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Subtitle B—Other Regulations Relating to Transportation (Continued)

CHAPTER X—SURFACE TRANSPORTATION BOARD, DEPARTMENT OF TRANSPORTATION

EDITORIAL NOTE: Nomenclature changes to chapter X appear at 62 FR 42075, Aug. 5, 1997.

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SUBCHAPTER A—GENERAL RULES AND REGULATIONS

Parts 1000–1019—General Provisions

PART 1000 [RESERVED]

PART 1001—INSPECTION OF RECORDS

Sec.
1001.1 Records available from the Board.
1001.2 Certified copies of records.
1001.3 Requests to inspect other records not considered public under 5 U.S.C. 552.
1001.4 Predisclosure notification procedures for confidential commercial information.

AUTHORITY: 5 U.S.C. 552, 49 U.S.C. 702, and 49 U.S.C. 721.

SOURCE: 62 FR 48954, Sept. 18, 1997, unless otherwise noted.

§ 1001.1 Records available from the Board.

(a) The following specific files and records in the custody of the Secretary of the Surface Transportation Board are available to the public and may be inspected at the Board's office upon reasonable request during business hours (between 8:30 a.m. and 5 p.m., Monday through Friday):

(1) Copies of tariffs and railroad transportation contract summaries filed with the Board pursuant to 49 U.S.C. 13702(b) and 10709(d), respectively.

(2) Annual and other periodic reports filed with the Board pursuant to 49 U.S.C. 11145.

(3) All docket files, which include documents of record in a proceeding.

(4) File and index of instruments or documents recorded pursuant to 49 U.S.C. 11301.

(5) Surface Transportation Board Administrative Issuances.

(b) The following records, so-called ''reading room'' documents, are available for inspection and copying at the Board's office:

(1) Final decisions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(2) Those statements of policy and interpretations that have been adopted by the agency and are not published in the FEDERAL REGISTER;

(3) Administrative staff manuals and instructions to staff that affect a member of the public; and

(4) Copies of all records, regardless of form or format, that have been released to any person under 5 U.S.C. 552(a)(3) and that, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records.

(c) The Board maintains, and makes available for inspection and copying, indexes of the documents described in paragraph (b) of this section. Final decisions are indexed in the ''Surface Transportation Board Daily Releases'', which is issued by the Board every working day. This document also explains how copies of decisions can be purchased. The remaining documents are indexed as they are made available.

(d) Documents described in paragraph (b) of this section that were created on and after November 1, 1996, are indexed by service date or date of issuance and are available for viewing and downloading from the Board's Electronic Reading Room at *www.stb.dot.gov*, the Board's website. Final decisions are maintained in a database that is full text searchable.

[64 FR 47711, Sept. 1, 1999]

§ 1001.2 Certified copies of records.

Copies of and extracts from public records will be certified by the Secretary. Persons requesting the Board to prepare such copies should clearly state the material to be copied, and whether it shall be certified. Charges will be made for certification and for the preparation of copies as provided in part 1002 of this chapter.

§ 1001.3 Requests to inspect other records not considered public under 5 U.S.C. 552.

Requests to inspect records other than those now deemed to be of a public nature shall be in writing and addressed to the Freedom of Information

Officer (Officer). The Officer shall determine within 10 days of receipt of a request (excepting Saturdays, Sundays, and legal public holidays) whether a requested record will be made available. If the Officer determines that a request cannot be honored, the Officer must inform the requesting party in writing of this decision and such letter shall contain a detailed explanation of why the requested material cannot be made available and explain the requesting party's right of appeal. If the Officer rules that such records cannot be made available because they are exempt under the provisions of 5 U.S.C. 552(b), an appeal from such ruling may be addressed to the Chairman. The Chairman's decision shall be administratively final and state the specific exemption(s) contained in 5 U.S.C. 552(b) relied upon for denial. Such an appeal must be filed within 30 days of the date of the Freedom of Information Officer's letter. The Chairman shall act in writing on such appeals within 20 days (excepting Saturdays, Sundays, and legal public holidays) of receipt of any appeal. In unusual circumstances, as set forth in 5 U.S.C. 552(a)(6)(B), the time limit may be extended, by written notice to the person making the particular request, setting forth the reasons for such extension, for no more than 10 working days. If the appeal is denied, the Chairman's order shall notify the requesting party of his or her right to judicial review. Charges shall be made as provided for in § 1002.1(f) of this chapter.

§ 1001.4 Predisclosure notification procedures for confidential commercial information.

(a) *In general.* Confidential commercial information provided to the Interstate Commerce Commission or the Board shall not be disclosed pursuant to a Freedom of Information Act (FOIA) request except in accordance with this section. For such purposes, the following definitions apply:

(1) *Confidential commercial information* means records provided to the government by a submitter that arguably contain material exempt from release under Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4), because disclosure could reasonably be expected to cause substantial competitive harm.

(2) *Submitter* means any person or entity who provides confidential commercial information to the government. The term ''submitter'' includes, but is not limited to, corporations, state governments, and foreign governments.

(b) *Notice to submitters.* Except as provided in paragraph (g) of this section, the Board, to the extent permitted by law, shall provide a submitter with prompt written notice, in accordance with paragraph (c) of this section, of receipt of an FOIA request encompassing its submissions. This notice shall either describe the exact nature of the information requested or provide copies of the records themselves.

(c) *When notice is required.* Notice shall be given to a submitter whenever:

(1) The Board has reason to believe that disclosure of the information could reasonably be expected to cause substantial competitive harm; or

(2) The information has been designated, in good faith by the submitter, as confidential commercial information at the time of submission or within a reasonable time thereafter. Whenever possible, the submitter's claim of confidentiality shall be supported by a statement or certification by an officer or authorized representative of the company that the information in question is in fact confidential commercial information and has not been disclosed to the public.

(d) *Opportunity to object to disclosure.* (1) Through the notice described in paragraph (b) of this section, the Board shall afford a submitter a reasonable period of time in which to provide it with a detailed statement of any objection to disclosure. Such statement shall specify all grounds for withholding the requested information.

(2) When notice is given to a submitter under this section, the Board also shall notify the requester that it has been provided.

(e) *Notice of intent to disclose.* (1) The Board shall consider carefully a submitter's objections and specific grounds for nondisclosure prior to its determination whether or not to disclose the requested information. Whenever the Board decides to disclose the

information over a submitter's objection, it shall provide the submitter with written notice containing the following:

(i) A description or copy of the information to be disclosed;

(ii) The reasons why the submitter's disclosure objections were not sustained; and

(iii) A specific disclosure date, which shall be a reasonable number of days after the notice of intent to disclose has been mailed to the submitter.

(2) At the same time that notice of intent to disclose is given to a submitter, the Board shall notify the requester accordingly.

(f) *Notice of lawsuit.* (1) Whenever an FOIA requester brings legal action seeking to compel disclosure of confidential commercial information, the Board shall promptly notify the submitter.

(2) Whenever a submitter brings legal action seeking to prevent disclosure of confidential commercial information, the Board shall promptly notify the requester.

(g) *Exception to notice requirement.* The notice requirements of this section shall not apply if:

(1) The Board determines that the information requested should not be disclosed; or

(2) The information already has been published or otherwise officially made available to the public; or

(3) Disclosure of the information is required by law (other than 5 U.S.C. 552); or

(4) Disclosure is required by a Board rule that:

(i) Was adopted pursuant to notice and public comment;

(ii) Specifies narrow classes of records submitted to the Board that are to be released; and

(iii) Provides in exceptional circumstances for notice when the submitter provides written justification, at the time the information is submitted or within a reasonable time thereafter, that disclosure of the information could reasonably be expected to cause substantial competitive harm; or

(5) The information requested was not designated by the submitter as exempt from disclosure, when the submitter had an opportunity to do so at the time of submission or within a reasonable time thereafter, unless the Board has reason to believe that disclosure of the information could reasonably be expected to cause substantial competitive harm; or

(6) The designation made by the submitter in accordance with these regulations appears obviously frivolous; in such case, the Board must provide the submitter only with written notice of any administrative disclosure determination within a reasonable number of days prior to the specified disclosure date.

PART 1002—FEES

Sec.

1002.1 Fees for records search, review, copying, certification, and related services.
1002.2 Filing fees.
1002.3 Updating user fees.

AUTHORITY: 5 U.S.C. 552(a)(4)(A) and 553; 31 U.S.C. 9701; and 49 U.S.C. 721. Section 1002.1(g)(11) also issued under 5 U.S.C. 5514 and 31 U.S.C. 3717.

§ 1002.1 Fees for records search, review, copying, certification, and related services.

Certifications and copies of such tariffs, reports and other public records and documents on file with the Surface Transportation Board as may be practicable to furnish, as well as searches and copying of records not considered public under the Freedom of Information Act (5 U.S.C. 552), will be furnished on the following basis:

(a) Certificate of the Secretary, $14.00.

(b) Service involved in examination of tariffs or schedules for preparation of certified copies of tariffs or schedules or extracts therefrom at the rate of $35.00 per hour.

(c) Service involved in checking records to be certified to determine authenticity, including clerical work, etc., incidental thereto, at the rate of $24.00 per hour.

(d) Photocopies of tariffs, reports, and other public documents, at the rate of $1.20 per letter or legal size exposure. A minimum charge of $6.00 will be made for this service.

(e) Fees for courier services to transport agency records to provide on-site access to agency records stored off-site

will be set at the rates set forth in the Board's agreement with its courier service provider. Rate information is available on the Board's Web site (*http://www.stb.dot.gov*), or can be obtained from the Board's Information Officer, Suite 880, Surface Transportation Board, Washington, DC 20423–0001.

(f) The fee for search and copying services requiring ADP processing are as follows:

(1) A fee of $62.00 per hour for professional staff time will be charged when it is required to fulfill a request for ADP data.

(2) Printing shall be charged at the rate of $.10 per page of computer generated output with a minimum charge of $.25. A charge of $30 per reel of magnetic tape will be made if the tape is to be permanently retained by the requestor.

(g) The fees for search, review and copying services for records not considered public under the Freedom of Information Act are as follows:

(1) When records are sought for commercial use, requesters will be assessed the full and reasonable direct costs of document search, review and duplication. A ''commercial use'' request refers to a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made.

(2) When records are not sought for commercial use and a request is made by an educational or noncommercial scientific institution, requesters will be assessed only for the cost of duplication (excluding charges for the first 100 pages). The term ''Educational Institution'' refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program of scholarly research. The term ''noncommercial scientific institution'' refers to an institution that is not operated on a ''commercial'' basis and that is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry. They must show that their request is authorized by and under the auspices of a qualifying institution and the records are not sought for a commercial use but, instead, are in furtherance of scholarly or scientific research.

(3) Requesters who are representatives of the news media (persons actively gathering news for an entity that is organized and operated to publish or broadcast news to the public) will be assessed only for the cost of duplication (excluding charges for the first 100 pages) if they can show that their request is not made for a commercial use. A request for records supporting the news dissemination function of the requester shall not be considered a request for a commercial use.

(4) All other requesters will be assessed fees which recover the full, reasonable direct cost of searching for and duplicating records that are responsive to the request (excluding charges for the first 100 pages of duplication and the first two hours of search time).

(5) All requesters must reasonably describe the records sought.

(6) The search and review hourly fees will be based upon employee grade levels in order to recoup the full, allowable direct costs attributable to their performance of these functions. They are as follows:

Grade	Rate
GS–1	$10.43
GS–2	11.36
GS–3	12.80
GS–4	14.37
GS–5	16.08
GS–6	17.92
GS–7	19.91
GS–8	22.05
GS–9	24.36
GS–10	26.82
GS–11	29.47
GS–12	35.32
GS–13	42.00
GS–14	49.64
GS–15 and over	58.39

(7) The fee for photocopies shall be $1.20 per letter or legal size exposure with a minimum charge of $6.00.

(8) The fees for ADP data are set forth in paragraph (f) of this section.

(9) If the cost of collecting any fee would be equal to or greater than the fee itself, it will not be assessed.

(10) A fee may be charged for searches which are not productive and for searches for records or those parts of records which subsequently are determined to be exempt from disclosure.

(11) Interest charges will be assessed on any unpaid bill starting on the date specified in the bill, at the rate prescribed in 31 U.S.C. 3717 and will accrue from the date of the billing. The Debt Collection Act, 5 U.S.C. 5514 (1982), including disclosure to the consumer reporting agencies and the use of collection agencies, as prescribed in the Board's Debt Collection Regulations in 49 CFR part 1018, will be utilized to encourage payment where appropriate.

(12) If search charges are likely to exceed $25, the requester will be notified of the estimated fees unless requester willingness to pay whatever fee is assessed has been provided in advance. The administrative time limits prescribed in 5 U.S.C. 552(a)(6) will not begin until after the requester agrees in writing to accept the prospective charges.

(13) An advance payment (before work is commenced or continued on a request) may be required if the charges are likely to exceed $250. Requesters who have previously failed to pay a fee charged in timely fashion (i.e. within 30 days of the date of billing) may be required first to pay this amount plus any applicable interest (or demonstrate that the fee has been paid) and then make an advance payment of the full amount of the estimated fee before the new or pending request is processed. The administrative time limits prescribed in 5 U.S.C. 552(a)(6) also will not begin until after a requester has complied with this provision.

(14) Documents shall be furnished without any charge or at a charge reduced below the fees set forth above if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. The following six factors will be employed in determining when such fees shall be waived or reduced:

(i) The subject of the request: Whether the subject of the requester records concerns ''the operations or activities of the government'';

(ii) The informative value of the information to be disclosed: Whether the disclosure is ''likely to contribute'' to an understanding of government operations or activities;

(iii) The contribution to an understanding of the subject by the general public likely to result from disclosure: Whether disclosure of the requested information will contribute to ''public understanding'';

(iv) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute ''significantly'' to public understanding of government operations or activities;

(v) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so

(vi) The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is ''primarily in the commercial interest of the requester.''

This fee waiver and reduction provision will be implemented in accordance with guidelines issued by the U.S. Department of Justice on April 2, 1987 and entitled ''New FOIA Fee Waiver Policy Guidance.'' A copy of these guidelines may be inspected or obtained from the Surface Transportation Board's Freedom of Information Office, Washington, DC 20423.

(h) Fees for services described in paragraphs (a) through (g) of this section may be charged to accounts established in accordance with 49 CFR 1002.2(a)(2), or paid for by check, money order, currency, or credit card in accordance with 49 CFR 1002.2(a)(3).

(i) Transcript of testimony and of oral argument, or extracts therefrom, may be purchased by the public from the Board's official reporter. For information regarding the official reporter, contact the Secretary, Surface Transportation Board, Washington, DC 20423.

[32 FR 20010, Dec. 20, 1967]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 1002.1, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 1002.2 Filing fees.

(a) *Manner of payment.* (1) Except as specified in this section, all filing fees will be payable at the time and place the application, petition, notice, tariff, contract summary, or other document is tendered for filing. Filing fees for tariffs, including schedules, and contract summaries, including supplements (Item 78), and filing fees for documents submitted for recording (Item 83) may be charged to accounts established by the Board in accordance with paragraph (a)(2) of this section.

(2) *Billing account procedure.* Form STB–1032 must be submitted to the Board's Section of Financial Services to establish STB billing accounts for filing fees for tariffs and for documents submitted for recording.

(3) Fees will be payable to the Secretary, Surface Transportation Board, by check payable in United States currency drawn upon funds deposited in a United States or foreign bank or other financial institution, money order payable in United States currency, or by credit card.

(b) Any filing that is not accompanied by the appropriate filing fee, payment via credit card or STB billing account, or a request for waiver of the fee, is deficient. However, the Board may find that a tariff which is submitted without the appropriate filing fee is deficient and reject the tariff filing, if the filer repeatedly fails to submit the appropriate filing fee after the Board has advised the filer of the proper filing fee and tariff filing procedures.

(c) *Fees not refundable.* Fees will be assessed for every filing in the type of proceeding listed in the schedule of fees contained in paragraph (f) of this section, subject to the exceptions contained in paragraphs (d) and (e) of this section. After the application, petition, notice, tariff, contract, or other document has been accepted for filing by the Board, the filing fee will not be refunded, regardless of whether the application, petition, notice, tariff, contract, or other document is granted or approved, denied, rejected before docketing, dismissed, or withdrawn. If an individual exemption proceeding becomes a matter of general applicability and is handled through the rulemaking process, the Board will refund the filing fee.

(d) *Related or consolidated proceedings.* (1)(i) Except as provided for in paragraph (d)(1)(ii) of this section, separate fees need not be paid for related applications filed by the same applicant that would be the subject of one proceeding.

(ii) In proceedings filed under the rail consolidation procedures at 49 CFR part 1180, the applicable filing fee must be paid for each proceeding submitted concurrently with the primary application. The fee for each type of proceeding is set forth in the fee schedule contained in paragraph (f) of this section.

(2) A separate fee will be assessed for the filing of an application for temporary authority to operate a motor carrier of passengers as provided for in paragraph (f)(5) of this section regardless of whether such application is related to a corresponding transfer proceeding as provided for in paragraph (f)(2) of this section.

(3) The Board may reject concurrently filed applications, petitions, notices, contracts, or other documents asserted to be related and refund the filing fee if, in its judgment, they embrace two or more severable matters which should be the subject of separate proceedings.

(e) *Waiver or reduction of filing fees.* It is the general policy of the Board not to waive or reduce filing fees except as described below:

(1) Filing fees are waived for an application or other proceeding which is filed by a federal government agency, or a state or local government entity. For purposes of this section the phrases ''federal government agency'' or ''government entity'' do not include a quasi-governmental corporation or government subsidized transportation company.

(2) In extraordinary situations the Board will accept requests for waivers or fee reductions in accordance with the following procedure:

(i) *When to request.* At the time that a filing is submitted to the Board the applicant may request a waiver or reduction of the fee prescribed in this part. Such request should be addressed to the Secretary.

(ii) *Basis.* The applicant must show the waiver or reduction of the fee is in the best interest of the public, or that payment of the fee would impose an undue hardship upon the requestor.

(iii) *Board action.* The Secretary will notify the applicant of the decision to grant or deny the request for waiver or reduction.

(f) *Schedule of filing fees.*

Type of proceeding	Fee
PART I: Non-Rail Applications or Proceedings to Enter Upon a Particular Financial Transaction or Joint Arrangement:	
(1) An application for the pooling or division of traffic	$3,700
(2)(i) An application involving the purchase, lease, consolidation, merger, or acquisition of control of a motor carrier of passengers under 49 U.S.C. 14303.	1,700
(ii) A petition for exemption under 49 U.S.C. 13541 (other than a rulemaking) filed by a non-rail carrier not otherwise covered.	2,700
(iii) A petition to revoke an exemption filed under 49 U.S.C. 13541(d)	2,200
(3) An application for approval of a non-rail rate association agreement. 49 U.S.C. 13703	23,300
(4) An application for approval of an amendment to a non-rail rate association agreement:	
(i) Significant amendment	3,900
(ii) Minor amendment	80
(5) An application for temporary authority to operate a motor carrier of passengers. 49 U.S.C. 14303(i)	400
(6) A notice of exemption for transaction within a motor passenger corporate family that does not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with motor passenger carriers outside the corporate family.	1,400
(7)–(10) [Reserved]	
PART II: Rail Licensing Proceedings other than Abandonment or Discontinuance Proceedings:	
(11)(i) An application for a certificate authorizing the extension, acquisition, or operation of lines of railroad. 49 U.S.C. 10901.	6,100
(ii) Notice of exemption under 49 CFR 1150.31–1150.35	1,500
(iii) Petition for exemption under 49 U.S.C. 10502	10,600
(12)(i) An application involving the construction of a rail line	62,900
(ii) A notice of exemption involving construction of a rail line under 49 CFR 1150.36	1,500
(iii) A petition for exemption under 49 U.S.C. 10502 involving construction of a rail line	62,900
(iv) A request for determination of a dispute involving a rail construction that crosses the line of another carrier under 49 U.S.C. 10902(d).	200
(13) A Feeder Line Development Program application filed under 49 U.S.C. 10907(b)(1)(A)(i) or 10907(b)(1)(A)(ii).	2,600
(14)(i) An application of a class II or class III carrier to acquire an extended or additional rail line under 49 U.S.C. 10902.	5,200
(ii) Notice of exemption under 49 CFR 1150.41–1150.45	1,500
(iii) Petition for exemption under 49 U.S.C. 10502 relating to an exemption from the provisions of 49 U.S.C. 10902.	5,600
(15) A notice of a modified certificate of public convenience and necessity under 49 CFR 1150.21–1150.24	1,400
(16)–(20) [Reserved]	
PART III: Rail Abandonment or Discontinuance of Transportation Services Proceedings:	
(21)(i) An application for authority to abandon all or a portion of a line of railroad or discontinue operation thereof filed by a railroad (except applications filed by Consolidated Rail Corporation pursuant to the Northeast Rail Service Act [Subtitle E of Title XI of Pub. L. 97–35], bankrupt railroads, or exempt abandonments).	18,700
(ii) Notice of an exempt abandonment or discontinuance under 49 CFR 1152.50	3,100
(iii) A petition for exemption under 49 U.S.C. 10502	5,300
(22) An application for authority to abandon all or a portion of a line of a railroad or operation thereof filed by Consolidated Rail Corporation pursuant to Northeast Rail Service Act.	400
(23) Abandonments filed by bankrupt railroads	1,600
(24) A request for waiver of filing requirements for abandonment application proceedings	1,500
(25) An offer of financial assistance under 49 U.S.C. 10904 relating to the purchase of or subsidy for a rail line proposed for abandonment.	1,300
(26) A request to set terms and conditions for the sale of or subsidy for a rail line proposed to be abandoned	19,100
(27)(i) A request for a trail use condition in an abandonment proceeding under 16 U.S.C.1247(d)	200
(ii) A request to extend the period to negotiate a trail use agreement	350
(28)–(35) [Reserved]	
PART IV: Rail Applications to Enter Upon a Particular Financial Transaction or Joint Arrangement:	
(36) An application for use of terminal facilities or other applications under 49 U.S.C. 11102	16,000
(37) An application for the pooling or division of traffic. 49 U.S.C. 11322	8,600
(38) An application for two or more carriers to consolidate or merge their properties or franchises (or a part thereof) into one corporation for ownership, management, and operation of the properties previously in separate ownership. 49 U.S.C. 11324:	
(i) Major transaction	1,257,600
(ii) Significant transaction	251,500
(iii) Minor transaction	6,500
(iv) Notice of an exempt transaction under 49 CFR 1180.2(d)	1,400
(v) Responsive application	6,500

Type of proceeding	Fee
(vi) Petition for exemption under 49 U.S.C. 10502	7,900
(vii) A request for waiver or clarification of regulations filed in a major financial proceeding as defined at 49 CFR 1180.2(a).	4,600
(39) An application of a non-carrier to acquire control of two or more carriers through ownership of stock or otherwise. 49 U.S.C. 11324:	
(i) Major transaction	1,257,600
(ii) Significant transaction	251,500
(iii) Minor transaction	6,500
(iv) A notice of an exempt transaction under 49 CFR 1180.2(d)	1,100
(v) Responsive application	6,500
(vi) Petition for exemption under 49 U.S.C. 10502	7,900
(vii) A request for waiver or clarification of regulations filed in a major financial proceeding as defined at 49 CFR 1180.2(a).	4,600
(40) An application to acquire trackage rights over, joint ownership in, or joint use of any railroad lines owned and operated by any other carrier and terminals incidental thereto. 49 U.S.C. 11324:	
(i) Major transaction	1,257,600
(ii) Significant transaction	251,500
(iii) Minor transaction	6,500
(iv) Notice of an exempt transaction under 49 CFR 1180.2(d)	1,000
(v) Responsive application	6,500
(vi) Petition for exemption under 49 U.S.C. 10502	7,900
(vii) A request for waiver or clarification of regulations filed in a major financial proceeding as defined at 49 CFR 1180.2(a).	4,600
(41) An application of a carrier or carriers to purchase, lease, or contract to operate the properties of another, or to acquire control of another by purchase of stock or otherwise. 49 U.S.C. 11324:	
(i) Major transaction	1,257,600
(ii) Significant transaction	251,500
(iii) Minor transaction	6,500
(iv) Notice of an exempt transaction under 49 CFR 1180.2(d)	1,200
(v) Responsive application	6,500
(vi) Petition for exemption under 49 U.S.C. 10502	5,600
(vii) A request for waiver or clarification of regulations filed in a major financial proceeding as defined at 49 CFR 1180.2(a).	4,600
(42) Notice of a joint project involving relocation of a rail line under 49 CFR 1180.2(d)(5)	2,000
(43) An application for approval of a rail rate association agreement. 49 U.S.C. 10706	58,800
(44) An application for approval of an amendment to a rail rate association agreement. 49 U.S.C. 10706:	
(i) Significant amendment	10,900
(ii) Minor amendment	80
(45) An application for authority to hold a position as officer or director under 49 U.S.C. 11328	650
(46) A petition for exemption under 49 U.S.C. 10502 (other than a rulemaking) filed by rail carrier not otherwise covered.	6,700
(47) National Railroad Passenger Corporation (Amtrak) conveyance proceeding under 45 U.S.C. 562	200
(48) National Railroad Passenger Corporation (Amtrak) compensation proceeding under Section 402(a) of the Rail Passenger Service Act.	200
(49)–(55) [Reserved]	
PART V: Formal Proceedings:	
(56) A formal complaint alleging unlawful rates or practices of carriers:	
(i) A formal complaint filed under the coal rate guidelines (Stand-Alone Cost Methodology) alleging unlawful rates and/or practices of rail carriers under 49 U.S.C. 10704(c)(1).	140,600
(ii) A formal complaint involving rail maximum rates filed under the small rate case procedures	150
(iii) All other formal complaints (except competitive access complaints)	13,900
(iv) Competitive access complaints	150
(v) A request for an order compelling a rail carrier to establish a common carrier rate	200
(57) A complaint seeking or a petition requesting institution of an investigation seeking the prescription or division of joint rates or charges. 49 U.S.C. 10705.	7,400
(58) A petition for declaratory order:	
(i) A petition for declaratory order involving a dispute over an existing rate or practice which is comparable to a complaint proceeding.	1,000
(ii) All other petitions for declaratory order	1,400
(59) An application for shipper antitrust immunity. 49 U.S.C. 10706(a)(5)(A)	5,900
(60) Labor arbitration proceedings	200
(61)(i) An appeal of a Surface Transportation Board decision on the merits or petition to revoke an exemption pursuant to 49 U.S.C. 10502(d).	200
(ii) An appeal of a Surface Transportation Board decision on procedural matters except discovery rulings.	300
(62) Motor carrier undercharge proceedings	200
(63)(i) Expedited relief for service inadequacies: A request for expedited relief under 49 U.S.C. 11123 and 49 CFR part 1146 for service emergency.	200
(ii) Expedited relief for service inadequacies: A request for temporary relief under 49 U.S.C. 10705 and 11102, and 49 CFR part 1147 for service inadequacies.	200
(64) A request for waiver or clarification of regulations except one filed in an abandonment or discontinuance proceeding, or in a major financial proceeding as defined at 49 CFR 1180.2(a).	500
(65)–(75) [Reserved]	
PART VI: Informal Proceedings:	

