

STB EX PARTE NO. 542 (SUB-NO. 6)

REGULATIONS GOVERNING FEES FOR SERVICES
PERFORMED IN CONNECTION WITH
LICENSING AND RELATED SERVICES
— POLICY STATEMENT —

Decided November 29, 2000

AGENCY: Surface Transportation Board
ACTION: Policy Statement.
SUMMARY: The Surface Transportation Board (Board) announces that henceforth it will apply its rule providing for a waiver of filing fees for state and local government entities only as originally intended. More specifically, the fee waiver rule will apply only to state and local government entities and only when they file on behalf of the general public. Any state or local government entity filing as an owner or proposed owner of a carrier or as a shipper, as well as quasi-governmental corporations and government-subsidized transportation companies, will not qualify for the fee waiver.

DATES: This policy statement is effective January 5, 2001.

FOR FURTHER INFORMATION CONTACT: Anne K. Quinlan, (202) 565-1727 [TDD/TTY for the hearing impaired: 1-800-877-8339].

SUPPLEMENTARY INFORMATION: Under the Independent Offices Appropriations Act, 31 U.S.C. 9701 (IOAA), agencies are obliged to establish fees for specific services provided to identifiable beneficiaries.¹ Office of

¹ 31 U.S.C. 9701 provides, in pertinent part:

(a) It is the sense of Congress that each service or thing of value provided by an agency * * * to a person (except a person on official business of the United States Government) is to be self-sustaining to the extent possible.

(b) The head of each agency * * * may prescribe regulations establishing the charge for a service or thing of value provided by the agency. Regulations prescribed by the heads of executive agencies are subject to the policies prescribed by the President and shall be as uniform as practicable. Each charge shall be —

(1) fair; and

(continued...)

Management and Budget (OMB) Circular No. A-25 establishes a policy of full cost recovery for government services and contains guidelines for federal agencies to apply in assessing and collecting those fees.

Pursuant to the IOAA and Circular No. A-25, the Board's predecessor, the Interstate Commerce Commission (ICC), undertook a thorough examination of the fee policy in *Regulations Governing Fees for Services*, 1 I.C.C.2d 60 (1984) (*Fees for Services*). The ICC adopted numerous new fee items and provided for fee waivers in certain circumstances, including a fee waiver for government entities, 49 CFR 1002.2(e)(1). In so doing, the ICC established strict guidelines for applying the government-entity fee waiver — a policy that the Board will henceforth follow more strictly in applying the rule.

Rule 1002.2(e)(1) provides as follows:

(e) *Waiver or reduction of filing fees.* It is the general policy of the Board not to waive or reduce filing fees except as described below:

(1) Filing fees are waived for an application or other proceeding which is filed by a federal government agency, or a state or local government entity. For purposes of this section the phrases "federal government agency" or "government entity" do not include a quasi-governmental corporation or government subsidized transportation company.

The fee waiver for federal government agencies is based on the IOAA, which excludes from its scope persons on official business of the United States Government. The fee waiver for state and local government entities was based on the provisions of former Circular No. A-25 that allowed agencies to make exceptions to the policy of full cost recovery where the recipient of a service was engaged in a non-profit activity designed for the public safety, health, or welfare, or if payment of the full fee by a state, local government, or non-profit group would not be in the interest of the program.²

In the *Fees for Services* proceeding, the ICC originally proposed to assess 50% of applicable fees to state or local government entities. It ultimately decided, however, to assess no fee to state and local government entities. The

¹(...continued)

(2) based on —

- (A) the costs to the Government;
- (B) the value of the service or thing to the recipient;
- (C) public policy or interest served; and
- (D) other relevant facts.

² Circular No. A-25, revised in 1993, no longer contains an exception from the policy of full cost recovery for state and local governments.

agency explained that state and local government entities generally do not receive direct benefits from participation in agency proceedings and that the benefits instead flow to the general public residing in the area. *Fees for Services* at 89. But the ICC limited the circumstances under which the fee waiver would apply, specifically providing that the waiver should not apply where a state agency owns a carrier and is before the ICC in its proprietary role. The ICC stated (*id.* at 71):

[W]e conclude here that when a governmental agency owns or subsidizes some transportation entity and comes before the Commission in that capacity, it should be required to pay the entire fee that would otherwise be applicable. When a State-owned transportation entity acts in the same capacity as a privately owned transportation entity, it should be treated as such. The Interstate Commerce Act does not exempt such transportation entities, and we do not believe that those entities should be treated differently from private transportation entities for purposes of determining user fees.

