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SERVICE DATE – DECEMBER 23, 2020

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 758

FILING FEE WAIVER REQUESTS

Decided: December 17, 2020

AGENCY: Surface Transportation Board.

ACTION: Final Rule.

SUMMARY: The Surface Transportation Board (Board or STB) clarifies and updates its rules regarding requests to waive or reduce certain filing fees.

DATES: This rule is effective on January 22, 2021.

FOR FURTHER INFORMATION CONTACT: Jonathon Binet at (202) 245-0368. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION: The Independent Offices Appropriations Act (IOAA), codified at 31 U.S.C. § 9701, provides that each service of value provided by an agency to a person (except those on official business of the U.S. Government) shall be self-sustaining to the extent possible and, accordingly, permits agencies to establish fees for services provided by the agency. The Office of Management and Budget (OMB) subsequently established a policy of full cost recovery for government services under which agencies must assess and collect user fees. OMB Circular A-25, User Charges (July 8, 1993). Under these authorities, the Board's predecessor—the Interstate Commerce Commission (ICC)—adopted the fee structure at 49 C.F.R. § 1002.2 to “cover all the [agency’s] expenses, including administrative expenses.” See Crystal City R.R.—Aban. Exemption—in LaSalle, Zavala, & Dimmit Cntys., Tex., AB 427X et al., slip op. at 2 (ICC served Aug. 22, 1995).

The Board's regulations also provide for waiver or reduction of filing fees in certain limited circumstances. Under 49 C.F.R. § 1002.2(e)(1), the Board's filing fees generally are waived for filings made by a federal government agency or a state or local government entity.¹

¹ For purposes of § 1002.2(e)(1), the phrases “federal government agency” or “government entity” do not include a quasi-governmental entity or government-subsidized transportation company. The Board has indicated that a quasi-governmental entity can include a public service corporation. See Reguls. Governing Fees for Servs. Performed in Connection with Licensing & Related Servs.—Pol’y Statement, 5 S.T.B. 352, 354-55 (2000).

Additionally, in “extraordinary situations,” a filing fee may be waived or reduced if the applicant shows that the waiver or reduction is in the best interest of the public or that payment of the fee would impose an undue hardship on the requestor. 49 C.F.R. § 1002.2(e)(2)(ii).

In 2000, the Board issued a policy statement that clarified its anticipated approach to fee waivers in several respects. Reguls. Governing Fees for Serv. 5 S.T.B. 352 (2000). As relevant here, the Board clarified that for state and local government entities, fees would be assessed pursuant to § 1002.2 “to any entity (a state or local governmental entity, a quasi-governmental entity, or a government-subsidized transportation company) that owns or proposes to own a carrier, or that is a shipper, and comes before the Board in that capacity. . . . The fee waiver will be available to a state or local government entity that is not acting in the capacity of a carrier or shipper.” 5 S.T.B. at 355. The Board also stated that “[f]ees will also be assessed to quasi-governmental corporations or government-subsidized transportation companies for *any filing* submitted for which there is a fee.” Id.

The Board has determined that it is appropriate to clarify its regulations and codify certain existing policies and practices to promote transparency and assist stakeholders who are considering requesting a waiver or reduction of filing fees. The Board will amend 49 C.F.R. § 1002.2(e)(1) to provide, consistent with Regulations Governing Fees for Services, that the fee waiver for government entities is not available to (1) quasi-governmental entities or government-subsidized transportation companies, or (2) any state and local government entity that is acting in the capacity of a carrier or shipper, or any such entity that owns or proposes to own a carrier and is before the agency in its proprietary role. As explained in Regulations Governing Fees for Services, when government entities are acting in a commercial capacity, they should be treated the same as any other entity that acts in a commercial capacity for purposes of fee waivers. 5 S.T.B. at 354-55.² This approach balances Congress’ policy that agencies provide services in a manner that is “self-sustaining to the extent possible” through collection of fees, 31 U.S.C. § 9701(a), with the agency’s longstanding view that government entities should not generally be charged fees when the benefits of their actions flow to the general public. See 5 S.T.B. at 354-55.

The Board will also clarify in § 1002.2(e)(1) and (e)(2) how applicants for fee waivers or reductions will be notified of decisions on their requests, consistent with the Board’s existing practices. In certain circumstances when a fee waiver request is granted under § 1002.2(e)(1) during the processing of the filing, the filing will be stamped “Filing Fee Waived” and posted in the public docket, and the Board need not provide any further notice to the applicant that the fee waiver request was granted.³ In all other circumstances, if a request for a fee waiver or reduction

² The fee waiver for federal government agencies, which is based on the IOAA’s waiver for persons on official business of the United States Government, will continue to apply. Reguls. Governing Fees for Serv., 5 S.T.B. at 353.

