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SERVICE DATE – DECEMBER 17, 2009

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 684

SOLID WASTE RAIL TRANSFER FACILITIES

Decided: December 16, 2009

This decision provides the factual basis for the Board's certification under 5 U.S.C. 605(b) of the Regulatory Flexibility Act that the interim rules governing the submission and review of applications for land-use-exemption permits and related filings under 49 CFR 1155 will not have a significant economic impact on a substantial number of small entities.

BACKGROUND

The Clean Railroads Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848 (Clean Railroads Act or CRA), enacted October 16, 2008, removed from the jurisdiction of the Surface Transportation Board the regulation of solid waste rail transfer facilities,¹ except as provided for in that act. The CRA limited the Board's authority with regard to solid waste rail transfer facilities to the issuance of land-use-exemption permits, a license that preempts a facility from compliance with state laws, regulations, orders, and other requirements affecting the siting of the facility.² On January 14, 2009, the Board served a notice of proposed rulemaking that set forth proposed procedures governing the submission and review of applications for land-use-exemption permits and related filings. See Solid Waste Rail Transfer Facilities, STB Ex Parte No. 684 (STB served Jan. 14, 2009) (January 14 Notice). Pursuant to 49 U.S.C. 10909(b), those proposed rules serve as the current interim rules.

In accordance with 5 U.S.C. 605(b) of the Regulatory Flexibility Act, we certified in the January 14 Notice that the proposed action would not have a significant economic impact on a substantial number of small entities. The Board also sought comment on the interim rules and

¹ The CRA defines a solid waste transfer facility as including the portion of a facility: (1) that is owned or operated by or on behalf of a rail carrier; (2) where solid waste is treated as a commodity transported for a charge; (3) where the solid waste is collected, stored, separated, processed, treated, managed, disposed of, or transferred; and (4) to the extent that solid-waste activity is conducted outside of the original shipping container. 49 U.S.C. 10908(e)(1)(H)(i).

² The Board, however, has the authority to require as a condition of the permit compliance with State laws, regulations, orders, and other requirements that affect the siting of a facility. 49 U.S.C. 10909(f).

the Board's interpretation of the CRA. During the time period allotted for comments, we received a request that we publish the factual basis for our certification and allow comments on it. See Salem Rail Logistics Comments at 3.

DISCUSSION AND CONCLUSIONS

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601-612, generally requires a description and analysis of new rules that will have a 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. When proposing new rules, 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).

In the January 14 Notice, the Board certified that the interim rules would not have a significant economic impact on a substantial number of small entities. The basis for that determination is as follows. While applicants for land-use-exemption permits could be small entities, as defined in 13 CFR Part 121, nothing in the interim rules gives the Board the authority, on its own volition, to require a party to apply for a Board permit. See 49 U.S.C. 10908(b)(2)(B), 10909(a); January 14 Notice, slip op. at 8-9. In general, that decision is solely within the control of the entity. The one exception is that a governor of the State in which an existing facility is located could petition the Board under 49 CFR 1155 Subpart B to require that facility to obtain a land-use-exemption permit in order for it to continue to operate. 49 U.S.C. 10908(b)(2)(B). But even in that circumstance, the authority lies with the State governors—not the Board—to initiate the Board's processes. Id. In all other scenarios, a party can avoid being subject to the Board's rules regarding land-use-exemption permits by complying with State requirements. Therefore, the interim rules will not circumscribe or mandate the conduct of a substantial number of small entities.

Moreover, there are no alternatives to the interim rules that would adequately achieve the objectives of the Clean Railroads Act. The only scenario in which a small entity might be compelled to avail itself of the new Board processes (when a State governor has properly petitioned the Board under 49 CFR 1155 Subpart B) must be included in the new rules because it is specifically required under the CRA. 49 U.S.C. 10908(b)(2)(B). Finally, we have provided a waiver provision that could mitigate any significant negative impact on small entities—an applicant may request a waiver of any particular part of the application procedures. See 49 CFR 1155.24(d)(2).

Pursuant to 5 U.S.C. 605(b), the factual basis for the certification that the regulations proposed in the January 14 Notice will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act has hereby been provided. Comments regarding this certification and its factual basis as described in this

decision will be due by January 6, 2010, and replies to those comments will be due by January 19, 2010.

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

It is ordered:

1. Comments on the Board's Regulatory Flexibility Act factual basis contained herein are due by January 6, 2010, and reply comments are due by January 19, 2010.

2. This decision will be published in the Federal Register.

3. This decision will be served upon the Chief Counsel for Advocacy, Offices of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

4. This decision is effective on its service date.

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