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Office of Proceedings
January 16, 2018
Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB WB17-44-10/20/17

RELEASE OF WAYBILL DATA

APPEAL OF DIRECTOR'S DECISION TO GRANT ACCESS TO
CONFIDENTIAL CARLOAD WAYBILL SAMPLES

Pursuant to 49 C.F.R. § 1244.9(d)(4)(iii), the Association of American Railroads ("AAR") submits this appeal of the December 27, 2017 Decision ("Decision") by the Acting Director of the Office of Economics to grant the request of certain transportation practitioners ("Requestors")¹ for access to recent Confidential Carload Waybill Samples ("CCWS"). The Decision grants access to sensitive CCWS data in a way that violates Board regulations and conflicts with a Sensitive Security Information ("SSI") determination by the Department of Transportation, and it should be reversed.

AAR appreciates that the Acting Director's Decision refused the Requestors' demands for access to contract rates and waybill masking factors, and refused to release the most recent years of CCWS data in an effort to

¹ The Requestors are Thompson Hine LLP, Economists, Inc., and L.E. Peabody & Associates, Inc. Their October 20, 2017 request for CCWS data is hereafter referred to as the "October 20 Request."

mitigate the potential commercial harm from the release. Respectfully, however, the Acting Director's Decision still conflicts with regulations that govern the release of CCWS data and with DOT's determination that certain information in the CCWS is SSI that can only be released in limited circumstances. The Requestors' demand for CCWS data is simply not consistent with controlling regulations, and it should be denied in its entirety for three reasons.

First, the Decision is predicated on a misreading of the Board's regulations, which set forth clear requirements that each "class of user" must satisfy to obtain waybill access. The plain language of the regulations does not permit "transportation practitioners, consulting firms and law firms" like Requestors to obtain waybill access without satisfying § 1244.9(b)(4)'s conditions for transportation practitioner access. The Decision's conclusion that Requestors can make an end run around § 1244.9(b)(4) by obtaining waybill access as "other users" cannot be reconciled with the language of the Board's regulations or with precedent applying those regulations.

Second, the Decision failed to address AAR's argument that Requestors' demand for the CCWS was fatally flawed because they offered no explanation of how a "benchmarking" approach to rate reasonableness could be consistent with the statutory scheme. The Board and courts have recognized that rate comparison methodologies cannot be viable approaches to rate regulation because such methodologies are incompatible with the

demand-based differential pricing that Congress has endorsed. The Decision was wrong to ignore this point and to authorize disclosure of the CCWS to parties that are pursuing a theory that is so baldly incompatible with the statutory scheme.

Third, the Decision grants access to information on Toxic-By-Inhalation (“TIH”) shipments that DOT has already determined to be SSI. SSI Order 2011-06-FRA-01 unambiguously designated certain TIH shipment information as SSI, including information on the “origin and destination of each shipment,” “the shipper and receiver,” “the rail car initial and number,” and “the type and quantity of the commodity in the rail car.” The Board does not have authorization to release this information to an entity that is not a “covered person” under 49 C.F.R. § 15.7 absent authorization from DOT. Requestors are not “covered persons,” and their request does not fall within the scope of the July 29, 2011 DOT Memorandum that permits disclosure of SSI in STB administrative proceedings. As such, the Board cannot release CCWS information on TIH movements without further action from DOT.

I. The Board’s Rules Do Not Permit Transportation Practitioners to Reclassify Themselves as “Other Users” To Sidestep The Regulatory Requirements for Waybill Access.

The text of 49 C.F.R. § 1244.9 cannot support the Decision’s conclusion that the Requestors can obtain CCWS access in the guise of “other users” without satisfying the minimum standards for “transportation practitioners.” The Requestors are all prominent transportation practitioners who regularly appear before the Board and who acknowledge that they seek CCWS data in

conjunction with their representation of the American Chemistry Council.² Despite these facts, the Decision held that Requestors did not have to satisfy § 1244.9(b)(4) to obtain the CCWS, and instead that they could obtain access as “other users.” But this interpretation of § 1244.9 cannot be squared with the text of the regulation or prior precedent interpreting that regulation.

