

ROUTE SLIP

BORDEREAU D'ACHEMINEMENT

TO - À (Title/Titre)	ROUTING SYMBOL / SYMBOLE D'ACHEMINEMENT	INITIALS / INITIALES	DATE
Freight Rail Transportation Policy / Direction De La Politique Du Transport Ferroviaire De Marchandises	ACGB	EH	Oct 25/18
Director General, Surface Transportation Policy / Directeur général, Politique du transport terrestre	ACG	MM	Oct 25/18
Assistant Deputy Minister, Policy / Sous-ministre adjoint, Politiques	AC		
Executive Advisor to the Associate Deputy Minister / Conseiller exécutif du Sous-ministre délégué	XM-EA-ASDM		
Associate Deputy Minister of Transport / Sous-ministre délégué Transports	XM-ASDM		
Executive Director to the Deputy Minister / Directeur exécutif au Sous-ministre	XM-ED		
Deputy Minister of Transport / Sous-ministre des transports	XM-DM		
Minister of Transport / Ministre des transports	XA		

Consultations conducted or undertaken -
 Consultations tenues ou entreprises

- Information - A titre d'information
- Approval - Approbation
- Legal - Services juridiques
- Communications
- Chief Financial Officer - Dirigeant principal des finances
- Parliamentary Affairs - Affaires parlementaires

WAYBILL DATA REPORTING FOR U.S.-BASED CARRIERS

DÉCLARATION DE DONNÉES DE BORDEREAU D'EXPÉDITION POUR LES TRANSPORTEURS BASÉS AUX ÉTATS-UNIS

Target Approval Date - Date d'approbation prévu: 31-Oct-2018

Rationale For Date Above - Justification pour la date susmentionnée: REQUESTED BY MINO.

Context For The Document - Contexte du document: WAYBILL DATA REPORTING FOR U.S.-BASED CARRIERS

Author - Auteur: KIMBERLY MACDONALD	Tel - Tél:
Director - Directeur: INDRANI RULAK	Tel - Tél: 613 999-1912
Director General - Directeur général: DAVID MC NABE	Tel - Tél: 613-995-2681

Memorandum to the Minister of Transport

Waybill Data Reporting for U.S.-Based Carriers

For Information

Purpose:

The purpose of this note is to update you on the current status of the implementation of the new Class 1 waybill data reporting requirements, introduced by the *Transportation Modernization Act (TMA)*.

Background:

The TMA introduced a new railway reporting requirement for Class 1 railway companies that requires them to provide, on a monthly basis, detailed information on the traffic they move through Canada. The TMA named six Class 1 rail carriers: Canadian National (CN), Canadian Pacific (CP), as well as U.S.-based carriers BNSF, CSX, Norfolk Southern (NS), and Union Pacific (UP).

In addition to introducing new reporting requirements, the TMA introduced a regulation-making authority to transition the requirements from the TMA into regulation. The regulatory process will include consultation with the public, including Class 1 railways and other rail sector stakeholders.

Since the introduction of the TMA, Transport Canada (TC) officials have been in communication with the Class 1 railways to discuss the TMA's freight rail provisions to help support their implementation.

The waybill requirement came into force upon Royal Assent and the first set of data, dating back to August 2016, was due on June 30, 2018, with subsequent reports due at the end of each month. CN and CP are in full compliance. NS and UP have indicated that they have little to no revenue traffic in Canada and are therefore not filing reports. BNSF and CSX are withholding a range of data fields, primarily due to their concerns about violating U.S. legal obligations and to a lesser extent, due to limitations in their reporting systems.

U.S. Legal Obligations - Subsection 11904

U.S.-based carriers believe that providing TC with certain aspects of the waybill data will place them in violation of U.S. Code Title 49, subsection 11904 (see Annex A), which prohibits a rail carrier from disclosing confidential shipper information without the consent of the shipper. U.S.-based railways have raised their concerns widely, including to U.S. congressional aides, the United States Surface Transportation Board (STB), and the U.S. Department of Transportation (DOT).

s.15(1) - I.A.

