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FR-4915-01-P

## **SURFACE TRANSPORTATION BOARD**

### **49 CFR Part 1244**

**[Docket No. EP 385 (Sub-No. 7)]**

### **Waybill Data Reporting for Toxic Inhalation Hazards; Withdrawal**

AGENCY: Surface Transportation Board.

ACTION: Proposed rule, withdrawal.

SUMMARY: The Surface Transportation Board is withdrawing the proposed rules and discontinuing the EP 385 (Sub-No. 7) rulemaking proceeding which proposed to expand the Waybill Sample collection with respect to traffic movements designated as a Toxic Inhalation Hazard.

DATES: The proposed rule published on February 2, 2010 (75 FR 5261) is withdrawn and the rulemaking proceeding is discontinued on July 28, 2016.

FOR FURTHER INFORMATION CONTACT: Allison Davis at (202) 245-0378.

Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.

SUPPLEMENTAL INFORMATION: On January 28, 2010, in the above titled docket, the Board issued a Notice of Proposed Rulemaking (NPR) seeking public comment on a proposal to expand information that certain railroads are required to submit to the Board for purposes of the carload Waybill Sample (75 FR 5261, February 2, 2010).

Specifically, the proposal would require railroads to submit information about all traffic movements designated as a Toxic Inhalation Hazard (TIH).

As explained below, this proceeding will be discontinued.

The Waybill Sample is the Board's primary source of information about freight rail shipments terminating in the United States. A waybill is a document describing the characteristics of an individual rail shipment, and includes (among other things) the following information: the originating and terminating freight stations, the railroads participating in the movement, the points of all railroad interchanges, the number of cars, the car initial and number, the movement weight in hundredweight, the commodity, and the freight revenue. Currently, railroads that are required to file Waybill Sample information may report a random sample of as little as 1% (using the manual system) or 2.5% (using the computerized system) of carloads on a waybill. See 49 CFR 1244.4(b) and (c).<sup>1</sup>

In the NPR, the Board suggested that the expanded information gathered from the proposed rule would permit the Board to assess TIH traffic within the United States more accurately. The NPR also stated that the information would be beneficial in Three-Benchmark rail rate cases involving TIH traffic, giving parties a larger number of movements from which to develop comparison groups. The additional information would also assist the Board in quantifying the magnitude of TIH traffic, and would help the Board more accurately measure the associated costs of handling such traffic.

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<sup>1</sup> Under 49 CFR 1244.2, a railroad is required to file Waybill Sample information for all line-haul revenue waybills terminated on its lines if it terminated at least 4,500 revenue carloads in any of the three preceding years, or it terminated at least 5% of the revenue carloads terminating in any state in any of the three preceding years. The Board recognizes that some of the submitted information is commercially sensitive, and thus the Board's regulations place limitations on releasing Waybill Sample data. See 49 CFR 1244.9.

On March 4, 2010, the Association of American Railroads (AAR) filed the single comment received in response to the NPR. The AAR agrees that expanded TIH waybill data for use in Three-Benchmark rate cases would be useful; but, it expressed several security-related concerns regarding the potential use of TIH-related data the Board proposed to collect. (AAR Comments 2, 7.)<sup>2</sup> The AAR submits that, in light of the sensitive nature of detailed TIH waybill data, the Board should not collect and maintain this data and subject it to potential inadvertent disclosure unnecessarily. (Id. at 8.) The AAR suggests several alternatives to the Board’s proposal. First, the AAR suggests disclosure on a case-by-case basis, where the defendant carrier in a Three-Benchmark rate proceeding would make all TIH waybills available to the complainant for the most current period. (Id. at 8.) Second, the AAR suggests that the Board could assess TIH traffic by obtaining data from the Transportation Security Administration, which collects some of the data that would be found in the Waybill Sample. (Id.) Lastly, the AAR suggests that, if the Board were to collect 100% of TIH waybill data, then the Board should restrict access to the data and house the data in a secure separate file. (Id. at 10-14.)

The Board appreciates and understands the AAR’s concerns about security as it relates to TIH traffic. Without commenting on the AAR’s suggested alternatives, we will discontinue this proceeding. Taking into consideration the security concerns raised and the lack of broader comment on the NPR, we will not move forward with the proposed

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<sup>2</sup> Federal agencies view TIH movements as a potential target for terrorist activity and consider detailed information pertaining to TIH movements as sensitive security information (SSI). See, e.g., Federal R.R. Admin. Order, Designation of Sensitive Security Information under 49 U.S.C. 40119(b), SSI Order 2011-06-FRA-01 (July 29, 2011), [http://www.stb.dot.gov/stb/industry/Rate\\_Cases.htm](http://www.stb.dot.gov/stb/industry/Rate_Cases.htm) (follow “Federal Railroad Administration, July 29, 2011” hyperlink).

rule and will discontinue this docket in the interest of administrative finality. However, the Board will consider ways to address this issue as part of future proceedings.

Decided: July 21, 2016.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman. Commissioner Begeman commented with a separate expression.

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COMMISSIONER BEGEMAN, commenting:

This proceeding was initiated in January 2010, well before a majority of the current members began serving here. The only real action that has occurred on this matter that I am aware of was when the Association of American Railroads filed its comments in March 2010. Since that time, the Board could have worked to meaningfully address AAR's concerns and ultimately improve the proposal. Yet no such effort occurred. Therefore, the best course of action for this proceeding—one that has been effectively dormant for over six years—is for it to be discontinued, regardless of the proposal's potential merits.

This proceeding is just one example of why I believe Congress has directed the Board to issue quarterly reporting on all of its outstanding rulemaking proposals. We simply must do more to improve the timeliness of all Board actions.

Kenyatta Clay

Clearance Clerk

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