Type of proceeding	Fee
(76) An application for authority to establish released value rates or ratings for motor carriers and freight forwarders of household goods under 49 U.S.C. 14706.	1,000
(77) An application for special permission for short notice or the waiver of other tariff publishing requirements	100
(78) The filing of tariffs, including supplements, or contract summaries	$1 per page ($20 minimum charge).
(79) Special docket applications from rail and water carriers:	
(i) Applications involving $25,000 or less	50
(ii) Applications involving over $25,000	100
(80) Informal complaint about rail rate applications	500
(81) Tariff reconciliation petitions from motor common carriers:	
(i) Petitions involving $25,000 or less	50
(ii) Petitions involving over $25,000	100
(82) Request for a determination of the applicability or reasonableness of motor carrier rates under 49 U.S.C. 13710(a)(2) and (3).	200
(83) Filing of documents for recordation. 49 U.S.C. 11301 and 49 CFR 1177.3(c)	$34 per document.
(84) Informal opinions about rate applications (all modes)	200
(85) A railroad accounting interpretation	950
(86)(i) A request for an informal opinion not otherwise covered	1,200
(ii) A proposal to use on a voting trust agreement pursuant to 49 CFR 1013 and 49 CFR 1180.4(b)(4)(iv) in connection with a major control proceeding as defined at 49 CFR 1180.2(a).	4,300
(iii) A request for an informal opinion on a voting trust agreement pursuant to 49 CFR 1013.3(a) not otherwise covered.	400
(87) Arbitration of Certain Disputes Subject to the Statutory Jurisdiction of the Surface Transportation Board under 49 CFR 1108:	
(i) Complaint	75
(ii) Answer (per defendant), Unless Declining to Submit to Any Arbitration	75
(iii) Third Party Complaint	75
(iv) Third Party Answer (per defendant), Unless Declining to Submit to Any Arbitration	75
(v) Appeals of Arbitration Decisions or Petitions to Modify or Vacate an Arbitration Award	150
(88) Basic fee for STB adjudicatory services not otherwise covered	200
(89)–(95) [Reserved]	
PART VII: Services:	
(96) Messenger delivery of decision to a railroad carrier's Washington, DC, agent	$27 per delivery.
(97) Request for service or pleading list for proceedings	$20 per list.
(98) Processing the paperwork related to a request for the Carload Waybill Sample to be used in a Surface Transportation Board or State proceeding that:	
(i) Does not require a **Federal Register** notice:	
(a) Set cost portion	100
(b) Sliding cost portion	$39 per party.
(ii) Does require a **Federal Register** notice:	
(a) Set cost portion	350
(b) Sliding cost portion	$39 per party.
(99)(i) Application fee for the Surface Transportation Board's Practitioners' Exam	150
(ii) Practitioners' Exam Information Package	25
(100) Uniform Railroad Costing System (URCS) software and information:	
(i) Initial PC version URCS Phase III software program and manual	50
(ii) Updated URCS PC version Phase III cost file—per year	$25 per year.
(iii) Public requests for *Source Codes* to the PC version URCS Phase III	100
(101) Carload Waybill Sample data on recordable compact disk (R–CD):	
(i) Requests for Public Use File on R–CD—per year	$250 per year.
(ii) Waybill—Surface Transportation Board or State proceedings on R–CD—per year	$500 per year.
(iii) User Guide for latest available Carload Waybill Sample	50
(iv) Specialized programming for Waybill requests to the Board	$93 per hour.

(g) *Returned check policy.* (1) If a check submitted to the Board for a filing or service fee is dishonored by a bank or financial institution on which it is drawn, the Board will notify the person who submitted the check that:

(i) All work will be suspended on the filing or proceeding, other than a tariff filing, until the check is made good;

(ii) A returned check charge of $20.00 and any bank charges incurred by the Board as a result of the dishonored check must be submitted with the filing fee which is outstanding; and

(iii) If payment is not made within the time specified by the Board, the proceeding will be dismissed or the filing may be rejected.

(2) If a person repeatedly submits dishonored checks to the Board for filing fees, the Board may notify the person

that all future filing fees must be submitted in the form of a certified or cashier's check or a money order.

[49 FR 18492, May 1, 1984]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 1002.2, see the List of CFR Sections affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 1002.3 Updating user fees.

(a) *Update.* Each fee established in this part shall be updated in accordance with this section at least once a year. However, any fee may be updated more than once a year, if the Board finds that an additional update is necessary.

(b) *Publication and effective dates.* Updated fees shall be published in the FEDERAL REGISTER and shall become effective 30 days after publication.

(c) *Payment of fees.* Any person submitting a filing for which a fee is established shall pay the fee in effect at the time of the filing.

(d) *Method of updating fees.* Each fee shall be updated by updating the cost components comprising the fee. Cost components shall be updated as follows:

(1) Direct labor costs shall be updated by multiplying base level direct labor costs by percentage changes in average wages and salaries of Board employees. Base level direct labor costs are direct labor costs determined by the cost study set forth in *Revision of Fees For Services,* 1 I.C.C.2d 60 (1984) or subsequent cost studies. The base period for measuring changes shall be April 1984.

(2) Operations overhead shall be developed each year on the basis of current relationships existing on a weighted basis, for indirect labor applicable to the first supervisory work centers directly associated with user fee activity. Actual updating of operations overhead will be accomplished by applying the current percentage factor to updated direct labor, including current governmental overhead costs.

(3)(i) Office general and administrative costs shall be developed each year on the basis of current level costs, i.e., dividing actual office general and administrative costs for the current fiscal year by total office costs for the Offices directly associated with user fee activity. Actual updating of office general and administrative costs will be accomplished by applying the current percentage factor to updated direct labor, including current governmental overhead and current operations overhead costs.

(ii) Board general and administrative costs shall be developed each year on the basis of current level costs; i.e., dividing actual Board general and administrative costs for the current fiscal year by total agency expenses for the current fiscal year. Actual updating of Board general and administrative costs will be accomplished by applying the current percentage factor to updated direct labor, including current governmental overhead, operations overhead and office general and administrative costs.

(4) Publication costs shall be adjusted on the basis of known changes in the costs applicable to publication of material in the FEDERAL REGISTER.

(e) *Rounding of updated fees.* Updated fees shall be rounded in the following manner: (1) Fees between $1–$30 will be rounded to the nearest $1; (2) fees between $30–$100 will be rounded to the nearest $10; (3) fees between $100–$999 will be rounded to the nearest $50; and (4) fees above $1,000 will be rounded to the nearest $100. (This rounding procedure excludes copying, printing and search fees.)

[49 FR 18494, May 1, 1984, as amended at 52 FR 46483, Dec. 8, 1987; 59 FR 44644, Aug. 30, 1994; 61 FR 42194, Aug. 14, 1996]

PART 1003—FORMS

AUTHORITY: 49 U.S.C. 721, 13301(f).

§ 1003.1 General information.

(a) Printed forms are prescribed for various applications under the Interstate Commerce Act and the Board's regulations contained in this chapter.

(b) All prescribed forms include instructions for their completion.

(c) Copies of all prescribed forms except insurance forms are available upon request from the Office of the Secretary, Surface Transportation Board, Washington, DC 20423.

[57 FR 41112, Sept. 9, 1992, as amended at 64 FR 53266, Oct. 1, 1999]

PART 1004—INTERPRETATIONS AND ROUTING REGULATIONS

Sec.
1004.1 Gifts, donations, and hospitality by carriers.
1004.2 Misrouting, adjustment of claims.

AUTHORITY: 49 U.S.C. 721.

SOURCE: 64 FR 47711, Sept. 1, 1999, unless otherwise noted.

§ 1004.1 Gifts, donations, and hospitality by carriers.

It is unlawful for any common carrier engaged in interstate or foreign commerce to offer, make, or cause any undue or unreasonable preference or advantage to any person. Gifts or services or anything of substantial value to particular shippers or their representatives are considered violations of the law. Expenditures for such gifts may not support requests to increase carrier rates. The Board shall take appropriate enforcement action to redress such unlawful expenditures.

§ 1004.2 Misrouting, adjustment of claims.

Carriers should adjust claims for damages resulting from misrouting. Where a carrier admits responsibility for billing, forwarding, or diverting a shipment over a higher rated route than that directed by the shipper or otherwise available, the misrouting carrier should refund the difference to the shipper (or reimburse the delivering carrier, as the case may be). Where the misrouting carrier alleges justification for using the higher rated route, the Board may, at its discretion and upon appropriate petition, determine or express an advisory opinion on the lawfulness of such routing. This interpretation must not be used to evade or defeat tariff rates or to meet the rate of a competing carrier or route, nor to relieve a shipper from responsibility for routing instruction. Damages caused by misrouting are not overcharges.

PART 1005—PRINCIPLES AND PRACTICES FOR THE INVESTIGATION AND VOLUNTARY DISPOSITION OF LOSS AND DAMAGE CLAIMS AND PROCESSING SALVAGE

Sec.
1005.1 Applicability of regulations.
1005.2 Filing of claims.
1005.3 Acknowledgment of claims.
1005.4 Investigation of claims.
1005.5 Disposition of claims.
1005.6 Processing of salvage.
1005.7 Weight as a measure of loss.

AUTHORITY: 49 U.S.C. 721, 11706, 14706, 15906.

§ 1005.1 Applicability of regulations.

The regulations set forth in this part shall govern the processing of claims for loss, damage, injury, or delay to property transported or accepted for transportation, in interstate or foreign commerce, by each railroad, express company, motor carrier, water carrier, and freight forwarder (hereinafter called carrier), subject to the Interstate Commerce Act.

[46 FR 16224, Mar. 11, 1981]

§ 1005.2 Filing of claims.

(a) *Compliance with regulations.* A claim for loss or damage to baggage or for loss, damage, injury, or delay to cargo, shall not be voluntarily paid by a carrier unless filed, as provided in paragraph (b) of this section, with the receiving or delivering carrier, or carrier issuing the bill of lading, receipt, ticket, or baggage check, or carrier on whose line the alleged loss, damage, injury, or delay occurred, within the specified time limits applicable thereto and as otherwise may be required by law, the terms of the bill of lading or other contract of carriage, and all tariff provisions applicable thereto.

(b) *Minimum filing requirements.* A written or electronic communication (when agreed to by the carrier and shipper or receiver involved) from a claimant, filed with a proper carrier within the time limits specified in the bill of lading or contract of carriage or transportation and: (1) Containing facts sufficient to identify the baggage or shipment (or shipments) of property, (2) asserting liability for alleged loss,

damage, injury, or delay, and (3) making claim for the payment of a specified or determinable amount of money, shall be considered as sufficient compliance with the provisions for filing claims embraced in the bill of lading or other contract of carriage; *Provided, however,* That where claims are electronically handled, procedures are established to ensure reasonable carrier access to supporting documents.

(c) *Documents not constituting claims.* Bad order reports, appraisal reports of damage, notations of shortage or damage, or both, on freight bills, delivery receipts, or other documents, or inspection reports issued by carriers or their inspection agencies, whether the extent of loss or damage is indicated in dollars and cents or otherwise, shall, standing alone, not be considered by carriers as sufficient to comply with the minimum claim filing requirements specified in paragraph (b) of this section.

(d) *Claims filed for uncertain amounts.* Whenever a claim is presented against a proper carrier for an uncertain amount, such as ''$100 more or less,'' the carrier against whom such claim is filed shall determine the condition of the baggage or shipment involved at the time of delivery by it, if it was delivered, and shall ascertain as nearly as possible the extent, if any, of the loss or damage for which it may be responsible. It shall not, however, voluntarily pay a claim under such circumstances unless and until a formal claim in writing for a specified or determinable amount of money shall have been filed in accordance with the provisions of paragraph (b) of this section.

(e) *Other claims.* If investigation of a claim develops that one or more other carriers has been presented with a similar claim on the same shipment, the carrier investigating such claim shall communicate with each such other carrier and, prior to any agreement entered into between or among them as to the proper disposition of such claim or claims, shall notify all claimants of the receipt of conflicting or overlapping claims and shall require further substantiation, on the part of each claimant of his title to the property involved or his right with respect to such claim.

[37 FR 4258, Mar. 1, 1972, as amended at 47 FR 12803, Mar. 25, 1982]

§ 1005.3 Acknowledgment of claims.

(a) Each carrier shall, upon receipt in writing or by electronic transmission of a proper claim in the manner and form described in the regulations, acknowledge the receipt of such claim in writing or electronically to the claimant within 30 days after the date of its receipt by the carrier unless the carrier shall have paid or declined such claim in writing or electronically within 30 days of the receipt thereof. The carrier shall indicate in its acknowledgment to the claimant what, if any, additional documentary evidence or other pertinent information may be required by it further to process the claim as its preliminary examination of the claim, as filed, may have revealed.

(b) The carrier shall at the time each claim is received create a separate file and assign thereto a successive claim file number and note that number on all documents filed in support of the claim and all records and correspondence with respect to the claim, including the acknowledgment of receipt. At the time such claim is received the carrier shall cause the date of receipt to be recorded on the face of the claim document, and the date of receipt shall also appear in the carrier's acknowledgment of receipt to the claimant. The carrier shall also cause the claim file number to be noted on the shipping order, if in its possession, and the delivery receipt, if any, covering such shipment, unless the carrier has established an orderly and consistent internal procedure for assuring: (1) That all information contained in shipping orders, delivery receipts, tally sheets, and all other pertinent records made with respect to the transportation of the shipment on which claim is made, is available for examination upon receipt of a claim; (2) that all such records and documents (or true and complete reproductions thereof) are in fact examined in the course of the investigation of the claim (and an appropriate record is made that such examination has in fact taken place); and (3)

that such procedures prevent the duplicate or otherwise unlawful payment of claims.

[37 FR 4258, Mar. 1, 1972, as amended at 37 FR 20943, Oct. 10, 1972; 47 FR 12803, Mar. 25, 1982]

§ 1005.4 Investigation of claims.

(a) *Prompt investigation required.* Each claim filed against a carrier in the manner prescribed herein shall be promptly and thoroughly investigated if investigation has not already been made prior to receipt of the claim.

(b) *Supporting documents.* When a necessary part of an investigation, each claim shall be supported by the original bill of lading, evidence of the freight charges, if any, and either the original invoice, a photographic copy of the original invoice, or an exact copy thereof or any extract made therefrom, certified by the claimant to be true and correct with respect to the property and value involved in the claim; or certification of prices or values, with trade or other discounts, allowance, or deductions, of any nature whatsoever and the terms thereof, or depreciation reflected thereon; *Provided, however,* That where property involved in a claim has not been invoiced to the consignee shown on the bill of lading or where an invoice does not show price or value, or where the property involved has been sold, or where the property has been transferred at bookkeeping values only, the carrier shall, before voluntarily paying a claim, require the claimant to establish the destination value in the quantity, shipped, transported, or involved; *Provided, further,* That when supporting documents are determined to be a necessary part of an investigation, the supporting documents are retained by the carriers for possible Board inspection.

(c) *Verification of Loss.* When an asserted claim for loss of an entire package or an entire shipment cannot be otherwise authenticated upon investigation, the carrier shall obtain from the consignee of the shipment involved a certified statement in writing that the property for which the claim is filed has not been received from any other source.

[37 FR 4258, Mar. 1, 1972, as amended at 37 FR 23909, Nov. 10, 1972; 47 FR 12803, Mar. 25, 1982]

§ 1005.5 Disposition of claims.

(a) Each carrier subject to the Interstate Commerce Act which receives a written or electronically transmitted claim for loss or damage to baggage or for loss, damage, injury, or delay to property transported shall pay, decline, or make a firm compromise settlement offer in writing or electronically to the claimant within 120 days after receipt of the claim by the carrier; *Provided, however,* That, if the claim cannot be processed and disposed of within 120 days after the receipt thereof, the carrier shall at that time and at the expiration of each succeeding 60-day period while the claim remains pending, advise the claimant in writing or electronically of the status of the claim and the reason for the delay in making final disposition thereof and it shall retain a copy of such advice to the claimant in its claim file thereon.

(b) When settling a claim for loss or damage, a common carrier by motor vehicle of household goods as defined in § 1056.1(b)(1) shall use the replacement costs of the lost or damaged item as a base to apply a depreciation factor to arrive at the current actual value of the lost or damaged item: *Provided,* That where an item cannot be replaced or no suitable replacement is obtainable, the proper measure of damages shall be the original costs, augmented by a factor derived from a consumer price index, and adjusted downward by a factor depreciation over average useful life.

[37 FR 4258, Mar. 1, 1972, as amended at 46 FR 16224, Mar. 11, 1981; 47 FR 12803, Mar. 25, 1982]

§ 1005.6 Processing of salvage.

(a) Whenever baggage or material, goods, or other property transported by a carrier subject to the provisions herein contained is damaged or alleged to be damaged and is, as a consequence thereof, not delivered or is rejected or refused upon tender thereof to the owner, consignee, or person entitled to receive such property, the carrier, after

giving due notice, whenever practicable to do so, to the owner and other parties that may have an interest therein, and unless advised to the contrary after giving such notice, shall undertake to sell or dispose of such property directly or by the employment of a competent salvage agent. The carrier shall only dispose of the property in a manner that will fairly and equally protect the best interests of all persons having an interest therein. The carrier shall make an itemized record sufficient to identify the property involved so as to be able to correlate it to the shipment or transportation involved, and claim, if any, filed thereon. The carrier also shall assign to each lot of such property a successive lot number and note that lot number on its record of shipment and claim, if any claim is filed thereon.

(b) Whenever disposition of salvage material or goods shall be made directly to an agent or employee of a carrier or through a salvage agent or company in which the carrier or one or more of its directors, officers, or managers has any interest, financial or otherwise, that carrier's salvage records shall fully reflect the particulars of each such transaction or relationship, or both, as the case may be.

(c) Upon receipt of a claim on a shipment on which salvage has been processed in the manner hereinbefore prescribed, the carrier shall record in its claim file thereon the lot number assigned, the amount of money recovered, if any, from the disposition of such property, and the date of transmittal of such money to the person or persons lawfully entitled to receive the same.

[37 FR 4258, Mar. 1972]

§ 1005.7 Weight as a measure of loss.

Where weight is used as a measure of loss in rail transit of scrap iron and steel and actual tare and gross weights are determined at origin and destination, the settlement of claims shall be based upon a comparison of net weights at origin and destination.

[41 FR 25908, June 23, 1976]

PART 1007—RECORDS CONTAINING INFORMATION ABOUT INDIVIDUALS

Sec.

1007.1 Purpose and scope.
1007.2 Definitions.
1007.3 Requests by an individual for information or access.
1007.4 Procedures for identifying the individual making the request.
1007.5 Disclosure of requested information to individuals; fees for copies of records.
1007.6 Disclosure to third parties.
1007.7 Content of systems of records.
1007.8 Amendment of a record.
1007.9 Appeals to the Chairman.
1007.10 Information supplied by the Board when collecting information from an individual.
1007.11 Public notice of records systems.
1007.12 Exemptions.

AUTHORITY: 5 U.S.C. 552, 49 U.S.C. 721.

SOURCE: 41 FR 3087, Jan. 21, 1976, unless otherwise noted.

§ 1007.1 Purpose and scope.

(a) This part contains the rules of the Surface Transportation Board implementing the Privacy Act of 1974 (5 U.S.C. 552a). These rules apply to all records maintained by this Board which are not excepted or exempted as provided for in § 1007.12, insofar as they contain personal information concerning an individual, identify that individual by name or other symbol and are contained in a system of records from which information is retrieved by the individual's name or identifying symbol. Among the primary purposes of these rules are to permit individuals to determine whether information about them is contained in Board files and, if so, to obtain access to that information; to establish procedures whereby individuals may have inaccurate and incomplete information corrected; and, to restrict access by unauthorized persons to that information.

(b) In this part the Board is also exempting certain Board systems of records from some of the provisions of the Privacy Act of 1974 that would otherwise be applicable to those systems.

§ 1007.2 Definitions.

As used in this part:

Board means the Surface Transportation Board.

Chairman means the Presidentially appointed Board Member who is the administrative head of the Surface Transportation Board.

Privacy Officer refers to the individual designated to process requests and handle various other matters relating to the Board's implementation of the Privacy Act of 1974.

Individual means a citizen of the United States or an alien lawfully admitted for permanent residence.

Maintain means the maintenance, collection, use, or dissemination (of records).

Record means any item, collection or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.

Statistical Record means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of Title 13 of the United States Code.

System of records means a group of any records under the control of the Board retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.

Routine use means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose of which the record was compiled.

Agency means any executive department, military department, Government corporation, Government-controlled corporation or other establishment in the Executive Branch of the Government or any independent regulatory agency.

§ 1007.3 Requests by an individual for information or access.

(a) Any individual may request information on whether a system of records maintained by the Board contains any information pertaining to him or her, or may request access to his or her record or to any information pertaining to him or her which is contained in a system of records. All requests shall be directed to the Privacy Officer, Surface Transportation Board, 1925 K Street, NW, Washington, DC 20423.

(b) A request for information or for access to records under this part may be made by mail or in person. The request shall:

(1) Be in writing and signed by the individual making the request; and,

(2) Include the full name of the individual seeking the information or record, along with his or her home and business addresses and telephone numbers.

(c) For each system of records from which information is sought, the request shall:

(1) Specify the title and identifying number as it appears in the system notice published by the Board;

(2) Provide such additional identifying information, if any, as may be required by the system notice;

(3) Describe the specific information or kind of information sought within that system of records; and,

(4) Set forth any unusual arrangements sought concerning the time, place, or form of access.

(d) The Board will respond in writing to a request made under this section within ten days (excluding Saturdays, Sundays and legal public holidays) after receipt of the request. If a definitive reply cannot be given within ten days, the request will be acknowledged and an explanation will be given of the status of the request.

(e) The individual either will be notified in writing of where and when he or she may obtain access to the records requested or will be given the name, address and telephone number of the member of the Board staff with whom he or she should communicate to make further arrangements for access.

[41 FR 3087, Jan. 21, 1976, as amended at 64 FR 53266, Oct. 1, 1999]

§ 1007.4 Procedures for identifying the individual making the request.

When a request for information or for access to records has been made pursuant to § 1007.3, before information is

given or access is granted pursuant to § 1007.5 of these rules, the Board shall require reasonable identification of the person making the request to insure that information is given and records are disclosed only to the proper person.

(a) An individual may establish his identity by:

(1) Submitting with his written request for information or for access to photocopy, two pieces of identification bearing his or her name and signature, one of which shall bear his or her current home or business address; or

(2) Appearing at any office of the Board during the regular working hours for that office and presenting either:

(i) One piece of identification containing a photograph and signature, such as a driver's license or passport, or, in the case of a Board employee, his or her STB identification card; or

(ii) Two pieces of identification bearing the individual's name and signature, one of which shows the individual's current home or business address; and

(3) Providing such other proof of identity as the Board deems satisfactory in the circumstances of a particular request.

(b) Nothing in this section shall preclude the Board from requiring additional identification before granting access to the records if there is reason to believe that the person making the request may not be the individual to whom the record pertains, or where the sensitivity of the data may warrant.

(c) The requirements of this subsection shall not apply if the records involved would be available to any person under the Freedom of Information Act.

§ 1007.5 Disclosure of requested information to individuals; fees for copies of records.

(a) Any individual who has requested access to his or her record or to any information pertaining to that individual in the manner prescribed in § 1007.3 and has identified himself or herself as prescribed in § 1007.4 shall be permitted to review the record and have a copy made of all or any portion thereof in a form comprehensible to the individual, subject to fees for copying services set forth in paragraph (f) of this section. Upon request, persons of the individual's own choosing may accompany the individual, provided that the individual has furnished a written statement authorizing discussion of his or her record in the accompanying person's presence.

(b) Access will generally be granted in the office of the Board where the records are maintained during normal business hours, but for good cause shown the Board may grant access at another office of the Board or at different times for the convenience of the individual making the request. When a request for access is from a Board employee, this request may be granted by forwarding the information desired through registered mail, return receipt requested.

(c) Where a document containing information about an individual also contains information not pertaining to him or her, the portion not pertaining to the individual shall not be disclosed except to the extent the information is available to any person under the Freedom of Information Act. If the records sought cannot be provided for review and copying in a meaningful form, the Board shall provide to the individual a summary of the information concerning the individual contained in the record or records which shall be complete and accurate in all material aspects.