SECRET
POLICY GROUP
CCM #: ACG2018-470450

The determination of whether a violation has occurred is at the discretion of the STB. It cannot be presupposed that the STB would allow a railway to submit waybill data to the Canadian government, or that it would pursue action against the railway.

This issue has also garnered the attention of Congressmen Bill Shuster (Chairman, Committee on Transportation and Infrastructure) and Jeff Denham (Chairman, Subcommittee on Railroads, Pipelines, and Hazardous Materials) who jointly sent a letter to Secretary of Transportation Elaine Chao and Ann Begeman, Chairman of the STB (Annex B). The correspondence expressed concern regarding the conflict between the TMA and 11904 and asked that they continue their efforts on this matter with their Canadian counterparts. The June 18, 2018 response from the STB noted that as per the STB Chairman's direction, staff had undertaken informal discussions with their Canadian government counterparts, staff at the U.S. embassy in Canada, the U.S. DOT, and representatives of the affected U.S. railroads to explore possible solutions (Annex C).

TC is working closely with both the STB and the DOT to better understand the U.S. statute. STB [REDACTED]

[REDACTED] TC has encouraged the US railways to undertake any required due diligence to comply with Canadian law and has suggested they approach shippers to gain consent to share the data with the Canadian government. TC has provided information on how the Government of Canada protects confidential data.

Future Regulations

The waybill reporting requirement is a transitional provision in the TMA, and the department is launching a regulatory process, including consultations, to move the waybill reporting requirement into the Transportation Information Regulations. As part of this process, railways, TC and other stakeholders will have opportunities to investigate the benefit of collecting various traffic details for transparency, policy development, and the LHI remedy, taking into consideration reporting burden and consistency with other reporting requirements.

Analysis and Considerations:

Policy purposes

The waybill reporting requirement aims to fulfill three main purposes:

1. To support the Agency in its rate-setting duties related to the Long-Haul Interswitching (LHI) remedy.
2. To increase transparency of Canada's freight rail network and the movement of goods, including dangerous goods.
3. Support the department in developing evidence-based policy.

Generally, the data being reported will support the fulfilment of these three policy purposes.

s.20(1)(b)
s.21(1)(a)
s.21(1)(b)

SECRET
POLICY GROUP
CCM #: ACG2018-470450

Policy Purpose 1: The Agency [REDACTED]

Policy Purposes 2 and 3: [REDACTED]

The fact that NS and UP are not reporting on their traffic is estimated [REDACTED] all the traffic moved by these two railways is done via interchange with CN and CP, who will report that traffic in their own reports. Additionally, the volume of traffic that NS and UP carry annually and the minimal distances in Canada over which they operate further [REDACTED]

[REDACTED]

BNSF

BNSF [REDACTED]

However, it withholds certain information because of its concerns about violating U.S. statute. This includes details that it feels could expose shipper information,

[REDACTED]

[REDACTED]

[REDACTED] rail annually and it operates over 300 km of track in British Columbia and Manitoba.

CSX

Similar to BNSF, CSX [REDACTED]

s.21(1)(a)
s.21(1)(b)
s.23

[REDACTED]

However, at this time, the department is working with the railways and the STB to better understand their concerns about U.S. and Canadian legal obligations, and to raise compliance related to the transitional provisions through dialogue, with a view

[REDACTED]

Enforcement Discretion

If a Class 1 railway does not provide the required transitional information, the Minister has the discretion to decide whether or not to pursue enforcement actions (i.e., prosecution).

[REDACTED]

[REDACTED]

the railways have been co-operating and complying to the extent they consider allows them to also comply with U.S. law;

[REDACTED]

Ministerial Exemption

It should be noted that the Minister has the power to exempt a railway from reporting information collected under section 50(1) of the *Canada Transportation Act* if the Minister is satisfied that it is not practicable for the railway to provide the information. Due to the provision at subsection 76(5) of the TMA, the waybill data requirement is deemed to be a requirement under section 50(1).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

s.21(1)(a)

s.23

SECRET
POLICY GROUP
CCM #: ACG2018-470450

[REDACTED]

Given the railways are partially complying with the requirement and are cooperative and communicative, [REDACTED]

Current Approach and Next Steps:

TC has been taking a balanced approach to encourage compliance among U.S. carriers. This approach includes the following actions:

1. Explaining the reporting requirements and enforcement options

- Indicate to the railways that the requirements are law, and that the railways must comply and provide the required information according to the timelines.
- Indicate that the Minister determines whether enforcement action is needed after a violation, on a case by case basis, accompanied by an explanation of what this means and some of the relevant considerations.

