

SERVICE DATE – JUNE 16, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 385 (Sub-No. 6)

WAYBILL SAMPLE

Decided: June 12, 2008

The Board is instituting this expedited rulemaking to require all carriers that submit carload-waybill-sample information (Waybill Sample) to report fuel surcharge revenue separately in a Waybill Sample field established for that purpose. To keep reporting consistent within each calendar year, the new field will be established for Waybill Samples commencing with the Waybill Sample filed for January 2009. This decision will become effective on August 18, 2008, unless an adverse comment is received.

BACKGROUND

A carload waybill is a document describing the characteristics of an individual rail shipment: originating and terminating freight stations, the names of all railroads participating in the movement, the points of all railroad interchanges, the number of cars, the car types, movement weight in hundredweight, the commodity, and the freight revenue. Under 49 CFR Part 1244, a railroad is required to file a Waybill Sample for all line-haul revenue waybills terminating on its lines if, in any of the three preceding years, the railroad terminated 4500 or more carloads, or it terminated at least 5% of the total revenue carloads that terminate in a particular state.

The Waybill Sample is the Board's primary source of information about freight rail shipments terminated in the United States. Of particular importance, the Board relies on the data in the "Freight Revenue" field to compute its "Revenue Shortfall Allocation Method" (RSAM) benchmarks.

In the last few years, the Board found that certain railroads were reporting fuel surcharge revenue in the "Miscellaneous Charges" field of the Waybill Sample, even though most were reporting this revenue in the "Freight Revenue" field.<sup>1</sup> In order to provide for consistency in the

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<sup>1</sup> As noted in Freight Railroads: Updated Information on Rates and Other Industry Trends, Government Accountability Office (GAO) Report No. 08-218T, at 9 (Oct. 2007), by 2005, revenue reported in the Waybill Sample as "Miscellaneous" had increased ten-fold over 2000 levels. In 2005, 20% of all tonnage moved in the United States generated revenue reported  
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reporting of fuel surcharge revenue in the Waybill Sample and thereby improve the accuracy and utility of the Board's RSAM calculations, on December 19, 2007, in Waybill Sample, STB Ex Parte No. 385 (Sub-No. 6) (Clarification) (published at 72 FR 72000 on December 19, 2007), the Board served a notice clarifying that all railroads that are required to submit a Waybill Sample under 49 CFR Part 1244 should report fuel surcharge revenue in the "Freight Revenue" field (columns 83-91) in the waybill-file-record layout.

Reconsideration Petition. On December 31, 2007, the National Industrial Transportation League (NITL) sought reconsideration of the Clarification. NITL notes that the Board has previously expressed the "hope to bring some transparency to the use of fuel surcharges by rail carriers," NITL Petition, at 1 (quoting Rail Fuel Surcharges, Ex Parte 661 (Sub-No. 1), at 12 (STB served Jan. 26, 2007)), and argues that the Board's Clarification, "instead of promoting transparency, will make it impossible to identify fuel surcharge revenue in the Waybill Sample, and thereby to use the Waybill Sample to analyze fuel surcharge revenue, and to match fuel costs to fuel surcharge revenue," Petition, at 1.<sup>2</sup> NITL asks the Board to require all carriers submitting a Waybill Sample to report fuel surcharge revenue "separately in a Waybill Sample field established for that purpose." Petition, at 2. On January 3, 2008, the National Grain and Feed Association (NGFA) joined in the NITL petition. Subsequently, 11 additional statements supporting the petition were filed primarily by shippers and shipper interest groups.<sup>3</sup> A letter of support was also filed by the Office of the Governor of the State of Montana, on behalf of 17

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as "Miscellaneous." Id. The GAO recommended that the STB ensure consistent and accurate reporting by railroads of all revenues, including miscellaneous revenue. Id. at 24.