(d) Where the disclosure involves medical records, the Privacy Officer may determine that such information will be provided only to a physician designated by the individual.

(e) Requests for copies of documents may be directed to the Privacy Officer or to the member of the Board's staff through whom arrangements for access were made.

(f) Fees for copies of records shall be charged at the rate set forth in 49 CFR 1002.1(d). Fees for requests requiring the use of a computer shall be charged at the actual cost for machine time. Payment should be made by check or money order payable to the Treasury of the United States. When it is determined to be in the best interest of the public, the Privacy Officer may waive the fee provision.

(g) Nothing in this subsection or in § 1007.3 shall:

(1) Require the disclosure of records exempted under § 1007.12 of these rules, including the exemption relating to investigative records;

(2) Allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding or a criminal proceeding; or,

(3) Require the furnishing of information or records which in the regular course of business cannot be retrieved by the name or other identifier of the individual making the request.

[41 FR 3087, Jan. 21, 1976, as amended at 53 FR 46483, Dec. 8, 1987]

§ 1007.6 Disclosure to third parties.

(a) The Board shall not disclose to any agency or to any person by any means of communication a record pertaining to an individual which is contained in a system of records, except under the following circumstances:

(1) The individual to whom the record pertains has given his written consent to the disclosure;

(2) The disclosure is to officers and employees of the Board who need it in the performance of their duties;

(3) Disclosure is required under the Freedom of Information Act (5 U.S.C. 552).

(4) Disclosure is for a routine use as defined in § 1007.2 of these rules and described in the system notice for that system of records;

(5) The disclosure is made to the Bureau of the Census for the purposes of planning or carrying out a census or survey or related activity;

(6) The disclosure is made to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(7) The disclosure is made to another agency or to an instrumentality of any Governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law and if the head of the agency or instrumentality has made a written request to the Board specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) The disclosure is made to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Administrator of General Services or his designee to determine whether the record has such value.

(9) The disclosure is made to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(10) The disclosure is made to either House of Congress, or, to the extent of matter(s) within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(11) The disclosure is made to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office; or,

(12) Pursuant to the order of a court of competent jurisdiction.

(b) The Board, with respect to each system of records under its control, shall keep for at least five years an accurate accounting of certain disclosures:

(1) A record shall be kept of all disclosures made under paragraph (a) of this section, except disclosures made with the consent of the individual to whom the record pertains (paragraph (a)(1) of this section), disclosures to authorized employees (paragraph (a)(2) of this section), and disclosures required under the Freedom of Information Act (paragraph (a)(3) of this section).

(2) The record shall include:

(i) The date, nature, and purpose of each disclosure of a record made to any person or to another agency;

(ii) The name and address of the person or agency to whom the disclosure was made.

(c) The accounting described in paragraph (b) of this section will be made available to the individual named in

the record upon his written request, directed to the Privacy Officer, Surface Transportation Board, 1925 K Street, NW, Washington, DC 20423, except that the accounting will not be revealed with respect to disclosures made under paragraph (a)(7) of this §1107.6 pertaining to law enforcement activity, and will not be maintained as to disclosures involving systems of records exempted under §1007.12.

(d) Whenever an amendment or correction of a record or a notation of dispute concerning the accuracy of records is made by the Board in accordance with §§1007.8 and 1007.9, the Board will inform any person or other agency to whom the record was previously disclosed, if an accounting of the disclosure was made pursuant to the requirements of paragraph (b) of this section.

[41 FR 3087, Jan. 21, 1976. as amended at 64 FR 53266, Oct. 1, 1999]

§1007.7 Content of systems of records.

(a) The Board will maintain in its records only such information about an individual as is relevant and necessary to accomplish the purposes of the Interstate Commerce Act and other purposes required to be accomplished by statute or by Executive Order of the President.

(b) The Board will maintain no record describing how any individual exercises rights guaranteed by the First Amendment of the United States Constitution unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity.

(c) The Board will collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs.

(d) The Board will maintain all records which are used by the Board in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination.

§1007.8 Amendment of a record.

(a) Any individual may request amendment of information pertaining to him which is contained in a system of records maintained by the Board and which is filed under his name or other individual identifier if he believes the information is not accurate, relevant, timely or complete. A request for amendment shall be directed to the Privacy Officer.

(b) A request for amendment may be made by mail or in person and shall: (1) Be in writing and signed by the person making the request; (2) describe the particular record to be amended with sufficient specificity to permit the record to be located among those maintained by the Board; and (3) specify the nature of the amendment sought and the justification for the requested change. The person making the request may be required to provide the information specified in §§1007.3 and 1007.4 in order to simplify identification of the record and permit verification of the identity of the person making the request for amendment.

(c) Receipt of a request for amendment will be acknowledged in writing within ten days (excluding Saturdays, Sundays and legal public holidays); except that if the individual is given notice within the ten-day period that his or her request will or will not be complied with, no acknowledgment is required.

(d) Assistance in preparing a request to amend a record may be obtained from the Privacy Officer, Surface Transportation Board, 1925 K Street, NW, Washington, DC 20423.

(e) Upon receipt of a request for amendment the Privacy Officer or a person designated by him shall promptly determine whether the record is materially inaccurate, incomplete, misleading, or is irrelevant or not timely, as claimed by the individual, and, if so, shall cause the record to be amended in accordance with the individual's request.

(f) If the Privacy Officer or designee grants the request to amend the record, the individual shall promptly be advised of the decision and of the action taken, and notice shall be given of the correction and its substance to each person or agency to whom the

record had previously been disclosed, as shown on the record of disclosures maintained in accordance with § 1007.6(b).

(g) If the Privacy Officer or designee disagrees in whole or in part with a request for amendment of a record, the individual shall promptly be notified of the complete or partial denial of his request and the reasons for the refusal. The individual shall also be notified of the procedures for administrative review by the Chairman of any complete or partial denial of a request for amendment, which are set forth in § 1007.9.

(h) If a request is received for amendment of a record prepared by another agency which is in the possession or control of the Board, the request for amendment will be forwarded to that agency. If that agency determines that the correction should be made, the Board will amend its records accordingly and notify the individual making the request for amendment of the change. If the other agency declines to make the amendment, the Privacy Officer or designee will independently determine whether the amendment will be made to the record in the Board's possession or control, considering any explanation given by the other agency for its decision.

[41 FR 3087, Jan. 21, 1976, as amended at 64 FR 53266, Oct. 1, 1999]

§ 1007.9 Appeals to the Chairman.

(a) Any individual may petition the Chairman:

(1) To review a refusal to comply with an individual request for access to records pursuant to the Privacy Act (5 U.S.C. 552a(d)(1)), and §§ 1007.3 and 1007.5 in this part;

(2) To review denial of a request for amendment made pursuant to § 1007.8;

(3) To correct any determination that may have been made adverse to the individual based in whole or in part upon inaccurate, irrelevant, untimely or incomplete information; and,

(4) To correct a failure to comply with any other provision of the Privacy Act and the rules of this part 1007, which has had an adverse effect on the individual.

(b) The petition to the Chairman shall be in writing and shall: (1) State in what manner it is claimed the Board or any Board employee has failed or refused to comply with provisions of the Privacy Act or of the rules contained in this part 1007, and (2) set forth the corrective action the petitioner wishes the Board to take. The petitioner may, if he or she wishes, state such facts and cite such legal or other authorities as are considered appropriate.

(c) The Chairman will make a determination of any petition filed pursuant to this subsection within thirty days (excluding Saturdays, Sundays and legal public holidays) after receipt of the petition, unless for good cause shown, the Chairman extends the 30-day period. If a petition is denied, the petitioner will be notified in writing of the reasons for such denial, and the provisions for judicial review of that determination which are set forth in section 552a(g) (1)(A) and (2)(A), of Title 5 of the United States Code and the provisions for disputed records set forth in paragraph (d) of this section.

(d) If, after review, the Chairman declines to amend the records as the individual has requested, the individual may file with the Privacy Officer a concise statement setting forth why he or she disagrees with the Chairman's denial of the request. Any subsequent disclosure containing information about which a statement of disagreement has been filed shall clearly note the portion which is disputed and include a copy of a concise statement explaining its reasons for not making the amendments requested. Prior recipients of the disputed record will be provided a copy of any statement of dispute to the extent that an accounting of disclosures was maintained.

§ 1007.10 Information supplied by the Board when collecting information from an individual.

The Board will inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual, of:

(a) The authority which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(b) The principal purpose or purposes for which the information is intended to be used;

(c) The routine uses which may be made of the information, as published in the FEDERAL REGISTER; and,

(d) The effects on the individual of not providing all or any part of the requested information.

§ 1007.11 Public notice of records systems.

(a) The Board will publish in the FEDERAL REGISTER, at least annually, a notice of the existence and character of each of its system of records, which notice shall include:

(1) The name and location of the system;

(2) The categories of individuals on whom records are maintained in the system;

(3) The categories of records maintained in the system;

(4) Each routine use of the records contained in the system, including the categories of users and purpose of such use;

(5) The policies and practices of the Board regarding storage, retrieval, access controls, retention, and disposal of the records;

(6) The title and business address of the Board official who is responsible for the system of records;

(7) The procedures whereby an individual can be notified at his or her request if the system of records contains a record pertaining to that individual;

(8) The procedures whereby an individual can be notified at his or her request how he or she can gain access to any record pertaining to that individual contained in the system of records, and how the content of the record can be contested; and,

(9) The categories of sources of records in the system.

(b) Copies of the notices as printed in the FEDERAL REGISTER will be available in each office of the Board. Mail requests should be directed to the Privacy Officer, Surface Transportation Board, 1925 K Street, NW, Washington, DC 20423. The first copy will be provided free of charge; additional copies are subject to charge provided for in paragraph (e) of this § 1007.5.

[41 FR 3087, Jan. 21, 1976, as amended at 64 FR 53266, Oct. 1, 1999]

§ 1007.12 Exemptions.

(a) Investigatory materials compiled for law enforcement purposes are exempt from portions of the Privacy Act of 1974 and of these rules on the basis and to the extent that individual access to these files could impair the effectiveness and orderly conduct of the Board's enforcement program. *Provided, however,* That if any individual is denied any right, privilege, or benefit to which he or she would otherwise be entitled by Federal law, or for which he or she would otherwise be eligible, as a result of the maintenance of such material, such materials shall be provided to the individual; except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

(b) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for employment with or contracts with the Board are exempt from portions of the Privacy Act of 1974 and of these rules to the extent that it identifies a confidential source. This is done in order to encourage persons from whom information is sought to provide information to the Board which, absent assurances of confidentiality, they might otherwise be unwilling to give. However, if practicable, material identifying a confidential source shall be extracted or summarized in a manner which protects the source, and the summary or extract shall be provided to the requesting individual.

(c) Complaints and investigatory materials compiled by the Board's Office of Inspector General are exempt from the provisions of 5 U.S.C. 552a and the regulations in this part, pursuant to 5 U.S.C. 552a(j)(2), except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11) and (i) to the

extent that the system of records pertains to the enforcement of criminal laws. Complaint and investigatory materials compiled by the Board's Office of Inspector General for law enforcement purposes also are exempt from the provisions of 5 U.S.C. 552a and the regulations of this part, pursuant to 5 U.S.C. 552a(k)(2).

[41 FR 3087, Jan. 21, 1976, as amended at 58 FR 15291, Mar. 22, 1993; 58 FR 28520, May 14, 1993]

PART 1011—BOARD ORGANIZATION; DELEGATIONS OF AUTHORITY

Sec.

1011.1 General.
1011.2 The Board.
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AUTHORITY: 5 U.S.C. 553; 31 U.S.C. 9701; 49 U.S.C. 701, 721, 11123, 11124, 11144, 14122, and 15722.

SOURCE: 67 FR 60167, Sept. 25, 2002, unless otherwise noted.

§ 1011.1 General.

(a) This part describes the organization of the Board, and the assignment of jurisdiction and the responsibilities to the Board, individual Board Members or employees, and employee boards.

(b) As used in this part, *matter* includes any case, proceeding, question, or other matter within the Board's jurisdiction; and *decision* includes any decision, ruling, order, or requirement of the Board, an individual Board Member or employee, or an employee board.

§ 1011.2 The Board.

(a) The Board reserves to itself for consideration and disposition:

(1) All rulemaking and similar proceedings involving the promulgation of rules or the issuance of statements of general policy.

(2) All investigations and other proceedings instituted by the Board, except as may be ordered in individual situations.

(3) All administrative appeals in a matter previously considered by the Board.

(4) All other matters submitted for decision except those assigned to an individual Board Member or employee or an employee board.

(5) Except for matters assigned to the Chairman of the Board under § 1011.4(a)(6):

(i) The determination of whether to reconsider a decision being challenged in court;

(ii) The disposition of matters that have been the subject of an adverse decision by a court; and

(iii) The determination of whether to file any memorandum or brief or otherwise participate on behalf of the Board in any court.

(6) The disposition of all matters involving issues of general transportation importance, and the determination whether issues of general transportation importance are involved in any matter.

(7) All appeals of initial decisions issued by the Director of the Office of Proceedings under the authority delegated by § 1011.7(b). Appeals must be filed within 10 days after service of the Director decision or publication of the notice, and replies must be filed within 10 days after the due date for appeals or any extension thereof.

(b) The Board may bring before it any matter assigned to an individual Board Member or employee or employee board.

§ 1011.3 The Chairman, Vice Chairman, and Board Member.

(a)(1) The Chairman of the Board is appointed by the President as provided by 49 U.S.C. 701(c)(1). The Chairman has authority, duties, and responsibilities assigned under 49 U.S.C. 701(c)(2) and described in this part.

(2) The Vice Chairman is elected by the Board for the term of 1 calendar year.

(3) In the Chairman's absence, the Vice Chairman is acting Chairman, and has the authority and responsibilities of the Chairman. In the Vice Chairman's absence, the Chairman, if

present, has the authority and responsibilities of the Vice Chairman. In the absence of both the Chairman and Vice Chairman, the remaining Board Member is acting Chairman, and has the authority and responsibilities of the Chairman and Vice Chairman.

(b)(1) The Chairman is the executive head of the Board and has general responsibilities for:

(i) The overall management and functioning of the Board;

(ii) The formulation of plans and policies designed to assure the effective administration of the Interstate Commerce Act and related Acts;

(iii) Prompt identification and early resolution, at the appropriate level, of major substantive regulatory problems; and

(iv) The development and use of effective staff support to carry out the duties and functions of the Board.

(2) The Chairman of the Board exercises the executive and administrative functions of the Board, including:

(i) The appointment, supervision, and removal of Board employees, except those in the immediate offices of Board Members other than the Chairman;

(ii) The distribution of business among such personnel and among administrative units of the Board; and

(iii) The use and expenditures of funds.

(3) In carrying out his or her functions, the Chairman is governed by general policies of the Board and by such regulatory decisions, findings, and determinations as the Board by law is authorized to make.

(4) The appointment by the Chairman of the heads of offices is subject to the approval of the Board. All heads of offices report to the Chairman.

(c)(1) The Chairman presides at all sessions of the Board and sees that every vote and official act of the Board required by law to be recorded is accurately and promptly recorded by the Secretary or the person designated by the Board for that purpose.

(2) Regular sessions of the Board are provided for by Board regulations. The Chairman may call the Board into special session to consider any matter or business of the Board. The Chairman shall convene a special session to consider any matter or business on request of a member of the Board unless a majority of the Board votes either not to hold a special session or to delay conference consideration of that item, or unless the Chairman finds that special circumstances warrant a delay. Notwithstanding the two immediately preceding sentences of this paragraph, on the written request of any member of the Board, the Chairman shall schedule a Board conference to discuss and vote on significant Board proceedings involving major transportation issues, and such conference shall be held within a reasonable time following the close of the record in the involved proceeding.

(3) The Chairman exercises general control over the Board's argument calendar and conference agenda.

(4) The Chairman acts as correspondent and speaks for the Board in all matters where an official expression of the Board is required.

(5) The Chairman brings any delay or failure in the work to the attention of the supervising Board Member, employee, or board, and initiates ways of correcting or preventing avoidable delays in the performance of any work or the disposition of any matter.

(6) The Chairman may appoint such standing or *ad hoc* committees of the Board as he or she considers necessary.

(7) The Chairman may reassign related proceedings to a board of employees and may remove a matter from an individual Board Member or employee or employee board for consideration and disposition by the Board.

(8) The Chairman may authorize any officer, employee, or administrative unit of the Board to perform a function vested in or delegated to the Chairman.

(9) The Chairman authorizes the institution of investigations on the Board's own motion, and their discontinuance at any time before hearing.

(10) The Chairman approves for publication all publicly issued documents by an office, except:

(i) Those authorized or adopted by the Board or an individual Board Member that involve decisions in formal proceedings;

(ii) Decisions or informal opinions of an office; and

(iii) Documents prepared for court cases or for introduction into evidence in a formal proceeding.

§ 1011.4 Delegations to individual Board Members.

(a) The following matters are referred to the Chairman of the Board:

(1) Entry of reparation orders responsive to findings authorizing the filing of statements of claimed damages as provided at 49 CFR part 1133.

(2) Extensions of time for compliance with orders and procedural matters in any formal case or pending matter, except appeals taken from the decision of a hearing officer on requests for discovery.

(3) Postponement of the effective date of orders in proceedings that are the subject of suits brought in a court to enjoin, suspend, or set aside the decision.

(4) Dismissal of complaints and applications on the unopposed motion of any party.

(5) Requests for access to waybills and to statistics reported under orders of the Board.

(6) Exercise of control over litigation arising under the Freedom of Information Act (5 U.S.C. 552) and the Privacy Act (5 U.S.C. 552a), except for determinations whether to seek further judicial review of:

(i) A decision in which a court finds under 5 U.S.C. 552(a)(4)(F) that Board personnel may have acted arbitrarily or capriciously in improperly withholding records from disclosure; or

(ii) A decision in which a court finds under 5 U.S.C. 552a(g)(4) that Board personnel acted intentionally or willfully in violating the Privacy Act.

(7) Issuance of certificates and decisions authorizing Consolidated Rail Corporation to abandon or discontinue service over lines for which an application under section 308 of the Regional Rail Reorganization Act of 1973 has been filed.

(8) Designation in writing of employees authorized to inspect and copy records and to inspect and examine lands, buildings, and equipment pursuant to 49 U.S.C. 11144, 14122, and 15722.

(9) Authority to act alone to take necessary actions in emergency situations when the Chairman is the only Board member reasonably available.

(b) The following matters are referred to the Vice Chairman of the Board:

(1) Matters within the jurisdiction of the Accounting Board if certified to the Vice Chairman by the Accounting Board or if removed from the Accounting Board by the Vice Chairman.

(2) Matters involving the admission, disbarment, or discipline of practitioners before the Board under 49 CFR part 1103.

(c) The Chairman, Vice Chairman, or other Board Member to whom a matter is assigned under this part may certify such matter to the Board.

(d) The Chairman shall notify all Board Members that a petition for a stay has been referred to the Chairman for disposition under paragraphs (a)(2) or (3) of this section. The Chairman shall also inform all Board Members of the decision on that petition before service of such decision. At the request of a Board Member, made at any time before the Chairman's decision is served, the petition will be referred to the Board for decision.

[67 FR 60167, Sept. 25, 2002, as amended at 68 FR 8726, Feb. 25, 2003]

§ 1011.5 Employee boards.

This section covers matters assigned to the Accounting Board, a board of employees of the Board.

(a) The Accounting Board has authority:

(1) To permit departure from general rules prescribing uniform systems of accounts for carriers and other persons under the Interstate Commerce Act, and from the regulations governing accounting and reporting forms;

(2) To prescribe rates of depreciation to be used by railroad and water carriers;

(3) To issue special authorizations permitted by the regulations governing the destruction of records of carriers subject to the Interstate Commerce Act; and

(4) To grant extensions of time for filing annual, periodic, and special reports in matters that do not involve taking testimony at a public hearing or the submission of evidence by opposing parties in the form of affidavits.

(b) The board may certify any matter assigned to it to the Board.

§ 1011.6 Delegations of authority by the Chairman.

(a)(1) This section provides for delegations of authority by the Chairman of the Surface Transportation Board to individual Board employees.

(2) The Chairman of the Board may remove for disposition any matter delegated under this section, and any matter delegated under this section may be referred by the Board employee to the Chairman for disposition.

(b) The Board will decide appeals from decisions of employees acting under authority delegated under this section. Appeals must be filed within 10 days after the date of the employee's action, and replies must be filed within 10 days after the due date for appeals. Appeals are not favored and will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice.

(c)(1) As used in this paragraph, *procedural matter* includes, but is not limited to, the assignment of the time and place for hearing; the assignment of proceedings to administrative law judges; the issuance of decisions directing special hearing procedures; the establishment of dates for filing statements in cases assigned for hearing under modified (non-oral hearing) procedure; the consolidation of proceedings for hearing or disposition; the postponement of hearings and procedural dates; the waiver of formal specifications for pleadings; and extensions of time for filing pleadings. It does not include interlocutory appeals from the rulings of hearing officers; nor does it include postponement of the effective date of:

(i) Decisions pending judicial review,

(ii) Decisions of the entire Board,

(iii) Cease and desist orders, or

(iv) Final decisions where petitions for discretionary review have been filed under 49 CFR 1115.3.

(2) Unless otherwise ordered by the Board in individual proceedings, authority to dispose of procedural matters is delegated to administrative law judges or Board Members in proceedings assigned to them.

(3) Unless otherwise ordered by the Board in individual proceedings, authority to dispose of routine procedural matters in proceedings assigned for handling under modified procedure, other than those assigned to an administrative law judge or a Board Member, is assigned to the Secretary of the Board. The Secretary shall also have authority, unless otherwise ordered by the Chairman or by a majority of the Board in individual proceedings, to decide whether complaint proceedings shall be handled under the modified procedure or be assigned for oral hearings. In carrying out these duties, the Secretary shall consult, as necessary, with the General Counsel and the Director of any Board office to which an individual proceeding has been assigned.

(d) Except as provided at 49 CFR 1113.3(b)(1), authority to dismiss a complaint on complainant's request, or an application on applicant's request, is delegated to the Secretary.

(e) Authority to grant or deny access to waybills and to statistics reported under orders of the Board is delegated to the Director of the Office of Economics, Environmental Analysis, and Administration.

(f) Certain accounts in the Uniform Systems of Accounts, 49 CFR parts 1200 through 1207, require Board approval to use. Authority to grant or deny requests for use of these accounts is delegated to the Director and Associate Director of the Office of Economics, Environmental Analysis, and Administration and the Chief of the Section of Economics.

(g) The Secretary of the Board is delegated authority, under the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, to:

(1) Sign and transmit to the Small Business Administration certifications of no significant economic effect for proposed rules, that if adopted by the Board, will not have a significant economic impact on a substantial number of small entities; and

(2) Sign and transmit findings regarding waiver or delay of an initial regulatory flexibility analysis or delay of a final regulatory flexibility analysis.

(h) Issuance of certificates and decisions authorizing Consolidated Rail Corporation to abandon or discontinue

service over lines for which an application under section 308 of the Regional Rail Reorganization Act of 1973 has been filed is delegated to the Director of the Office of Proceedings.

§ 1011.7 Delegations of authority by the Board to specific offices of the Board.

(a) *The Secretary*. The Secretary of the Board is delegated the following authority:

(1) Whether (in consultation with involved Offices) to waive filing fees set forth at 49 CFR 1002.2(f).

(2) To issue, on written request, informal opinions and interpretations (exclusive of informal opinions and interpretations on carrier tariff provisions), which are not binding on the Board. In issuing informal opinions or interpretations, the Secretary shall consult with the Director of the appropriate Board office. Such requests must be directed to the Secretary, Surface Transportation Board, Washington, DC 20423. Authority to issue informal opinions and interpretations on carrier tariff provisions is delegated at paragraph (c)(2) of this section to the Office of Compliance and Enforcement.

(b) *Office of Proceedings*. In addition to the authority delegated at 49 CFR 1011.6(h), the Director of the Office of Proceedings shall have authority initially to determine the following:

(1) Whether to designate abandonment proceedings for oral hearings on request.

(2) Whether offers of financial assistance satisfy the statutory standards of 49 U.S.C. 10904(d) for purposes of negotiations or, in exemption proceedings, for purposes of partial revocation and negotiations.

(3) Whether:

(i) To impose, modify, or remove environmental or historic preservation conditions; and

(ii) In abandonment proceedings, to impose public use conditions under 49 U.S.C. 10905 and the implementing regulations at 49 CFR 1152.28.

(4) In abandonment proceedings, when a request for interim trail use/rail banking is filed under 49 CFR 1152.29, to determine whether the National Trails System Act, 16 U.S.C. 1247(d), is applicable and, where appropriate, to issue Certificates of Interim Trail Use or Abandonment (in application proceedings) or Notices of Interim Trail Use or Abandonment (in exemption proceedings).

(5) In any abandonment proceeding where interim trail use/rail banking is an issue, to make such findings and issue decisions as may be necessary for the orderly administration of the National Trails System Act, 16 U.S.C. 1247(d).

(6) Whether to institute requested declaratory order proceedings under 5 U.S.C. 554(e).

(7) To issue decisions, after 60 days' notice by any person discontinuing a subsidy established under 49 U.S.C. 10904 and at the railroad's request:

(i) In application proceedings, immediately issuing decisions authorizing abandonment or discontinuance; and

(ii) In exemption proceedings, immediately vacating the decision that postponed the effective date of the exemption.

(8) In proceedings under the Feeder Railroad Development Program under 49 U.S.C. 10907 and the implementing regulations at 49 CFR part 1151:

(i) Whether to accept or reject primary applications under 49 CFR 1151.2(b); competing applications under section 1151.2(c); and incomplete applications under 49 CFR 1151.2(d).