2. Address carriers' concerns about 11904 and the protection of shipper data

- Offer guidance on how the data will be received, stored and used, including the actions taken to secure protected shipper and railway information.
- Work closely with the railways and the STB to better understand how Title 49, subsection 11904 of the U.S. CFR, is impacted by the TMA's reporting requirement. This work will help inform the regulatory process.

3. Determine next steps for supporting network transparency and policy development:

- [REDACTED]
- [REDACTED]

SECRET
POLICY GROUP
CCM #: ACG2018-470450

Unsigned

Michael Keenan
Deputy Minister of Transport

Unsigned

Thao Pham
Associate Deputy Minister of Transport

Date: _____

Attachment

- Annex A: Title 49 U.S. Code § 11904 - Unlawful disclosure of information**
- Annex B: Letter from Congressmen Shuster and Denham regarding Bill C-49 and impacts on US carriers**
- Annex C: Safety Transportation Board Response to Congressmen Schuster and Denham**

SECRET
POLICY GROUP
CCM #: ACG2018-470450

Annex A: Title 49 U.S. Code § 11904 - Unlawful disclosure of information

(a) A—

(1) rail carrier providing transportation subject to the jurisdiction of the Board under this part, or an officer, agent, or employee of that rail carrier, or another person authorized to receive information from that rail carrier, that knowingly discloses to another person, except the shipper or consignee; or

(2) person who solicits or knowingly receives,

information described in subsection (b) without the consent of the shipper or consignee shall be fined not more than \$1,000.

(b) The information referred to in subsection (a) is information about the nature, kind, quantity, destination, consignee, or routing of property tendered or delivered to that rail carrier for transportation provided under this part, or information about the contents of a contract authorized under section 10709 of this title, that may be used to the detriment of the shipper or consignee or may disclose improperly, to a competitor, the business transactions of the shipper or consignee.

(c) This part does not prevent a rail carrier providing transportation subject to the jurisdiction of the Board under this part from giving information—

(1) in response to legal process issued under authority of a court of the United States or a State;

(2) to an officer, employee, or agent of the United States Government, a State, or a territory or possession of the United States; or

(3) to another rail carrier or its agent to adjust mutual traffic accounts in the ordinary course of business.

(d) An employee of the Board delegated to make an inspection or examination under section 11144 of this title who knowingly discloses information acquired during that inspection or examination, except as directed by the Board, a court, or a judge of that court, shall be fined not more than \$500, imprisoned for not more than 6 months, or both.

(e) A person that knowingly discloses confidential data made available to such person under section 11163 of this title by a rail carrier providing transportation subject to the jurisdiction of the Board under this part shall be fined not more than \$50,000.

SECRET
POLICY GROUP
CCM #: ACG2018-470450

**Annex B: Letter from Congressmen Shuster and Denham regarding the
Transportation Modernization Act and impacts on US carriers**



**Committee on Transportation and Infrastructure
U.S. House of Representatives**

Washington, DC 20515

**Bill Shuster
Chairman**

**Peter A. DeFazio
Ranking Member**

June 8, 2018

Telephone: (202) 225-4111

Website: www.transportation.house.gov

**The Honorable Elaine Chao
Secretary
U.S. Department of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20590**

**The Honorable Ann Begeman
Chairman
Surface Transportation Board
395 E Street, SW
Washington, DC 20423**

Dear Secretary Chao and Chairman Begeman:

I am writing to express concern over Bill C-49, the Transportation Modernization Act ("Act"), legislation recently enacted by the Canadian Parliament that modifies Canada's existing transportation regulatory provisions in various ways. Specifically, the new law creates a potential conflict with United States law by requiring certain United States rail carriers that have only a few miles of operations or track in Canada to provide Transport Canada, monthly data for any of the carriers' freight traffic that originates or terminates in Canada, including information regarding the portion of the movement that is in the United States.