The State-owned carrier in those situations receives the "special benefits" envisioned under the IOAA and Budget Circular A-25. We recognize that there may be public benefits associated with a State-owned entity. However, those public benefits are indistinguishable from the public benefits that are incidental to the special benefits conferred upon private carriers in a similar posture. Therefore, we believe fees should be charged to the state-owned entities.

In recent years the fee waiver for state and local government entities rule has been applied more broadly than envisioned in *Fees for Services*. We have waived fees in cases where the filer has been a state or local government entity acting in a proprietary capacity as a carrier. For example, the fee waiver has been applied where states, state agencies and local transportation authorities and districts have submitted filings to acquire rail lines, usually for operation by a third party. We also have waived fees where the filer has been a quasi-government corporation. For example, waivers have been granted if the filer demonstrated that it was created through legislation designed to meet a public purpose.

Public corporations are created by statute for public purposes only and the interests of public corporations are the exclusive property and domain of the government. Private corporations, on the other hand, are created for private, rather than purely public, purposes and their powers are exercised for the profit or advantage of the stockholders. Quasi-public (or quasi-governmental) corporations, commonly referred to as public service corporations, have the appearance of being public, but in many respects they are private. Quasi-public corporations are private corporations that have special powers or privileges of a public nature, such as the power of eminent domain, to enable them to carry out those functions that benefit the public; but they also exercise their powers to further the interests of their stockholders. Corporations are not considered public

merely because they are creatures of legislation or established to promote the public interest. In our view, only the true public corporation should qualify for a waiver. Whether a corporation should be considered public or not depends on the terms of its charter and the laws under which it has been organized.

We are not, through this policy, seeking to inhibit parties from using our processes, or to undercut transactions by which, for example, local bodies attempt to facilitate continued rail service. But Congress has directed us to collect appropriate fees, and we must make every effort to conform our fee assessment and collection practices to the policy of full cost recovery that underlies the IOAA and Circular No. A-25. Thus, filers must henceforth clearly demonstrate that they are true public corporations in order to qualify for the fee waiver. Fees will be assessed 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. *See Fees for Services* at 71. Fees will also be assessed to quasi-governmental corporations or government-subsidized transportation companies for *any filing* submitted for which there is a fee. 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. Thus, for example, a state or local entity filing an adverse (or third party) abandonment proposal would benefit from the waiver rule because the filer would not be appearing as a carrier or as a shipper.

Entities that do not qualify for the fee waiver may request a fee waiver or reduction in fees under 49 CFR 1002.2(e)(2), which provides that in extraordinary situations the Board will waive or reduce fees. The requestor must show 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.

As a final matter, we are clarifying the process by which waiver requests will be administered at the Board. Currently, a waiver request must be submitted at the time the related filing is submitted, and a filing (other than a tariff) not accompanied by the appropriate fee is deficient. *See* 49 CFR 1002.2(e)(2)(i), 1002.2(b). Waiver requests are considered only when accompanied by the related filing; waiver requests submitted in advance of the filing to which they relate are not accepted. When a waiver request is accompanied by the related filing and the appropriate fee, the filing is processed immediately, the fee is deposited, and the waiver request is acted upon in due course. If the waiver is granted, the filer receives a refund from the U. S. Department of the Treasury.

We understand that some parties may find it financially burdensome to submit the fee and then run the risk that the waiver will not be granted. We will permit parties to file waiver requests without submitting the fees; however, as we sometimes need to review the substantive document in order to determine

whether the waiver ought to be granted, we will not accept a waiver request unless the substantive document is also filed. Moreover, if a waiver request is filed with the related filing but without the appropriate fee, we will be unable to process the substantive filing until the fee issue is resolved. Therefore, whenever a waiver request is filed without an appropriate fee, the substantive filing will be processed only after the waiver request has been granted or, if the request is denied, upon receipt of the appropriate fee. A filer seeking a waiver and prompt processing of a filing should, therefore, submit the fee, the related filing and the waiver request simultaneously.

The legal and policy bases underlying rule 1002.2(e)(1) already have been established in *Fees for Services*. Thus, we do not propose a new rule or policy here, but rather announce a stricter adherence to a policy that has already been established and was never formally changed. For that reason, we do not seek public comment on this announcement that we will henceforth follow this policy more literally.

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.