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SERVICE DATE – MAY 9, 2019

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 743

WATER CARRIER TARIFF FILING PROCEDURES

Decided: May 6, 2019

AGENCY: Surface Transportation Board.

ACTION: Final Rule.

SUMMARY: The Surface Transportation Board (STB or Board) adopts a new procedure for water carriers operating in the noncontiguous domestic trade to electronically publish, file, and keep tariffs available for public inspection.

DATES: This rule is effective on June 8, 2019.

ADDRESSES: Requests for information or questions regarding this final rule should reference Docket No. EP 743 and be submitted via the Board's e-filing format or in writing addressed to: Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001. Any person using e-filing should attach a document and otherwise comply with the instructions found on the Board's website at www.stb.gov at the E-Filing link.

FOR FURTHER INFORMATION CONTACT: Michael Higgins at 202-245-0284. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION: In April 2017, the Board established its Regulatory Reform Task Force (RRTF) to comply with the spirit of Executive Order 13,777. The primary objective of the RRTF is to identify Board rules and practices that are burdensome, unnecessary, or outdated and to recommend how they should be addressed. See Regulatory Reform Task Force, EP 738 (STB served June 20, 2017). The RRTF identified the current water carrier tariff regulations at 49 C.F.R. part 1312 as imposing unnecessary costs on the carriers as well as the Board. See RRTF 90-Day Status Report (issued May 25, 2017); RRTF Status Report (issued

Nov. 21, 2017).¹ Water carriers operating in the noncontiguous domestic trade² are required to publish, file, and keep available for public inspection tariffs setting forth their rates, charges, rules, and classifications. 49 U.S.C. § 13702(a)-(b).³ The Board’s current regulations for filing water carrier tariffs contemplate the filings of tariffs with the Board in paper format. However, the Board has granted Special Tariff Authority—relief from the current regulations on a case-by-case basis—to allow water carriers to file their tariffs in alternative electronic formats, typically email.⁴ For many carriers, these email submissions are a daily occurrence.

The Board issued a notice of proposed rulemaking that proposed to update the regulations to allow water carriers⁵ to electronically publish, file, and keep tariffs available for public inspection. Water Carrier Tariff Filing Procedures (NPRM), EP 743 (STB served Dec. 21, 2018) (83 Fed. Reg. 66,229).⁶ The Board received comments on the NPRM from Tropical Shipping and Construction Co., Ltd. (Tropical), The Pasha Group (Pasha), and TOTE, LLC (TOTE). After considering the comments, the Board is adopting the rule proposed in the NPRM, without substantive change, as a final rule. The attached Appendix contains the text of the final rule.

Proposed Rule. The NPRM proposed to revise 49 C.F.R. part 1312 to include regulations which would allow water carriers to publish, file, and keep their tariffs electronically, but would also continue to allow water carriers the option of filing their tariffs in paper format. Specifically, under the proposal, a water carrier would be permitted to comply with the filing requirement in 49 U.S.C. § 13702 by: (1) maintaining a publicly available version of its current and historical tariffs on the Internet, and (2) electronically filing (e-filing) with the Board an annual certification made by a duly authorized corporate officer of the carrier that (a) contains an active link⁷ to the Internet location and access information for its tariffs and (b) affirms the water carrier’s continuing compliance with the relevant sections of Part 1312. The proposed

¹ These status reports can be accessed on the Board’s website.

² Noncontiguous domestic trade means “transportation subject to jurisdiction under chapter 135 involving traffic originating in or destined to Alaska, Hawaii, or a territory or possession of the United States.” 49 U.S.C. § 13102(17).

³ Section 13702(a)(1) includes an exception from the tariff filing requirement for bulk cargo, forest products, recycled metal scrap, waste paper, and paper waste.

⁴ Under 49 C.F.R. § 1312.2(e), a water carrier may apply for Special Tariff Authority.

⁵ Many water carriers use third-party service providers to manage and maintain their tariffs on the Internet.

⁶ The NPRM provides additional information on the background of water carrier tariff requirements.