(ii) Whether to grant waivers from specific provisions of 49 CFR part 1151.

(9) In exemption proceedings subject to environmental or historic preservation reporting requirements, to issue a decision, under 49 CFR 1105.10(g), making a finding of no significant impact where no environmental or historic preservation issues have been raised by any party or identified by the Board's Section of Environmental Analysis.

(10) Whether to issue notices of exemption under 49 U.S.C. 10502:

(i) For acquisition, lease, and operation transactions under 49 U.S.C. 10901 and 10902 and the implementing regulations at 49 CFR part 1150, subparts D and E;

(ii) For connecting track constructions under 49 U.S.C. 10901 and the implementing regulations at 49 CFR 1150.36;

(iii) For rail transactions under 49 U.S.C. 11323 and the implementing regulations at 49 CFR 1180.2(d); and

(iv) For abandonments and discontinuances under 49 U.S.C. 10903 and the implementing regulations at 49 CFR 1152.50.

(11) When an application or a petition for exemption for abandonment is filed, the Director will issue a notice of that filing pursuant to 49 CFR 1152.24(e)(2) and 49 CFR 1152.60, respectively.

(12) Whether to issue a notice of exemption under 49 U.S.C. 13541 for a transaction under 49 U.S.C. 14303 within a motor passenger carrier corporate family that does not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with motor passenger carriers outside the corporate family.

(13) Whether to issue rail modified certificates of public convenience and necessity under 49 CFR part 1150, subpart C.

(14) Whether to waive the regulations at 49 CFR part 1152, subpart C, on appropriate petition.

(15) To reject applications, petitions for exemption, and verified notices (filed in class exemption proceedings) for noncompliance with the environmental rules at 49 CFR part 1105.

(16) To reject applications by The Burlington Northern and Santa Fe Railway Company to abandon rail lines in North Dakota exceeding the 350-mile cap of section 402 of Public Law 97–102, 95 Stat. 1465 (1981), as amended by The Department of Transportation and Related Agencies Appropriations Act, 1992, Public Law 102–143, section 343 (Oct. 28, 1991).

(c) *Office of Compliance and Enforcement.* The Office of Compliance and Enforcement is delegated the authority to:

(1) Reject tariffs and railroad transportation contract summaries filed with the Board that violate applicable statutes, rules, or regulations. Any rejection of a tariff or contract summary may be by letter signed by or for the Director, Office of Compliance and Enforcement, or the Chief, Section of Tariffs, Office of Compliance and Enforcement.

(2) Issue, on written request, informal opinions and interpretations on carrier tariff provisions, which are not binding on the Board.

(3) Grant or withhold special tariff authority granting relief from the provisions of 49 CFR part 1312. Any grant or withholding of such relief may be by letter signed by or for the Director, Office of Compliance and Enforcement, or the Chief, Section of Tariffs, Office of Compliance and Enforcement.

(4) Resolve any disputes that may arise concerning the applicability of motor common carrier rates under 49 U.S.C. 13710(a)(2).

(5) Issue orders by the Director in an emergency under 49 U.S.C. 11123 and 11124 if no Board Member is reasonably available.

[67 FR 60167, Sept. 25, 2002, as amended at 68 FR 8726, Feb. 25, 2003]

PART 1012—MEETINGS OF THE BOARD

Sec.
1012.1 General provisions.
1012.2 Time and place of meetings.
1012.3 Public notice.
1012.4 Public participation.
1012.5 Transcripts; minutes.
1012.6 Petitions seeking to open or close a meeting.
1012.7 Meetings which may be closed to the public.

AUTHORITY: 5 U.S.C. 552b(g), 49 U.S.C. 701, 721.

SOURCE: 42 FR 13796, Mar. 11, 1977, unless otherwise noted.

§ 1012.1 General provisions.

(a) The regulations contained in this part are issued pursuant to the provisions of 5 U.S.C. 552b(g), added by section 3(a) of the Government in the Sunshine Act, Pub. L. 94–409 (Act), and section 17(3) of the Interstate Commerce Act. They establish procedures under which meetings of the Surface Transportation Board (Board) are held. They apply to oral arguments as well as to deliberative conferences. They apply to meetings of the Board. They include provisions for giving advance public notice of meetings, for holding meetings which may lawfully be closed to the public, and for issuing minutes and transcripts of meetings.

(b) The words *meeting* and *conference* are used interchangeably in this part to mean the deliberations of at least a majority of the members of the Board, where such deliberations determine or result in the joint conduct or disposition of official Board business. They do not include meetings held to determine whether some future meeting should be open or closed to the public. They do not include the deliberations of members of boards of employees of the Board.

(c) These regulations are not intended to govern situations in which members of the Board consider individually and vote by notation upon matters which are circulated to them in writing. Copies of the votes or statements of position of all Board Members eligible to participate in action taken by notation voting will be made available, as soon as possible after the date upon which the action taken is made public or any decision or order adopted is served, in a public reading room or other easily accessible place within the Board, or upon written request to the Secretary of the Board.

[42 FR 13796, Mar. 11, 1977, as amended at 64 FR 53266, 53267, Oct. 1, 1999]

§ 1012.2 Time and place of meetings.

(a) Conferences, oral arguments, and other meetings are held at the Board's offices located at 1925 K Street, NW, Washington, DC, unless advance notice of an alternative site is given. Room assignments will be posted at the Board on the day of the meeting.

(b) Regular Board conferences are held on the first and third Tuesdays of each month, or on the following day if the regular conference day is a holiday. Oral arguments before the Board are normally scheduled on the first or third Wednesday of each month. Regular Board conferences and oral arguments before the Board normally begin at 9:30 a.m. A luncheon recess is taken at approximately noon, and other recesses may be called by the presiding officer. Times for reconvening following a recess, or on subsequent days if a conference or oral argument lasts more than one day, are set by the presiding officer at the time the recess is announced.

(c) Special Board conferences or oral arguments are scheduled by the Chairman of the Board.

(d) If one or more portions of the same meeting are open to the public while another portion or other portions are closed, all those portions of the meeting which are open to the public are scheduled at the beginning of the meeting agenda, and are followed by those portions which are closed.

[42 FR 13796, Mar. 11, 1977, as amended at 64 FR 53267, Oct. 1, 1999]

§ 1012.3 Public notice.

(a) Unless a majority of the Board determines that such information is exempt from disclosure under the Act, public notice of the scheduling of a meeting will be given by filing a copy of the notice with the Secretary of the Board for posting and for service on all parties of record in any proceeding which is the subject of the meeting or any other person who has requested notice with respect to meetings of the Board, and by submitting a copy of the notice for publication in the FEDERAL REGISTER.

(b) Public notice of a scheduled meeting will contain:

(1) The date, time, place, and subject matter of the meeting.

(2) Whether it is open to the public.

(3) If the meeting or any portion of the meeting is not open to the public, an explanation of the action taken in closing the meeting or portion of the meeting, together with a list of those expected to attend the meeting and their affiliations.

(4) If a vote is taken on the question of whether to close a meeting or a portion of a meeting to the public, a statement of the vote or position of each Board Member eligible to participate in that vote. If such a vote is taken, public notice of its result will be posted within one working day following completion of the voting. If the result of the vote is to close the meeting or a portion of the meeting, an explanation of that action will be included in the notice to be issued within one working day following completion of the voting. The public notice otherwise required by this subparagraph may be withheld

if the Board finds that such information is exempt from disclosure under the Act.

(5) The name and telephone number of the Board official designated to respond to requests for information about the meeting. Unless otherwise specified, that official will be the Board's Public Information Officer, whose telephone number is (202) 275–7252.

(c) Except as provided in paragraphs (d) and (e) of this section, public notice will be given at least one week before the date upon which a meeting is scheduled.

(d) Due and timely execution of the Board's functions will not normally permit the giving of one week's public notice of meetings called to consider or determine whether to suspend or investigate a tariff or schedule under sections 15(7), 15(8), 215(g), 218(c), 307(g), 307(i), or 406(e) of the Interstate Commerce Act (49 U.S.C. 15(7), 15(8), 316(g), 318(c), 907(g), 907(i), 1006(e)); to consider whether to grant special permission to deviate from tariff filing requirements under section 6(3), 217(c), 218(a), 306(d), 306(e), or 405(d) of the Interstate Commerce Act (49 U.S.C. 6(3), 317(c), 318(a), 906(d), 906(e), or 1005(d)); or to consider or dispose of an application for temporary authority under section 210a(a) or 311(a) of the Interstate Commerce Act (49 U.S.C. 310a(a) or 911(a)). Such meetings will normally be called on less than one week's notice, and public notice will be posted and published at the earliest practicable time.

(e) If a majority of the Board Members eligible to participate in the conduct or disposition of the matter which is the subject of a meeting determines, by recorded vote, that Board business requires that a meeting be called on less than one week's notice, the meeting may be called on short notice, and public notice will be posted and published at the earliest practicable time.

(f) Changes in the scheduling of a meeting which has been the subject of a public notice will also be made the subject of a public notice, which will be posted at the earliest practicable time. Changes in, or additions to a conference agenda or in the open or closed status of a meeting will be made only if a majority of the Board Members eligible to participate in the conduct or disposition of the matter which is the subject of the meeting determines, by recorded vote, that the Board's business requires such change and that no earlier announcement of the change was possible. In such a case, the public notice of the change, will show the vote of each Board Member on the change.

[42 FR 13796, Mar. 11, 1977, as amended at 64 FR 53267, Oct. 1, 1999]

§ 1012.4 Public participation.

(a) In the case of Board or Division conferences or meetings of committees of the public, members of the public will be admitted as observers only. Active participation, as by asking questions or attempting to participate in the discussion, will not be permitted, and anyone violating this proscription may be required to leave the meeting by the presiding officer.

(b) Oral arguments are always open to the public. The scheduling of participants in the arguments and the allotment of time is governed by 49 CFR part 1116.

[42 FR 13796, Mar. 11, 1977, as amended at 47 FR 49596 and 49597, Nov. 1, 1982; 47 FR 54083, Dec. 1, 1982; 47 FR 55686, Dec. 13, 1982; 57 FR 44135, Sept. 24, 1992]

§ 1012.5 Transcripts; minutes.

(a) A verbatim transcript, sound recording or minutes will be made of all meetings closed to the public under these regulation, and will be retained by the Board for two years following the date upon which the meeting ended, or until one year after the conclusion of any proceeding with respect to which the meeting was held, whichever occurs later. In the case of meetings closed to the public under § 1012.7(d) (1) through (7) and (9) of this part, a transcript or recording rather than minutes will be made and retained.

(b) The Board will make available free of charge, upon request, in a public reading room or some other easily accessible place, the minutes, transcript or recording of all portions of any meeting which was closed to the public except those portions which it finds to be properly exempt from disclosure under the Act. A copy of such minutes,

transcript or recording will be provided, upon request, upon payment of fees as provided in part 1002 of this chapter.

(c) In the case of all meetings closed to the public, the presiding officer shall cause to be made, and the Board shall retain, a statement setting forth:

(1) The date, time, and place of the meeting.

(2) The names and affiliations of those attending.

(3) The subject matter.

(4) The action taken.

(5) A copy of the certification issued by the General Counsel that, in his or her opinion, the meeting was one that might properly be closed to the public.

§ 1012.6 Petitions seeking to open or close a meeting.

(a) The Board will entertain petitions requesting either the opening of a meeting proposed to be closed to the public or the closing of a meeting proposed to be open to the public. In the case of a meeting of the Board, the original and 15 copies of such a petition shall be filed, and in the case of a meeting of a Division or committee of the Board, an original and five copies shall be filed.

(b) A petition to open a meeting proposed to be closed, filed by any interested person, will be entertained.

(c) A petition to close a meeting proposed to be open will be entertained only in cases in which the subject at the meeting would:

(1) Involve accusing a person of a crime or formally censuring a person.

(2) Disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy.

(3) Disclose trade secrets or commercial or financial information obtained on a privileged or confidential basis.

(4) Disclose investigatory records or information, compiled for law enforcement purposes, to the extent that the production of such records or information would (i) interfere with enforcement proceedings being conducted or under consideration by an agency other than the Board; (ii) deprive a person of a right to a fair trial or an impartial adjudication; (iii) constitute an unwarranted invasion of personal privacy; (iv) disclose the identity of a confidential investigation agency or a national security intelligence agency; (v) disclose investigative techniques and procedures of an agency other than the Board; or (vi) endanger the life or physical safety of law enforcement personnel.

(5) Disclose information the premature disclosure of which could lead to significant financial speculation in securities.

(d) Every effort will be made to dispose of petitions to open or close a meeting in advance of the meeting date. However, if such a petition is received less than three working days prior to the date of the meeting, it may be disposed of as the first order of business at the meeting, in which case the decision will be communicated to the petitioner orally through the Board's Public Information Officer or other spokesperson.

§ 1012.7 Meetings which may be closed to the public.

(a) A meeting may be closed pursuant to this section only if a majority of the Board Members eligible to participate in the conduct or disposition of the matter which is the subject of the meeting votes to close the meeting.

(b) A single vote may be taken to close a series of meetings on the same particular matters held within 30 days of the initial meeting in the series.

(c) With respect to any meeting closed to the public under this section, the General Counsel of the Board will issue his or her certification that, in his opinion, the meeting is one which may properly be closed pursuant to one or more of the provisions of paragraph (d) of this section.

(d) Meetings or portions of meetings may be closed to the public if the meeting or portion thereof is likely to:

(1) Disclose matters (i) specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy and (ii) in fact properly classified pursuant to such Executive order.

(2) Relate solely to the internal personnel rules and practices of the Board.

(3) Disclose matters specifically exempted from disclosure by statute

(other than 5 U.S.C. 552); *Provided*, That such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

(4) Disclose trade secrets or commercial information obtained from a person and privileged or confidential.

(5) Involve accusing any person of a crime, or formally censuring any person.

(6) Disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy.

(7) Disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would (i) interfere with enforcement proceedings, (ii) deprive a person of a right to a fair trial or an impartial adjudication, (iii) constitute an unwarranted invasion of personal privacy, (iv) disclose the identity of a confidential source and (in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation) disclose confidential information furnished only by the confidential source, (v) disclose investigative techniques and procedures, or (vi) endanger the life or physical safety of law enforcement personnel.

(8) Disclose information the premature disclosure of which could (i) lead to significant financial speculation in currencies, securities, or commodities, or (ii) significantly endanger the stability of any financial institution.

(9) Disclose information, the premature disclosure of which would be likely significantly to frustrate implementation of a proposed Board action, except that this subparagraph shall not apply in any instance after the content or nature of the proposed Board action has already been disclosed to the public by the Board, or where the Board is required by law to make such disclosure prior to the taking of final Board action on such proposal.

(10) Specifically concern the issuance of a subpoena.

(11) Specifically concern the Board's participation in a civil action or proceeding or an arbitration.

(12) Specifically concern the initiation, conduct, or disposition of a particular case or formal adjudication conducted pursuant to the procedures in 5 U.S.C. 554 or otherwise involving a determination on the record after an opportunity for hearing.

PART 1013—GUIDELINES FOR THE PROPER USE OF VOTING TRUSTS

Sec.

1013.1 The independence of the trustee of a voting trust.
1013.2 The irrevocability of the trust.
1013.3 Review and reporting requirements for regulated carriers.

AUTHORITY: 49 U.S.C. 721, 13301(f).

SOURCE: 44 FR 59909, Oct. 17, 1979, unless otherwise noted.

§ 1013.1 The independence of the trustee of a voting trust.

(a) In order to avoid an unlawful control violation, the independent voting trust should be established before a controlling block of voting securities is purchased.

(b) In voting the trusteed stock, the trustee should maintain complete independence from the creator of the trust (the settlor).

(c) Neither the trustee, the settlor, nor their respective affiliates should have any officers or board members in common or direct business arrangements, other than the voting trust, that could be construed as creating an indicium of control by the settlor over the trustee.

(d) The trustee should not use the voting power of the trust in any way which would create any dependence or intercorporate relationship between the settlor and the carrier whose corporate securities constitute the corpus of the trust.

(e) The trustee should be entitled to receive cash dividends declared and paid upon the trusteed voting stock

and turn them over to the settlor. Dividends other than cash should be received and held by the trustee upon the same terms and conditions as the stock which constitutes the corpus of the trust.

(f) If the trustee becomes disqualified because of a violation of the trust agreement or if the trustee resigns, the settlor should appoint a successor trustee within 15 days.

§ 1013.2 The irrevocability of the trust.

(a) The trust and the nomination of the trustee during the term of the trust should be irrevocable.

(b) The trust should remain in effect until certain events, specified in the trust, occur. For example, the trust might remain in effect until (1) all the deposited stock is sold to a person not affiliated with the settlor or (2) the trustee receives a Board decision authorizing the settlor to acquire control of the carrier or authorizing the release of the securities for any reason.

(c) The settlor should not be able to control the events terminating the trust except by filing with this Board an application to control the carrier whose stock is held in trust.

(d) The trust agreement should contain provisions to ensure that no violations of 49 U.S.C. 11343 will result from termination of the trust.

§ 1013.3 Review and reporting requirements for regulated carriers.

(a) Any carrier choosing to utilize a voting trust may voluntarily submit a copy of the voting trust to the Board for review. The Board's staff will give an informal, nonbinding opinion as to whether the voting trust effectively insulates the settlor from any violation of Board policy against unauthorized acquisition of control of a regulated carrier.

(b) Any person who establishes an independent trust for the receipt of the voting stock of carrier must file a copy of the trust, along with any auxiliary or modifying documents, with the Board.

(c) Any carrier required to file a Schedule 13D with the Securities and Exchange Board (17 CFR 240.13d–1) which reports the purchase of 5 percent or more of the registered securities of another I.C.C. regulated carrier (or the listed shares of a company controlling 10 percent or more of the stock of an I.C.C. regulated carrier), must simultaneously file a copy of that schedule with this Board, along with any supplements to that schedule.

(d) Failure to comply with the reporting requirements in paragraphs (b) or (c) of this section will result in denial of the application in which acquisition of control, through the acquisition of the voting stock of another carrier, is sought, unless the applicant shows, by clear and convincing evidence, and the Board finds, that the failure to comply was unintentional and that denial of the application will substantially and adversely affect the public interest and the national transportation policy.

PART 1014—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE SURFACE TRANSPORTATION BOARD

Sec.

1014.101 Purpose.
1014.102 Application.
1014.103 Definitions.
1014.104–1014.109 [Reserved]
1014.110 Self-evaluation.
1014.111 Notice.
1014.112–1014.129 [Reserved]
1014.130 General prohibitions against discrimination.
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1014.140 Employment.
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1014.149 Program accessibility: Discrimination prohibited.
1014.150 Program accessibility: Existing facilities.
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1014.152–1014.159 [Reserved]
1014.160 Communications.
1014.161–1014.169 [Reserved]
1014.170 Compliance procedures.
1014.171–1014.999 [Reserved]

AUTHORITY: 29 U.S.C. 794.

SOURCE: 51 FR 22896, June 23, 1986, unless otherwise noted.

§ 1014.101 Purpose.

This part effectuates section 119 of the Rehabilitation, Comprehensive

Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

§ 1014.102 Application.

This part applies to all programs or activities conducted by the agency.

§ 1014.103 Definitions.

For purposes of this part, the term—

Assistant Attorney General means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

Auxiliary aids means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, brailled materials, audio recordings, telecommunications devices and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices.

Complete complaint means a written statement that contains the complainant's name and address and describes the agency's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

Facility means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

Handicapped person means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

As used in this definition, the phrase:

(1) *Physical or mental impairment* includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term ''physical or mental impairment'' includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

(2) *Major life activities* includes functions such as caring for one's self performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) *Is regarded as having an impairment* means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the agency as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by the agency as having such an impairment.

Historic preservation programs means programs conducted by the agency that

have preservation of historic properties as a primary purpose.

Historic properties means those properties that are listed or eligible for listing in the National Register of Historic Places or properties designated as historic under a statute of the appropriate State or local government body.

Qualified handicapped person means—

(1) With respect to preschool, elementary, or secondary education services provided by the agency, a handicapped person who is a member of a class of persons otherwise entitled by statute, regulation, or agency policy to receive education services from the agency.

(2) With respect to any other agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, a handicapped person who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature;

(3) With respect to any other program or activity, a handicapped person who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity; and

(4) *Qualified handicapped person* is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this part by § 1014.140.

Section 504 means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93–112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93–516, 88 Stat. 1617), and the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95–602, 92 Stat. 2955). As used in this part, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

Substantial impairment means a significant loss of the integrity of finished materials, design quality, or special character resulting from a permanent alteration.

§§ 1014.104–1014.109 [Reserved]

§ 1014.110 Self-evaluation.

(a) The agency shall, by August 24, 1987, evaluate its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this part, and, to the extent modification of any such policies and practices is required, the agency shall proceed to make the necessary modifications.

(b) The agency shall provide an opportunity to interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The agency shall, until three years following the completion of the self-evaluation, maintain on file and make available for public inspection:

(1) A description of areas examined and any problems identified, and

(2) A description of any modifications made.

§ 1014.111 Notice.

The agency shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the programs or activities conducted by the agency, and make such information available to them in such manner as the head of the agency finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this regulation.

§§ 1014.112–1014.129 [Reserved]

§ 1014.130 General prohibitions against discrimination.

(a) No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

(b)(1) The agency, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap—

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons than is provided to others unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vi) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) The agency may not deny a qualified handicapped person the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would—

(i) Subject qualified handicapped persons to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to handicapped persons.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude handicapped persons from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to handicapped persons.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified handicapped persons to discrimination on the basis of handicap.

(6) The agency may not administer a licensing or certification program in a manner that subjects qualified handicapped persons to discrimination on the basis of handicap, nor may the agency establish requirements for the programs or activities of licensees or certified entities that subject qualified handicapped persons to discrimination on the basis of handicap. However, the programs or activities of entities that are licensed or certified by the agency are not, themselves, covered by this part.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by Federal statute or Executive order to a different class of handicapped persons is not prohibited by this part.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.

§§ 1014.131–1014.139 [Reserved]

§ 1014.140 Employment.

No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR part 1613, shall apply to employment in federally conducted programs or activities.

§§ 1014.141–1014.148 [Reserved]

§ 1014.149 Program accessibility: Discrimination prohibited.

Except as otherwise provided in § 1014.150, no qualified handicapped person shall, because the agency's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

§ 1014.150 Program accessibility: Existing facilities.

(a) *General.* The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by handicapped persons. This paragraph does not—

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by handicapped persons;

(2) In the case of historic preservation programs, require the agency to take any action that would result in a substantial impairment of significant historic features of an historic property; or

(3) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 1014.150(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that handicapped persons receive the benefits and services of the program or activity.

(b) *Methods*—(1) *General.* The agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by handicapped persons. The agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified handicapped persons in the most integrated setting appropriate.

(2) *Historic preservation programs.* In meeting the requirements of § 1014.150(a) in historic preservation programs, the agency shall give priority to methods that provide physical access to handicapped persons. In cases where a physical alteration to an historic property is not required because of § 1014.150(a)(2) or (a)(3), alternative methods of achieving program accessibility include—

(i) Using audio-visual materials and devices to depict those portions of an historic property that cannot otherwise be made accessible;

(ii) Assigning persons to guide handicapped persons into or through portions of historic properties that cannot otherwise be made accessible; or

(iii) Adopting other innovative methods.

(c) *Time period for compliance.* The agency shall comply with the obligations established under this section by

October 21, 1986, except that where structural changes in facilities are undertaken, such changes shall be made by August 22, 1989, but in any event as expeditiously as possible.

(d) *Transition plan.* In the event that structural changes to facilities will be undertaken to achieve program accessibility, the agency shall develop, by February 23, 1987, a transition plan setting forth the steps necessary to complete such changes. The agency shall provide an opportunity to interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum—

(1) Identify physical obstacles in the agency's facilities that limit the accessibility of its programs or activities to handicapped persons;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the official responsible for implementation of the plan.

§ 1014.151 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by handicapped persons. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151–4157), as established in 41 CFR 101–19.600 to 101–19.607, apply to buildings covered by this section.

§§ 1014.152–1014.159 [Reserved]

§ 1014.160 Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford a handicapped person an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the handicapped person.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf person (TDD's) or equally effective telecommunication systems shall be used.

(b) The agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 1014.160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of

the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, handicapped persons receive the benefits and services of the program or activity.

§§ 1014.161–1014.169 [Reserved]

§ 1014.170 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the agency.

(b) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) The Equal Opportunity Officer shall be responsible for coordinating implementation of this section. Complaints may be sent to the Section of Personnel Services, Surface Transportation Board, Washington, DC 20423.

(d) The agency shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within 180 days of the alleged act of discrimination. The agency may extend this time period for good cause.

(e) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate government entity.

(f) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), or section 502 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 792), is not readily accessible to and usable by handicapped persons.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency shall notify the complainant of the results of the investigation in a letter containing—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found; and

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the agency of the letter required by §1014.170(g). The agency may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the head of the agency.

(j) The head of the agency shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the head of the agency determines that additional information is needed from the complainant, he or she shall have 60 days from the date of receipt of the additional information to make his or her determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of this section may be extended with the permission of the Assistant Attorney General.

(l) The agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated to another agency.

[51 FR 22896, June 23, 1986, as amended at 51 FR 22896, June 23, 1986; 64 FR 53267, Oct. 1, 1999]

§§ 1014.171–1014.999 [Reserved]

PART 1016—SPECIAL PROCEDURES GOVERNING THE RECOVERY OF EXPENSES BY PARTIES TO BOARD ADJUDICATORY PROCEEDINGS

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AUTHORITY: 5 U.S.C. 504(c)(1), 49 U.S.C. 721.

