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SMALL ENTITY SIZE STANDARDS UNDER THE REGULATORY FLEXIBILITY ACT

COMMENTS OF
THE AMERICAN SHORT LINE AND REGIONAL
RAILROAD ASSOCIATION

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The American Short Line and Regional Railroad Association ("ASLRRA") respectfully submits the following Comments on the Surface Transportation Board's ("STB" or "Board") July 11, 2013 Decision concerning proposed size standards for purposes of the Regulatory Flexibility Act ("RFA"). In it the Board proposes to limit the definition of a small railroad business for purposes of RFA analysis to those carriers with revenues that would qualify them as Class III carriers and thus exclude all Class II regional railroads from the small business designation.

ASLRRA agrees with the Small Business Administration's current definition of small short line railroads which uses the number of employees, not revenue, as the relevant metric. The Small Business Administration (SBA) is the agency within the federal government specifically tasked with understanding and Classifying small businesses of all kinds. It has determined that a small line haul carrier in the railroad industry is a railroad with 1500 or fewer employees.¹ ASLRRA believes the SBA definition incorporates both the correct metric (employees) and the right measure: 1500 employees. The Surface Transportation should adopt it and drop its own proposal for a different definition for purposes of the Regulatory Flexibility Act.

An examination of the most recent available data from the ASLRRA's survey of the small railroad industry shows that even Class II carriers as a whole are only *a fraction* as large as

¹ 13 CFR 121.201 (industry subsector 482)

the SBA threshold. Average employment among Class II railroads is only 280 workers.² In the scale of the rail industry as a whole, much less of all industry as a whole, 280 employees is a miniscule. Thus, it is apparent that the SBA definition is rational and purposefully chosen to include by a wide margin *all* Class II and Class III railroads.

Revenue is the wrong metric for railroads for determining if a railroad is a ‘small entity’. Because railroads are so capital intensive their revenues must provide a return on that huge investment, or they cannot stay in business. A small operation with very few employees can generate relatively large gross revenues, but it still looks acts and operates dramatically differently than a Class I railroad. To put railroad revenues into a more illuminating context, compare Class II railroad revenues per employee to Class I revenues per employee. In 2010 Class I carriers generated over 200% of revenue per employee than Class II and Class III carriers.³ Revenues per employee are dramatically lower than Class I’s because they handle much smaller loads and operate less frequently than Class I railroads. Even Class II carriers rely routinely on short general manifest trains. 120 car unit trains are rare. Again that is true for both Class II and Class III carriers, but vastly different than Class I operations where unit trains are ubiquitous and highly favored. That difference in revenues per employee also reflects the vastly more sophisticated and robust infrastructure behind each Class I employee.

Further, revenue is an unreliable measure for determining what railroads are small entities because small railroad revenues are driven largely by the types of commodities they happen to carry. One railroad with 50 employees may carry chemicals with high revenues per car; another 50 employee railroad may carry grain with much lower revenues per car. While their revenues may look much different, they are both small 50 employee operations. If their revenues were compared, however, at one inflection point one might be deemed a ‘small entity’, and the other might not.

The consequences of choosing revenue as the determinant for ‘small entity’ Classification are real. By excluding Class II railroads from this designation the board will strip them from the financial impact review that is the right of small entities during the rulemaking process pursuant to the Regulatory Flexibility Act. For purposes of rulemaking the Class II

² *Short Line and Regional Railroad Facts and Figures*, 2012 Edition

³ *Short Line and Regional Railroad Facts and Figures*, 2012 Edition; Association of American Railroads, *Class I Railroad Statistics*, January 10, 2013.

railroads will be lumped in with the massive Class I carriers. Yet Class II railroads have little in common with giant Class I railroads and cannot muster nearly the same financial or operational strength that even the smallest Class I carrier can produce. They share most characteristics with the smaller Class III railroads and should receive the same regulatory impact analysis that Class III railroads receive.

SBA is the repository for expertise in defining small business within the federal government, and the STB should give that agency's experience and understanding of the issue much deference. The SBA's judgment on this matter is sound and based in fact. By departing from the SBA definition the Board is rejecting the SBA's experience and judgment and substituting its own. In the process it is turning Class II carriers into miniature Class I's. There is no rational basis for this action, and the consequences will be detrimental to Class II carriers for no valid reason. In effect the Board sacrifices the best interests Class II rail carriers merely to avoid the inconvenience to itself of performing economic impact analyses of its own rulemaking as it affects these carriers. That is not a fair or valid tradeoff. ASLRRRA urges the Board to adopt the SBA definition of a 'small entity' railroad.

Respectfully submitted,

American Short Line and Regional Railroad Association by



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