



U.S. Department
of Transportation

1200 New Jersey Ave., S.E.
Washington, DC 20590

**Federal Railroad
Administration**

Authorization to Share Sensitive Security Information (SSI) With
Complainants and Other Parties Involved in
Surface Transportation Board (STB) Administrative Proceedings

15(e) Memorandum

Purpose

This memorandum authorizes railroads involved in administrative proceedings before the STB to share railroad traffic data that has been determined to be SSI by the Department of Transportation (DOT) with complainants and other parties involved in the administrative proceeding, their legal counsel and their consultants.

Background

The STB is an economic regulatory agency that Congress charged with resolving railroad rate and service disputes and reviewing proposed railroad mergers and other transactions. The STB serves as both an adjudicatory and a regulatory body. The agency has jurisdiction over (among other things) railroad rate and service issues and other various transactions initiated by rail carriers. Railroads regularly participate in administrative hearings before the STB regarding the rates that they charge to rail shippers. Under the STB's regulations and procedures, a rail shipper or other party may bring a complaint if it believes a railroad is not charging a fair rate. After a hearing, the STB renders a decision about the challenged rate. As part of an STB rate proceeding, railroads must sometimes produce in discovery to complainants detailed rail traffic information. The complainants must have this information to advocate their rate complaint before the STB. The rail traffic information is normally treated by the railroads and parties to the administrative proceedings as Confidential Business Information, and it is subject to a protective order during the STB proceedings. Similar traffic information is sometimes required to be produced, under protective order, in other STB administrative proceedings. Some rail traffic information regarding certain quantities and types of hazardous materials has been determined by DOT to be SSI. See SSI Order 2011-06-FRA-01.

Discussion

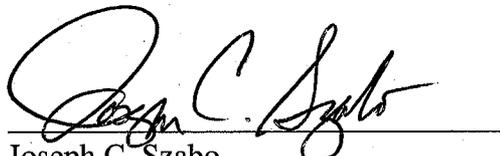
In some cases, a party to an STB proceeding is not a covered person as defined in 49 CFR § 15.7. In addition, parties employ legal counsel and technical consultants to assist them in the STB proceedings. If parties are not "covered persons," then their counsel and consultants are also not "covered persons" as defined by the SSI regulations; nor would they have a "need to know" the SSI as defined in 49 CFR § 15.11. Under 49 CFR § 15.15(e), DOT may provide written authorization to access SSI if such access would not be detrimental to transportation safety. This memorandum authorizes railroads in STB rate and other proceedings to provide SSI

to parties, their legal counsel and their technical consultants, subject to the conditions outlined below.

Determination

Disclosure of the rail traffic information determined to be SSI under DOT's SSI Order 2011-06-FRA-01 to parties, their legal counsel, and their technical consultants who have a need to know in order to advocate a case before the STB, subject to the conditions below, would not be detrimental to transportation safety. DOT hereby authorizes the disclosure and use of such SSI in discovery in administrative proceedings before the STB provided that:

- (1) the information is protected from disclosure by a protective order issued by the STB;
- (2) the railroad producing the information and the other parties to the STB proceeding who are introducing the information as evidence or otherwise disclosing it during the proceeding comply with the SSI marking requirements set forth in 49 CFR § 15.13; if that is not practicable given the nature of the pre-existing hard copy or electronic records, at a minimum the railroad must produce the information with a cover sheet stating that the material includes Sensitive Security Information produced in an STB proceeding pursuant to the authority of SSI Order 2011-06-FRA-01 and identifying the SSI included (for hard copies); and for electronic records (such as those on a CD, DVD, external hard drive or otherwise), in addition to a cover sheet, the railroad must affix a conspicuous label and, if possible, embed an electronic notification stating that the accessed material includes Sensitive Security Information produced in an STB proceeding pursuant to the authority of SSI Order 2011-06-FRA-01;
- (3) the parties to the STB proceeding and their legal counsel and consultants have been advised that this conditional disclosure makes them each a "covered person" under 49 CFR § 15.7(m), and the parties and their legal counsel and consultants acknowledge in writing their understanding of their responsibilities as "covered persons" and that unauthorized disclosure may result in civil penalty or other action; and
- (4) the information is destroyed when it is no longer needed for the proceeding, in accordance with 49 CFR § 15.19.



Joseph C. Szabo
Administrator, Federal Railroad Administration

7/29/11
Date

Attachment – SSI Order 2011-06-FRA-01



UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Designation of

SENSITIVE SECURITY INFORMATION

under 49 U.S.C. 40119(b)

ORDER

Summary. By this Order, the Department of Transportation (DOT) designates certain information as Sensitive Security Information (SSI) under 49 U.S.C. 40119(b), as implemented by 49 CFR Part 15. The information is therefore subject to restrictions on its release, maintenance, and dissemination, as specified in 49 CFR Part 15.

