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SERVICE DATE – FEBRUARY 15, 2011

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 542 (Sub-No. 18)

REGULATIONS GOVERNING FEES FOR SERVICES

Decided: February 14, 2011

AGENCY: Surface Transportation Board.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Board proposes to amend the regulations governing user fees for services performed. The proposed amendment would set the fee for sub-items 56(i), 56(ii), and 56(iv) of the Board's fee schedule, 49 C.F.R. § 1002.2(f), Part V, at \$350.

DATES: Comments on this proposal are due by April 19, 2011; and replies are due by May 19, 2011.

ADDRESSES: Comments may be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the E-Filing link on the Board's website, at <http://www.stb.dot.gov>. Any person submitting a filing in the traditional paper format should send an original and 10 copies to: Surface Transportation Board, Attn: Docket No. EP 542 (Sub-No. 18), 395 E Street, S.W., Washington, DC 20423-0001.

Copies of paper comments will be available for viewing and self-copying at the Board's Public Docket Room, Room 131; paper and electronic copies will be posted to the Board's website.

FOR FURTHER INFORMATION CONTACT: Valerie Quinn at 202-245-0382. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.

SUPPLEMENTARY INFORMATION: The Board sets user fees in accordance with the Independent Offices Appropriation Act of 1952 (IOAA). The IOAA directs agencies such as the Board to establish fees for specific services that it provides to identifiable recipients, so that the service provided may be "self-sustaining to the extent possible." 31 U.S.C. § 9701(a). The fees must be "fair" and be based on a variety of factors, including (but not limited to) the costs to the agency of each covered service, public policy or interest served, and the value of the service to

the entity receiving it. 31 U.S.C. § 9701(b). The Board's fees transfer some of the cost of funding the agency from the general taxpayer to the entity receiving the benefit of a particular Board action.¹

Historically, certain fees have been set at levels below the full cost. For example, fee sub-item 58(i), a petition for declaratory order involving a dispute over an existing rate or practice, and fee sub-item 58(ii), all other petitions for declaratory order, were held at \$1,000 and \$1,400, respectively, well below full cost to agency, to avoid any possible "chilling effect"² that higher fees would have on access by shippers and consumers to the Board's adjudicatory process. See Regulations Governing Fees for Servs. Performed in Connection With Licensing and Related Servs., 1 S.T.B. 179, 199-200 (1996). Filing fees for formal complaints generally have been set based on a percentage of the full cost. Id. at 195-99. Since 2008, pursuant to Congressional directive, we have held the fees for all rate complaints at or below \$350, the level of filing fees for complaints in district court. Fees for competitive access complaints and complaints seeking establishment of a common carrier rate are also below \$350.

Thus, in our current fee structure, we have a large gap between the relatively low fees for most complaints and for petitions for declaratory orders and the \$20,600 fee for all other formal complaints, a gap that is not good public policy. Therefore, the Board proposes to lower the fee for sub-item 56(iv) [all other formal complaints except competitive access] from \$20,600 to \$350. Under this proposal, the fee for sub-items 56(i) [full Stand-Alone Cost rate complaints] and 56(ii) [Simplified-SAC rate complaints] would be set at \$350, and the fee for sub-item 56(iii) [Three Benchmark rate complaints], the most likely path to rate relief for small shippers, would remain at \$150.

We believe three sound public policy considerations call for the Board to set relatively low fees for filing a complaint. Under the ICC Termination Act of 1995,³ Congress eliminated authority previously held by the ICC to initiate investigations of alleged illegal or unreasonable rates or practices. As a result, the filing of a complaint by shippers or other entities is the Board's only mechanism for investigating and addressing potential rate violations or other unlawful practices.

Second, it is possible that the relatively high fees for filing formal complaints under item 56(iv) – currently \$20,600 – may be having a chilling effect on shippers and other entities seeking to bring a complaint to the Board. For example, over the past 10 years, our Rail Consumer and Public Assistance unit has assessed hundreds of informal complaints related to

¹ The fees established by the Board for specific services offset the Board's appropriated funding, and do not directly add to it.

