequently does not have visibility into service or other data of the other carriers that participate in the move.¹³ Finally, such service data could be commercially sensitive and identify a particular customer, limiting the usefulness of its inclusion in the CWS.

AAR’s concern about commercially-sensitive information also applies to still other commenter requests for further stratification and the submission of all waybill data. Some commenters request the Board further stratify the data by categories, such as distance, railroad, commodity, and geographic or regional data.¹⁴ Further stratification of waybill data would give

¹¹ 49 C.F.R. § 1244.1(c).

¹² *Contra* Comments of RSI Logistics at 1 (requesting the Board “[r]elease the data in a timelier manner.”)

¹³ *See* 49 C.F.R. § 1244.2(a). Moreover, there would be significant challenges in reporting such information for movements that involve Class III carriers.

¹⁴ *See* Comments of the National Grain and Feed Association at 4; Comments of the United States Department of Agriculture at 3-4.

greater granularity to identify similar movements. Such specificity in sampling would distort the CWS because more characteristics would make the sample less random and therefore less reflective of the overall population. In addition, AAR cautions that such stratification would allow individual shippers and their rates for service to be more easily identified by marketplace participants. Because waybill data are reported at the SPLC level, which generally includes multiple terminals, there is inherently a certain level of anonymity for railroad customers. Were the Board to further stratify by commodity, geography, region, or other proposed categories, the anonymity of a particular customer at the SPLC level would be threatened. If anonymity were compromised, the inferred information could be used to the competitive disadvantage of relevant shippers.

Similarly, some commenters request the Board simply collect all waybill data.¹⁵ As AAR has noted previously, collection of all waybills for certain types of commodities, particularly TIH, would require stringent protections as security-sensitive information.¹⁶ In that proceeding,

¹⁵ See Comments of the National Grain and Feed Association at 4; Comments of the United States Department of Agriculture at 2-3. The USDA notes that the U.S. Army Corps of Engineers (“USACE”) “collects similar ... data on *all* waterborne movements.” *Id.* at 3 (emphasis in original). While it is true the USACE collects waterborne movement information, it is not “*all* waterborne movements”, as there are five specifically-enumerated exceptions to the monthly reporting requirements in the regulations. See 33 C.F.R. § 207.800(b)(2). Regardless, the USACE is the entity responsible for water resource development projects that construct, rehabilitate, and/or maintain the nation’s harbors and waterways, and that are funded through the harbor maintenance tax. See Water Resources Development Act of 1986, Pub. L. No. 99-662, § 1402 (1986). USACE, therefore, collects the movement information, including harbor maintenance tax-related information, to assure navigation projects are properly maintained, new projects are feasible, and funding is available for those projects. See 33 C.F.R. § 207.800; see also Water Resources Development Act of 1986, Pub. L. No. 99-662 (1986); River and Harbors Act of 1922, Ch. 427 § 11, 42 Stat. 1043 (Sept. 22, 1922). So, the USACE’s purpose is distinct from the Board’s in collecting the CWS, which is by its very definition a representative *sampling* of movements. Moreover, the navigational information collected does not share the competitive advantage concerns attendant to the CWS data set. See 33 C.F.R. § 209.320 (stating the policy of the Department of the Army to “hold in strict confidence any data or information furnished ... with the understanding that it will not be disclosed.”).

¹⁶ See Comments of the Association of American Railroads, EP 385 (Sub-No. 7), *Waybill Data Reporting for Toxic Inhalation Hazards*; 49 C.F.R. § 1520.9, 1520.19 (establishing restrictions for the disclosure of security-sensitive information).

the Board “appreciate[d] and underst[ood] the AAR’s concerns about security as it relates to TIH traffic” and discontinued the proceeding to expand waybill collection to all TIH movements.¹⁷ No commenter in that proceeding dispelled the security concerns regarding the expansion of the waybill to 100% of TIH movements, which the commenters here propose. Moreover, even if concerns regarding security-sensitive movements were somehow addressed, the Board’s primary identified reason for increasing the CWS rate is to assist parties in Three-Benchmark cases by providing a greater number of comparable movements for the litigation, which does not necessitate the collection of hundreds of thousands of waybills.¹⁸ The sheer amount of data the Board would need to collect and maintain would be extensive, and create an obligation on the Board to protect that information, as there would be a greater risk of public release, inadvertent or otherwise, of customer identity and rates for service.¹⁹ AAR believes the Board’s proposal with AAR’s modification strikes a balanced approach to obtaining more information, while preserving customer anonymity.²⁰

Finally, two commenters express concerns that the collection of more data will impact the Board’s calculations of RCAF, RSAM, R/VC180, the URCS Worktable A1 Part 6, and other Board indices.²¹ One commenter suggests that the “effects of increasing and applying Waybill Sample data on the Board’s wide range of formulas and policies largely is unknown at this

¹⁷ See *Waybill Data Reporting for Toxic Inhalation Hazards*, EP 385 Sub-No. 7), slip op. at 2 (STB served July 27, 2016).

¹⁸ See NPRM at 2, 5, and 8; see also *US Magnesium, L.L.C.*, NOR 42114, slip op. at 9 & n.12, (STB served Jan. 28, 2010) (noting the dearth of observations for certain toxic-by-inhalation commodities in the parties’ comparison groups); *Simplified Standards*, EP 646 (Sub-No. 1), slip op. at 83 (acknowledging that there may be instances in Three-Benchmark cases where a particular movement is so unique that there would be insufficient comparable movements in the CWS).

¹⁹ See 49 U.S.C. § 11904; 49 C.F.R. § 1244.9.

²⁰ See Comments of the Association of American Railroads at 1.

²¹ See Comments of the National Grain and Feed Association at 5; Comments of the Western Coal Traffic League at 2-5.

time ... [and] could materially affect the Board's current formulas and indices."²² The Board can modify its processes to address anomalies or unintended consequences if they arise. For that reason, AAR does not oppose the National Grain & Feed Association suggestion that the Board monitor the effects of any changes in its CWS sampling procedures.²³

CONCLUSION

The Board should adopt the NPRM proposal, as modified by the AAR's opening comments.

Respectfully submitted,



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²² Comments of the National Grain and Feed Association at 5; *see* Comments of the Western Coal Traffic League at 2 (explaining that the "League is concerned that accuracy and consistency in other matters that rely on the waybill sample may be compromised in the process.").

²³ *See* Comments of National Grain & Feed Association at 5 ("adopting the NPRM or increasing the sampling size beyond 1/5 should be accompanied by examination and monitoring"). AAR objects to the Western Coal Traffic League suggestion "that the Board address this matter by collecting and processing the sample using both the existing methodology and the new methodology ... for two consecutive years" Comments of Western Coal Traffic League at 3. That suggestion fails to address the increased costs of implementing both the old and new methodologies for two years.