SOURCE: 46 FR 61660, Dec. 18, 1981, unless otherwise noted.

Subpart A—General Provisions

§ 1016.101 Purpose of these rules.

The Equal Access to Justice Act (5 U.S.C. 504) (called the ''Act'' in this part), provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (called ''adversary adjudications'') before the Surface Transportation Board. An eligible party may receive an award when it prevails over the Board or another agency of the United States participating in the Board proceeding, unless the Board's position in the proceeding, or that of the other agency, was substantially justified or special circumstances make an award unjust. The rules in this part describe the parties eligible for awards and the proceedings that are covered. They also explain how to apply for awards, and the procedures and standards that the Board will use to make them.

§ 1016.102 When the Act applies.

The Act applies to any adversary adjudication pending before the Board after October 1, 1981. This includes proceedings begun before October 1, 1981, if final Board action has not been taken before that date, regardless of when they were initiated or when final Board action occurs. These rules incorporate the changes made in Pub. L. No. 99–80, 99 Stat. 183, which applies generally to cases instituted after October 1, 1984. If awards are sought for cases pending on October 1, 1981 or filed between that date and September 30, 1984, the prior statutory provisions (to the extent they differ from the existing ones, and our implementing rules) apply.

[54 FR 26379, June 23, 1989]

§ 1016.103 Proceedings covered.

(a) The Act applies to adversary adjudications conducted by the Board under 5 U.S.C. 554 in which the position of this or any other agency of the United States, or any component of an agency, is presented by an attorney or other representative (hereinafter ''agency counsel'') who enters an appearance and participates in the proceeding. Proceedings for the purpose of establishing or fixing a rate are not covered by the Act. Proceedings to grant or renew licenses are also excluded, but proceedings to modify, suspend, or revoke licenses are covered if they are otherwise ''adversary adjudications.'' Generally, the types of Board proceedings covered by the Act include, but are not limited to, investigation proceedings instituted under 49 U.S.C. 11701 and 49 U.S.C. 10925 and disciplinary proceedings conducted pursuant to 49 CFR 1100.11.

(b) The Board may also designate a proceeding not listed in paragraph (a) of this section as an adversary adjudication for purposes of the Act by so stating in an order initiating the proceeding, designating the matter for hearing or at any other time during the proceeding. The Board's failure to designate a proceeding as an adversary adjudication shall not preclude the filing of an application by a party who believes the proceeding is covered by the Act; whether the proceeding is covered will then be an issue for resolution in proceedings on the application.

(c) If a proceeding includes both matters covered by the Act and matters specifically excluded from coverage, any award made will include only fees and expenses related to covered issues.

§ 1016.104 Decisionmaking authority.

Unless otherwise ordered by the Board in a particular proceeding, each application for an award under this part shall be assigned for decision to the official or decisionmaking body that entered the decision in the adversary adjudication. That official or decisionmaking body is referred to in this part as the ''adjudicative officer.''

[46 FR 61660, Dec. 18, 1981, as amended at 54 FR 26379, June 23, 1989]

§ 1016.105 Eligibility of applicants.

(a) To be eligible for an award of attorney fees and other expenses under the Act, the applicant must be a party to the adversary adjudication for which it seeks an award, it must have stood in an adversary relationship to the position taken by agency counsel, and it must have prevailed on one or more of the issues raised by agency counsel. The term ''party''is defined in 5 U.S.C. 504(b)(1)(B). The applicant must show that it meets all conditions of eligibility set out in this subpart and in Subpart B.

(b) The types of eligible applicants are as follows:

(1) An individual whose net worth did not exceed $2 million at the time the adversary adjudication was initiated;

(2) Any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization whose net worth does not exceed $7 million and which had no more than 500 employees at the time the adversary adjudication was initiated;

(3) Any organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association.

(c) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the proceeding was initiated.

(d) The employees of an applicant include all persons who regularly perform services for remuneration for the applicant, under the applicant's direction and control. Part-time employees shall be included on a proportional basis. Independent contractors under lease to motor carriers are not employees of the carriers under these rules. Also, agents for motor common carriers of household goods are not employees of their respective principal carriers.

(e) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless the adjudicative officer determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the adjudicative officer may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(f) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

[46 FR 61660, Dec. 18, 1981, as amended at 54 FR 26379, June 23, 1989]

§ 1016.106 Standards for awards.

(a) A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding, or in a significant and discrete substantive portion of the proceeding, unless the position of the agency over which the applicant has prevailed was substantially justified. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record made in the adversary adjudication for which fees and other expenses are sought. The burden of proof that an

award should not be made to an eligible prevailing applicant is on the agency counsel, which may avoid an award by showing that its position was reasonable in law and fact.

(b) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if special circumstances make the award sought unjust.

[46 FR 61660, Dec. 18, 1981, as amended at 54 FR 26379, June 23, 1989]

§ 1016.107 Allowable fees and expenses.

(a) Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

(b) No award for the fee of an attorney or agent under these rules may exceed $75.00 per hour, unless a higher fee is justified. 5 U.S.C. 504(b)(1)(A). However, an award may also include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent, or witness ordinarily charges clients separately for such expenses.

(c) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the adjudicative officer shall consider the following:

(1) If the attorney, agent or witness is in private practice, his or her customary fee for similar services, or, if an employee of the applicant, the fully allocated cost of the services;

(2) The prevailing rate for similar services in the community in which the attorney, agent, or witness ordinarily performs services;

(3) The time actually spent in the representation of the applicant;

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(5) Such other factors as may bear on the value of the services provided.

(d) The reasonable cost of any study, analysis, engineering report, test, project or similar matter prepared on behalf of a party may be awarded, to the extent that the charge for the service does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of the applicant's case.

[46 FR 61660, Dec. 18, 1981, as amended at 54 FR 26379, June 23, 1989]

§ 1016.109 Awards against other agencies.

If an applicant is entitled to an award because it prevails over another agency of the United States that participates in a proceeding before this agency and takes a position that is not substantially justified, the award or an appropriate portion of the award shall be made against that agency.

Subpart B—Information Required From Applicants

§ 1016.201 Contents of application.

(a) An application for an award of fees and expenses under the Act shall identify the applicant and the proceeding for which an award is sought. The application shall show that the applicant has prevailed and identify the position of the Board or other agencies in the proceeding that the applicant alleges was not substantially justified. Unless the applicant is an individual, the application shall also state the number of employees of the applicant and describe briefly the type and purpose of its organization or business.

(b) The application shall also include a statement that the applicant's net worth does not exceed $2 million (if an individual) or $7 million (for all other applicants, including their affiliates). However, an applicant may omit this statement if:

(1) It attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code; or

(2) It states that it is a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)).

(c) The application shall state the amount of fees and expenses for which an award is sought.

(d) The application may also include any other matters that the applicant

wishes the Board to consider in determining whether and in what amount an award should be made.

(e) The application shall be signed by the applicant or an authorized officer or attorney of the applicant. It shall also contain or be accompanied by a written verification under oath or under penalty of perjury that the information provided in the application is true and correct.

[46 FR 61660, Dec. 18, 1981, as amended at 54 FR 26380, June 23, 1989]

§ 1016.202 Net worth exhibit.

(a) Each applicant must provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates (as defined in § 1016.105(f) of this part) when the proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part. The adjudicative officer may require an applicant to file additional information to determine its eligibility for an award.

(b) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, an applicant that objects to public disclosure of information in any portion of the exhibit and believes that there are legal grounds for withholding it from disclosure may file a motion to withhold the information from public disclosure. The burden is on the moving party to justify the confidentiality of the information.

[46 FR 61660, Dec. 18, 1981, as amended at 54 FR 26380, June 23, 1989]

§ 1016.203 Documentation of fees and expenses.

The application shall be accompanied by full documentation of the fees and expenses, including the cost of any study, analysis, engineering report, test, project or similar matter, for which an award is sought. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by another person or entity for the services provided. The adjudicative officer may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

Subpart C—Procedures for Considering Applications

§ 1016.301 When an application may be filed.

(a) An application may be filed whenever the applicant has prevailed in the proceeding or in a significant and discrete substantive portion of the proceeding, but in no case later than 30 days after an administratively final disposition of the proceeding.

(b) If review or reconsideration is sought or taken of a decision as to which an applicant believes it has prevailed, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy.

(c) For purposes of this rule, see the Board's rules governing appellate procedures at §§ 1115.2 and 1115.3 to determine when a decision becomes administratively final.

[46 FR 61660, Dec. 18, 1981, as amended at 54 FR 26380, June 23, 1989]

§ 1016.302 Filing and service of documents.

Any application for an award or other pleading or document related to an application shall be filed and served on all parties to the proceeding in the same manner as other pleadings in the proceeding, except as provided in § 1016.202(b) for confidential financial information.

§ 1016.303 Answer to application.

(a) Within 30 days after service of an application, counsel representing the agency against which an award is sought may file an answer to the application. Unless agency counsel requests an extension of time for filing or files a statement of intent to negotiate

under paragraph (b) of this section, failure to file an answer within the 30-day period may be treated as a consent to the award requested.

(b) If agency counsel and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 30 days, and further extensions may be granted as justified.

(c) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of agency counsel's position. If the answer is based on any alleged facts not already in the record of the proceeding, agency counsel shall include with the answer either supporting affidavits or a request for further proceedings under § 1016.307.

[46 FR 61660, Dec. 18, 1981, as amended at 54 FR 26380, June 23, 1989]

§ 1016.304 Reply.

Within 15 days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the applicant shall include with the reply either supporting affidavits or a request for further proceedings under § 1016.307.

§ 1016.305 Comments by other parties.

Any party to a proceeding other than the applicant and agency counsel may file comments on an application within 30 days after it is served or on an answer within 15 days after it is served. A commenting party may not broaden the issues.

[46 FR 61660, Dec. 18, 1981, as amended at 54 FR 26380, June 23, 1989]

§ 1016.306 Settlement.

The applicant and agency counsel may agree on a proposed settlement of the award before final action on the application, either in connection with a settlement of the underlying proceeding, or after the underlying proceeding has been concluded. If a prevailing party and agency counsel agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement.

§ 1016.307 Further proceedings.

(a) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or agency counsel or on his or her own initiative, the adjudicative officer may order further proceedings when necessary.

(b) A request that the adjudicative officer order further proceedings under this section shall specifically identify the information sought or the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.

[46 FR 61660, Dec. 18, 1981, as amended at 54 FR 26380, June 23, 1989]

§ 1016.308 Decision.

The adjudicative officer shall issue a decision on the application within 50 days after completion of proceedings on the application. The decision shall include written findings and conclusions on the applicant's eligibility and status as a prevailing party, and an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision shall also include, if at issue, findings on whether the Board's or other agency's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust. If the applicant has sought an award against more than one agency, the decision shall allocate responsibility for payment of any award made among the agencies, and shall explain the reasons for the allocation made.

[46 FR 61660, Dec. 18, 1981, as amended at 54 FR 26380, June 23, 1989]

§ 1016.309 Agency review.

In the event the adjudicative officer is not the entire Board, the applicant or agency counsel may seek review of the initial decision on the fee application, or the Board may review the decision on its own initiative, in accordance with § 1115.2. If no appeal is taken, the initial decision becomes the action of the Board 20 days after it is issued.

If the adjudicative officer is the entire Board, § 1115.3 applies.

[54 FR 26380, June 23, 1989]

§ 1016.310 Judicial review.

Judicial review of final Board decisions on awards may be sought as provided in 5 U.S.C. 504(c)(2).

§ 1016.311 Payment of award.

An applicant seeking payment of an award shall submit to the appropriate official of the paying agency a copy of the Board's final decision granting the award, accompanied by a statement that the applicant will not seek review of the decision in the United States courts. Where the award is granted against the Surface Transportation Board the applicant shall make its submission to the Secretary, Surface Transportation Board, Washington, DC 20423. The Board will pay the amount awarded to the applicant within 60 days of the applicant's submission unless the judicial review of the award or of the underlying decision of the adversary adjudication has been sought by the applicant or any other party to the proceeding.

PART 1017—DEBT COLLECTION—COLLECTION BY OFFSET FROM INDEBTED GOVERNMENT AND FORMER GOVERNMENT EMPLOYEES

Sec.

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AUTHORITY: 31 U.S.C. 3716, 5 U.S.C. 5514; Pub. L. 97–365; 4 CFR parts 101–105; 5 CFR part 550.

SOURCE: 56 FR 32333, July 16, 1991, unless otherwise noted.

§ 1017.1 Purpose and scope.

(a) These regulations set forth guidelines for implementing the Debt Collection Act of 1982 at the Surface Transportation Board (STB). The purpose of the Act is to give agencies the ability to more aggressively pursue debts owed the Federal Government and to increase the efficiency of government-wide efforts to collect debts owed the United States. The authority for these regulations is found in the Debt Collection Act of 1982 (Pub. L. 97–365 and 4 CFR 101.1 et seq.), Collection by Offset From Indebted Government Employees (5 CFR 550.1101 et seq.), Federal Claims Collection Standards (4 CFR 101.1 et seq.), and Administrative Offset (31 U.S.C. 3716).

(b) These regulations provide procedures for administrative offset of a Federal employee's salary without his/her consent to satisfy certain debts owed to the Federal Government. The regulations covered in this part apply to all current and former Federal employees who owe debts to the Board and to current Board employees who owe debts to other Federal agencies. The regulations set forth herein do not apply when the employee consents to recovery from his/her current pay account.

(c) These regulations do not apply to debts or claims arising under:

(1) The Social Security Act;

(2) The Internal Revenue Code of 1954;

(3) The tariff laws of the United States; or

(4) Any case where a collection of a debt by salary offset is explicitly provided for or prohibited by another statute.

(d) These regulations also do not preclude the compromise, suspension, or termination of collection action, where appropriate, under the standards implementing the Federal Claims Collection Act (31 U.S.C. 3711 et seq., 4 CFR 101.1 et seq.). These regulations do not preclude an employee's requesting a waiver of a salary overpayment (i.e., alleged indebtedness) under 5 U.S.C. 5584, 10 U.S.C. 2774, or 32 U.S.C. 716, or in any way questioning the amount or validity of a debt by submitting a

claim to the General Accounting Office (GAO), or requesting a waiver under statutory provisions pertaining to the particular debt.

(e) The Board's regulations governing debt collection for entities and individuals who are not current or former government employees are contained in 49 CFR part 1018.

[56 FR 32333, July 16, 1991, as amended at 58 FR 7749, Feb. 9, 1993]

§ 1017.2 Definitions.

For the purposes of these regulations, the following definitions will apply:

(a) *Agency*. An executive agency as defined at 5 U.S.C. 105, including the U.S. Postal Service; the U.S. Postal Rate Board; a military department as defined at 5 U.S.C. 102; an agency or court in the Judicial Branch; an agency of the Legislative Branch, including the U.S. Senate and House of Representatives; and other independent establishments that are entities of the Federal Government.

(b) *Creditor agency*. The agency to which the debt is owed.

(c) *Debt*. An amount of money or property which has been determined by an appropriate agency official to be owed to the United States from any person.

(d) *Disposable pay*. The amount that remains from an employee's Federal pay after required deductions for social security; Federal, State, or local income taxes; health insurance premiums; retirement contributions; life insurance premiums; Federal employment taxes; and any other deductions that are required to be withheld by law.

(e) *FCCS*. The Federal Claims Collection Standards jointly published by the Justice Department and the General Accounting Office at 4 CFR 101.1 et seq.

(f) *Hearing official*. The official responsible for conducting a hearing which is properly and timely requested by the debtor. An Administrative Law Judge shall be responsible for conducting the hearing and the Chief Administrative Law Judge shall determine which judicial official will be assigned the hearing.

(g) *Paying agency*. The agency that employs the individual who owes the debt and authorizes the payment of his/her current pay.

(h) *Administrative offset*. The withholding of monies payable by the United States to or held by the United States on behalf of an employee to satisfy a debt owed the United States by that employee.

(i) *Waiver*. A cancellation, forgiveness, or non-recovery of a debt allegedly owed by an employee or former employee to the agency as permitted or required by law.

§ 1017.3 Applicability.

These regulations are to be followed when:

(a) The Board is owed a debt by a current employee;

(b) The Board is owed a debt by an individual currently employed by another Federal agency;

(c) The Board employs an individual who owes a debt to another Federal agency; and

(d) The Board is owed a debt by an employee who separates from Federal Government service. The authority to collect debts owed by former Federal employees is found in the FCCS and 31 U.S.C. 3716.

§ 1017.4 Notice requirements.

(a) Deductions shall not be made unless the employee is provided with written notice, signed by the debt collection official (Chief, Section of Financial Services), of the debt at least 30 days before administrative offset commences.

(b) The written notice to current Federal employees shall be hand delivered if at headquarters or sent certified mail, return receipt requested, if located in a field office and shall contain:

(1) A statement that the debt is owed and an explanation of its nature and amount;

(2) The agency's intention to collect the debt by means of deduction from the employee's current disposable pay account;

(3) The amount, frequency, proposed beginning date, and duration of the intended deduction(s);

(4) An explanation of interest, penalties, and administrative charges, including a statement that such charges

will be assessed unless excused in accordance with the FCCS (4 CFR 101.1 et seq.);

(5) The employee's right to inspect, request, and copy Government records relating to the debt (if an employee is unable to physically inspect the Government records, the agency will reproduce copies of the records and may charge for those copies);

(6) If not previously provided, the opportunity (under terms agreeable to the creditor agency) to establish a schedule for the voluntary repayment of the debt or to enter into a written agreement with the agency to establish a schedule for the voluntary repayment of the debt in lieu of offset. The agreement must be in writing, signed by both the employee and the creditor agency, and documented in the creditor agency's files (4 CFR 102.2(e));

(7) The right to a hearing conducted by an impartial hearing official concerning the existence or amount of the debt and the repayment schedule, if it was not established by a written agreement between the employee and the creditor agency;

(8) The method and time period for petitioning for a hearing;

(9) A statement that the timely filing of a petition for a hearing (on or before the 15th day following receipt of the written notice) will stay the commencement of collection proceedings, together with instructions on how and where to file a petition;

(10) A statement that a final decision on the hearing (if one is requested) will be issued not later than 60 days after the filing of the petition requesting the hearing unless the employee requests, and the hearing official grants, a delay in the proceedings;

(11) A statement that knowingly false or frivolous statements, representations, or evidence may subject the employee to appropriate disciplinary procedures and criminal penalties (i.e., for false certification, etc.);

(12) A statement of other rights and remedies available to the employee under statutes or regulations governing the program for which the collection is being made; and

(13) Unless there are contractual or statutory provisions to the contrary, a statement that amounts paid on or deducted for the debt which are later waived or found not owed to the United States will be promptly refunded to the employee.

(c) The written notice to former Federal employees shall be sent certified mail, return receipt requested, and shall contain:

(1) A statement that the debt is owed and an explanation of its nature and amount;

(2) The agency's intention to collect the debt by administrative offset against amounts due and payable to the debtor from the Civil Service Retirement and Disability Fund or by use of a collection service to recover the delinquent debt;

(3) An explanation of interest, penalties, and administrative charges, including a statement that such charges will be assessed unless excused in accordance with 4 CFR 101.1 et seq.;

(4) The former employee's rights to inspect, request, and copy Government records relating to the debt (if the former employee is unable to physically inspect the Government records, the agency will reproduce copies of the records and may charge for those copies);

(5) The opportunity to enter into a written agreement with the agency to establish a schedule for the voluntary repayment of the debt;

(6) The right to a hearing conducted by an impartial hearing official concerning the existence or amount of the debt and the repayment schedule, if it was not established by a written agreement between the former employee and the creditor agency;

(7) The method and time period for petitioning for a hearing;

(8) A statement that the timely filing of a petition for a hearing (on or before the 15th day following receipt of the written notice) will stay the commencement of collection proceedings, together with instructions on how and where to file a petition;

(9) A statement that a final decision on the hearing will be issued not later than 60 days after the filing of the petition requesting the hearing unless the former employee requests, and the hearing official grants, a delay in the proceedings;

(10) A statement that knowingly false or frivolous statements, representations, or evidence may subject the former employee to appropriate criminal penalties (i.e., for false certification, etc.);

(11) A statement of other rights and remedies available to the former employee under statutes or regulations governing the program for which the collection is being made; and

(12) Unless there are contractual or statutory provisions to the contrary, a statement that amounts paid on or deducted for the debt which are later waived or found not owed to the United States will be promptly refunded to the former employee.

[56 FR 32333, July 16, 1991, as amended at 64 FR 53267, Oct. 1, 1999]

§ 1017.5 Hearing procedures.

(a) Upon the Administrative Law Judge's determination of an employee's compliance with §§ 1017.4(b)(8) or 1017.4(c)(7) of this part, whichever is applicable, he/she shall set the time, date, and location for the hearing, paying due consideration to convenience to the employee.

(b) All significant matters discussed at the hearing shall be documented, although a verbatim transcript of the hearing shall not be made.

(c) The Administrative Law Judge may exclude any evidence he/she deems irrelevant, immaterial, or unduly repetitious.

(d) Any party to a hearing under these regulations is entitled to present his or her case or defense by oral or documentary evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(e) The Board has the initial burden of proof as to the existence and amount of the debt.

(f) The employee requesting the hearing shall bear the ultimate burden of proof.

(g) The evidence presented by the employee must prove that no debt exists or cast sufficient doubt that reasonable minds could differ as to the existence or amount of the debt.

(h) Where the employee files a petition for a hearing contesting the offset schedule imposed by the Board, the Administrative Law Judge shall take into consideration all relevant factors as to the employee's financial situation in determining whether said offset schedule should be altered.

(i) Any party to a hearing under these regulations is entitled to be accompanied, represented, and advised by counsel, as well as to appear in person or by or with counsel.

(j) The Administrative Law Judge shall issue a final written decision at the earliest practicable date, but not later than 60 days after the filing of the petition requesting the hearing, as stated in § 1017.4(b)(10) or § 1017.4(c)(9) of this part, whichever is applicable.

§ 1017.6 Result if employee fails to meet deadlines.

An employee will not be granted a hearing and will have his/her disposable pay offset in accordance with the Board's offset schedule if the employee:

(a) Fails to file a petition for a hearing in conformity with the requirements of § 1017.4(b)(8) or § 1017.4(c)(9) of this part, whichever is applicable. However, failure to file within the requisite time period set out in § 1017.4(b)(8) or § 1017.4(c)(9) of this part whichever is applicable, will not result in denial of a hearing or in immediate offset, if the Administrative Law Judge excuses the late filing if the employee can show that the delay was because of circumstances beyond his/her control or because of failure to receive notice of the filing deadline.

(b) Is scheduled to appear and fails to appear at the hearing without good cause.

§ 1017.7 Written decision following hearing.

(a) Written decisions provided after a request for a hearing will include:

(1) A statement of the facts presented to support the nature and origin of the alleged debt;

(2) The Administrative Law Judge's analysis, findings, and conclusions, in light of the hearing, concerning the employee's or the Board's grounds;

(3) The amount and validity of the alleged debt; and

(4) The repayment schedule (including percentage), if applicable.

(b) The Administrative Law Judge's decision does not preclude an employee from requesting a waiver of a salary payment under 5 U.S.C. 5584, 10 U.S.C. 2774, or 32 U.S.C. 716, or in any way questioning the amount or validity of a debt by submitting a subsequent claim to GAO in accordance with procedures prescribed by GAO.

§ 1017.8 Exception to entitlement to notice, hearing, written responses and final decisions.

The Board shall except from the provisions of § 1017.4 through § 1017.7 any adjustment to pay arising out of an employee's election of coverage or a change in coverage under a Federal benefits program, requiring periodic deductions from pay, if the amount to be recovered was accumulated over four pay periods or less.

§ 1017.9 Coordinating offset with another Federal agency.

(a) *The Board as creditor agency*. When the Chief, Section of Financial Services, determines that an employee of another Federal agency owes a delinquent debt to the Board, he/she shall:

(1) Arrange for a hearing upon proper petitioning by the employee;

(2) Certify in writing to the other Federal agency that the employee owes the debt, the amount and basis of the debt, the date on which payment is due, the date the Government's right to collect the debt accrued, that the Board's regulations for administrative offset have been approved by the Office of Personnel Management, and that the provisions of 4 CFR 102.3(f) have been fully complied with;

(3) If collection must be made in installments, advise the paying agency of the amount or percentage of disposable pay to be collected in each installment;

(4) Advise the paying agency of any action taken under 5 U.S.C. 5514(a);

(5) If the employee is in the process of separating, the Board must submit its debt claim to the paying agency as provided in this part. The paying agency must certify any amounts already collected, notify the employee, and send a copy of the certification and notice of the employee's separation to the creditor agency—if the paying agency is aware that the employee is entitled to money from the Civil Service Retirement and Disability Fund, it must certify to the Office of Personnel Management (OPM) that:

(i) The debtor owes the U.S. a debt, including the amount of that debt;

(ii) The Board has complied with the applicable statutes, regulations, and procedures of OPM; and

(iii) The Board has complied with the requirements of 4 CFR 102.3, including any hearing or review; and

(6) If the employee has already separated and all payments due from the paying agency have been paid, the Chief, Section of Financial Services, may request from OPM, unless otherwise prohibited, that money payable to the employee from the Civil Service Retirement and Disability Fund or other similar funds be collected by administrative offset and provide the certification described in paragraph (a)(5) of this section.

(b) *The Board as paying agency*. (1) Upon receipt of a properly certified debt claim from another agency, deductions will be scheduled to begin at the next established pay interval. The employee must receive written notice that the Board has received a certified debt claim from the creditor agency, the amount of the debt, the date administrative offset will begin, and the amount of the deduction(s). The Board shall not review the merits of the creditor agency's determination of the validity or the amount of the certified claim.