⁷ To comply with the proposed rule, if the Internet address for a water carrier’s tariff system changes during the 12-month period following the filing of its annual certification, the water carrier would need to adhere to the proposed outage requirements at 49 C.F.R. § 1312.4(b)(3) and provide the Board an updated certification with an active link as soon as possible.

regulation, at 49 C.F.R. § 1312.4(b), listed the requirements for the annual certification and provided sample language to be used in the certification.

As explained in the NPRM and proposed at 49 C.F.R. § 1312.4(b)(3), advance notification to the Board would be required if a water carrier anticipates an outage of its electronic tariff system. NPRM, EP 743, slip op. at 5. In circumstances beyond the carrier's control (such as a software malfunction), the carrier would be required to notify the Board promptly via email at tariffs@stb.gov. Id. In the event of any tariff system outage, carriers would be required to make alternative arrangements with the Board to ensure that the agency and public have access to the tariffs in effect during the outage, and the Board would provide that information on its website so that the public would be made aware of the particular outage as soon as reasonably possible. Id.

The proposed electronic archiving requirement under 49 C.F.R. § 1312.4(b)(4) would require a water carrier to maintain historical versions of its tariffs, including all rates and applicable rules, for a period of not less than five years, beginning when a carrier first electronically files its tariffs. Id. at 11. Tariffs kept on the Internet would also need to comply with the proposed addition to 49 C.F.R. § 1312.3, requiring that water carriers provide the date on which tariffs or changes to tariffs first appear on the Internet and the date on which they are expected to become effective. Id. at 5. The rule would not prescribe the specific information technology resources (programming, applications or software, etc.) that water carriers must use to house this information, but any electronic system selected by a carrier would need to comply with regulatory requirements and allow access by the Board and any member of the public who requests it, free of charge. Id.

The NPRM explained that to utilize e-filing, a filer would first pay the required fee⁸ via electronic payment through Pay.gov.⁹ NPRM, EP 743, slip op. at 4. Once the payment has been submitted, a confirmation email from Pay.gov would be sent containing a unique transaction number. The filer would then go to the Board's e-filing website and, through a registered account, submit the transaction number received from Pay.gov and attach the annual certification. Once the certification is received and verified, the Director of the Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC) or a designee would acknowledge receipt of the annual certification in writing. Id.

Under the proposed regulations, the Board would create a webpage that provides links to the location of a water carrier's current tariff, the most recent annual certification, and prior certifications. NPRM, EP 743, slip op. at 4. It is expected that this webpage could be accessed by the Board and public and that the Internet links to water carrier tariffs would be available

⁸ The Board proposed an expansion of fee item 78 at 49 C.F.R. § 1002.2(f), to reflect the filing fee associated with the annual certification. The final rule adopted here also adds a heading to paragraph (b) of § 1002.2.

⁹ Recently, the Board updated its regulations to add an electronic payment option at 49 C.F.R. § 1002.2(a). See Payment, Filing, & Service Procedures, EP 747 (STB served Mar. 22, 2019) (84 Fed. Reg. 12,940). As of May 10, 2019, the Board will accept electronic payment of fees through Pay.gov.

24 hours a day, seven days a week, year-round. *Id.* at 4-5. Access to water carrier tariffs filed in paper format would continue to be available to the public via requests to OPAGAC.

By adding an e-filing option to the regulations, the proposed rule would eliminate the option to obtain tariff filing relief under the existing Special Tariff Authority application process, and would revoke all prior grants of Special Tariff Authority. *NPRM*, EP 743, slip op. at 4 (citing 49 C.F.R. § 1312.2(e)). The proposed changes would require water carriers to either file their tariffs in paper format or electronically as outlined here.

Comments. As noted above, the Board received comments on the *NPRM* from Tropical, Pasha, and TOTE. The comments uniformly supported the proposal to allow water carriers to publish, file, and keep their tariffs electronically. Tropical and Pasha both state that the proposal would reduce the regulatory burden on water carriers, allowing them to function in a more efficient and less costly manner. (Tropical Comments 2; Pasha Comments 2.) TOTE supports the comments submitted by Tropical and Pasha, and states that its subsidiaries would realize substantial savings from the proposed rule, and that the public interest will be protected through the Board's ongoing regulatory oversight of water carriers. (TOTE Comments 2.)