³ This process is only used in limited circumstances where it is clear that the government-entity applicant qualifies for a waiver of the fee (e.g., when a government entity requests to extend a negotiating period under a notice of interim trail use or abandonment).

is granted or denied under either § 1002.2(e)(1) or (e)(2), the Board, through the Chief of the Section of Administration in the Office of Proceedings, will notify the applicant by letter.⁴

Additionally, the Board has held that third parties lack any legal interest in, and therefore cannot challenge or appeal, the grant or denial of a fee waiver or reduction request. Hartwell First United Methodist Church—Adverse Aban. & Discontinuance—Great Walton R.R., AB 1242 (STB served June 2, 2017). The Board will codify that principle by amending 49 C.F.R. § 1002.2(e) to provide that third-party appeals of fee waiver or reduction decisions are not permitted.

Finally, the Board will amend the language in 49 C.F.R. § 1002.2(e) to consistently refer to the entity seeking a fee waiver or reduction as the “fee waiver applicant.”

Administrative Procedure Act

Under the Administrative Procedure Act (APA), the public generally may participate in the promulgation of rules through a notice and comment period. 5 U.S.C. § 553(b) & (c). However, an agency may publish “rules of agency organization, procedure, or practice” in final form without notice and comment. See 5 U.S.C. § 553(b)(3)(A). Because the Board has determined that these updates to its regulations relate to agency organization, practice, and procedure, the Board finds that notice and public comment on these changes is unnecessary.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. §§ 601-612, generally requires an agency to prepare a regulatory flexibility analysis of any rules subject to notice-and-comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Because the Board has determined that notice and comment are not required under the APA for these rulemakings, the requirements of the RFA do not apply.

Paperwork Reduction Act

These final rules do not require a new or amended information collection under the Paperwork Reduction Act of 1995, 44 U.S.C. §§ 3501-3521.

Congressional Review Act

The Board has determined that this action is not a rule as defined by the Congressional Review Act, 5 U.S.C. § 804(3).

⁴ Pursuant to 49 C.F.R. § 1104.12(d), service of decisions and other Board issuances as appropriate will be made by electronic means except in the case of paper filers that have not consented to e-service, in which case service upon that recipient will be made by mail.

List of Subjects

49 C.F.R. Part 1002

Administrative Practice and Procedure

Common Carriers

Freedom of information

It is ordered:

1. The Board adopts the final rules as set forth in this decision. Notice of the adopted rules will be published in the Federal Register.

2. This decision is effective on January 22, 2021.

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

APPENDIX

Code of Federal Regulations

For the reasons set forth in the preamble, the Surface Transportation Board amends part 1002 of title 49, chapter X, of the Code of Federal Regulations as follows:

PART 1002 – FEES

1. The authority citation for part 1002 continues to read as follows:

Authority: 5 U.S.C. 552(a)(4)(A), (a)(6)(B), and 553; 31 U.S.C. 9701; and 49 U.S.C. 1321.

2. Amend § 1002.2 by revising paragraphs (e)(1), (e)(2)(i), (ii), and (iii), and adding paragraph (e)(3) to read as follows:

§ 1002.2 Filing fees.

* * * * *

(e) * * *

(1) Except as noted in this paragraph (e)(1), filing fees are waived for an application, petition, notice, tariff, contract summary, or other document that is filed by a federal government agency or a state or local government entity. A fee waiver is not available under this paragraph for a quasi-governmental entity or government-subsidized transportation company. A fee waiver is also not available to any state or local government entity that is acting in the capacity of a carrier or shipper or that owns or proposes to own a carrier and is before the agency in its proprietary role.

(i) *When to request.* At the time that a filing is submitted to the Board, the fee waiver applicant may request a waiver of the fee prescribed in this part. Such request should be addressed to the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board.

(ii) *Board action.* The Board will either stamp the relevant filing with the notation “Filing Fee Waived,” or the fee waiver applicant will be notified of the decision to grant or deny the request for waiver by the Chief, Section of Administration, Office of Proceedings.

(2) * * *

(i) *When to request.* At the time that a filing is submitted to the Board, the fee waiver applicant may request a waiver or reduction of the fee prescribed in this part. Such request should be addressed to the Chief, Section of Administration, Office of Proceedings.

(ii) *Basis.* The fee waiver applicant must show the waiver or reduction of the fee is in the best interest of the public, or that payment of the fee would impose an undue hardship on the fee waiver applicant.

(iii) *Board action.* The Chief, Section of Administration, Office of Proceedings will notify the fee waiver applicant of the decision to grant or deny the request for waiver or reduction.

(3) *Review.* No third-party appeals of fee waiver or reduction decisions are permitted.
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