



FR-4915-01-P

SURFACE TRANSPORTATION BOARD

49 CFR Part 1201

[Docket No. EP 763]

Montana Rail Link, Inc.—Petition for Rulemaking—Classification of Carriers

AGENCY: Surface Transportation Board.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Surface Transportation Board (STB or Board) proposes to modify the thresholds for classifying rail carriers.

DATES: Comments are due by November 2, 2020. Reply comments are due by December 1, 2020.

ADDRESSES: Comments and replies may be filed with the Board via e-filing on the Board's website at [www.stb.gov](http://www.stb.gov) and will be posted to the Board's website.

FOR FURTHER INFORMATION CONTACT: Amy Ziehm at (202) 245-0391.

Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION: Under 49 CFR part 1201, General Instructions section 1-1(a), rail carriers are grouped into one of three classes for purposes of accounting and reporting. The classification of rail carriers is also used in a variety of other contexts, including differentiating the legal standards and procedures that apply to certain transactions subject to Board licensing, see, e.g., 49 U.S.C. 10902, 11324, 11325, and prescribing labor protection conditions, see, e.g., 49 U.S.C. 10903(b)(2), 11326, among others.

The class to which any rail carrier belongs is determined by its annual operating revenues after application of a revenue deflator adjustment. Section 1-1(b)(1). Currently, Class I carriers have annual operating revenues of \$504,803,294 or more, Class II carriers have annual operating revenues of less than \$504,803,294 and more than \$40,384,263, and Class III carriers have annual operating revenues of \$40,384,263 or less, all when adjusted for inflation. Section 1-1(a) (setting thresholds unadjusted for inflation); Indexing the Annual Operating Revenues of R.Rs., EP 748 (STB served June 10, 2020) (calculating revenue deflator factor and publishing thresholds adjusted for inflation based on 2019 data).<sup>1</sup> The revenue classification levels for railroads set forth at 49 CFR part 1201, General Instructions section 1-1(a) were adopted in 1992 by the Board's predecessor, the Interstate Commerce Commission. Mont. Rail Link, Inc. & Wis. Cent. Ltd., Joint Pet. for Rulemaking with respect to 49 CFR part 1201 (1992 Rulemaking), 57 FR 27184 (June 18, 1992), 8 I.C.C.2d 625 (1992).

### Background

On February 14, 2020, Montana Rail Link, Inc. (MRL), filed a petition for rulemaking to amend the Board's rail carrier classification regulations. In its petition, MRL requests that the Board increase the revenue threshold for Class I carriers to \$900 million. (Pet. 1.) MRL contends that it continues to be a regional railroad operationally and economically but may exceed the Class I revenue threshold within two years. (Id.)

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<sup>1</sup> The railroad revenue deflator formula is based on the Railroad Freight Price Index developed by the Bureau of Labor Statistics. The formula is as follows: Current Year's Revenues  $\times$  (1991 Average Index/Current Year's Average Index). 49 CFR part 1201, Note A. Each year, the Board calculates the annual revenue deflator factor and publishes the updated railroad revenue thresholds for each class of carrier in a decision and on its website.

Citing principles drawn from the 1992 Rulemaking, in which the revenue thresholds were last raised, MRL asks that the Board address “whether a regional carrier such as MRL should be treated as a Class I carrier, taking into account (1) the financial and operational differences between MRL and existing Class I carriers, and (2) the cost-benefit analysis of imposing Class I requirements on MRL.” (Id. at 12.)

MRL argues that, from an operational standpoint, it is clearly different from a typical Class I carrier because of its heavy dependence on a single Class I interchange partner and because of the regional nature of its operations, with approximately 95% of its mainline track located in Montana. (Id. at 5-6.) From a financial standpoint, MRL also notes, among other things, that the average operating revenue for Class I railroads in 2018 was more than 27 times MRL’s total revenue for that year and that the operating revenue for even the smallest Class I railroad was about 3.5 times the total revenue of MRL. (Id. at 8.) MRL contends that treating a regional railroad like MRL, with its operational and financial characteristics, as a Class I carrier would impose significant burdens on MRL with no offsetting public benefit. (Id. at 12.)

MRL submitted eight letters in support of its petition.<sup>2</sup> No replies to MRL’s petition were received.

On May 14, 2020, the Board initiated a rulemaking proceeding to consider MRL’s petition and consider issues related to the Class I carrier revenue threshold determination.

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<sup>2</sup> Letters of support were from the Montana Contractors’ Association, Montana Agricultural Business Association, Montana Grain Elevator Association, Montana Petroleum Association, Inc., Montana Taxpayers Association, Montana Chamber of Commerce, Treasure State Resources Association, and Montana Wood Products Association.

