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SURFACE TRANSPORTATION BOARD

49 CFR Chapter X

[Docket No. EP 719]

Small Entity Size Standards under the Regulatory Flexibility Act

AGENCY: Surface Transportation Board (Board or STB).

ACTION: Final statement of agency policy.

SUMMARY: On July 11, 2013, the Board issued a notice of proposed size standards for purposes of the Regulatory Flexibility Act, along with a request for public comment. This decision discusses the comment received in response to the proposed size standards and adopts the proposed standard as the final statement of agency policy concerning the definition of "small business."

DATES: This policy statement is effective June 30, 2016.

FOR FURTHER INFORMATION CONTACT: Amy Ziehm at (202) 245-0391. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at (800) 877-8339.

SUPPLEMENTARY INFORMATION: The Regulatory Flexibility Act (RFA) requires agencies to consider the impact of their regulations on small entities,[1] analyze effective alternatives that minimize the impact to small entities, and make their analyses available for public comment. The Small Business Administration (SBA) developed

[1] The RFA defines "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." 5 U.S.C. 601(6).

"size standards" to clarify the term small business and to carry out the purposes of the Small Business Act. Agencies can then use the SBA's size standards for purposes of defining "small entities" to comply with the RFA. However, an agency may establish other definitions for small business that are appropriate to the agency's activities after consultation with the SBA's Office of Advocacy and after opportunity for public comment. 5 U.S.C. 601(3). The SBA has promulgated regulations that classify "Line-Haul Railroads" with 1,500 or fewer employees and "Short Line Railroads" with 500 or fewer employees as small businesses. 13 CFR 121.201 (industry subsector 482).

On July 16, 2013, the Board served a notice proposing its own small entity size standards for purposes of the RFA, along with a request for comment. 78 FR 42,484 (July 16, 2013). After consulting with the SBA's Office of Advocacy, the Board proposed to establish a small entity size standard based on its longstanding classification system, which classifies freight railroads as Class I, Class II, or Class III based on annual operating revenues.[2] Specifically, the Board proposed to define "small business" as only those rail carriers that would be classified as Class III carriers. The Board stated that it believed that this definition is more realistic and useful than the general definitions previously established by the SBA. The Board also noted that this would create consistency with the Federal Railroad Administration (FRA), which in 2003 adopted the Class III standard as its definition of a small business.

[2] Class III carriers have annual operating revenues of $20 million or less in 1991 dollars, or $38,060,383 or less when adjusted for inflation using 2014 data. Class II rail carriers have annual operating revenues of up to $250 million in 1991 dollars or up to $475,754,802 when adjusted for inflation using 2014 data. The Board calculates the revenue deflator factor annually and publishes the railroad revenue thresholds on its website. 49 CFR 1201.1-1.

The American Short Line and Regional Railroad Association (ASLRRA) submitted a comment on August 5, 2013, opposing the Board's proposal. ASLRRA agrees with the SBA's current definition of small business, which uses the number of employees, rather than revenue, as the relevant metric. It maintains that revenue is an unreliable metric for determining whether a railroad is a small business because railroads are "so capital intensive their revenues must provide a return on that huge investment or they cannot stay in business" and because "small railroad revenues are driven largely by the types of commodities they happen to carry." (ASLRRA Comment 3) ASLRRA argues that changing the definition would exclude many Class II railroads from the small business designation, and would thus "strip them from the financial impact review that is the right of small entities during the rulemaking process pursuant to the Regulatory Flexibility Act." (Id.) Finally, ASLRRA claims that Class II railroads have little in common with Class I railroads and share more characteristics with the smaller Class III railroads. (Id. at 4.)

Despite ASLRRA's objection to the use of our revenue classifications over employee counts to define a small business, we find that it is the more appropriate basis for doing so. Even if, as ASLRRA argues, there is some variation between carriers of similar employment levels due, in part, to the types of commodities being shipped, that alone does not mean that employment level represents the better approach to defining a small business. As the Board explained in the notice, the system of classifying railroads based on revenue is used pervasively by the Board and the railroad industry. The agency has used revenue to classify rail carriers since as early as 1911, and the agency's governing statute, precedent, and regulations often impose different requirements

depending on the class of carrier involved. The validity of using revenues to define carrier size has thus been sufficiently demonstrated over time. ASLRRA has not demonstrated that using a size standard based on employment levels is superior to the revenue basis the agency and railroad industry have used for decades.