Background. For many years, DOT's Federal Aviation Administration (FAA) had statutory authority to prevent disclosure of information related to aviation security, termed "SSI." In the leading case of *Public Citizen v. Federal Aviation Administration*, 988 F.2d 186 (D.C. Cir. 1993), the court set forth three aspects of this authority:

1. The statute under which FAA restricted disclosure of this information – 49 U.S.C. App. 1357 (1993) – qualified under Exemption 3 of the Freedom of Information Act (FOIA) as a “statute (A) [that] requires that the matters be withheld from the public in such a way as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.” (5 U.S.C. 552(b)(3).) Hence, SSI may be withheld from public disclosure under FOIA.
2. The information may be withheld from the public rulemaking record in an informal rulemaking under 5 U.S.C. 553.
3. The information may be withheld from discovery in civil litigation.

In response to the attacks upon the United States of 9/11/2001, Congress enacted the Aviation and Transportation Security Act (Pub. L. 107-71, 115 Stat. 597 (2001)), which created in DOT a new Transportation Security Administration (TSA), with authority for security in all modes of transportation. 49 U.S.C. 114. That statute, at that time, also gave TSA the authority to designate information as SSI and expanded the scope of that authority to all modes of

transportation. 49 U.S.C. 114(s).¹ When Congress created the Department of Homeland Security (DHS) in the Homeland Security Act of 2002 (Pub. L. 107-295, 116 Stat. 2064 (2002)), it transferred TSA and its SSI authority from DOT to DHS, and gave similar authority to DOT, again as to all modes of transportation. See 49 U.S.C. 40119(b).²

Both 49 U.S.C. 114(s) and 49 U.S.C. 40119(b) require that an agency administering SSI authority promulgate regulations specifying the types of information qualifying for SSI treatment. DOT's regulations appear at 49 CFR Part 15, and TSA's appear at 49 CFR Part 1520, both entitled "Protection of Sensitive Security Information."³ Parts 15 and 1520 set forth categories of information that qualify as SSI and authorize officials of DOT and TSA to determine that specific items of information come within any of those categories. The authority vested in the Secretary of Transportation by 49 U.S.C. 40119(b) and implemented in 49 CFR Part 15 has been delegated to the Administrator of each DOT agency. See 49 CFR 1.45(a)(19).

Discussion. Railroads carry over 1.7 million shipments of hazardous materials annually. Certain categories of hazardous materials have been designated by DOT as requiring additional safety and security measures during rail transportation. Those types and quantities of hazardous materials are: (1) more than 2,268 kg (5,000 lbs.) in a single carload of a Division 1.1, 1.2 or 1.3

¹ 49 U.S.C. 114(s): Nondisclosure of security activities.

(1) In general. Notwithstanding section 552 of title 5, the [Administrator of TSA] shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act (Public Law 107-71) or under chapter 449 of [title 49, US Code] if the [Administrator of TSA] decides that disclosing the information would –

- (A) be an unwarranted invasion of personal privacy;
- (B) reveal a trade secret or privileged or confidential commercial or financial information; or
- (C) be detrimental to the security of transportation.

² 49 U.S.C. 40119. Security and research and development activities.

* * * * *

b) Disclosure.

(1) Notwithstanding section 552 of title 5 and the establishment of a Department of Homeland Security, the Secretary of Transportation shall prescribe regulations prohibiting disclosure of information obtained or developed in ensuring security under this title if the Secretary of Transportation decides disclosing the information would –

- (A) be an unwarranted invasion of personal privacy;
- (B) reveal a trade secret or privileged or confidential commercial or financial information; or
- (C) be detrimental to transportation safety.

³ 69 FR 28066, May 18, 2004. TSA's regulations have been amended many times; see, e.g., 70 FR 41586, 41599, July 19, 2005; 73 FR 72130, 72172, Nov. 26, 2008; 74 FR 47672, 47695, Sept. 16, 2009. DOT's regulations have been amended just once: 70 FR 1379, 1381, Jan. 7, 2005.

explosive; (2) a quantity of a material poisonous by inhalation⁴ in a single bulk packaging; or (3) a highway route-controlled quantity of a Class 7 (radioactive) material, as defined in 49 CFR 173.403. See 49 CFR 172.820.