Final Rule. After considering the comments, the Board is adopting the rule proposed in the *NPRM*, without substantive change, as a final rule. The only modification from the proposed electronic filing procedure is changing the due date for the annual certification from the first business day of February to the first business day of October in order to allow water carriers to more quickly utilize this option. Water carriers may continue to file under their existing Special Tariff Authority until the first due date of the annual certification, which will be October 1, 2019, at which time grants of Special Tariff Authority will be automatically revoked.¹⁰ It is anticipated that the final rule will significantly reduce the burdens associated with the current tariff filing requirements. The new e-filing tariff procedures will also allow the public to easily access current and historical tariffs without requesting them from the Board, resulting in time and cost savings for both the Board and the public. The attached Appendix contains the text of the final rule.

Regulatory Flexibility Act. The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. §§ 601-612, generally requires a description and analysis of new rules that would 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. §§ 601-604. In its final rule, the agency must either include a final regulatory flexibility analysis, § 604(a), or certify that the final rule would not have a "significant impact on a substantial number of small entities," § 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. v. Conner*, 553 F.3d 467, 480 (7th Cir. 2009).

¹⁰ Water carriers that have filed tariff updates within the past year will be served a copy of this decision.

In the NPRM, the Board certified under 5 U.S.C. § 605(b) that the proposed rule would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA.¹¹ The Board explained that the proposed rule would not place any additional burden on small entities because the proposed rule would provide new procedures for water carriers operating in noncontiguous domestic trade to electronically publish, file, and keep tariffs available for public inspection. The new regulations would be an option to eliminate the burdens associated with the current tariff filing requirements. No parties submitted comments on this issue. A copy of the NPRM was served on the U.S. Small Business Administration.

The final rule adopts the procedures proposed in the NPRM, with the revision of the due date for the annual certification. Therefore, the Board certifies under 5 U.S.C. § 605(b) that the final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. 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.

Paperwork Reduction Act. In this proceeding, the Board is modifying an existing collection of information that is currently approved by the Office of Management and Budget (OMB) under OMB Control No. 2140-0026. In the NPRM, the Board sought comments pursuant to the Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3521, and OMB regulations at 5 C.F.R. § 1320.11 regarding: (1) whether the collection of information associated with the proposed changes to the OFA regulations is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility; (2) the accuracy of the Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate. No comments were received pertaining to the collection of this information under the PRA.

This modification to an existing collection will be submitted to OMB for review as required under the PRA, 44 U.S.C. § 3507(d), and 5 C.F.R. § 1320.11.

List of Subjects

49 C.F.R. Part 1002

¹¹ The Small Business Administration's Office of Size Standards has established a size standard for water transportation, pursuant to which deep sea freight transportation is considered small if its number of employees is 500 or less, and coastal and Great Lakes freight transportation is considered small if its number of employees is 750 or less. 13 C.F.R. § 121.201 (industry subsector 483).

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

49 C.F.R. Part 1312

Freight forwarders, Maritime carriers, Motor carriers, Pipelines, Railroads, Reporting and recordkeeping requirements.

It is ordered:

1. The Board adopts the final rule as set forth in this decision. Notice of the adopted rule will be published in the Federal Register.
2. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.
3. This decision is effective June 8, 2019.

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

**Appendix A
Code of Federal Regulations**

For the reasons set forth in the preamble, the Surface Transportation Board amends parts 1002 and 1312 of title 49, chapter X, of the Code of Federal Regulations as follows:

PART 1002—FEES

1. The authority citation for part 1002 is revised 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. Section 1002.1(f)(11) is also issued under 5 U.S.C. 5514 and 31 U.S.C. 3717.

2. Amend § 1002.2 as follows:
 - a. In paragraph (b), add a paragraph heading; and
 - b. Revise paragraph (f)(78).

The addition and revision read as follows:

§ 1002.2 Filing fees.