Section 1244.9 “identif[ies] five classes of users of the STB Waybill Sample.” § 1244.9(a). Four of these “classes of users” are set forth in § 1244.9(b): railroads (§ 1244.9(b)(1)); federal agencies (§ 1244.9(b)(2)); states (§ 1244.9(b)(3)); and transportation practitioners, consulting firms, and law firms (§ 1244.9(b)(4)). For each of these classes, the regulations define what waybill data may be obtained and what the user must do or show to obtain it. The fifth class of users is defined in section 1244.9(c): “*Other users*: Users other than those described in paragraphs (b)(1) through (b)(5) of this section.”

The Decision concluded correctly that the Requestors could not meet the § 1244.9(b)(4) standards for CCWS release to transportation practitioners. *See* Decision at 2 (“Requestors sought to make broader use of the CCWS than is contemplated under section 1244.9(b)”). Under § 1244.9(b)(4), “[t]ransportation practitioners, consulting firms and law firms” may only receive the CCWS if they demonstrate that it is relevant to issues in a “pending formal proceeding” and that the scope of data requested is “narrowly tailored to what is ‘absolutely essential’ to the preparation of

² *See* October 20 Request at 1.

testimony.”³ Here, Requestors identified no “pending formal proceeding” for which the CCWS would be relevant, and they certainly did not show that the requested CCWS data is absolutely essential to the preparation of testimony in such a proceeding.⁴

Where the Decision went wrong was its conclusion that Requestors could instead opt to request data as an “other user.” The § 1244.9(c) “Other User” category is not a catchall available to all entities; it is definitionally limited to “Users *other than* those described in paragraphs (b)(1) through (b)(5) of this section.” § 1244.9(c) (emphasis added). Because transportation practitioners are plainly “described” in paragraph (b)(4), no transportation practitioner can be an “Other User” within the meaning of § 1244.9(c). (Just as no railroad, federal agency, or State could avoid applicable requirements of § 1244.9(b) by rebranding itself as an “other user.”)

³ *Simplified Standards For Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1), at 32, (STB served July 28, 2006) *citing* *Waybill Release*, 4 I.C.C.2d at 200; 49 CFR 1244.9(b)(4).

⁴ Requestors suggested that they might wish to submit a benchmarking proposal in Ex Parte 736 or in “such other proceeding(s) the Board may designate for that purpose.” October 20 Request at 4. But there is no procedural schedule for comments in Ex Parte 736, and the Board has not indicated that it intends to allow the submission of comments regarding SAC alternatives in that proceeding or in any other pending proceeding. Indeed, § 1244.9(b)(4)’s limitation of waybill access to “formal proceedings before the STB” suggests that it ordinarily cannot be invoked to obtain the CCWS for use in informal proceedings under the Administrative Procedure Act such as rulemakings. *Cf. Ex Parte Communications in Informal Rulemaking Procedures*, at 8, STB Ex Parte No. 739 (Sept. 28, 2017) (recognizing APA distinction between informal rulemakings and formal rulemaking and adjudicatory proceedings).

While an agency may have discretion to interpret an ambiguous regulation, there is nothing ambiguous about § 1244.9(c)’s application to users “other than” those described in § 1244.9(b). The Decision’s interpretation plainly conflicts with the language of the regulation, and it is a clear error that the Board should correct.

The error in the Decision is confirmed by agency precedent. In 2012, the Office of Economics on at least three occasions refused requests by a railroad to obtain CCWS data under the “other user” category; the Director held that the railroad’s request should have been framed under § 1244.9(b).⁵ It is impossible to reconcile this 2012 decision with the Decision here, and it would be arbitrary and capricious to apply a different standard to shipper representatives than has been applied to railroads.