Railroads compile and retain detailed rail traffic records on all rail shipments for business purposes. The information in these detailed records includes (among other things): the origin and destination of each shipment; the shipper and receiver; the rail car initial and number; the type and quantity of the commodity in the rail car; and the routing for the rail car, including specific location information and dwell time (i.e., the length of time a railcar sits at a particular location). When it concerns the security of hazardous materials described above, this information could be of particular use and interest to a terrorist.

DOT's Federal Railroad Administration (FRA) is responsible for promulgating and enforcing general railroad safety regulations that contribute to the safe rail transportation of hazardous materials, including the security-sensitive materials described above. In addition, FRA assists DOT's Pipeline and Hazardous Materials Safety Administration (PHMSA) in developing and enforcing safety and security regulations regarding the movement of security-sensitive and other hazardous materials. In carrying out its various railroad safety and security roles, FRA periodically requests railroad traffic information from carriers of these security-sensitive materials. TIH traffic information requested by FRA from rail offerors and carriers has already been determined to be SSI under a previous DOT order. See SSI Order 2005-09-FRA-01.

The Surface Transportation Board (STB) was created by the ICC Termination Act of 1995 (Pub. L. No. 104-88, 109 Stat. 803). That Act abolished the Interstate Commerce Commission and transferred certain functions and proceedings to the STB. The STB is an economic regulatory agency that Congress charged with resolving railroad rate and service disputes and reviewing proposed railroad mergers and other transactions. The STB is decisionally independent, although it is administratively affiliated with DOT.

The STB serves as both an adjudicatory and a regulatory body. The agency has jurisdiction over (among other things) railroad rate and service issues and various other transactions initiated by rail carriers. Railroads regularly participate in administrative hearings before the STB regarding the rates that they charge to rail shippers. Under the STB's regulations and procedures, a rail shipper or other party may bring a complaint if it believes a railroad is not charging a fair rate. After a hearing, the STB renders a decision about the challenged rate. As part of an STB administrative proceeding involving rates or various carrier transactions, railroads must sometimes produce detailed rail traffic information. Some of the rail traffic information produced is necessarily about the security-sensitive hazardous materials described above, and is thus also information that would be of interest to a terrorist.

I conclude that release of the traffic information regarding the specific security-sensitive hazardous materials described above would be detrimental to transportation safety, and therefore meets the requirements for SSI designation under 49 U.S.C. 40119(b) and is not currently protected as such under 49 CFR Part 15.

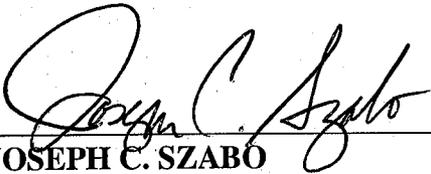
⁴ Materials poisonous by inhalation are also known as poison inhalation hazards (PIH) and toxic inhalation hazards (TIH). These terms are used interchangeably.

ACCORDINGLY,

1. The information identified in the Appendix to this Order is designated Sensitive Security Information, irrespective of the medium in which that information may appear; and
2. The information is subject to 49 CFR Part 15, as it may be amended from time to time.

FOR THE SECRETARY OF TRANSPORTATION

By:



JOSEPH C. SZABO

Administrator, Federal Railroad Administration

Date: 7/29/11

APPENDIX TO SSI ORDER 2011-06-FRA-01

1. Description of SSI: The following information has been designated as SSI, irrespective of the medium in which that information appears:

Railroad traffic information produced by a railroad in the course of an administrative proceeding before the Surface Transportation Board (STB) concerning the following specific types and quantities of hazardous materials:

- a. More than 2,268 kg (5,000 lbs.) in a single carload of a Division 1.1, 1.2 or 1.3 explosive, as defined in 49 CFR 173.50(b);
- b. A quantity of a material poisonous by inhalation in a single bulk packaging. Materials considered poisonous by inhalation are defined in 49 CFR 171.8, and fall into one of the following three categories:
 - (i) A gas meeting the defining criteria in 49 CFR 173.115(c), and assigned to Hazard Zone A, B, C, or D in accordance with 49 CFR 173.116(a);
 - (ii) A liquid (other than a mist) meeting the defining criteria in 49 CFR 173.132(a)(1)(iii), and assigned to Hazard Zone A or B in accordance with 49 CFR 173.133(a); or
 - (iii) Any material identified as an inhalation hazard by a special provision in column 7 of the table in 49 CFR 172.101.
- c. A highway route-controlled quantity of a Class 7 (radioactive) material, as defined in 49 CFR 173.403.

2. Marking Requirement: The information described in Paragraph 1 must be marked and handled in accordance with the Section 15(e) Memorandum accompanying this Order.