* * * * *

(b) *Nonpayment of fees.* * * *

(f) * * *

Type of Proceeding	Fee
* * * * *	
Part VI: Informal Proceedings:	
* * * * *	
(78) (i) The filing of tariffs, including supplements, or contract summaries	\$1 per page. (\$29 min charge.)
(ii) The filing of water carrier electronic annual certifications.....	\$29.
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PART 1312—REGULATIONS FOR THE PUBLICATION, FILING, AND KEEPING OF TARIFFS FOR THE TRANSPORTATION OF PROPERTY BY OR WITH A WATER CARRIER IN NONCONTIGUOUS DOMESTIC TRADE

3. The authority citation for part 1312 is revised to read as follows:

Authority: 49 U.S.C. 1321(a), 13702(a), 13702(b), and 13702(d).

4. The heading of part 1312 is revised to read as set forth above.

5. Amend § 1312.1(c) by revising the definition of “Publication” to read as follows:

§ 1312.1 Scope; definitions.

* * * * *

(c) * * *

Publication means a bound tariff, a tariff supplement, a looseleaf tariff page, or an electronically published tariff.

* * * * *

6. Amend § 1312.2 by revising paragraph (b), removing paragraph (e), and redesignating paragraph (f) as paragraph (e) to read as follows:

§ 1312.2 Requirement to publish and file a tariff.

* * * * *

(b) *Adherence to tariff.* The carrier may not charge or receive a different compensation for the transportation or service than the rate specified in the tariff, whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

* * * * *

7. Amend § 1312.3 by revising paragraph (a) to read as follows:

§ 1312.3 Tariff contents and standards; Essential criteria.

(a) *Contents.* Tariffs filed with the Board, including tariffs published, filed, and kept electronically in accordance with § 1312.4(b), must: be filed in English; include an accurate description of the services offered to the public; provide the specific applicable rates explicitly stated in U.S. dollars and cents (or the basis for calculating the specific applicable rates) and service terms; and be arranged in a way that allows for the determination of the exact rate(s) and service terms applicable to any given shipment (or to any given group of shipments). Tariffs that are electronically kept on the Internet must also provide the date on which a new tariff or any change in any tariff matter first appears on the Internet and the date on which it becomes effective.

* * * * *

8. Revise § 1312.4 to read as follows:

§ 1312.4 Filing of tariffs.

(a) *Paper filing requirements.* (1) Two copies of each tariff publication shall be filed with the Board. Packages containing tariff filings should be prominently marked “TARIFF FILING” and addressed to: Office of Public Assistance, Governmental Affairs and Compliance, Surface Transportation Board, Washington, DC 20423-0001. Tariffs shall be printed on paper not larger than 8½ x 11 inches.

(2) A paper tariff filing must be accompanied by an authorized document of transmittal identifying each publication filed, and by the appropriate filing fee (see 49 CFR part 1002). Acknowledgement of Board receipt of a paper tariff filing can be obtained by enclosing a duplicate transmittal letter and a postage-paid, self-addressed return envelope. Each transmittal letter shall clearly indicate in the upper left-hand corner thereof:

- (i) The assigned alpha code of the issuing carrier or agent;
- (ii) The number of pages transmitted;
- (iii) The filing fee enclosed (pursuant to 49 CFR 1002.2(a)); and
- (iv) The transmittal number if the filer utilizes transmittal numbers.

(b) *Electronic filing requirements.* As an alternative to the paper tariff filing procedures set forth in paragraph (a) of this section, a water carrier may file its tariffs electronically in accordance with the procedures and requirements of this section. Tariffs published, filed, and kept electronically in accordance with the requirements of this section shall be deemed to be on file with the Board for purposes of 49 U.S.C. 13702(b).

(1) *Annual certification.* A water carrier that seeks to file its tariff electronically must electronically file an annual certification with the Board, made by the water carrier's duly authorized corporate officer. The annual certification must be submitted to the Board on the first business day in October each year. The Director of the Office of Public Assistance, Governmental Affairs, and Compliance or a designee will acknowledge receipt of each carrier's certification in writing. The annual certification shall include the following:

- (i) Certification that it is a water carrier operating in the noncontiguous domestic trade subject to the Board's jurisdiction;
- (ii) Certification that it is in compliance with the regulations of this section for purposes of publishing, filing, and keeping its tariff electronically;
- (iii) Certification that it is in compliance with all other regulations in this part, except those specifically applicable to tariffs maintained in paper format;
- (iv) An active link to the Internet address of tariffs;
- (v) The assigned alpha code of the issuing carrier or agent; and
- (vi) Confirmation of electronic payment of the filing fee (pursuant to 49 CFR 1002.2(a)).