In short, the Decision’s grant of CCWS access to Requestors as “other users” was predicated on a misinterpretation of the § 1244.9 regulations, and the Board should correct this clear error.

⁵ *See, e.g.*, Letter from W. Huneke, STB, to D. Smith, Sidley Austin LLP, at 1 (Feb. 29, 2012) (“Waybill Request WB484-2”) (waybill request filed on behalf of rail carrier was governed by 49 C.F.R. § 1244.9(b)(1)); Letter from W. Huneke, STB, to W. Mullins, Baker & Miller PLLC, at 1 (Feb. 29, 2012) (“Waybill Request WB595-9”) (same); Letter from W. Huneke, STB, to M. Rosenthal, Covington & Burling LLP, at 1 (Feb. 29, 2012) (“Waybill Request WB468-13”) (same).

II. Rate Benchmarking Is Not A Viable Alternative To SAC Because It Prevents Lawful Differential Pricing

The Decision also ignored the primary objection raised by the AAR to the release of the masked CCWS. The AAR observed both that Requestors offer no theory of how they could use a benchmarking approach as a viable alternative to the Stand-Alone Cost (“SAC”) test and that access to the Public Waybill Sample should suffice. The Decision addressed only the second argument and ignored AAR’s first argument. This was plain error.⁶

Requestors cannot receive the CCWS unless they show that it is “essential to meet a particular and legitimate need.” *Waybill Release*, 4 I.C.C.2d at 199. Here, the stated purpose for Requestors’ waybill request was to create a “rate benchmarking” alternative to SAC. As described by Requestors, “Rate benchmarking involves the development of an econometric model that measures the statistical relationship between rates and shipment characteristics to predict the competitive rate levels for captive traffic based upon the principal factors that influence the rates of competitive traffic.” Request at 4. Requestors claimed they needed the CCWS to “demonstrate the functionality and feasibility of a rate benchmarking standard as an alternative to SAC.” *Id.*

⁶ The Decision stated that “the CCWS has much more granular level data than does the Public Use Waybill Sample, and thus use of the CCWS should prove helpful in attempting to establish a reliable statistical relationship between rates and shipment characteristics.” Decision at 2. AAR disagrees, but is not challenging this finding given the heightened standard on appeal.

But confidential data is not what Requestors need—they need a viable theory. No data are required to show “proof of concept” that an econometric model can predict market rates based on shipment characteristics. There are countless published studies that have undertaken that kind of academic inquiry. Rather, AAR objected to the release of the CCWS because Requestors offer no explanation for how they could translate an econometric model of market rates into a viable rate-setting methodology. The Board can release the masked CCWS only where “essential to meet a particular and legitimate need.” *Waybill Release*, 4 I.C.C.2d at 199. Without a sound theory for which they hope to show “proof of concept,” Requestors have no legitimate need for the CCWS.⁷ The Decision ignored this challenge entirely.

The law is clear that challenged rates cannot be judged by comparison to other so-called “competitive” rates. The D.C. Circuit struck down a “rate benchmarking standard” alternative to SAC, noting several “fundamental conceptual problems” to the use of a comparison approach to determine maximum lawful rates. *Burlington N. R.R. Co. v. ICC*, 985 F.2d 589, 597 (D.C. Cir. 1993). Here, the AAR observed that Requestors offered no hint of

⁷ A naked desire to create an econometric model to seek out the relationship between market rates and shipment characteristics is not a legitimate use of the CCWS. This law firm and these consultants routinely advise shippers in rate negotiations with railroads. Handing them a confidential dataset so they can develop a reliable statistical relationship between rates and shipment characteristics would make a mockery of the general rule that “confidential waybill data generally will not be released to other users.” *Waybill Release*, 4 I.C.C.2d at 199.

how they would address the well-known conceptual problems with a “rate benchmarking standard.” For example, the Board has recognized that rate comparisons to shipments with R/VCs less than 180% are inconsistent with established transportation policy.⁸ Yet without explanation, the Decision grants confidential information for hundreds of thousands of movements that fall below that threshold. A desire to explore a rate reasonableness proposal that is inconsistent with fundamental congressional policies set forth by the courts and this agency is not a legitimate justification for this sweeping request.

