



SURFACE TRANSPORTATION BOARD

Report on Compliance with the Small Business Regulatory Enforcement Fairness Act of 1996

April 6, 2020

Small Business Regulatory Enforcement Fairness Act of 1996

Report to the President

On October 9, 2019, President Trump issued Executive Order 13892, *Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication* (EO 13892). Section 10 of EO 13892 requires that, within 180 days, each administrative agency submit a report to the President demonstrating its compliance with the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104-121 (title II), as amended (SBREFA). The Surface Transportation Board (STB or Board) hereby submits this report pursuant to EO 13892 regarding its SBREFA compliance.

Background

The Board was created on January 1, 1996, as the successor to the former Interstate Commerce Commission (ICC). It has always been decisionally independent, but it was administratively housed within the U.S. Department of Transportation until December 18, 2015, when enactment of the STB Reauthorization Act of 2015 established the STB as a wholly independent agency. The STB is composed of five Board members, one of whom serves as the Chairman, and is supported by a staff divided into various program offices.¹

The STB is primarily charged with the economic oversight of the nation's freight rail system. The economics of freight rail regulation impact the national transportation network and are important to our nation's economy. For this reason, Congress gave the STB sole jurisdiction over railroad entry and exit licensing, mergers, and consolidations, exempting STB-approved transactions from federal antitrust laws and state and municipal laws. The Board also has exclusive authority to determine whether certain railroad rates and practices are reasonable.

While a majority of the Board's work involves freight railroads, the STB also performs certain oversight of passenger rail matters, the intercity bus industry, pipelines other than water, gas, or oil, household goods carriers' tariffs, certain collective activities in the trucking industry, and rate regulation of non-contiguous domestic water transportation (marine freight shipping involving the mainland United States, Hawaii, Alaska, Puerto Rico, and other U.S. territories and possessions).

On March 29, 1996, shortly after the Board's creation, SBREFA was enacted.² SBREFA requires federal agencies to:

- Publish compliance guides written in plain language to assist small entities in complying with agency rules. (Section 212)
- Answer inquiries by small entities concerning compliance with statutes and regulations administered by the agency. (Section 213)

¹ The STB is currently comprised of 117 FTEs; two Board member positions are vacant.

² SBREFA constituted Title II of the Contract with America Advancement Act of 1996.

- Establish a policy or program for the reduction or waiver of civil penalties for violations of a statutory or regulatory requirement by a small entity. (Section 223)

The Board's Compliance With SBREFA

A. Compliance Guides

Section 212 of SBREFA requires agencies to publish “small entity compliance guides” written in plain language. A guide is required “[f]or each rule or group of related rules for which an agency is required to prepare a final regulatory flexibility analysis under” the Regulatory Flexibility Act (RFA), 5 U.S.C. § 604. Generally, under the RFA, an agency must prepare a final regulatory flexibility analysis when the agency promulgates a final rule pursuant to notice-and-comment rulemaking. 5 U.S.C. § 604(a). But a final regulatory flexibility analysis is not required “if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.” 5 U.S.C. § 605(b).

Most rules promulgated by the Board since SBREFA have included a certification that the rule would not have a significant economic impact on a substantial number of small entities (primarily small rail carriers).³ Thus, the Board has not been required to prepare a final regulatory flexibility analysis in most rulemaking proceedings. For those few rules for which the Board has prepared a final regulatory flexibility analysis, the Board has created small entity compliance guides and posted them on its website at www.stb.gov (click on “About STB” then “Agency Materials”). For example, the Board established default rules in 2014 to govern certain aspects of railroads’ practices regarding demurrage (charges assessed against a shipper or receiver that detains rail cars too long for loading or unloading). The Board prepared a small entity compliance guide to explain the manner of notice that carriers were required to provide before assessing demurrage. More recently, the Board issued a final rule in February 2020 making clear that demurrage is subject to Board regulation even when transportation is generally exempted from regulation under the class exemptions for certain miscellaneous commodities, for boxcar transportation, and for certain agricultural commodities. The Board prepared a small entity compliance guide to explain its new demurrage exemption rule.