(2) *Sample text for the annual certification.*

[Name of Director, Office of Public Assistance, Governmental Affairs, and Compliance],
Office of Public Assistance, Governmental Affairs and Compliance, Surface
Transportation Board, Washington, DC.

Dear Director: I, [name of signor], certify that I am [title of office] of [name of water carrier], a water carrier operating in the noncontiguous domestic trade subject to the jurisdiction of the Surface Transportation Board, that [name of water carrier] is in compliance with the regulations at part 1312 for purposes of publishing, filing, and keeping its tariff electronically, and that it is in compliance with all other regulations at part 1312, except those specifically applicable to tariffs maintained in paper format.

The Internet address where [name of water carrier]'s tariffs can be located is:

This Internet address is current as of [date].

I further declare (certify, verify or state) under penalty of perjury ["under the laws of the United States of America" if executed outside of the United States of America] that the foregoing is true and correct. Executed on [date].

Sincerely,

[signature of a duly authorized corporate officer of water carrier]

(3) *Tariff access requirement.* (i) A water carrier must provide the Board with at least two business days advance notice of any planned outage when its tariff will not be available on the Internet, and prompt notice on any occasion when the tariff becomes unavailable due to circumstances beyond the carrier’s control. Notice shall be submitted by email to tariffs@stb.gov. In the event of any outage, carriers are required to make alternative arrangements with the agency to ensure that the Board receives the tariffs in effect during the outage.

(ii) A water carrier may establish reasonable registration requirements for purposes of public access to its current tariff and historical tariff information, such as requiring a user to provide his or her name and email address; however, such requirements may not limit tariff access to any particular group or class of users (such as shippers or potential shippers) or impose unreasonable burdens on the user, such as access fees or a showing of need.

(4) *Historical tariff information and archiving.* Tariffs kept on the Internet by a water carrier must allow the Board and the public to retrieve historical versions, including all rates and applicable rules, for a period of not less than five years, beginning on the date when a carrier first electronically files its tariffs under these regulations.

9. Amend § 1312.6 by adding paragraph (e) to read as follows:

§ 1312.6 Advance notice required.

* * * * *

(e) *Notice for purposes of electronically filed tariffs.* A water carrier that keeps its tariffs on the Internet must comply with the notice requirements set forth in paragraph (b) of this section, provided however, that the relevant notice periods set forth in paragraphs (b)(1) and (2) of this section shall run from the date on which the tariff matter first appears in the water carrier’s tariff on the Internet.

10. Amend § 1312.12 by adding paragraph (c) to read as follows:

§ 1312.12 Posting requirements.

* * * * *

(c) *Exemption for electronically filed tariffs.* A water carrier that publishes, files, and keeps its tariffs electronically in accordance with § 1312.4(b) is exempt from the posting requirements of this section.

11. Amend § 1312.13 by adding paragraph (g) to read as follows:

§ 1312.13 Furnishing copies of tariff publications.

* * * * *

(g) *Exemption for electronically filed tariffs.* A water carrier that publishes, files, and keeps its tariffs electronically in accordance with § 1312.4(b) is exempt from this section.

12. Amend § 1312.15 by adding a sentence at the end of paragraph (a) and a sentence at the end of paragraph (b) to read as follows:

§ 1312.15 Change of carrier or agent.

(a) * * * A water carrier that publishes, files, and keeps its tariffs electronically in accordance with § 1312.4(b) shall promptly submit any such change by email to tariffs@stb.gov, but in no case later than 20 days after the effective date.

(b) * * * A water carrier that publishes, files, and keeps its tariffs electronically in accordance with § 1312.4(b) shall promptly submit any such change of agent by email to tariffs@stb.gov, but in no case later than 20 days after the effective date.