The recent TRB report also casts cold water on the use of benchmarking to determine rate reasonableness. The TRB report never proposed benchmarking as an alternative rate reasonableness methodology, only as an alternative to the market dominance test. *See* TRB, *Modernizing Freight Rail Regulation*, at 141-142. As the Board is aware, to replace the existing statutory market dominance test would require an act of Congress.

⁸ *See, e.g., Rail Transportation of Grain, Rate Regulation Review*, STB Ex Parte No. 665 (Sub-No. 2), at 13 (STB served Aug. 31, 2016) (“Although the shipper community presented arguments in favor of including traffic below 180% R/VC in comparison groups, the Board is concerned that including shipments below 180% R/VC may be contrary to the principle of demand-based differential pricing.”). The ICC and STB have already explained the limited use of “rate benchmarking standard” as an alternative to SAC, but only where the case cannot justify a full or simplified SAC presentation. It is called the Three-Benchmark test. Over the objection of the railroads, that simplified test was adopted and modified through two rulemakings to meet the congressional directive to provide an alternative to SAC where the value of the case cannot justify the expense of pursuing relief under that rate standard.

The economists and statistician who wrote the TRB report were charged by Congress with exploring out-of-the-box ways to modernize rail regulation. Yet that group never proposed to use benchmarking to set maximum lawful rates—perhaps because they understood the well-known limitations of such a methodology.

This agency, the courts, and Congress have concluded that rate benchmarking is not a viable method for ratemaking in the railroad industry because it is the polar opposite of demand-based differential pricing. “The core regulatory principle in the rail industry is that a railroad must be able to engage in some form of demand-based differential pricing to have the opportunity to earn adequate revenues.” *See Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No.1), at 20 (served Oct. 30, 2006). Indeed, proper and lawful exercise of differential pricing is “crucial to the viability of the industry.” *Intermodal Rail Competition - Proportional Rates*, ICC Ex Parte Docket No. 445 (Sub-No.2), 1990 MCC LEXIS 70 at 7-8 (Apr. 17, 1990). To remain financially sound, “carriers must be allowed to engage in ‘demand-based differential pricing’ - that is, in order to recover the substantial joint and common costs of its network, a railroad must be able and permitted to charge different customers different prices based on their different levels of demand for transportation services. If a railroad is unable to recover these joint and common costs, it will not be able to earn adequate revenues.”

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Ex Parte No. 711, at 7 (STB served July 25, 2012). The Board-sponsored InterVISTAS Report agreed that the “[d]ifferential pricing” authorized by the Staggers Act benefited all shippers because it “effectively provided new tools for railroads to maximize the use of rail transport, and the resulting higher traffic volumes allowed lower rates for shippers overall than if fixed pricing (*i.e.*, average cost pricing) had been used.”⁹

The federal courts resoundingly agree. *See, e.g., Union Pac. R. R. Co. v. United States*, 637 F.2d 764, 767, n.2 (10th Cir. 1981) (Pursuant to the 4-R Act, “the railroads may propose a rate which includes a price increment over and above fully allocated costs in order to assist them [sic] attain adequate revenue levels. This method of ‘differential pricing’ has been judicially approved as a valid means of achieving the ultimate goal of the 4 R Act which is to financially regenerate the nation’s railroads.”); *Mr. Sprout, Inc. v. United States*, 8 F.3d 118, 124-125 (2d Cir. 1983) (explaining that “Congress in the Staggers Act recognized that railroads must engage in differential pricing”); *MidAmerican Energy Co. v. STD*, 169 F.3d 1099, 1106 (8th Cir. 1999) (explained that the “Board has recognized that an important part of achieving revenue adequacy is differential pricing”); *Union Pac. R.R. Co. v. STB*, 628 F.3d 597, 600 (D.C. Cir. 2010) (by “statute, rail carriers are

⁹ InterVISTAS, An Examination of the STB’s Approach to Freight Rail Rate Regulation and Options for Simplification, at 12 (Sept. 14, 2016).

authorized to engage in a certain amount of demand-based differential pricing in order to earn ‘adequate revenues’’).