(2) When the Board receives an incomplete debt from another (creditor) agency, the Board must return the debt claim with a notice that procedures under 5 U.S.C. 5514 and 5 CFR 1108 must be provided and a properly certified debt claim received before action will be taken to collect from the employee's current pay account.

(3) If the employee transfers to another agency after the creditor agency has submitted its debt claim to the Board and before the debt is fully collected, the Board must certify the total amount collected to the creditor agency, along with notice of the transfer, and furnish a copy of same to the employee.

[56 FR 32333, July 16, 1991, as amended at 64 FR 53267, Oct. 1, 1999]

§ 1017.10 Procedures for administrative offset.

(a) Debts will be collected in one lump sum where possible. If the employee is financially unable to pay in one lump sum, collection shall be made in installments.

(b) Debts shall be collected by deduction at officially established pay intervals from an employee's current pay account, unless alternative arrangements for repayment are made.

(c) Installment deductions will be made over a period not greater than the anticipated period of employment. The size of installment deductions must bear a reasonable relationship to the size of the debt and the employee's ability to pay. The deduction for the pay intervals for any period shall not exceed 15 percent of disposable pay, unless the employee has agreed in writing to a deduction of a greater amount.

(d) Unliquidated debts may be offset against any financial payment due to a separated employee (including, but not limited to, final salary payment or lump-sum payment for leave).

§ 1017.11 Refunds.

(a) The Board shall promptly refund any amounts deducted to satisfy debts owed to it when the debt is waived, found not owed to the Board, or when directed by an administrative or judicial order.

(b) A creditor agency will promptly return any amounts deducted by the Board to satisfy debts owed to a creditor agency when the debt is waived, found not owed, or when directed by an administrative or judicial order.

(c) Unless required by law, refunds under this subsection shall not bear interest.

§ 1017.12 Statute of limitations.

If a debt has been outstanding for more than 10 years after the agency's right to collect the debt first accrued, the agency may not collect by salary offset unless facts material to the Government's right to collect were not known and could not reasonably have been known by the official or officials who were charged with the responsibility for discovery and collection of such debts.

§ 1017.13 Nonwaiver of rights.

An employee's involuntary payment of all or any part of a debt collected under these regulations will not be construed as a waiver of any rights that employee may have under 5 U.S.C. 5514 or any other provision of law.

§ 1017.14 Interest, penalties, and administrative costs.

(a) The rate of interest assessed shall be the rate of the current value of funds to the U.S. Treasury (i.e., the Treasury tax and loan account rate), as prescribed and published by the Secretary of the Treasury in the FEDERAL REGISTER and the Treasury Financial Manual Bulletins. A higher rate of interest can be assessed if the Board can reasonably determine that a higher rate is necessary to protect the interests of the United States. The rate of interest, as initially assessed, shall remain fixed for the duration of the indebtedness, except where a debtor has defaulted on a repayment agreement and seeks to enter into a new agreement. The Board may set a new interest rate which reflects the current value of funds to the Treasury at the time the new agreement is executed. The Board shall waive the collection of interest on the debt or any portion of the debt which is paid within 30 days after the date on which interest began to accrue.

(b) The Board shall assess a penalty charge not to exceed 6 percent a year on any portion of a debt that is delinquent as defined in 4 CFR 101.2(b) for more than 90 days. This charge need not be calculated until the 91st day of delinquency, but shall accrue from the date that the debt became delinquent.

(c) The Board shall assess against a debtor charges to cover administrative costs incurred as a result of a delinquent debt—that is, the additional costs incurred in processing and handling the debt because it became delinquent as defined in 4 CFR 101.2(b).

(d) When a debt is paid in partial or installment payments, amounts received by the agency shall be applied first to outstanding penalty and administrative cost charges, second to accrued interest, and third to outstanding principal.

PART 1018—DEBT COLLECTION

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AUTHORITY: 31 U.S.C. 3701, 31 U.S.C. 3711 *et seq.*, 49 U.S.C. 721, 4 CFR parts 101–105.

SOURCE: 58 FR 7749, Feb. 9, 1993, unless otherwise noted.

Subpart A—Application and Coverage

§ 1018.1 Application.

(a) This part applies to claims for the payment of debts owed to the United States Government in the form of money or property and unless a different procedure is specified in a statute, regulation, or a contractual agreement with the Board, prescribes procedures by which the Board:

(1) Collects, compromises, suspends, and terminates collection actions for claims;

(2) Determines and collects interest and other charges on these claims; and

(3) Refers unpaid claims to the General Accounting Office (GAO) and the Department of Justice (DOJ) for litigation.

(b) The following are examples of the kinds of debts to which special statutory and administrative procedures apply:

(1) A claim against an employee for erroneous payment of pay and allowances subject to waiver under 5 U.S.C. 5584 and other claims against employees which are handled under 49 CFR part 1017.

(2) A claim involving the payment of civil penalties or forfeitures which may arise under provisions of the Interstate Commerce Act or legislation supplemental thereto. Those claims are handled under procedures set forth in 49 CFR part 1021.

(3) A claim involved in a case pending before any Federal Contract Appeals

Board or Grant Appeals Board. However, nothing in this part prevents negotiation and settlement of a claim pending before a Board.

§ 1018.2 Definitions.

(a) *Administrative offset* means withholding money payable by the United States to, or held by the Government for, a person to satisfy a debt the person owes the Government.

(b) *Claim* and *debt* are used synonymously and interchangeably for purposes of this part. These terms refer to an amount of money or property which has been determined by an appropriate agency official to be owed to the United States by any person, organization, or entity except another Federal agency.

(c) *Delinquent.* A debt is considered delinquent if it has not been paid by the date specified in the initial written demand for payment or applicable contractual agreement with the Board, unless other satisfactory payment arrangements have been made by that date. If the debtor fails to satisfy an obligation under a payment agreement with the Board after other payment arrangements have been made, the debt becomes a delinquent debt.

(d) *Payment in full* means payment of the total debt due the United States, including any interest, penalty, and administrative costs of collection assessed against the debtor.

§ 1018.3 Communications.

Unless otherwise specified, all communications concerning the regulations in this part should be addressed to Chief, Section of Financial Services, Surface Transportation Board, room 1330, Washington, DC 20423.

[58 FR 7749, Feb. 9, 1993, as amended at 64 FR 53267, Oct. 1, 1999]

§ 1018.4 Claims that are covered.

(a) These procedures generally apply to any claim for payment of a debt which:

(1) Results from activities of the Board including fees imposed under 49 CFR part 1002; or

(2) Is referred to the Board for collection.

(b) These procedures do not apply to:

(1) A claim based on a civil monetary penalty for violation of a requirement of the Interstate Commerce Act or an order or regulation of the Board unless 49 CFR part 1021 provides otherwise;

(2) A claim as to which there is an indication of fraud, the presentation of a false claim, or misrepresentation on the part of the debtor, or any other party having an interest in the claim;

(3) A claim between Federal agencies; and

(4) A claim once it becomes subject to salary offset which is governed by 5 U.S.C. 5514.

§ 1018.5 Monetary limitation on Board authority.

The Board's authority to compromise a claim or to terminate or suspend collection action on a claim covered by these procedures is limited by 31 U.S.C. 3711(a) to claims that:

(a) Have not been referred to another Federal agency, including the GAO, for further collection action; and

(b) Do not exceed $100,000, exclusive of interest, penalties, and administrative costs (the monetary limitation).

§ 1018.6 Omissions not a defense.

(a) The failure of the Board to include in this part any provision of the Federal Claims Collection Standards, 4 CFR parts 101 through 105, does not prevent the Board from applying these provisions.

(b) A debtor may not use the failure of the Board to comply with any provision of this part or the Federal Claims Collection Standards as a defense to the debt.

§ 1018.7 Conversion claims.

These procedures are directed primarily to the recovery of money on behalf of the Government. The Board may demand:

(a) The return of specific property; or

(b) Either the return of property or the payment of its value.

§ 1018.8 Subdivision of claims.

The Board shall consider a debtor's liability arising from a particular transaction or contract as a single claim in determining whether the claim is less than the monetary limitation for the purpose of compromising

or suspending or terminating collection action. A claim may not be subdivided to avoid the monetary limitation established by 31 U.S.C. 3711(a)(2) and § 1018.5 of this part.

Subpart B—Administrative Collection of Claims

§ 1018.20 Written demand for payment.

(a) The Board shall make appropriate written demand upon the debtor for payment of money in terms which specify:

(1) The basis for the indebtedness and the right of the debtor to request review within the Board;

(2) The amount claimed;

(3) The date by which payment is to be made, which normally should not be more than 30 days from the date that the initial demand letter statement was mailed, unless otherwise specified by contractual agreement, established by Federal statute or regulation, or agreed to under a payment agreement;

(4) The applicable standards for assessing interest, penalties, and administrative costs (4 CFR 102.13 and 49 CFR 1018.30); and

(5) The applicable policy for reporting the delinquent debt to consumer reporting agencies.

(b) The Board normally shall send three progressively stronger written demands at not more than 30-day intervals, unless circumstances indicate that alternative remedies better protect the Government's interest, that the debtor has explicitly refused to pay, or that sending a further demand is futile. Depending upon the circumstances of the particular case, the second and third demands may:

(1) Offer or seek to confer with the debtor;

(2) State the amount of the interest and penalties that will be added on a daily basis, as well as the administrative costs that will be added to the debt until the debt is paid; and

(3) State that the authorized collection procedures include any procedure authorized in this part including:

(i) Contacts with the debtor's employer when the debtor is employed by the Federal Government or is a member of the military establishment or the Coast Guard;

(ii) Possible referral of the debt to a private agency for collection;

(iii) Possible reporting of the delinquent debt to consumer reporting agencies in accordance with the guidelines and standards contained in 4 CFR 102.5 and the Board's procedures set forth in § 1018.23 of this part;

(iv) The suspension or revocation of a license or other remedy under § 1018.25 of this part;

(v) Installment payments possibly requiring security; and

(vi) The right to refer claims to GAO or DOJ for litigation.

(c) The failure to state in a letter of demand a matter described in § 1018.20 is not a defense for a debtor and does not prevent the Board from proceeding with respect to that matter.

[58 FR 7749, Feb. 9, 1993; 58 FR 11099, Feb. 23, 1993]

§ 1018.21 Telephone inquiries and investigations.

(a) If a debtor has not responded to one or more written demands, the Board shall make reasonable efforts by telephone to determine the debtor's intentions. If the debtor cannot be reached by telephone at the debtor's place of employment, the Board may telephone the debtor at his or her residence between 8 a.m. and 9 p.m.

(b) The Board may undertake an investigation to locate a debtor, if the whereabouts of a debtor is a problem, or if a debtor cannot be contacted by telephone. The Board may also send a representative to a debtor's place of employment if the debtor cannot be contacted by phone or the debtor does not respond to written demands by the Board for payment of claims.

(c) The Board under 15 U.S.C. 1681(f) may obtain consumer credit information from private firms, including name, address, former address, place of employment, and former place of employment of a debtor.

§ 1018.22 Personal interviews.

(a) The Board may seek an interview with the debtor at the offices of the Board when:

(1) A matter involved in the claim needs clarification;

(2) Information is needed concerning the debtor's circumstances; or

(3) An agreement of payment might be negotiated.

(b) The Board shall grant an interview with a debtor upon the debtor's request. The Board will not reimburse a debtor's interview expenses.

§ 1018.23 Use of consumer reporting agencies.

(a) In addition to assessing interest, penalties, and administrative costs under § 1018.30 of this part, the Board may report a debt that has been delinquent for 90 days to a consumer reporting agency, if all the conditions of this paragraph are met.

(1) The debtor has not:

(i) Paid or agreed to pay the debt under a written payment plan that has been signed by the debtor and agreed to by the Board; or

(ii) Filed for review of the debt under § 1018.23(a)(2)(iv) of this section.

(2) The Board has included a notification in the third written demand (see § 1018.20(b)) to the debtor stating:

(i) That the account has been reviewed and payment of the debt is delinquent;

(ii) That, within not less than 60 days after the date of notification, the Board intends to disclose to a consumer reporting agency that the individual is responsible for the debt;

(iii) The specific information to be disclosed to the consumer reporting agency; and

(iv) That the debtor has the right to a complete explanation of the debt (if that has not already been given), to dispute information on Board records about the debt, and to request reconsideration of the debt by administrative appeal or review of the debt.

(3) The Board has sent at least one written demand by either registered or certified mail with the notification described in paragraph (a)(2) of this section.

(4) The Board has reconsidered its initial decision on the debt when the debtor has requested a review under § 1018.23(a)(2)(iv).

(5) The Board has taken reasonable action to locate a debtor for whom the Board does not have a current address to send the notifications provided for in paragraph (a)(2) of this section.

(b) If there is a substantial change in the condition or amount of the debt, the Board shall:

(1) Promptly disclose that fact(s) to each consumer reporting agency to which the original disclosure was made;

(2) Promptly verify or correct information about the debt, on request of a consumer reporting agency for verification of any or all information so disclosed by the Board; and

(3) Obtain satisfactory assurances from each consumer reporting agency that they are complying with all applicable Federal, state, and local laws relating to its use of consumer credit information.

(c) The information the Board discloses to the consumer reporting agency is limited to:

(1) Information necessary to establish the identity of the individual debtor, including name, address, and taxpayer identification number;

(2) The amount, status, and history of the debt; and

(3) The Board activity under which the claim arose.

§ 1018.24 Contact with the debtor's employing agency.

If a debtor is employed by the Federal government or is a member of the military establishment or the Coast Guard, and collection by offset cannot be accomplished in accordance with 5 U.S.C. 5514, the Board shall contact the employing agency to arrange with the debtor for payment of the indebtedness by allotment or otherwise.

§ 1018.25 Sanctions.

(a) *Closure of accounts.* If a tariff filing fee or insurance filing fee account is past due more than 90 days, the Board will freeze the account until the account is made current. The Board will notify the account holder that the account has been frozen and that until the account balance including any applicable interest, penalties, and administrative costs are paid, all future filings, must be accompanied by a certified or cashier's check or a money order. The Board reserves the right to refuse to maintain an account which is repeatedly delinquent.

(b) *Suspension or revocation of tariff or insurance filing privileges.* If the account holder fails to satisfy all claims for tariff or insurance filing fees including applicable interest, penalties, and the administrative costs of collection of the debt, the Board may suspend or prohibit a tariff or insurance filing fee account holder from submitting tariff or insurance filings in its own name or on behalf of others.

(c) *Suspension or revocation of certificates, licenses, or permits granted by the Board.* The Board may suspend or revoke any certificates, permits, or licenses which the Board has granted to an account holder or other debtor for any inexcusable, prolonged, or repeated failure or refusal to pay a delinquent debt.

(d) *Procedures for suspension or revocation of filing privileges or certificates, licenses, or permits for failure to pay tariff or insurance filing fees.* Before suspending or revoking an account holder's privilege to submit tariff or insurance filings or suspending or revoking any certificate, license, or permit which the Board has granted to any account holder, the Board shall issue to the account holder an order to show cause why the tariff or insurance filing privilege or any certificate, license, or permit should not be suspended or revoked. The Board shall allow the debtor no more than 30 days to pay the debt in full including applicable interest, penalties, and administrative costs of collection of the delinquent debt. The Board may suspend or revoke any certificate, license, permit, approval or filing privilege at the end of this period upon a finding of willful noncompliance with the Board's order. If any certificate, license, permit, or filing privilege is revoked under this authority of this part, a new application with appropriate fees must be made to the Board, and all previous delinquent debts of the debtor to the Board must be paid before the Board will consider such application.

(e) *Other sanctions.* The remedies and sanctions available to the Board in this area are not exclusive. The Board may impose other sanctions, where permitted by law for any inexcusable, prolonged, or repeated failure of a debtor to pay such claim. In such cases, the Board will provide notice and a hearing, as required by law, to the debtor prior to the imposition of any such sanctions.

§ 1018.26 Disputed debts.

(a) A debtor who disputes a debt shall explain why the debt is incorrect in fact or law within 30 days from the date that the initial demand letter was mailed. The debtor may support the explanation by submitting affidavits, statements certified under penalty of perjury, canceled checks, or other relevant evidence.

(b) The Board may extend the interest waiver period as described in § 1018.30(j) pending a final determination of the existence or amount of the debt.

(c) The Board may investigate the facts involved in the dispute and if necessary, the Board may arrange for a conference at which the debtor may present evidence and arguments in support of the debtor's positions.

§ 1018.27 Contracting for collection services.

The Board may contract for collection services in order to recover delinquent debts. However, the Board retains the authority to resolve disputes, compromise claims, suspend or terminate collection action, and initiate enforced collection through litigation. When appropriate, the Board shall contract in accordance with 4 CFR 102.6.

§ 1018.28 Collection by administrative offset.

(a) The Board may administratively undertake collection by offset on each claim which is liquidated or certain in amount in accordance with the guidelines and the standards contained in 4 CFR 102.2, 102.3, and 102.4 and 5 U.S.C. 5514, as applicable. The Board may not initiate administrative offset to collect a debt more than 10 years after the Government's right to the debt first accrued, unless facts material to the Government's right to collect the debt were not known and could not reasonably have been known to the Board.

(b) Collection by administrative offset of amounts payable from the Civil Service Retirement and Disability

Fund, the Federal Employees Retirement System, or other similar fund is made pursuant to 4 CFR 102.4 and the provisions of paragraph (d) of this section.

(c) Salary offset is governed by 5 U.S.C. 5514.

(d) The following procedures apply when the Board seeks to collect a debt by offset against any payment to be made to a debtor or against the assets of a holder of a certificate, permit, license, or authorization issued by the Board.

(1) Before the offset is made, the Board shall provide the debtor written notice of the nature and amount of the debt and:

(i) Notice of the Board's intent to collect the debt by offset;

(ii) An opportunity to inspect and copy Board records pertaining to the debt;

(iii) An opportunity to request reconsideration of the debt by the Board, or if provided for by statute, waiver of the debt;

(iv) An opportunity to enter into a written agreement with the Board to repay or pay the debt, as the case may be;

(v) An explanation of the debtor's rights under this subpart; and

(vi) An opportunity for a hearing when required under the provisions of 4 CFR 102.3(c).

(2) If the Board learns that other agencies of the Government are holding funds payable to the debtor, the Board shall provide the other agencies with written certification that the debt is owed to the Board and that the Board has complied with the provisions of 4 CFR 102.3. The Board shall request that funds which are due the debtor and which are necessary to offset the debt to the Board be transferred to the Board.

(3) The Board may accept a repayment or payment agreement, as appropriate, in lieu of offset, but will do so only after balancing the Government's interest in collecting the debts against fairness to the debtor. If the debt is delinquent and the debtor has not disputed its existence or amount, the Board may accept a repayment or payment agreement in lieu of offset only if the debtor is able to establish under sworn affidavit or statement certified under penalty of perjury that offset would result in financial hardship or would result in undue financial hardship or would be against equity and good conscience.

(4) Administrative offset is not authorized with respect to:

(i) Debts owed by any State or local government;

(ii) Debts once they become subject to the salary offset provisions of 5 U.S.C. 5514; or

(iii) Any case in which collection of the type of debt involved by administrative offset is explicitly provided for or prohibited by another statute.

(5) The Board reserves the right to take any other action in respect to offset as is permitted under 4 CFR 102.3.

(e) The Board shall make appropriate use of the cooperative efforts of other agencies including the Army Holdup List in effecting collections by offset. The Army Holdup List is a list of contractors indebted to the United States.

§ 1018.29 Payments.

(a) *Payment in full.* The Board shall make every effort to collect a claim in full before it becomes delinquent. The Board shall impose charges for interest, penalties, and administrative costs as specified in § 1018.30.

(b) *Payment in installments.* If a debtor furnishes satisfactory evidence of inability to pay a claim in one lump sum, payment in regular installments may be arranged. Evidence may consist of a financial statement or a signed statement certified under penalty of perjury to be true and correct that application for a loan to enable the debtor to pay the claim in full was rejected. Except for a claim described at 5 U.S.C. 5514, all installment payment arrangements must be in writing and require the payment of interest and administrative charges.

(1) Installment note forms including confess-judgement notes may be used. The written installment agreement must contain a provision accelerating the debt payment in the event the debtor defaults. If the debtor's financial statement discloses the ownership of assets which are free and clear of liens or security interests, or assets in which the debtor owns equity, the

debtor may be asked to secure the payment of an installment note by executing a Security Agreement and Financial Statement transferring to the United States a security interest in the assets until the debt is discharged.

(2) If the debtor owes more than one debt and designates how a voluntary installment payment is to be applied among those debts, the Board shall follow that designation. If the debtor does not designate the application of the payment, the Board shall apply the payment to the various debts in accordance with the best interest of the United States as determined by the facts and circumstances of the particular case.

(c) *To whom payment is made.* Payment of a debt is made by check, money order, or credit card payable to the Surface Transportation Board and mailed or delivered to the Section of Financial Services, Surface Transportation Board, Washington, DC 20423, unless payment is:

(1) Made pursuant to arrangements with the GAO or DOJ;

(2) Ordered by a Court of the United States; or

(3) Otherwise directed in any other part of this chapter.

[58 FR 7749, Feb. 9, 1993, as amended at 64 FR 53267, Oct. 1, 1999]

§ 1018.30 Interest, penalties, and administrative costs.

(a) The Board shall assess interest, penalties, and administrative costs on debts owed to the United States Government in accordance with the guidance provided under the Federal Claims Collection Standards, 4 CFR 102.13 unless otherwise directed by statute, regulation, or contract.

(b) Before assessing any charges on delinquent debts, the Board shall mail a written notice to debtor explaining its requirements concerning these charges under 4 CFR 102.2 and 102.13.

(c) Interest begins to accrue from the date on which the initial invoice is first mailed to the debtor unless a different date is specified on a statute, regulation, or contract.

(d) The Board shall assess interest based upon the rate of the current value of funds to the United States Treasury (the Treasury tax and loan account rate) prescribed by statute, regulation, or contract.

(e) Interest is computed only on the principal of the debt, and the interest rate remains fixed for the duration of the indebtedness, unless the debtor defaults on a repayment agreement and seeks to enter into a new agreement.

(f) The Board shall assess against a debtor charges to cover administrative costs incurred as a result of a delinquent debt. Administrative costs may include costs incurred in obtaining a credit report or in using a private debt collector, to the extent they are attributable to the delinquency.

(g) The Board shall assess a penalty charge of six percent a year on any portion of a debt that is delinquent for more than 90 days. The charge accrues retroactively to the date that the debt became delinquent.

(h) Amounts received by the Board as partial or installment payments are applied first to outstanding penalty and administrative cost charges, second to accrued interest, and third to outstanding principal.

(i) The Board shall waive collection of interest on the debt or any portion of the debt which is paid in full within 30 days after the date on which interest began to accrue.

(j) The Board may waive interest during the periods a debt disputed under § 1018.26 is under investigation or review before the Board. This additional waiver is not automatic and must be requested before the expiration of the initial 30-day waiver period. The Board may grant the additional waiver only when it finds merit in the explanation the debtor has submitted under § 1018.26.

(k) The Board may waive the collection of interest, penalties, and administrative costs if it finds that one or more of the following conditions exists:

(1) The debtor is unable to pay any significant sum toward the debt within a reasonable time;

(2) Collection of interest, penalties, and administrative costs will jeopardize collection of the principal of the debt;

(3) The Board is unable to enforce collection in full within a reasonable time by enforced collection proceedings; or

(4) Collection would be against equity and good conscience or not in the best interest of the United States, including the situation in which an administrative offset or installment payment agreement is in effect.

§ 1018.31 Use of credit reports.

The Board may institute a credit investigation of the debtor at any time following receipt of knowledge of the debt in order to aid the Board in making appropriate determinations as to:

(a) The collection and compromise of a debt;

(b) The collection of interest, penalties, and administrative costs;

(c) The use of administrative offset;

(d) The use of other collection methods; and

(e) The likelihood of collecting the debt.

§ 1018.32 Bankruptcy claims.

When the Board receives information that a debtor has filed a petition in bankruptcy or is the subject of a bankruptcy proceeding, it shall suspend all collection actions against the debtor in accordance with 11 U.S.C. 362 and shall furnish information concerning the debt owed the United States to the Department of Justice's Nationwide Central Intake Facility to permit the filing of a claim.

§ 1018.33 Use and disclosure of mailing addresses.

(a) When attempting to locate a debtor in order to collect or compromise a debt under this part, the Board may send a written request to the Secretary of the Treasury (or designee) in order to obtain a debtor's mailing address from the records of the Internal Revenue Service.

(b) The Board may disclose a mailing address obtained under paragraph (a) of this section to other agents, including collection service contractors, in order to facilitate the collection or compromise of debts under this part, except that a mailing address may be disclosed to a consumer reporting agency only for the limited purpose of obtaining a commercial credit report on the particular taxpayer.

(c) The Board and its agents, including consumer reporting agencies and collection services, must comply with the provisions of 26 U.S.C. 6103(p)(4) and applicable regulations of the Internal Revenue Service.

§ 1018.34 Additional administrative collection action.

Nothing contained in this part is intended to preclude any other administrative remedy which may be available.

Subpart C—Compromise of a Claim

§ 1018.50 When a claim may be compromised.

The Board may compromise a claim not in excess of the monetary limitation if it has not been referred to GAO or DOJ for litigation. Only the Comptroller General of the United States or designee may effect the compromise of a claim that arises out of the exceptions made by the GAO in that account of an accountable officer, including a claim against the payee, prior to its referral by GAO for litigation.

[58 FR 7749, Feb. 9, 1993; 58 FR 11099, Feb. 23, 1993]

§ 1018.51 Reasons for compromising a claim.

