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SERVICE DATE – JULY 2, 2020

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 764

POLICY STATEMENT ON FACTORS CONSIDERED IN ASSESSING CIVIL MONETARY PENALTIES ON SMALL ENTITIES

Decided: July 1, 2020

AGENCY: Surface Transportation Board.

ACTION: Statement of Board Policy.

SUMMARY: The Surface Transportation Board (STB or Board) is issuing this policy statement to provide the public with information on factors the Board expects to consider in determining the appropriate level of civil monetary penalties on small entities in individual cases.

DATES: This policy statement is effective on July 22, 2020.

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

SUPPLEMENTARY INFORMATION: In this Policy Statement, the Board provides information regarding the factors it expects to consider when evaluating the possible reduction, and in appropriate circumstances the waiver, of civil monetary penalties for violations of a statutory or regulatory requirement by a small entity. Although this Policy Statement does not limit the Board's discretion to consider different factors in any particular enforcement action, it is appropriate to provide the public with general guidance regarding the agency's expected approach.

Background

Section 223 of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, 110 Stat. 847, as amended, requires each agency that regulates the activities of small entities¹ to establish a "policy or program . . . to provide for the reduction,

¹ Section 221 of SBREFA defines the term "small entity" as having the same meaning as in the Regulatory Flexibility Act (RFA), 5 U.S.C. § 601, which, in turn, allows an agency to establish an alternative definition appropriate to the agency's activities, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for notice and comment, 5 U.S.C. § 601(3). The Board pursued this route, defining "small entities" for

and under appropriate circumstances for the waiver, of civil penalties for violations of a statutory or regulatory requirement by a small entity.”² Section 223 also provides that “[u]nder appropriate circumstances, an agency may consider ability to pay in determining penalty assessments on small entities.”

The Interstate Commerce Act, as amended, provides for a variety of potential civil monetary penalties. In general, a rail carrier that “knowingly violat[es] this part [49 U.S.C. §§ 10101-11908] or an order of the Board under this part is liable to the United States Government for a civil penalty of not more than \$5,000 for each violation.” 49 U.S.C. § 11901(a).³ Similarly, “[a] person knowingly authorizing, consenting to, or permitting a violation of sections 10901 through 10906 of this title [dealing with licensing rail line constructions, mergers, and abandonments], or of a requirement or a regulation under any of those sections, is liable to the United States Government for a civil penalty of not more than \$5,000.” 49 U.S.C. § 11901(c). There are also civil monetary penalties for violations relating to, among other things, recordkeeping, reporting, and inspections. See 49 U.S.C. § 11901(e).⁴

Potential Factors for the Reduction or Waiver of Civil Monetary Penalties

Generally, Congress has given the Board discretion to impose civil monetary penalties “not more than” a certain amount. See 49 U.S.C. § 11901(a), (c), (d). In determining an appropriate amount in such cases, the Board will keep in mind that its main objective is not punishment for its own sake but rather to see that the laws it administers are followed. With compliance as its ultimate goal, the Board expects to look to the following non-exhaustive list of factors when considering whether to reduce or waive a penalty for a small entity:

purposes of implementing the RFA as including only those rail carriers classified as Class III rail carriers under 49 C.F.R. § 1201.1-1. Small Entity Size Standards Under the Regulatory Flexibility Act, EP 719 (STB served June 30, 2016). The RFA’s small business size standards (based on number of employees or average annual receipts) continue to apply to other non-rail entities under the Board’s jurisdiction.

² The Board recently became aware that the agency did not establish a formal policy or program in 1997, as required by SBREFA, regarding civil penalty enforcement for small entities. Accordingly, the Board is issuing this policy statement now.

³ Under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, enacted as part of the Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 701, 129 Stat. 584, 599-601, the Board adjusts its civil penalties for inflation annually. See, e.g., Civil Monetary Penalties—2020 Adjustment, EP 716 (Sub-No. 5) (STB served Jan. 8, 2020).

⁴ The Board’s penalty authority related to motor carriers, water carriers, brokers, and freight forwarders appears at 49 U.S.C. §§ 14901-14916. The Board’s penalty authority related to pipeline carriers appears at 49 U.S.C. §§ 16101-16106.

- **Self-Reporting:** Whether the small entity reported its own violation to the Board voluntarily, not under threat of imminent disclosure, and in a timely manner.⁵
- **Compliance History:** Whether the small entity otherwise has a record of fully complying with statutory and regulatory requirements, as well as Board orders.
- **Safeguards:** Whether the small entity, at the time of the violation, had in place a reasonable mechanism, given the entity's size and resources, to prevent, identify, and correct violations, and, if possible, to mitigate the effects of any violations that do occur.
- **Candor:** Whether the small entity forthrightly acknowledged the facts and the existence of a violation.
- **Cooperation:** Whether the small entity cooperated during any agency investigation into the violation, such as by freely providing documents and access to relevant personnel.
- **Good Faith:** Whether the small entity had a good-faith reason for noncompliance (for those violations that need not be committed "knowingly"), such as reasonable reliance on faulty advice.
- **Impact of Violation:** Whether the violation resulted in, or was likely to result in, little or no actual impact on others, including shippers, carriers, and the general public.
- **Lack of Benefit to Violator:** Whether there was an absence of any significant benefit to the small entity from the violation.
- **Deterrence:** Whether, in light of the small entity's size and resources, a reduced or waived penalty would be sufficient to deter future violations by both the small entity at issue and similarly situated small entities.
- **Impact of Penalty:** Whether the small entity has demonstrated that paying a full penalty would substantially interfere with its ability to operate or otherwise have an adverse effect on third parties not responsible for the violation, such as shippers.
- **Extenuating Circumstances:** Any other circumstance not covered above that may justify a reduction or waiver of a penalty.

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⁵ Pursuant to Executive Order 13,892, Promoting the Rule of Law Through Transparency & Fairness in Civil Administrative Enforcement & Adjudication, 84 Fed. Reg. 55,239 (Oct. 15, 2019), the Board also expects to consider this factor when determining whether to reduce or waive penalties for larger entities.

The Board expects to take into consideration the factors discussed above, together with all of the evidence and argument before it, in assessing civil monetary penalties on small entities in future cases. The Board notes, however, that because there is significant diversity among the small entities subject to the Board's jurisdiction, a flexible case-by-case approach to penalty waivers and reductions is most appropriate.⁶ Parties in individual matters are also free to raise additional factors they believe the Board should consider or to argue that one of the above-listed factors should not be considered (or should be modified).

This action is categorically excluded from environmental review under 49 C.F.R. § 1105.6(c)(6).

Congressional Review Act

Pursuant to the Congressional Review Act, 5 U.S.C. §§ 801-808, the Office of Information and Regulatory Affairs has designated this policy statement as non-major, as defined by 5 U.S.C. § 804(2).

Decided: July 1, 2020.

By the Board, Board Members Begeman, Fuchs, and Oberman.

⁶ For example, some small entities are small stand-alone switching carriers, whereas others are part of larger corporate holding companies with more resources.