Indeed, Congress recently confirmed that the ability to charge different customers different prices remains a core federal policy. When it enacted the Surface Transportation Board Reauthorization Act of 2015, Congress acknowledged that demand-based differential pricing is a central feature of the Staggers Act regulatory regime, permitting “railroads to charge lower rates to their customers who operate in a competitive environment and higher rates to customers who are ‘captive’ to one railroad carrier for transportation service (*i.e.*, demand-based differential pricing).” S. Rep. No. 114-52, 114th Cong., 1st Sess., at 2 (2015). A rate benchmark approach, where “the captive shipper pays the rates observed in comparable movements of competitive traffic,”¹⁰ cannot be squared with the central feature of the federal regulatory regime adopted and reaffirmed by Congress.

Nor can the recent call by Vice Chairman Miller in the *Consumers* rate case for “further exploration of a competitive market-rate benchmarking approach” add legitimacy to this request.¹¹ While the AAR has reservations about using competitive benchmarking as a gateway to some new simplified rate review process, what Vice Chairman Miller suggested is a world apart

¹⁰ See Reply Comments of Concerned Shipper Association, EP 722 (Sub-No. 2), Reply Verified Statement of Kevin Caves and Hal Singer at 20 (dated Nov. 4, 2014) (referenced in Requestors’ waybill request).

¹¹ *Consumers Energy Co. v. CSX Transp., Inc.*, at 75, STB Docket No. NOR 42142 (served Jan. 11, 2018) (Vice Chairman Miller concurring).

from the approach proposed by Requestors. Vice Chairman Miller again¹² recognized that the TRB report only claimed that information in the CCWS could be used to identify rates above a certain, defined percentage of the benchmark that “should be subject to challenge.” Vice Chairman Miller suggested that one “idea worth exploring” would be whether rates at the “high-end of the spectrum for similar traffic . . . qualify for a streamlined review process.” In other words, Vice Chairman Miller suggested that the Board explore using competitive benchmarking as a gateway to a new (as yet unidentified) streamlined rate review process. For Requestors, competitive benchmarking is the end game – rate regulation. So while Vice Chairman Miller and Requestors may use the same label to describe their respective ideas, the ideas share virtually nothing in common. One proposes a threshold test to provide access to a consideration of rate reasonableness; the other proposes that a comparison to competitive rates could alone definitively determine whether a rate is reasonable.

AAR recognizes the STB’s desire to simplify the agency’s ratemaking methodologies. But the kind of benchmarking contemplated by Requestors is not the answer. It has been rejected so often, by so many, for so long that the Board must demand something more from Requestors to show how their

¹² Vice Chairman Miller previously recognized at the *Revenue Adequacy* hearing that the TRB came well short of recommending that price benchmark comparisons be used as a method for establishing the reasonableness of rates. See Public Hearing Transcript, *Railroad Revenue Adequacy*, STB Ex Parte No. 722, at 162-66 (Jul. 22, 2015).

theory could possibly be squared with the statutory scheme. A desire to roll back the clock to pre-Staggers regulation with a rate benchmarking alternative to SAC cannot justify releasing the confidential data.

AAR respectfully urges the Board to overturn the Decision because of its failure to address AAR's primary argument. Requestors must come forth with a viable theory they seek to test, not one rejected by the agency, courts, and Congress.