The Board invited “comment about whether it should amend 49 CFR part 1201, General Instructions section 1-1(a), to increase the revenue threshold for Class I carriers, and, if so, whether \$900 million or another amount would be appropriate.” Mont. Rail Link, Inc.—Pet. for Rulemaking—Classification of Carriers, 85 FR 30680 (May 20, 2020), EP 763, slip op. at 2 (STB served May 14, 2020).

The Board received two comments in response to its May 14, 2020 decision. On June 15, 2020, the American Short Line and Regional Railroad Association (ASLRRA) filed a comment in support of MRL’s petition, and Transportation Trades Department, AFL-CIO (TTD) filed a comment opposing MRL’s petition. MRL filed a reply on July 2, 2020.

ASLRRA supports MRL’s petition, arguing that Class II railroads such as MRL are distinctly different from Class I railroads and that, in addition to many operational differences, there is a massive revenue gap between the largest Class II and the smallest Class I railroad. (ASLRRA Comment 2-3.) ASLRRA argues that MRL and similarly situated Class II railroads should continue to be classified in their current category, as the accounting, financial, and other burdens imposed on a Class II carrier by becoming a Class I carrier would outweigh any resulting benefits. (Id. at 3-4.) In addition to the cost of preparing the reports,<sup>3</sup> ASLRRA notes that reclassifying MRL and other similarly situated railroads as Class I carriers would unnecessarily deprive them of the benefit of the Short Line Rehabilitation Tax Credit, which has provided MRL almost \$3 million per

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<sup>3</sup> In its petition, MRL estimates it would have to expend at least \$150,000 annually to prepare the required reports, in addition to the costs associated with converting its accounting system, training employees, and maintaining and recording the reports. (Pet. 9.)

year in additional funds to invest in infrastructure, and the Railroad Industry Agreement, which provides a mechanism for the railroads to work together to increase rail traffic.

(Id. at 4.)

TTD, a coalition of 33 affiliate unions, opposes MRL's petition and requests that the Board not increase the Class I threshold. (TTD Comment 1.) TTD contends that increasing the Class I threshold could prevent MRL employees from benefiting from labor protective conditions that would apply if MRL were to become a Class I and engage in a transaction with a Class III railroad. (See id. at 1-2.) Additionally, TTD contends that MRL has not shown that raising the threshold is appropriate or necessary or that classification as a Class I would be overly burdensome. (Id. at 1.) TTD also disagrees with MRL's assertion that the ICC intended the 1992 Rulemaking to prevent large regional railroads from becoming Class I railroads. (Id. at 2.) TTD asks that, if the Board grants MRL's petition, it adopt "unique conditions" for MRL; specifically, TTD requests that, if the Board finds it necessary to relieve MRL of financial reporting requirements, it nevertheless should apply the labor protective arrangements that would otherwise apply if MRL were to become a Class I railroad under the current threshold. (Id.)

In its reply, MRL reiterates that its operating and financial profiles are distinct from those of the current Class I carriers (noting, for example, that in 2018 it operated only about 720 miles of mainline track, nearly all of which is in one state, whereas the smallest current Class I carrier operated 3,397 miles of track across 10 states and two countries) and that significant burdens would be imposed on MRL if the threshold is not increased, while limited, if any, benefits would accrue to the public. (MRL Reply 2, 5.)

Further, MRL notes that the petition has received no opposition from any shipper, shipper organization, or governmental entity. (Id. at 5.) MRL also argues that the petition has not received “broad-based opposition” from labor organizations. (Id.)<sup>4</sup> Regarding TTD’s concern that MRL’s proposal would keep its employees from benefiting from labor protective conditions, (see TTD Comment 1-2), MRL argues that the rail carrier classification system was established for the purpose of implementing accounting and reporting requirements and that TTD offers no rationale to support treating MRL as a Class I carrier for purposes of labor protections. (MRL Reply 3, 4.)

#### Proposed Amendments

The agency “has broad discretion to require rail carriers to report financial and operating data, and to prescribe an underlying accounting system to produce that information.” 1992 Rulemaking, 8 I.C.C.2d at 631; see also 49 U.S.C. 11144, 11145, 11161-64. As noted above, the Board’s classification of rail carriers affects the degree to which they must file annual, quarterly, and other operational reports and is relevant in other regulatory contexts as well. See 1992 Rulemaking, 8 I.C.C.2d at 631-32; 49 CFR parts 1201, 1241-1250.

After reviewing the petition and comments, the Board will propose amendments to its rail carrier classification regulations. The proposed amendments would raise the Class I revenue threshold from \$504,803,294 (as adjusted for inflation) to \$900 million and have the effect of excluding MRL (and other similarly situated carriers) from Class I status unless they have met the proposed revenue threshold for three years.

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<sup>4</sup> MRL states that TTD only represents approximately 11.5% of MRL’s employees. (MRL Reply 1.)