² The Interstate Commerce Commission (ICC) previously defined a "chilling effect" as the level at which the filing fee represents a significant factor in determining whether to bring a complaint. See Regulations Governing Fees for Servs. Performed in Connection With Licensing and Related Servs., 1 I.C.C. 2d 196, 198 (1984).

³ Pub. L. No. 104-88, 109 Stat. 803 (1995).

service and demurrage, and although many have been successfully resolved, several that were unresolved did not become the subjects of formal complaints. While we presume that some of these cases were not brought before the Board for reasons unrelated to fees, the proposed fee amendment would minimize any chilling effect of high fees, and encourage outside parties to bring potential regulatory violations before the Board for adjudication.

Finally, the proposed amendment should result in better management of the Board's docket and use of Board resources. Maintaining comparatively low filing fees for petitions for declaratory orders, coupled with the high fee for complaints (other than rate or competitive access complaints) under fee item 56(iv), appears to have led parties to seek broad declarations by the Board rather than asking the Board to resolve individual complaints. In some cases, an individual complaint may have been preferable and the Board's fee structure should not be the deciding factor in a party's decision of what type of case to bring.

While not part of the changes proposed here, we intend, in a future proceeding, to consider revising the fees for declaratory order proceedings to better reflect the cost of these proceedings to the agency. However, to encourage courts to continue to seek our advice, when appropriate, under the doctrine of primary jurisdiction, and so as not to unduly burden parties, we also intend to establish a new, comparatively low fee item for petitions for declaratory order that result from court referrals.

The Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601-612, generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. In drafting a rule an agency is required to: (1) assess the effect that its regulation will have on small entities; (2) analyze effective alternatives that may minimize a regulation's impact; and (3) make the analysis available for public comment. 5 U.S.C. §§ 601-604. In its notice of proposed rulemaking, the agency must either include an initial regulatory flexibility analysis, 5 U.S.C. § 603(a), or certify that the proposed rule will not have a "significant impact on a substantial number of small entities," 5 U.S.C. § 605(b). The impact must be a direct impact on small entities "whose conduct is circumscribed or mandated" by the proposed rule. White Eagle Coop. Ass'n v. Conner, 553 F.3d 467, 480 (7th Cir. 2009).

Though these rules may impact some small entities because they may be subject to a filing fee, the fees proposed above would change only the fee for "all other formal complaints except competitive access complaints," by reducing that fee from \$20,600 to \$350. Accordingly, pursuant to 5 U.S.C. § 605(b), the Board certifies that the regulations proposed herein would not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

This rulemaking will affect the following subjects:

49 CFR Part 1002

Administrative practice and procedure, Common carriers, Freedom of information.

It is ordered:

1. Comments addressing the proposals discussed herein are due by April 19, 2011; and replies are due by May 19, 2011.
2. Notice of this decision will be published in the Federal Register.
3. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Nottingham, and Commissioner Mulvey.

Appendix

Code of Federal Regulations

For reasons set forth in the preamble, the Surface Transportation Board proposes to amend title 49, chapter X, part 1002, 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) and § 553; 31 U.S.C. § 9701 and 49 U.S.C. § 721(a). Section 1002.1(g)(11) also issued under 5 U.S.C. § 5514 and 31 U.S.C. § 3717.

2. Revise § 1002.2, paragraph (f)(56)(iv) to read as follows:

§ 1002.2 Filing fees.

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(f) * * *

PART V: Formal Proceedings:	
* * *	
(56) A formal complaint alleging unlawful rates or practices of carriers:	
(i) A formal complaint filed under the coal rate guidelines (Stand-Alone Cost Methodology) alleging unlawful rates and/or practices of rail carriers under 49 U.S.C. 10704(c)(1)	\$350.
(ii) A formal complaint involving rail maximum rates filed under the Simplified-SAC methodology	\$350.
(iii) A formal complaint involving rail maximum rates filed under the Three Benchmark methodology.	\$150.
(iv) All other formal complaints (except competitive access complaints)	\$350.
(v) Competitive access complaints.	\$150.
(vi) A request for an order compelling a rail carrier to	

establish a common carrier rate.	\$250.
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