<sup>2</sup> NITL notes that it submitted comments in Rail Fuel Surcharges, Ex Parte 661 (Sub-No. 1) (Fuel Surcharge Reporting), specifically asking the Board to "add [separate fuel surcharge] data fields to its Waybill Sample to better monitor fuel surcharge revenue." Petition, at 1. In Fuel Surcharge Reporting, the Board sought comments on and then adopted a proposal to require Class I carriers (currently 7) to submit a new fuel- surcharge-revenue report, unrelated to the Waybill Sample. The Board declined to consider requests to modify the Waybill Sample at that time, noting that "any suggestion to add information on fuel surcharge data into the Waybill Sample would be more properly addressed in a petition for a rulemaking involving the Waybill Sample." Fuel Surcharge Reporting, at 5 n.5. (More than 140 carriers are required to submit a Waybill Sample.)

<sup>3</sup> Grain Processing Corporation; Pioneer Oil LLC; Searles Valley Minerals; Freight Resources Network, LLC; Fertilizer Institute; International Paper Company; Taminco; Vulcan Materials Company; Bayer Cropscience; Total Petrochemicals; and Rhodia Inc.

supporting agricultural interest groups.<sup>4</sup> No rail carrier objected to, or even responded to, NITL's petition.

Reporting fuel surcharge revenue in a separate field in the Waybill Sample, rather than in the "Freight Revenue" field, should increase transparency about the use of fuel surcharges by rail carriers without detracting from the Board's ability to obtain consistent results for the purposes of including such revenue in its RSAM calculations. The Board would simply add the total revenues from the two (fuel surcharge and general freight revenue) fields. No carrier has opposed the petition, and there does not appear to be a reasonable basis on which carriers might do so. Because NITL's request that fuel surcharge revenue be reported separately appears to be both reasonable and feasible, the Board will modify the Waybill Sample to create a new field for the purpose of reporting fuel surcharge revenue.

Because reporting fuel surcharge revenue in a newly created field is a new requirement, rather than an interpretation or clarification of the requirements in the existing waybill-file-record layout, the Board has initiated this rulemaking. An express revision to the Code of Federal Regulations (CFR) will not be triggered by this new requirement, but the Board will need to designate a separate field for fuel surcharge revenue by modifying Statement No. 81-1, to which the CFR refers.<sup>5</sup>

Given that no rail carrier has replied to this petition, however, there is ample reason to believe that the new requirement is unlikely to be opposed. Therefore, the Board is using the expedited rulemaking procedures that are available for adopting non-controversial rules.<sup>6</sup> Under these special procedures (sometimes referred to as "direct-final rulemaking"), the Board will

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<sup>4</sup> Montana Wheat & Barley Committee, Colorado Wheat Administrative Committee, Colorado Association of Wheat Growers, Idaho Barley Commission, Idaho Wheat Commission, Idaho Grain Producers Association, Montana Grain Growers Association, Nebraska Wheat Board, Nebraska Wheat Growers Association, Oklahoma Wheat Commission, South Dakota Wheat Commission, South Dakota Wheat Inc., Texas Wheat Producers Board, Texas Wheat Producers Association, Washington Wheat Commission, National Association of Wheat Growers, and National Barley Growers Association.

<sup>5</sup> The Waybill Sample fields are not dictated in the CFR itself. Rather the CFR references Statement No. 81-1, Procedures for Sampling Waybill Records by Computer, which is, as noted, issued by the STB and "may be revised from time to time." 49 CFR 1244.4(c).

<sup>6</sup> These procedures were originally developed and used by EPA and were endorsed by the National Performance Review and the Administrative Conference (ACUS). See Jeffrey S. Lubbers, A Guide to Federal Agency Rulemaking 115 n. 264 & 265, and associated text (American Bar Assoc. 4th Ed. 2006).

publish the proposed modification as a final rule, which will become effective on August 18, 2008, unless an adverse comment is received.

Pursuant to 5 U.S.C. 605(b), the Board certifies that this action will not have a significant economic effect on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Commencing with the Waybill Sample filed for January 2009, carriers that are required to submit a Waybill Sample under 49 CFR 1244 will report fuel surcharge revenue in the separate waybill field created by the Board for that purpose.
2. The Board will revise Statement No. 81-1 to reflect this change.
3. Notice of this decision will be published in the Federal Register.
4. This decision is effective August 18, 2008, unless an adverse comment is received.

Decided: June 12, 2008.

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

Anne K. Quinlan  
Acting Secretary