(a) A claim may be compromised for one or more reasons set forth below:

(1) The full amount cannot be collected because:

(i) The debtor is unable to pay the full amount within a reasonable time; or

(ii) The debtor refuses to pay the claim in full, and the Government is unable to enforce collection in full within a reasonable time; or

(2) There is a real doubt concerning the Government's ability to prove its case in Court for the full amount claimed, either because of the legal issues involved or a bona fide dispute as to the facts; or

(3) The costs of collecting the claim do not justify the enforced collection of the full amount. The Board shall apply this reason for compromise in accordance with the guidelines in 4 CFR 103.4.

(b) The Board shall determine the debtor's inability to pay, the Government's ability to enforce collection,

and the amounts which are acceptable in compromise in accordance with the Federal Claims Collection Standards, 4 CFR part 103.

(c) Compromises payable in installments are discouraged, but, if necessary, must be in the form of a legally enforceable agreement for the reinstatement of the prior indebtedness less sums paid thereon. The agreement also must provide that in the event of default:

(1) The entire balance of the debt becomes immediately due and payable; and

(2) The Government has the right to enforce any security agreement.

§ 1018.52 Restrictions on the compromise of a claim.

(a) The Board may not accept a percentage of a debtor's profits or stock in a debtor's corporation in compromise of a claim. In negotiating a compromise with a business concern, consideration is given to requiring a waiver of the tax-loss-carry-forward and tax-loss-carry-back rights of the debtor.

(b) If two or more debtors are jointly or severally liable, collection action is not withheld against one debtor until the other or others pay their share. The amount of a compromise with one debtor is not considered a precedent or binding in determining the amount which will be required from other debtors jointly and severally liable on the claim.

§ 1018.53 Finality of a compromise.

An offer of compromise must be in writing and signed by the debtor. An offer of compromise which is accepted by the Board is final and conclusive on the debtor and on all officials, agencies and courts of the United States, unless obtained by fraud, misrepresentation, the presentation of a false claim, or mutual mistake of fact.

Subpart D—Suspension or Termination of Collection Action

§ 1018.60 When collection action may be suspended or terminated.

The Board may suspend or terminate collection action on a claim not in excess of the monetary limitation, exclusive of interest, penalties, and administrative costs, after deducting the amount of partial payments, if any, if it has not been referred to GAO or DOJ for litigation.

§ 1018.61 Reasons for suspending collection action.

Collection action may be suspended temporarily:

(a) When the debtor cannot be located after diligent efforts, and there is reason to believe that future collection action may be sufficiently productive to justify periodic review and action on the claim considering the size of the claim and the amount which may be realized on it; or

(b) When the debtor owns no substantial equity in realty and is unable to make payments on the Government's claim or effect a compromise on it at the time, but the debtor's future prospects justify retention of the claim for periodic review and action:

(1) The applicable statute of limitations has been tolled or started anew; or

(2) Future collection can be effected by offset notwithstanding the statute of limitations.

§ 1018.62 Reasons for terminating collection action.

Collection action may be terminated:

(a) When it becomes clear that the Government cannot collect or enforce collection of any significant sum from the debtor having due regard for the judicial remedies available to the Government, the debtor's future financial prospects, and the exemptions available to the debtor under State and Federal law;

(b) When the debtor cannot be located, there is no security remaining to be liquidated, the applicable statute of limitations has run, and the prospects of collecting by offset, notwithstanding the bar of the statute of limitations, are too remote to justify retention of the claim; or

(c) When it is likely that the cost of the collection action will exceed the amount recoverable.

§ 1018.63 Termination of collection action.

Collection action shall be terminated:

(a) Whenever it is determined that the claim is legally without merit; or

(b) When it is determined that the evidence necessary to prove the claim cannot be produced, or necessary witnesses are unavailable, and efforts to induce voluntary payments have been unavailing.

§ 1018.64 Transfer of a claim.

The Board may refer a claim to GAO when there is doubt as to whether or not a collection action should be suspended or terminated.

Subpart E—Referral of a Claim

§ 1018.70 Prompt referral.

(a) A claim which requires enforced collection is referred to GAO or DOJ for litigation. A referral is made as early as possible consistent with aggressive collection action and, in, any event, well within the time required to bring a timely suit against the debtor. Ordinarily, referrals are made within 1 year of the Board's final determination of the fact and the amount of the debt.

(b) When the merits of the Board's claim, the amount owed on the claim, or the propriety of acceptance of a proposed compromise, suspension, or termination of collection actions is in doubt, the Board shall refer the matter to GAO for resolution and instruction prior to proceeding with collection actions and/or referral to DOJ for litigation.

(c) The Board may refer a claim to GAO or DOJ even though the termination of collection activity might otherwise be given consideration under § 1018.63 if:

(1) A significant enforcement policy is involved in reducing a statutory penalty or forfeiture to judgment; or

(2) Recovery of a judgment is a prerequisite to the imposition of administrative sanctions, such as suspension or revocation of a license or privilege of participating in a Government sponsored program.

(d) Once a claim has been referred to GAO or DOJ under this subpart, the Board shall refrain from any contact with the debtor and shall direct the debtor to GAO or DOJ as appropriate, when questions concerning the claim are raised by the debtor. The Board shall immediately advise GAO or DOJ, as appropriate, of any payments by the debtor.

§ 1018.71 Referral of a compromise offer.

The Board may refer a debtor's firm written offer of compromise which is substantial in amount to GAO or to DOJ if the Board is uncertain whether the offer should be accepted.

§ 1018.72 Referral to the Department of Justice.

(a) Claims for which the gross original amount is over $500,000 must be referred to the Commercial Litigation Branch, Civil Division, Department of Justice, Washington, DC 20530. Claims for which the gross original amount is $500,000 or less must be referred to the Department of Justice's Nationwide Central Intake Facility.

(b) A claim of less than $600, exclusive of interest, is not referred for litigation unless:

(1) Referral is important to a significant enforcement policy; or

(2) The debtor has the clear ability to pay the claim, and the government can effectively enforce payment.

(c) A claim on which the Board holds a judgment is referred to DOJ for further action if renewal of the judgment lien or enforced collection proceedings are justified under the criteria discussed in this part.

(d) Claims must be referred to the Department of Justice in the manner prescribed by 4 CFR 105.2. Care must be taken to preserve all files, records, and exhibits on claims referred under paragraphs (a) and (b) of this section.

Subpart F—Internal Revenue Service Procedure

§ 1018.80 Reporting discharged debts to the Internal Revenue Service.

When the Board discharges a debt for less than the full value of the indebtedness, it will report the outstanding balance discharged, not including interest to the Internal Revenue Service, using

IRS Form 1099–G or any other form prescribed by the IRS, when:

(a) The principal amount of the debt not in dispute is $600 or more;

(b) The obligation has not been discharged in a bankruptcy proceeding; and

(c) The obligation is no longer collectible either because the time limit in the applicable statute for enforcing collection expired during the tax year, or because during the tax year a formal compromise agreement was reached in which the debtor was legally discharged of all or a portion of the obligation.

Subpart G—Tax Refund Offset

§ 1018.90 Purpose.

This subpart establishes procedures for the Board to refer past-due debts to the Internal Revenue Service (IRS) for the offset against the income tax refunds of persons owing debts to the Board. It specifies the Board's procedures and the rights of the debtor applicable to claims for the payment of debts owed to the Board.

§ 1018.91 Applicability and scope.

(a) These regulations implement 31 U.S.C. 3720A which authorizes the IRS to reduce a tax refund by the amount of a past-due legally enforceable debt owed to the Government of the United States.

(b) For purposes of this section, a past-due legally enforceable debt referable to the IRS is a debt which is owed to the Government of the United States and:

(1) Except in the case of a judgment debt, has been delinquent for at least 3 months but has not been delinquent for more than 10 years at the time the offset is made;

(2) Cannot be currently collected pursuant to the salary offset provisions of 5 U.S.C. 5514(a)(1);

(3) Is ineligible for administrative offset under 31 U.S.C. 3716(a) by reason of 31 U.S.C. 3716(c)(2) or cannot be collected by administrative offset under 31 U.S.C. 3716(a) by the Board against amounts payable to or on behalf of the debtor by or on behalf of the Board.

(4) With respect to which the Board has given the taxpayer at least 60 days from the date of notification to present evidence that all or part of the debt is not past-due or legally enforceable, has considered evidence presented by such taxpayer, and has determined that an amount of such debt is past-due and legally enforceable.

(5) Has been disclosed by the Board to a consumer reporting agency as authorized by 31 U.S.C. 3711(f), unless a consumer reporting agency would be prohibited from using such information by 15 U.S.C. 1681c, or unless the amount of the debt does not exceed $100.00;

(6) With respect to which the Board has notified or has made a reasonable attempt to notify the taxpayer that the debt is past-due and, unless repaid within 60 days thereafter, the debt will be referred to the IRS for offset against any overpayment of tax;

(7) Is at least $25.00;

(8) All other requirements of 31 U.S.C. 3720A and the Department of the Treasury regulations codified at 26 CFR 301.6402–6T relating to the eligibility of a debt for tax return offset have been satisfied.

§ 1018.92 Administrative charges.

In accordance with 49 CFR 1018.30, all administrative charges incurred in connection with the referral of the debts to the IRS shall be assessed on the debt and thus increase the amount of the offset.

§ 1018.93 Notice requirement before offset.

A request for reduction of an IRS tax refund will be made only after the Board makes a determination that an amount is owed and past-due and provides the debtor with 60 days written notice. The Board's notice of intention to collect by IRS tax refund offset (Notice of intent) will state:

(a) The amount of the debt;

(b) That unless the debt is repaid within 60 days from the date of the Board's Notice of Intent, the Board intends to collect the debt by requesting that the IRS reduce any amount payable to the debtor as Federal Income tax refunds an amount equal to amount of the debt including all accumulated interest and other charges;

(c) That the debtor has the right to present evidence that all or part of the

debt is not past-due or legally enforceable; and

(d) A mailing address for forwarding any written correspondence and a contact name and phone number for any questions.

§ 1018.94 Review within the Board.

(a) *Notification by Debtor.* A debtor who receives a Notice of Intent has the right to present evidence that all or part of the debt is not past-due or not legally enforceable. To exercise this right, the debtor must:

(1) Send a written request for a review of the evidence to the address provided in the notice.

(2) State in the request the amount disputed and the reasons why the debtor believes that the debt is not past-due or is not legally enforceable.

(3) Include in the request any documents which the debtor wishes to be considered or state that additional information will be submitted within the 60-day period.

(b) *Submission of evidence.* The debtor may submit evidence showing that all or part of the debt is not past-due or not legally enforceable along with the notification required by paragraph (a) of this section. Failure to submit the notification and evidence within 60 days will result in an automatic referral of the debt to the IRS without further action by the Board.

(c) *Review of the evidence.* The Board will consider all available evidence related to the debt. Within 30 days, if feasible, the Board will notify the debtor whether the Board has sustained, amended, or canceled its determination that the debt is past-due and legally enforceable.

§ 1018.95 Board determination.

(a) Following review of the evidence, the Board will issue a written decision which will include the supporting rationale for the decision.

(b) If the Board either sustains or amends its determination, it shall notify the debtor of its intent to refer the debt to the IRS for offset against the debtor's Federal income tax refund. If the Board cancels its original determination, the debt will not be referred to IRS.

§ 1018.96 Stay of offset.

If the debtor timely notifies the Board that the debtor is exercising the right described in § 1018.94(a) of this subpart, any notice to the IRS will be stayed until the issuance of a written decision which sustains or amends its original determination.

PART 1019—REGULATIONS GOVERNING CONDUCT OF SURFACE TRANSPORTATION BOARD EMPLOYEES

Sec.

1019.1 Cross-reference to employee ethical conduct standards and financial disclosure regulations.
1019.2 Interpretation and advisory service.
1019.3 Ex parte communications.
1019.4 Use of intoxicants.
1019.5 Sexual harassment.
1019.6 Disciplinary and other remedial action.

AUTHORITY: 49 U.S.C. 721.

SOURCE: 58 FR 42027, Aug. 6, 1993, unless otherwise noted.

§ 1019.1 Cross-reference to employee ethical conduct standards and financial disclosure regulations.

Members and employees of the Surface Transportation Board also should refer to the executive branch Standards of Ethical Conduct at 5 CFR part 2635, the STB regulations at 5 CFR part 5001 which supplement the executive branch standards, and the executive branch financial disclosure regulations at 5 CFR part 2634.

§ 1019.2 Interpretation and advisory service.

(a) The Board's Executive Counsel shall be the Board's Designated Agency Ethics Official (DAEO).

(b) By June 30 of each year, the DAEO shall report to the Board on the operation of the Board's ethics program with any recommendations that the DAEO deems advisable.

[58 FR 42027, Aug. 6, 1993, as amended at 64 FR 53267, Oct. 1, 1999]

§ 1019.3 Ex parte communications.

Members and employees of the Board must conform to the standards adopted by the Board in 49 CFR 1102.2.

§ 1019.4 Use of intoxicants.

Members and employees of the Board shall not use alcohol, drugs, or other intoxicants so as to impede the discharge of their official duties.

§ 1019.5 Sexual harassment.

(a) Members and employees shall not engage in harassment on the basis of sex. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

(1) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

(2) Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

(3) Such conduct has the purpose or effect of interfering with an individual's work performance or creating an intimidating, hostile, offensive, or unpleasant working environment.

(b) Employees and applicants may follow the standard Equal Employment Opportunity Board complaint process if they believe they have a work-related sexual harassment problem. This requires that the employee or applicant contact an EEO Counselor within 45 days of the alleged harassment or, if a personnel action is involved, within 45 days of its effective date.

(c) The regulations in this section apply also to harassment based on race, color, religion, or national origin.

§ 1019.6 Disciplinary and other remedial action.

Any violation of the regulations in this part by an employee shall be cause for appropriate disciplinary or other remedial action as provided in the STB's Manual of Administration 22–751, which may be in addition to any penalty prescribed by law. The manual is available from the Section of Personnel Services, Surface Transportation Board, Washington, DC 20423.

[58 FR 42027, Aug. 6, 1993, as amended at 64 FR 53267, Oct. 1, 1999]

Parts 1021–1029—Enforcement

PART 1021—ADMINISTRATIVE COLLECTION OF ENFORCEMENT CLAIMS

Sec.
1021.1 Standards.
1021.2 Enforcement claims and debtors.
1021.3 Enforcement collection designee.
1021.4 Notice of claim and demand.
1021.5 Agreement and release.
1021.6 Method of claim payment.

AUTHORITY: 31 U.S.C. 3701, 3711, 3717, 3718.

SOURCE: 32 FR 20015, Dec. 20, 1967, unless otherwise noted.

§ 1021.1 Standards.

The regulations issued jointly by the Comptroller General of the United States and the Attorney General of the United States under section 3 of the Federal Claims Collection Act of 1966 (31 U.S.C. 951 et seq.) and published in 4 CFR parts 101 through 105 are hereby adopted by the Surface Transportation Board for the administrative collection of enforcement claims.

§ 1021.2 Enforcement claims and debtors.

(a) Enforcement claims are all separate civil penalty or forfeiture claims not exceeding $20,000 which may arise under the provisions of the Interstate Commerce Act or legislation supplementary thereto.

(b) Debtor is any person or corporation subject to civil penalties or forfeitures for violation of the provisions of the Interstate Commerce Act or legislation supplementary thereto.

§ 1021.3 Enforcement collection designee.

The Director, Office of Compliance and Enforcement, Surface Transportation Board, is the Board's designee to take all necessary action administratively to settle by collection, compromise, suspension or termination, enforcement claims within the contemplation of the Federal Claims Collection Act of 1966.

[45 FR 31374, May 13, 1980, as amended at 64 FR 53267, Oct. 1, 1999]

§ 1021.4 Notice of claim and demand.

Initiation of administrative collection of enforcement claims will be

commenced by the enforcement collection designee mailing a letter of notice of claim and demand to the debtor. Such letter will state the statutory basis for the claim, a brief resume of the factual basis for the claim, the amount of the claim, and indicate the availability of the designee or his personal agent for discussion of the claim should the debtor so desire.

§ 1021.5 Agreement and release.

Upon the debtor's agreement to settle a claim, an Agreement and Release Form will be provided to the debtor in duplicate. This form, after reciting the statutory basis for the claim, will contain a statement to be signed in duplicate by the debtor evidencing his agreement to settlement of the claim for the amount stated in the agreement. Both copies of the signed agreement shall be returned to the collection designee. Upon final collection of the claim, one copy of the agreement and release shall be returned to the debtor with the release thereon signed by the enforcement collection designee.

§ 1021.6 Method of claim payment.

(a) Debtors: Debtors shall be required to settle claims by:

(1) Payment by bank cashier check or other instrument acceptable to designee.

(2) Installment payments by check after the execution of a promissory note containing an agreement for judgment.

(b) All checks or other instruments will be made out to ''Surface Transportation Board,'' and after receipt will be forwarded to U.S. Treasury.

Parts 1030–1039—Carriers Subject to Part I, Interstate Commerce Act

PART 1033—CAR SERVICE

Sec.

1033.1 Car hire rates.
1033.2 Car service orders.

AUTHORITY: 49 U.S.C. 721, 11121, 11122.

§ 1033.1 Car hire rates.

(a) Definitions applicable to this section:

(1) *Car.* A freight car bearing railroad reporting marks, other than an excluded boxcar as defined in § 1039.14(c)(2) of this chapter whenever it is owned or leased by any class III carrier and bears a class III carrier's reporting marks.

(2) *Car hire.* Compensation to be paid by a user to an owner for use of a car. Such compensation may include, but need not be limited to, hourly and mileage rates.

(3) *Fixed rate car.* Any car placed in service or rebuilt prior to January 1, 1993 or for which there was a written and binding contract to purchase, build, or rebuild prior to July 1, 1992, regardless of whether such car bore railroad reporting marks prior to January 1, 1993, provided, however, that until December 31, 1993, all cars shall be deemed to be fixed rate cars.

(4) *Market rate car.* Any car that is not a fixed rate car.

(5) *Owner.* A rail carrier entitled to receive car hire on cars bearing its reporting marks.

(6) *Prescribed rates.* The hourly and mileage rates in effect on December 31, 1990, as published in Association of American Railroads Circular No. OT–10 found in the information section of tariff STB RER 6411–U known as the Official Railway Equipment Register. This information can be obtained at the Association of American Railroads or the Board. Prescribed rates will be enhanced to reflect OT–37 surcharges and Rule 88 rebuilds for work undertaken and completed during 1991 and 1992, and for rebuilding work for which there was a written and binding contract prior to July 1, 1992.

(7) *User.* A rail carrier in possession of a car of which it is not the owner.

(b) *Fixed rate cars.* Car hire for fixed rate cars shall be determined as follows:

(1) Except as provided in paragraph (b)(3) of this section, for a 10-year period beginning January 1, 1993, the prescribed rates shall continue to apply to fixed rate cars without regard to the aging of such cars subsequent to December 31, 1990. Prescribed car hire rates shall not be increased for any additions and betterments performed on such cars after December 31, 1990. Any OT–37 surcharge to prescribed rates for

work performed prior to January 1, 1993 shall expire upon the earlier of:

(i) The car becoming a market rate car; or

(ii) The expiration date provided in Association of American Railroads Circular No. OT–37.

(2) Upon termination of the 10-year period specified in paragraph (b)(1) of this section, all fixed rate cars shall be deemed to be market rate cars and shall be governed by paragraph (c) of this section.

(3) (i) During each calendar year beginning January 1, 1994, a rail carrier may voluntarily elect to designate up to 10% of the cars in its fleet as of January 1, 1993 to be treated as market rate cars for the purposes of this section. The 10% limitation shall apply each calendar year and shall be noncumulative. Cars designated to be treated as market rate cars shall be governed by paragraph (c) of this section. Such election shall be effective only in accordance with the following provisions:

(A) An election shall be irrevocable and binding as to the rail carrier making the election and all users and subsequent owners if:

(*1*) The rail carrier making the election has legal title to the car; or

(*2*) The rail carrier making the election does not have legal title to the car but obtains written consent for such election from the party holding legal title; or

(*3*) The transaction pursuant to which the party holding legal title to the car has furnished the car to the rail carrier making the election was entered into after January 1, 1991.

(B) An election shall be irrevocable and binding only for the term of the transaction pursuant to which the car was furnished to the rail carrier making the election as to that rail carrier and all users and subsequent owners if:

(*1*) That rail carrier does not have legal title to the car and does not obtain written consent or such election from the party holding legal title;

(*2*) The transaction was entered into prior to January 1, 1991; and

(*3*) The transaction does not provide that the compensation to be paid to the party furnishing the car is to be based in whole or in part directly on the car hire earnings of the car; provided, however, that if the rail carrier making the election subsequently obtains legal title to the car, such election shall then be irrevocable and binding as to the rail carrier and all users and subsequent owners.

(C) The party holding legal title to the car may revoke an election subject to the provisions of paragraph (b)(3)(i)(B) of this section only:

(*1*) At the time the transaction pursuant to which the car was furnished to the rail carrier making the election is first extended or renewed after January 1, 1991; or

(*2*) If such transaction is not extended or renewed, at the time such transaction terminates.

If such election is so revoked, a rail carrier may make a new election only with the written consent of the party holding legal title to the car, and such election shall be irrevocable and binding as to the rail carrier making the election and all users and subsequent owners.

(ii) Nothing in paragraph (b)(3)(i) of this section shall be construed to limit the rights of parties to any transaction to provide for the consent of any party to an election made pursuant to paragraph (b)(3)(i) of this section.

(c) *Market rate cars.* (1) Market rate cars shall not be subject to prescribed rates or to the provisions of 49 CFR 1039.14(c)(1) (i) and (ii) and (c)(4).

(2) (i) The Board shall not prescribe car hire for market rate cars.

(ii) The Code of Car Hire Rules referenced in the Association of American Railroads Car Service and Car Hire Agreement provides that owners and users party to that agreement shall resolve car hire disputes thereunder. The Board may review allegations of abuse of the car hire dispute resolution process established under those rules.

(iii) Car hire disputes involving an owner or user not a party to that agreement may be resolved by the Board.

(d) *Car hire agreements.* Rail carriers are authorized to negotiate and enter into agreements governing car hire.

(e) *Effective date.* This part shall take effect on January 1, 1994.

[58 FR 60144, Nov. 15, 1993]

§ 1033.2 Car service orders.

Emergency and temporary service orders are issued under this part but are not carried in the Code of Federal Regulations.

[58 FR 60145, Nov. 15, 1993]

PART 1034—ROUTING OF TRAFFIC

AUTHORITY: 49 U.S.C. 721, 11123.

§ 1034.1 Temporary authority.

(a) *Authority.* Any railroad subject to regulation under 49 U.S.C. 10501 may reasonably divert or reroute traffic to other carriers, if it is unable due to circumstances beyond its control promptly to transport traffic over a portion of its lines. Traffic necessarily diverted under this authority shall be rerouted to preserve as much as possible the participation and revenues of other carriers provided in the original routing. This authority may be exercised for no more than 30 days following the day on which the rerouting begins. If a carrier needs more than 30 days before its disability or the disability of a receiving carrier is cured, it may automatically extend its rerouting for additional 30-day periods. To extend the period, it must submit a written or telegraphic notice to the Association of American Railroads and the Board's Office of Compliance and Enforcement explaining why the rerouting is necessary, when it began, when the disability occurred, why an extension is necessary, the specific lines disabled, the rerouting to be continued, which shippers are affected, and any other important facts.

(b) *Concurrence by carriers.* A railroad rerouting traffic must receive the concurrence of other railroads to which the traffic will be diverted or rerouted, before the rerouting or diversion begins. A rerouting carrier must also confirm the inability of a disabled receiving carrier to handle the traffic before rerouting that traffic. If the receiving carrier is no longer disabled, it must accept the traffic according to the routing originally designated.

(c) *Notice by rerouting carrier.* A rerouting carrier must notify the Board's Office of Compliance and Enforcement, the Association of American Railroads, Car Service Division, as agent of all railroads subscribing to car service and car hire agreements, and the American Short Line Railroad Association before the rerouting or diversion begins. The originating carrier must notify each shipper at the time each shipment is rerouted or diverted and furnish to each shipper the rerouting, *except when the disability requiring the rerouting occurs after the movement has begun.* When a rerouting carrier submits to the Board a notice and explanation for an extension of the rerouting period, it must immediately also submit a copy of that notice and explanation to the AAR, the ASLRA and all shippers that have been affected or that the carrier believes will be affected or that request a copy.

(d) *Notice by AAR.* The AAR shall notify all carriers affected by rerouting or by an extension of a rerouting period, in a manner similar to that used for embargoes.

(e) *Applicable rates.* The rates applicable on shipments rerouted or diverted will be the rates applicable over the route originally designated at the time the shipments are tendered.

(f) *Divisions.* The carriers involved in the rerouting or diversion shall proceed even though no contracts, agreements, or arrangements exist between them at the time concerning the divisions of the rates applicable to the traffic. Divisions shall be, during the time the rerouting is in effect, those voluntarily agreed upon by the carriers.

[46 FR 21782, Apr. 14, 1981, as amended at 46 FR 26064, May 11, 1981; 64 FR 53267, Oct. 1, 1999]

PART 1035—BILLS OF LADING

Sec.
1035.1 Requirement for certain forms of bills of lading.
1035.2 Modification of front of uniform bill of lading.
APPENDIX A TO PART 1035—UNIFORM STRAIGHT BILL OF LADING
APPENDIX B TO PART 1035—CONTRACT TERMS AND CONDITIONS

AUTHORITY: 49 U.S.C. 721, 11706, 14706.

SOURCE: 58 FR 60797, Nov. 18, 1993, unless otherwise noted.