In proposing the amendments, the Board has considered ASLRRA's and MRL's arguments that the operational characteristics of regional railroads, like MRL, significantly differentiate it from the Class Is. For example, ASLRRA argues that small railroads are largely dependent on their Class I interchange partners for revenue, power, and car supply. (ASLRRA Comment 2.) This is true for MRL, which states that its only interchange partner is BNSF Railway Company (BNSF) and that approximately 84% of MRL's total revenue is generated from traffic interchanged with BNSF and ancillary services MRL performs for BNSF and 96% of MRL's non-switching traffic is subject to rates set by BNSF. (MRL Reply 2.) ASLRRA also contends that smaller railroads are often dependent upon a limited market and a traffic base that may be non-diversified. (ASLRRA Comment 3.) This characteristic also appears to apply to MRL, as a majority of its traffic consists of only three commodities. (MRL Reply 2.) Based on the record to date, it does appear that regional railroads, such as MRL, even with revenues approaching the current threshold, function more like significant Class II carriers and do not possess the comparative attributes of Class I carriers.

Moreover, MRL provides a persuasive argument that the benefits of certain Class II carriers becoming Class I carriers under the Board's existing revenue thresholds would not outweigh the burdens that would be imposed on the newly classified carriers. (Pet. 8-9 (arguing that the same reasons that led the ICC in the 1992 Rulemaking to increase the Class I threshold to prevent regional railroads from becoming Class I carriers still apply today).) Should a regional carrier, such as MRL, become a Class I carrier pursuant to the current threshold, several significant accounting and financial reporting requirements would begin to apply even though the carrier's revenues would still be

many hundreds of millions of dollars less, and its operations far more limited, than those of the smallest Class I carrier. (See id. (arguing that the key burden on MRL, if it were to become a Class I carrier, is the financial reporting); see also MRL Reply 2-3.) While the accounting and financial reporting required of Class I carriers is critical to the Board's regulatory framework, it is not apparent that additional reporting by carriers with MRL's characteristics is warranted,<sup>5</sup> particularly when the regulatory impact to such carriers extends beyond the Board's regulations. (See, e.g., ASLRRRA Comment 4.) Therefore, the Board proposes to increase the Class I revenue threshold at this time in order to preserve an appropriate distinction between Class I and II railroads.<sup>6</sup>

MRL has requested that the Board set an amended Class I threshold of \$900 million, and no commenter has raised specific concerns with the \$900 million figure.

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<sup>5</sup> Traditionally, the agency has not found the need to collect accounting and reporting information from regional and smaller railroads to the same extent as the Class I rail carriers, all of which have much larger networks and different operational and financial characteristics. See, e.g., Calculation of Variable Costs in Rate Complaint Proceedings involving Non-Class I R.Rs., 6 S.T.B. 798, 799 (2003); Elimination of Accounting & Reporting Requirements of Class II R.Rs., No. 37614, slip op. at 2 (ICC served Feb. 25, 1982); Reduction of Accounting & Reporting Requirements, No. 37523, slip op. at 2 (ICC served Dec. 15, 1980). Consistent with these findings, the burden of additional reporting by carriers with MRL's characteristics is not justified by any potential use of that information from analysis, monitoring, and other purposes.

<sup>6</sup> In 2001, the Board declined to increase the Class I revenue threshold in response to a request by Wisconsin Central Ltd.'s parent company. Proposal to Require Consol. Reporting by Commonly Controlled R.Rs., 5 S.T.B. 1050 (2001). As MRL observed, (see Pet. 5 n.1), the key reason the Board rejected Wisconsin Central's request was Wisconsin Central's subsequent acquisition by Canadian National, which was already a Class I carrier. Although in that decision the Board also noted briefly that financial reporting for larger carriers, like Wisconsin Central, would be reasonable and not unduly burdensome, see Proposal to Require Consolidated Reporting, 5 S.T.B. at 1054-55, in this proceeding MRL has provided its own arguments—described above—regarding the relative burdens of accounting and financial reporting between Class I and Class II carriers and has identified burdens beyond such reporting.

The Board proposes \$900 million as a reasonable demarcation between Class I railroads and Class II railroads as it is sufficiently above the current Class II annual revenue level and below the revenue level of the smallest Class I carrier to maintain an appropriate division between the two classes of carriers for the foreseeable future.

TTD is concerned that MRL employees would lose the potential benefit of eligibility for the labor protective conditions available to employees of Class I carriers if the Class I threshold is raised. (TTD Comment 1-2.) However, if the threshold is raised, MRL employees would suffer no loss of eligibility for labor protection compared to the status quo; they would continue to qualify for the same level of protection—that available to employees of Class II carriers—as they have for decades. TTD’s comments to date have not persuaded the Board that this continued level of labor protection would be insufficient if MRL’s annual revenues were between the current threshold and the proposed threshold of \$900 million. In addition, TTD’s suggestion that the Board adopt “unique conditions” for MRL would not establish a more appropriate demarcation between Class I and Class II carriers generally.