III. The Decision Would Release SSI Information Without Authorization, In Violation of Federal Law.

The Decision also erred by dismissing concerns about SSI in the CCWS. AAR pointed out in its objection to the October 20 Request that the CCWS included information about TIH movements that was designated SSI by SSI Order 2011-06-FRA-01 and that could not be released without DOT authorization. Yet the Decision summarily concluded that AAR "failed to establish" why DOT's SSI Order precluded the Board from releasing data "pursuant to the Board's longstanding regulations and confidentiality standards." Decision at 2. This was clear error, for there is no question that the Board has no jurisdiction to overrule SSI determinations made by agencies with authority over SSI and no authority to release SSI in a way that has not been authorized by those agencies.

Congress charged DOT with responsibility for designating information as SSI and for establishing rules governing the release of such information. *See* 49 U.S.C. § 40119(b). DOT has promulgated regulations that set forth

categories of SSI and that govern the release of SSI. *See, e.g.*, 49 C.F.R.

§ 15.9. These regulations are not administered by the Board, and they may not be circumvented by the Board.

The Board recognized its lack of jurisdiction over SSI in 2011, when it responded to questions raised about the production of SSI data in rate reasonableness cases by referring the issue to DOT. The result of that referral was SSI Order 2011-06-FRA-01, in which DOT concluded that information on TIH traffic “could be of particular use and interest to a terrorist” and thus constitutes SSI. SSI Order 2011-06-FRA-01, at 3 (Jul. 29, 2011). DOT held that TIH traffic information that constitutes SSI includes the “origin and destination of each shipment,” “the shipper and receiver,” “the rail car initial and number,” and “the type and quantity of the commodity in the rail car.” *Id.* On the same date of SSI Order 2011-06-FRA-01, the FRA Administrator issued a separate memorandum that authorized disclosure of this SSI “in administrative proceedings before the STB” where a party has “a need to know [the SSI] in order to advocate a case before the STB.”¹³

Under SSI Order 2011-06-FRA-01, there is no question that certain TIH traffic information in the CCWS constitutes SSI—particularly fields that could be used to derive the origin and destinations of TIH shipments and type

¹³ Memorandum, Authorization to Share Sensitive Security Information (SSI) With Complainants and Other Parties Involved in Surface Transportation Board (STB) Administrative Proceedings, at 2 (July 29, 2011) (“SSI Authorization Memorandum”).

and quantity of TIHs being transported. And under the SSI Authorization Memorandum, that SSI can only be disclosed “in administrative proceedings before the STB” if a party has “a need to know [the SSI] in order to advocate a case before the STB.”¹⁴ Here, Requestors have not sought the information in connection with a particular “case before the STB,” and therefore the SSI Authorization Memorandum does not apply to the requested disclosure. And neither Requestors nor the Decision have identified any other DOT authorization that could allow the STB to disclose SSI to Requestors outside the context of a particular STB proceeding.

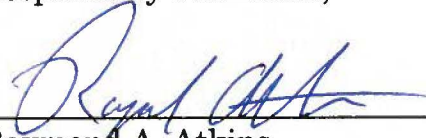
The Board simply does not have legal authority to disclose SSI without DOT authorization, and the Decision’s conclusion to the contrary should be reversed.

¹⁴ *Id.*

CONCLUSION

Based on the foregoing, the Decision's conclusion that CCWS data should be released to Requestors is erroneous, and the Board should deny the Requestors' request in its entirety.

Respectfully submitted,



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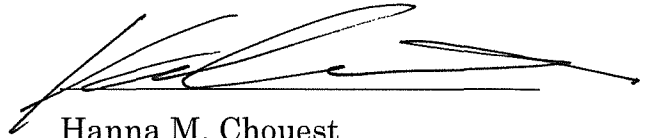
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January 16, 2018

CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2018, I caused the foregoing
Appeal of Director's Decision to Grant Access to Confidential Carload Waybill
Samples to be served by first class mail or more expedient method upon the
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