We now address whether the definition of small business should or should not include Class II carriers. The Board acknowledges ASLRRA's concerns regarding Class II rail carriers and recognizes the differences between Class I, Class II, and Class III railroads. However, the Board does not believe that Class II carriers should be classified as small businesses. Under the Board's governing statutes and regulations, special exceptions are made for Class III carriers, but not Class II carriers.[3] The Board's decision to limit the definition of small business solely to Class III carriers is therefore consistent with the broader regulatory scheme and merely formalizes what is already a common understanding of a small business in the railroad industry.

In addition, the Board also believes there is significant utility in maintaining consistency with the practices of the Federal Railroad Administration, which adopted the same definition of small entity for RFA purposes. Final Policy Statement Concerning Small Entities Subject to the Railroad Safety Laws, 68 FR 24,891 (May 9, 2003); see also Interim Policy Statement Concerning Small Entities Subject to the Railroad Safety Laws, 62 FR 43,024 (Aug. 11, 1997). Having two agencies that play complementary roles in

[3] For example, the Board created a class exemption for acquisitions of rail lines by Class III carriers (49 CFR Subpart E—Exempt Transactions Under 49 U.S.C. 10902 for Class III Rail Carriers); Class III carriers are exempt from labor protective conditions for line acquisitions and mergers (49 U.S.C. 11326(c)); and Class III carriers are the only carriers allowed to file Feeder Line applications (49 U.S.C. 10907(a)).

railroad industry regulation use different definitions of small business could result in lack of uniformity in the adoption of Federal regulations. In particular, an entity could be considered a small entity for purposes of FRA rules but not a small entity for purposes of STB rules. Not altering the Board's definition of a small business would also perpetuate the incongruous situation of the FRA relying on the Board's classification system as a basis for defining a small business, but the Board not doing so itself.

For the reasons set forth above, the Board will define small business for the purpose of Regulatory Flexibility Act analyses to mean those rail carriers classified as Class III rail carriers under 49 CFR 1201.1-1.

It is ordered:

1. For the purpose of Regulatory Flexibility Act analyses, the Board adopts the definition of "small business" to mean those rail carriers classified as Class III rail carriers under 49 CFR 1201.1-1.

2. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.

3. Notice of this decision will be published in the Federal Register.

4. This decision is effective on June 30, 2016.

Decided: June 22, 2016.

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

Tia Delano,

Clearance Clerk.

COMMISSIONER BEGEMAN, dissenting:

I am a strong proponent of the notice and comment process and find it especially important given the Board's extreme ex parte communication restrictions. So when the only comments received are from the stakeholders most affected, and those stakeholders express strong opposition to a Board proposal, I think we are obligated to carefully consider the concerns expressed and reassess the wisdom of our approach. Upon doing so here, I have concluded this proposal should be withdrawn.

The American Short Line and Regional Railroad Association (ASLRRA), which represents 550 Class II and Class III rail carriers across the country, filed in strong opposition to the Board's July 2013 proposal to alter its small entity definition for Regulatory Flexibility Act (RFA) purposes. ASLRRA argued that the Board's proposal to use revenue rather than number of employees (the measure developed by the Small Business Administration that agencies can use to comply with the RFA) would effectively lump all Class II carriers with Class I carriers for RFA purposes, an unreasonable outcome given the significant differences between those carrier types. ASLRRA further argued that the Board's proposal would be "detrimental to Class II carriers." I find ASLRRA's concerns alarming.

I am not convinced that the action the Board is taking today is necessary or somehow worth the potential harms described by ASLRRA. After all, the majority's decision does not dispute ASLRRA's claims. It appears the driving factor in this decision is the majority's desire to create "consistency" with the Federal Railroad Administration. While consistency may be fine, it certainly is not a very compelling

reason since the two agencies have used different small business definitions for 13 years without issue.

There are a host of stale proceedings piled up at the Board and I am all for the Chairman moving the docket. But if (after three years) the majority was merely going to dismiss the only comment received from representatives of the parties affected, there was no real point in the Board inviting comment in the first place. I dissent.

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