The proposed amendment to 49 CFR part 1201, General Instructions § 1-1(a) would increase the revenue threshold for Class I carriers to \$900 million.<sup>7</sup> The proposal would not materially change the current threshold between Class II and Class III carriers but would merely restate it in 2019 dollars.<sup>8</sup> As a result, Class I carriers would be those

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<sup>7</sup> Instruction section 1-1(a) currently defines Class I carriers as those with annual operating revenues of \$250 million or more after applying the railroad revenue deflator formula shown in Note A, which, as noted above, is \$504,803,294 or more in 2019 dollars.

<sup>8</sup> Instruction section 1-1(a) currently defines Class II carriers as those with annual operating revenues of less than \$250 million but in excess of \$20 million and Class III

with annual operating revenues of \$900 million or more; Class II carriers would be those with annual operating revenues of less than \$900 million but in excess of \$40.4 million; and Class III carriers would be those with annual operating revenues of \$40.4 million or less. The proposal also would amend Note A to replace the 1991 Average Index with the 2019 Average Index, as the new threshold levels would be calculated in 2019 dollars.

The Board seeks comment on the proposed amendments discussed above. Interested persons may comment on the proposed amendments by November 2, 2020; replies to comments may be filed by December 1, 2020.

#### 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 of 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. Sections 601-604. In its notice of proposed rulemaking, the agency must either include an initial regulatory flexibility analysis, section 603(a), or certify that the proposed rule would not have a "significant impact on a substantial number of small entities." Section 605(b).

Because the goal of the RFA is to reduce the cost to small entities of complying with federal regulations, the RFA requires an agency to perform a regulatory flexibility

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carriers as those with annual operating revenues of \$20 million or less, in both cases after applying the railroad revenue deflator formula shown in Note A. The current Class II/Class III threshold, in 2019 dollars, is \$40,384,263, which the proposed rule would round to \$40.4 million.

analysis of small entity impacts only when a rule directly regulates those entities. In other words, 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).

The Board’s proposed changes to its regulations here are intended to update the Board’s class classifications and do not mandate or circumscribe the conduct of small entities. For the purpose of RFA analysis for rail carriers subject to the Board’s jurisdiction, the Board defines a “small business” as only including those rail carriers classified as Class III rail carriers under 49 CFR part 1201, General Instructions section 1-1. See Small Entity Size Standards Under the Regulatory Flexibility Act, 81 FR 42566 (June 30, 2016), EP 719 (STB served June 30, 2016) (with the Board Member Begeman dissenting). With respect to the Class III thresholds, no substantive changes are being made, as the Board is only updating the regulations to reflect the Class III threshold in 2019 dollars (rounded) as opposed to 1991 dollars. Therefore, the Board certifies under 5 U.S.C. 605(b) that these proposed rules, if promulgated, would not have a significant economic impact on a substantial number of small entities within the meaning of RFA.

#### Paperwork Reduction Act

The Board’s proposal does not contain a new or amended information collection requirement subject to the Paperwork Reduction Act of 1995, 44 U.S.C. 3501-3521.

List of Subjects in 49 CFR Part 1201

Railroads, Uniform System of Accounts.

It is ordered:

1. The Board proposes to amend its rules as set forth in this decision. Notice of the proposed rules will be published in the Federal Register.

2. Comments are due by November 2, 2020. Reply comments are due by December 1, 2020.

3. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.

4. This decision is effective on its service date.

Decided: September 28, 2020.

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

Jeffrey Herzig,

Clearance Clerk.

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend title 49, chapter X, part 1201 of the Code of Federal Regulations as follows:

**PART 1201—RAILROAD COMPANIES**

1. The authority citation for part 1201 continues to read as follows:

Authority: 49 U.S.C. 11142 and 11164.

Subpart A—Uniform System of Accounts

2. In the General Instructions in subpart A, section 1-1(a) and Note A to section 1-1 are revised to read as follows:

GENERAL INSTRUCTIONS

1-1 *Classification of carriers.* (a) For purposes of accounting and reporting, carriers are grouped into the following three classes:

Class I: Carriers having annual carrier operating revenues of \$900 million or more after applying the railroad revenue deflator formula shown in Note A.

Class II: Carriers having annual carrier operating revenues of less than \$900 million but in excess of \$40.4 million after applying the railroad revenue deflator formula shown in Note A.

Class III: Carriers having annual carrier operating revenues of \$40.4 million or less after applying the railroad revenue deflator formula shown in Note A.

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NOTE A: The railroad revenue deflator formula is based on the Railroad Freight Price Index developed by the Bureau of Labor Statistics. The formula is as follows:

Current Year's Revenues  $\times$  (2019 Average Index/Current Year's Average Index)

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