B. Informal Small Entity Guidance

Section 213 of SBREFA requires agencies, where appropriate, to “answer inquiries by small entities concerning information on, and advice about, compliance with [the] statutes and regulations [administered by the agency], interpreting and applying the law to specific sets of facts supplied by the small entity.”

The Board complies with this requirement through its Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC), which the Board established as a principal point of contact

³ After consultation with the Small Business Administration and after opportunity for public comment, 5 U.S.C. § 601(3), the Board defined “small entities” for purposes of implementing the RFA as those rail carriers classified as Class III rail carriers under 49 C.F.R. § 1201.1-1. *Small Entity Size Standards Under the Regulatory Flexibility Act*, EP 719 (STB served June 30, 2016).

for stakeholders, including small entities. OPAGAC's mission includes helping the public understand the Board's jurisdiction and decisions. OPAGAC's Rail Customer and Public Assistance Program (RCPA) offers assistance with compliance. RCPA staff are knowledgeable about both STB processes and railroad operations, including the unique issues facing smaller rail carriers. They answer questions about the STB's decisions, the status of pending matters, and the laws that the agency implements. In particular, small carriers and other stakeholders may contact RCPA staff for informal, non-binding advice and information on compliance with the statutes and regulations administered by the Board.

RCPA also provides an informal venue for the private-sector resolution of shipper-railroad and railroad-railroad disputes. At no cost to parties, RCPA staff facilitates communication among the various segments of the rail-transportation industry and encourages solutions to railroad operational and service issues without resorting to the Board's formal adjudication processes or litigation in court. In 2019, RCPA handled 1,624 matters and, although RCPA does not maintain data by size of carrier, a portion of the rail-related matters involved small carriers.

C. Policy or Program for Penalty Reduction/Waiver

SBREFA also requires consideration of small entity concerns in regulatory enforcement. Under Section 223, agencies are required to “[e]stablish a policy or program . . . to provide for the reduction, and under appropriate circumstances for the waiver, of civil penalties for violations of a statutory or regulatory requirement by a small entity.” As part of any such program, “the agency is allowed to consider ability to pay in determining penalty assessments on small entities.”

The Board, like the ICC before it, has long tried to avoid unnecessarily imposing on small entities regulatory requirements that could lead to civil penalties. *See, e.g., Reduction of Accounting and Reporting Requirements*, No. 37523 (ICC served Dec. 15, 1980) (eliminating reporting requirements for Class III railroads, among others); 49 C.F.R. § 1201.1-1(c) (“Class I carriers shall keep all of the accounts of this system which are applicable to their operations. Class II and III carriers are not required to maintain the accounts of this system.”); *Rail Fuel Surcharges*, EP 661 (Sub-No. 1), slip op. at 4 (STB served Aug. 14, 2007) (excluding small railroads from new fuel surcharge reporting requirements); *Publication Requirements for Agricultural Products*, EP 528 (Sub-No. 1), slip op. at 8, 12 (STB served June 30, 2017) (declining to require small railroads to publish tariffs online); *Demurrage Billing Requirements*, EP 759, slip op. at 10 (STB served Oct. 7, 2019) (excluding small railroads from proposed demurrage invoicing and direct billing requirements). And small railroads may seek waivers from applicable regulatory requirements. *See* 49 C.F.R. § 1110.9 (“[A]ny person may petition the Board for a permanent or temporary waiver of any rule.”). The waiver rule thus affords all persons, including small entities, the opportunity to provide sufficient grounds for regulatory waivers and thereby avoid potential penalties for regulatory violations.

To further assist small entities, the Board is considering a policy or other action that would address enforcement issues specifically related to such entities. This policy could, for example, identify a non-exhaustive list of factors the Board would consider in future enforcement actions involving small entities. Since its creation in 1996, the Board has not levied a fine on a small entity.

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The STB appreciates the opportunity to report on its SBREFA compliance and its long-standing efforts to consider carefully the issues facing the small entities subject to the STB's jurisdiction. Questions about the STB's report should be directed to Lucille Marvin, Director, OPAGAC, at Lucille.Marvin@stb.gov or (202) 245-0236.