Transport Canada has apparently indicated that the data-reporting requirements include providing information such as transportation rates, shipper identities, and traffic volumes for rail traffic that originates or terminates in the United States and that predominantly occurs, on a mileage basis, within United States territory. The required information must be submitted on a monthly basis to Transport Canada. The initial report under the law - which is due on June 30, 2018, roughly one month after the Act's passage - must contain a rail carrier's data extending back nearly two years. The new data reporting requirements exceed requirements United States rail carriers previously had under Canadian law and exceed those required under United States law and regulations. Under the Act, rail carriers that fail to report the newly required data are subject to fines.

Of particular concern, it appears that providing the information sought by Transport Canada for the United States portion of the cross-border traffic would constitute a violation by the United States rail carriers of 49 U.S.C. § 11904. Section 11904 forbids United States rail carriers from

SECRET
POLICY GROUP
CCM #: ACG2018-470450

knowingly disclosing the type of information the Act demands, and the statute provides no exception for disclosures to foreign governments. Non-compliance with Section 11904 can subject a railroad to fines and penalties

The United States and Canada have a long and proud history of cooperation, coordination and collaboration in areas of public policy that have cross-border and international implications. I appreciate the efforts by the Surface Transportation Board and the U.S. Department of Transportation to convey to Transport Canada the potential conflicts between this new Canadian law and existing United States statutes and regulations governing rail carriers in the United States. I would encourage your continued efforts with your Canadian counterparts on this matter, and, as you continue to closely monitor Transport Canada's implementation of the Act, please keep me informed of important developments.

Thank you for your attention to this request. Please contact Dennis Wirtz, Staff Director, Subcommittee on Railroads, Pipelines, and Hazardous Materials, at (202) 226-0727, if you have any questions

Sincerely,



Bill Shuster
Chairman
Committee on Transportation
and Infrastructure



Jeff Denham
Chairman
Subcommittee on Railroads, Pipelines,
and Hazardous Materials

SECRET
POLICY GROUP
CCM #: ACG2018-470450

Annex C: Safety Transportation Board Response to Congressmen Schuster and Denham



Office of the Chairman

Surface Transportation Board
Washington, D.C. 20423-1001

June 18, 2018

The Honorable Bill Shuster
Chairman
Committee on Transportation and
Infrastructure
U.S. House of Representatives
2165 Rayburn House Office Building
Washington, DC 20515

The Honorable Jeff Denham
Chairman
Subcommittee on Railroads, Pipelines, and
Hazardous Materials
U.S. House of Representatives
1730 Longworth House Office Building
Washington, DC 20515

Dear Chairman Shuster and Subcommittee Chairman Denham:

Thank you for your recent letter regarding a newly enacted transportation law in Canada. I appreciate hearing from you on this important matter.

As you know, Canada's Transportation Modernization Act, referred to as C-49, requires Class 1 carriers that conduct any operations in Canada to report to Transport Canada on a monthly basis extensive commercial and operational information. Such reporting is scheduled to commence on June 30, 2018. Importantly, however, to the extent C-49 requires information about cross-border movements, U.S. law (at 49 U.S.C. 11904) generally prohibits railroads from disclosing certain commercially sensitive information without the consent of the shipper or consignee.

Given the issues raised by the intersection of C-49 and section 11904, at my direction, STB staff have had informal discussions with their Canadian government counterparts, staff at the U.S. Embassy in Canada as well as the U.S. Department of Transportation, and representatives of the affected U.S. railroads to explore possible solutions. STB staff has also been keeping staff of the STB's Congressional oversight committees, including your staff, informed on this issue and will continue to do so. The STB will also continue its analysis of the issue and outreach to stakeholders.

If you or your staff have additional questions or concerns, please do not hesitate to contact me or Lucille Marvin, Director of the Office of Public Assistance, Governmental Affairs, and Compliance at 202-245-0238.

Sincerely,

Ann Begeman
Chairman

cc: Secretary Elaine Chan