CROSS REFERENCES: For interstate transportation of livestock, see 9 CFR parts 71–77.

For lading and unlading of vessels, see 19 CFR part 4.

§ 1035.1 Requirement for certain forms of bills of lading.

(a) All common carriers, except express companies, engaged in the transportation of property other than livestock and wild animals, by rail or by water subject to the Interstate Commerce Act are required to use straight bills of lading as prescribed in Appendix A and B to this part, or order bills of lading as prescribed in Appendix A and B to this Part, except that order bills of lading shall:

(1) Be entitled ''Uniform Order Bill of Lading'' and be designated as ''Negotiable'' on the front (appendix A to this part);

(2) Indicate consignment ''to the order of * * * '' on the front (appendix A to this part); and

(3) Provide for endorsement on the back portion (appendix B to this part).

(b) All such bills of lading:

(1) May be either documented on paper or issued electronically;

(2) May be a copy, reprographic or otherwise, of a printed bill of lading, free from erasure and interlineation;

(3) May vary in the arrangement and spacing of the printed matter on the face of the form.

§ 1035.2 Modification of front of uniform bill of lading.

Notwithstanding any other provision of § 1035.1(a), with respect to the information called for, the front portion only (appendix A to this part) of a bill of lading may deviate from the language prescribed in this part so long as the deviation conforms with approved national standards for the electronic data interchange or other commercial requirements for bill of lading information; *provided* that no such deviation in the language shall affect the obligations of any shipper to provide information absent the consent of such shipper nor shall such deviation be deemed to alter any rights or obligations conferred by statute or regulation on either carriers or shippers with respect to the preparation or issuance of bills of lading.

APPENDIX A TO PART 1035—UNIFORM STRAIGHT BILL OF LADING

UNIFORM STRAIGHT BILL OF LADING

Original—Not Negotiable

Shipper's No _____

Agent's No _____

Company _____

Received, subject to the classifications and tariffs in effect on the date of this Bill of Lading:

at_____, 19____

from _____

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

[Mail or street address of consignee—For purposes of notification only.]

Consigned to _____

Destination _____

State of _____

County of _____

Route _____

Delivering Carrier _____

Car Initial _____

Car No _____

Trailer Initials/Number _____

Length _____

Plan _____

Length _____

Plan _____

Container Initials/Number _____

Length _____

Plan _____

Length _____

Plan _____

No. packages	Description of articles, special marks, and exceptions	*Weight (subject to correction)	Class or rate	Check column	
. .....	.....	.....	.....	.....	Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:
. .....	.....	.....	.....	.....	
. .....	.....	.....	.....	.....	The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.
. .....	.....	.....	.....	.....	
. .....	.....	.....	.....	.....	
. .....	.....	.....	.....	.....	.....
					(Signature of consignor)
. .....	.....	.....	.....	.....	
. .....	.....	.....	.....	.....	If charges are to be prepaid, write or stamp here,
. .....	.....	.....	.....	.....	''To be Prepaid.''
. .....	.....	.....	.....	.....	
. .....	.....	.....	.....	.....	Received $_____ to apply in prepayment of the charges on the property described hereon.
. .....	.....	.....	.....	.....	
. .....	.....	.....	.....	.....	.....
					Agent or Cashier
. .....	.....	.....	.....	.....	Per_____
. .....	.....	.....	.....	.....	(The signature here acknowledges only the amount prepaid.)
. .....	.....	.....	.....	.....	

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is ''carrier's or shipper's weight.''

Note. Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding—

_____ per_____

Charges advanced: _____

Shipper

Agent

Per

Per

Permanent post office address of shipper

APPENDIX B TO PART 1035—CONTRACT TERMS AND CONDITIONS

CONTRACT TERMS AND CONDITIONS

Sec. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

(c) In case of quarantine the property may be discharged at risk and expense of owners

into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: Provided, That the carrier reimburse the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: Provided, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the

case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: Provided, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier, may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: Provided, That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it, and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. Provided, that, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier

erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property; but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term ''delivering carrier'' means the line-haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with part III of the Interstate Commerce Act.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, and loss, damage or injury to said property occurs while the same is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to transportation by water. Such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of Congress of the United States, approved on February 13, 1893, and entitled ''An act relating to the navigation of vessels, etc.'' and of other statutes of the United States according carriers by water the protection of limited liability as well as the following subdivisions of this section: and to the conditions contained in this bill of lading not inconsistent with this section, when this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York-Antwerp Rules of 1924, sections 1 to 15, inclusive, and sections 17 to 22, inclusive, and as to matters not covered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the

vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenance, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term ''water carriage'' in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

PART 1037—BULK GRAIN AND GRAIN PRODUCTS—LOSS AND DAMAGE CLAIMS

Sec.
1037.1 Weights and weighing.
1037.2 Cars.
1037.3 Claims.

AUTHORITY: 49 U.S.C. 721.

SOURCE: 40 FR 49342, Oct. 22, 1975, unless otherwise noted.

§ 1037.1 Weights and weighing.

(a) How determined—Accuracy of the weights used in determining the quantity of grain and grain products received for transportation by carriers and delivered by them to consignees being of primary and fundamental importance, the use of estimated weights based upon the cubical contents of the load and the test weight per bushel of the grain and grain products, or otherwise, will not be accepted. All shipments shall be carefully weighed by competent weighers upon scales that are known to be accurate within the limits of tolerance stated in scale specifications.

(b) Inspection of scales—Before weighing grain and grain products to and from cars, the scale and all other facilities to be used must be thoroughly inspected to ascertain whether they are in proper working condition, necessary adjustments or repairs, if any required, must be made, and an accurate and complete record thereof shall be entered at the time of inspection.

(c) Shipping weights—Where the shipper weighs the grain or grain products for shipment and a claim for loss and damage is subsequently filed on that shipment, the shipper shall furnish the carrier with whom the claim is filed certificates of weight showing car initials and number; the kind of grain or grain products; the total scale weight; the type and house number of the scale used; the number of drafts and weight of each draft; the date and time of weighing; whether the weight is official, board-of-trade, grain-exchange, State, or other supervised weight; and the number of grain doors used. This information should be furnished at the time the claim is filed.

(d) Destination weights—Where the consignee weighs a shipment of grain or grain products and a claim for loss and damage is subsequently filed on the shipment, the consignee shall furnish the carrier with whom the claim is filed certificates of weight showing the car initials and number; the kind of grain or grain products; the total scale weight; the type and house number of the scale used; the number of drafts and weight of each draft, and the date and time of weighing; and whether the weight is official, board-of-trade, grain-exchange, State, or other supervised weight. This information should be furnished at the time the claim is filed.

(e) A difference in weights at origin and destination, both of which are based on supervised scales, establishes *prima facie* that the loss occurred in

transit and that the railroad is liable. When a difference in weights is based in part on an unsupervised weight, which nevertheless, was accepted by the railroad as the basis for assessing freight charges, such unsupervised weight in combination with a supervised weight establishes *prima facie* that the loss occurred in transit and the railroad is liable. When a difference in weights is based in part on an unsupervised weight, with the above exception, a *prima facie* case of railroad liability for loss in transit has *not* been established. Such difference in weights is a factor, however, to be considered in connection with other evidence that a clear-record car arrived at destination with seals intact and unbroken or that the shipper made a written complaint that any car placed for loading was defective, in response to which the railroad filed a written report after investigation of the complaint. See paragraph (c) of § 1037.3.

§ 1037.2 Cars.

A car is not in suitable condition for the transportation of bulk grain and grain products when it is defective. The rules prescribed in this part 1037 apply on shipments transported solely in railroad-owned and railroad-leased cars.

[57 FR 54334, Nov. 18, 1992]

§ 1037.3 Claims.

(a) In computing the amount of the loss for which the carrier will pay there will be deducted from the gross amount of the ascertained actual loss one-fourth of 1 percent of the established loading weight to cover invisible loss and waste; provided, however, that where grain and grain products heat in transit and investigation shows that the invisible loss resulting therefrom exceeded one-fourth of 1 percent of such other amount as may hereafter be fixed in the manner above stated, and that the carrier is not otherwise liable for said loss, then the ascertained actual amount of the invisible loss due to heating of the grain and grain products will be deducted.

(b) Where investigation discloses a defect in equipment, seal or seal record, or a transfer in transit by the carrier of a carload of bulk grain or grain products upon which the unloading weight is less than the loading weight and the shipper furnishes duly attested certificates showing the correctness of the claimed weight, and investigation fails to show that the discrepancy is due to defective scales or other shipper facilities, or to inaccurate weighing or other error at point of origin or destination, or to fraud, then the resulting claim will be adjusted subject to the deductions authorized in the immediately preceding paragraph (a) of this § 1037.3; provided, however, that the clear record of either the carrier's or shippers' facilities shall not be interpreted as affecting or changing the burden of proof now lawfully resting upon either party. Therefore, movement in a clear-record car is not conclusive evidence of the fact that the car is not defective. It must be considered along with other evidence to determine liability. See paragraph (e) of § 1037.1

(c) In case of a disputed claim, the records of both the carrier and the claimant affecting the shipment involved shall be available to both parties. These records shall include a written complaint, if any, filed by the shipper with the railroad at the time the car was placed for loading that the car was defective, and the written report of an investigation of the complaint, filed by the railroad with the shipper, if made.

PART 1039—EXEMPTIONS

Sec.

1039.10 Exemption of agricultural commodities except grain, soybeans, and sunflower seeds.
1039.11 Miscellaneous commodities exemptions.
1039.12 Long and short haul transportation exemption.
1039.13 Rail intermodal transportation exemption.
1039.14 Boxcar transportation exemptions and rules.
1039.16 Exemption of new highway trailers or containers.
1039.17 Protective service contracts exemption.
1039.20 Storage leases.
1039.21 International joint through rates.
1039.22 Exemption of certain payments, services, and commitments from the Elkins Act and related provisions.

AUTHORITY: 49 U.S.C. 10502, 13301.

SOURCE: 47 FR 50262, Nov. 5, 1982, unless otherwise noted.

§ 1039.10 Exemption of agricultural commodities except grain, soybeans, and sunflower seeds.

The rail transportation of the commodities listed below is exempt from the provisions of subtitle IV of title 49, except that carriers must continue to comply with Board accounting and reporting requirements, including a brief statement in their annual reports of operations under this exemption, and must maintain copies of rates, charges, rules or regulations, for traffic moved under this exemption, at their principal office, subject to inspection, and send a letter of notification to the docket [Ex Parte No. 346 (Sub-No. 14)], within 30 days, of the fact that they are using the exemption. All tariffs pertaining to the transportation of these miscellaneous commodities will no longer apply except to the extent adopted by carrier quotations. The categories of commodities which are exempt under this decision, by Standard Transportation Commodity Code (STCC) number are:

01	Farm products, with the exception of grain (STCC No. 0113), soybeans (STCC No. 01144), and sunflower seeds (STCC No. 0114940).
09	Fresh fish and other marine products.
20–11	Fresh meat.
20–15	Fresh dressed poultry.
20–17	Processed poultry.
20–21	Creamery Butter.
20–23	Condensed, Evaporated or Dried Milk.
20–25	Cheese and Special Dairy Products.
20–26	Processed Whole Milk.
20–141	Hides and Skins.
20–144	Animal refuse, tankage, or meat meal.
20–421–27	Citrus pomace.
20–712–12	Shelled walnuts.
20–914–25	Cottonseed hulls.
20–915	Cotton linters.
20–999–29	Butter and honey mixed.
20–999–41	Honey, comb, granulated or strained, or heat treated to retard granulation.
20–999–76	Freeze-dried poultry.
20–999–77	Freeze-dried meat.
20–999–78	Freeze-dried salad ingredients.
20–999–93	Fresh and salted meat and products mixed, not hung.
20–999–94	Fresh and salted meat and products mixed, hung and not hung.
21–4	Stemmed or redried tobacco.
22–811–30	Cotton, carded, dyed or not dyed, but not spun, woven or knitted, but including cotton lap.
22–911–63	Mattress felt, nec, cjors, not finished.
22–911–74	Felts, cotton, nec.
22–971–35	Wool, nec, scoured.
22–995–22	Flax fibre.
22–999–26	Cotton linters, bleached or dyed.
28–423–37	Beeswax.

and shall embrace all articles assigned additional digits. The STCC shall be those code numbers in effect as of January 1, 1979, as shown in Standard Transportation Commodity Code Tariff 1–G, STB STCC 6001–C. Nothing in this exemption shall be construed to affect our jurisdiction under section 10502 or our ability to enforce this decision or any subsequent decision made under authority of this exemption section. This exemption shall remain in effect, unless modified or revoked by a subsequent order of this Board.

[48 FR 9277, Mar. 4, 1983; 49 FR 22095, May 25, 1984, as amended at 49 FR 26745, June 29, 1984; 49 FR 27321, July 3, 1984; 64 FR 53267, Oct. 1, 1999; 69 FR 58365, Sept. 30, 2004]

§ 1039.11 Miscellaneous commodities exemptions.

(a) *Commodities exempted.* Except as indicated in paragraph (b) of this section, the rail transportation of the commodities listed below is exempt from the provisions of 49 U.S.C. subtitle IV. The Standard Transportation Commodity Code (STCC) numbers that identify the exempted commodities are those in effect on the effective date of the tariff cited, and shall embrace all commodities assigned additional digits.

STCC No.	STCC tariff	Commodity
14 1	6001–T, eff. 1–1–92.	Dimension stone, quarry.
14 2	.....do	Crushed or broken stone or riprap.
14 411	.....do	Sand (aggregate or ballast).
14 412	.....do	Gravel (aggregate or ballast).
20	.....do	Food or kindred products except 20 143 Grease or inedible tallow. 20 32 Canned specialties. 20 33 Canned fruits, jams, jellies, preserves or vegetables. 20 4 Grain mill products. 20 6 Sugar, beet or cane. 20 8 Beverages or flavoring extracts. 20 911 Cottonseed oil, crude or refined. 20 914 Cottonseed cake or meal or by-products. 20 92 Soybean oil or by-products. 20 93 Nut or vegetable oils or by-products.
22	.....do	Textile mill products.
23	.....do	Apparel or other finished textile products or knit apparel.
24	.....do	Lumber or wood products.
25	.....do	Furniture or fixtures.

STCC No.	STCC tariff	Commodity
26	.....do	Pulp, paper or allied products except
		26 1 Pulp or pulp mill products.
		26 211 Newsprint.
		26 212 Ground wood paper, uncoated.
		26 213 Printing paper, coated or uncoated, etc.
		26 214 Wrapping paper, wrappers or coarse paper.
		26 218 Sanitary tissue stock.
		26 471 Sanitary tissues or health products.
		26 6 Building paper or building board except
		26 613 Wallboard.
27	.....do	Printed matter.
28 195 22–23.	.....do	Iron chloride, liquid.
28 195 27–30.	.....do	Iron sulphate.
28 195 68–69.	.....do	Ferrous sulphate.
29 914	.....do	Coke produced from coal.
29 915	.....do	Distillate or residual fuel oil from coal refining.
30	.....do	Rubber or miscellaneous plastics products except
		30 111 Rubber pneumatic tires or parts.
31	.....do	Leather or leather products.
32	.....do	Clay, concrete, glass or stone products except
		32 411 Hydraulic cement, natural, portland or masonry.
		32 741 Lime or lime plaster.
		32 95 Nonmetallic earths or minerals, ground or treated in any other manner except
		32 952 15 Cinders, clay, shale expanded shale), slate or volcanic (not pumice stone), or haydrite.
33	.....do	Primary metal products, including galvanized.
34	.....do	Fabricated metal products except
		34 6 Metal stampings.
		34 919 40 Radioactive material shipping containers, etc.
35	.....do	Machinery except
		35 11 Steam engines, turbines, turbine generator sets, or parts.
		35 85 Refrigerators or refrigeration machinery or complete air-conditioning units.
36	.....do	Electrical machinery, equipment or supplies except
		36 12 Power, distribution or specialty transformers.
		36 21 Motors or generators.
37 11	.....do	Motor vehicles.
37 14	.....do	Motor vehicle parts or accessories.
38	.....do	Instruments, photographic goods, optical goods, watches or clocks.
39	.....do	Miscellaneous products of manufacturing.
41 118	6001–U, eff. 1–1–93.	Used vehicles.
14 715	6001–V, eff. 1–1–94.	Rock salt.
20 143	.....do	Grease or inedible tallow.
28 133	.....do	Carbon dioxide.
28 991	.....do	Salt.
32–4	.....do	Hydraulic cement.
34 912	6001–W, eff. 1–1–95..	Steel shipping containers.
40 211	.....do	Iron and steel scrap.
33 119	6001–X, eff. 1–11–96.	Blast furnace, open hearth, rolling mill or coke oven products, NEC.
20511	6001–X, eff., 1–1–96.	Bread or other bakery products exc. biscuits, crackers, pretzels or other dry bakery products. See 20521–20529.
22941	.....do.	Textile waste, garnetted, processed, or recovered or recovered fibres or flock exc. packing or wiping cloths or rags. See 22994.
22973	.....do.	Textile fibres, laps, noils, nubs, roving, sliver or slubs, prepared for spinning, combed or converted.
22994	.....do.	Packing or wiping cloths or rags (processed textile wastes).
24293	.....do.	Shavings or sawdust.
30311	.....do.	Reclaimed rubber.
3229924	.....do.	Cullet (broken glass).
33312	.....do.	Copper matte, speiss, flue dust, or residues, etc.
33322	.....do.	Lead matte, speiss, flue dust, dross, slag, skimmings, etc.
33332	.....do.	Zinc dross, residues, ashes, etc.
33342	.....do.	Aluminum residues, etc.
33398	.....do.	Misc. nonferrous metal residues, including solder babbitt or type metal residues.
40112	.....do.	Ashes.
40212	.....do.	Brass, bronze, copper or alloy scrap, tailings, or wastes.
40213	.....do.	Lead, zinc, or alloy scrap, tailings or wastes.
40214	.....do.	Aluminum or alloy scrap, tailings or wastes.
4021960	.....do.	Tin scrap, consisting of scraps or pieces of metallic tin, clippings, drippings, shavings, turnings, or old worn-out block tin pipe having value for remelting purposes only.
40221	.....do.	Textile waste, scrap or sweepings.
40231	.....do.	Wood scrap or waste.
40241	.....do.	Paper waste or scrap.
40251	.....do.	Chemical or petroleum waste, including spent.
40261	.....do.	Rubber or plastic scrap or waste.
4029114	.....do.	Municipal garbage waste, solid, digested and ground, other than sewage waste or fertilizer.
4029176	.....do.	Automobile shredder residue.
4111434	.....do.	Bags, old, burlap, gunny, istle (ixtle), jute, or sisal, NEC.
41115	.....do.	Articles, used, returned for repair or reconditioning.
42111	.....do.	Nonrevenue movement of containers, bags, barrels, bottles, boxes, crates, cores, drums, kegs, reels, tubes, or carriers, NEC, empty, returning in reverse of route used in loaded movement, and so certified.

STCC No.	STCC tariff	Commodity
42112	.....do.	Nonrevenue movement of shipping devices, consisting of blocking, bolsters, cradles, pallets, racks, skids, etc., empty, returning in reverse of route used in loaded movement, and so certified.
42311	.....do.	Revenue movement of containers, bags, barrels, bottles, boxes, crates, cores, drums, kegs, reels, tubes, or carriers, NEC., empty, returning in reverse of route used in loaded movement and so certified.

Excluded from this exemption are any movements for which a finding of market dominance has been made. However, this exemption shall not be construed as affecting in any way the existing regulations, agreements, prescriptions, conditions, allowances or levels of compensation regarding the use of equipment, whether shipper or railroad owned or leased, including car hire, per diem and mileage allowances, and also including exemption from the anti-trust laws necessary to negotiate car service regulations or mandatory interchange of equipment or to maintain and execute such agreements. Nor shall this exemption be construed to affect existing Class III railroad ''protections'' in the case of boxcars.

(b) *Conditions.* Carriers must continue to comply with Board accounting and reporting requirements. All railroad tariffs pertaining to the transportation of these miscellaneous commodities will no longer apply. This exemption shall remain in effect, unless modified or revoked by a subsequent order of this Board.

[48 FR 24901, June 3, 1983, as amended at 48 FR 33306, July 21, 1983; 48 FR 55744, Dec. 15, 1983; 54 FR 51402, Dec. 15, 1989; 56 FR 31547, July 11, 1991; 58 FR 4356, Jan. 14, 1993; 58 FR 27951, May 12, 1993; 58 FR 43818, Aug. 18, 1993; 58 FR 53434, Oct. 15, 1993; 59 FR 51134, Oct. 7, 1994; 59 FR 59663, Nov. 18, 1994; 59 FR 63926, Dec. 12, 1994; 60 FR 26840, May 19, 1995; 60 FR 38281, July 26, 1995; 61 FR 7426, Feb. 28, 1996; 61 FR 47446, Sept. 9, 1996; 61 FR 66231, Dec. 17, 1996; 63 FR 19665, Apr. 21, 1998]

§ 1039.12 Long and short haul transportation exemption.

(a) All rates and charges for rail transportation are exempt from the provisions of 49 U.S.C. 10726 to the extent that:

(1) Board approval or consideration before the effective date of these rates and charges is not required; and

(2) Section 10707 will not apply to rates to the extent that they are challenged on the basis of alleged violations of section 10726.

(b) This exemption does not extend to review by the Board upon the filing of a formal complaint alleging a violation of section 10726. Board review will, however, be subject to the following conditions:

(1) A showing that a rate violates section 10726 will not create a presumption that the higher rate is unreasonably high, and

(2) A finding by the Board that a rate or charge violates the provisions of section 10726 will not, absent a specific showing of damages, afford a basis for an award of reparations.

[48 FR 9649, Mar. 8, 1983]

§ 1039.13 Rail intermodal transportation exemption.

See Part 1090.

[52 FR 23660, June 24, 1987]

§ 1039.14 Boxcar transportation exemptions and rules.

(a) The Rail transportation of all commodities in boxcars is exempt from the provisions of 49 U.S.C. subtitle IV except as otherwise provided in this section.

(b) The Board retains jurisdiction in the following areas:

(1) Car hire and car service.

(2) Mandatory interchange of equipment.

(3) Reciprocal switching or joint use of terminal facilities.

(4) Car supply.

(5) Freight car pooling agreements.

(6) Freight rates applicable to boxcar traffic originating or terminating at an industry facility served physically by a Class III rail carrier, to the extent provided in paragraphs (c)(4) and (c)(5) of this section.

(c)(1) Except as provided in paragraph (c)(2) of this section, carriers are authorized to take the following actions with respect to boxcar equipment use:

(i) Assess charges for empty movement of cars where movements are made at the request of the car owner, the Association of American Railroads, or the Board. The empty mileage charge is subject to a maximum of 35 cents per mile, as adjusted for inflation or deflation using the rail cost adjustment factors published periodically by the Board in Ex Parte No. 290 (Sub-No. 2), *Railroad Cost Recovery Procedures.* In applying those factors, the figure of 35 cents will be treated as having been in effect on October 1, 1982.

(ii) Store empty cars and reclaim car hire payments beginning at the expiration of a 72-hour grace period after the car is made empty.

(iii) Negotiate bilateral agreements governing car hire rates, empty movements, and storage.

(2) The authorization in paragraphs (c)(1) (i) and (ii) of this section will not apply to excluded carriers, as defined in paragraph (c)(2)(i) of this section, nor will it apply to any boxcar which, on December 30, 1983, was owned or leased by a carrier which then would have qualified as an excluded carrier and which bears the reporting marks of an excluded carrier.

(i) An ''excluded carrier'' is a Class III carrier or a Class II carrier not affiliated with one or more Class I carriers. To be affiliated, the Class II carrier must be more than 50 percent owned by one or more Class I carriers.

(ii) The boxcar exclusion of paragraph (c)(2) of this section will apply:

(A) To an excluded boxcar whenever it is owned or leased by any Class III carrier and bears a Class III carrier's reporting marks; and

(B) To an excluded boxcar owned or leased by an excluded Class II carrier beginning on October 16, 1986, and ending on October 31, 1990, so long as such boxcar has not been otherwise owned or leased by another carrier during this period.

(iii) The exclusion will not apply during any period in which an excluded boxcar is leased or assigned to a Class I or affiliated Class II carrier. If an excluded Class II carrier becomes a Class III carrier within the period under § 1039.14(c)(2)(ii)(B), that carrier will thereafter, for purposes of this rule, be treated as if it had been a Class III carrier on December 10, 1983.

(iv) Nothing in paragraph (c)(2) of this section will affect the right of any carrier to negotiate bilateral agreements governing car hire rates and rules.

(3) The hourly and mileage car hire rates in effect on January 1, 1985, as published in AAR Traffic Circular No. OT–10, for any boxcar excluded under paragraph (c)(2) of this section, will remain in effect without regard to the aging of such car subsequent to January 1, 1986, and any modification to the existing car hire formula will not apply to such cars. With respect to an excluded boxcar owned or leased by an excluded Class II carrier, those car hire rates shall remain in effect through October 31, 1990. Any improvements subsequent to January 1, 1985, to the excluded boxcars capitalized under OT–37 criteria or under rebuilt criteria will be subject to the same formula applicable to OT–37 or rebuilt cars under Ex Parte No. 334 or any other railroad car hire proceeding, including any efficiency ratio, if adopted. Any improvements or repairs subsequent to December 31, 1990, to the excluded boxcars performed under OT–37 criteria or under rebuilt criteria or any other criteria shall not result in any increases, additions, or surcharges in the car hire rates for such cars.

(4) No freight rate made effective after April 1, 1985, that applies to traffic moving by boxcar and originating or terminating at an industry facility served physically by a Class III rail carrier may discriminate while these rules are in effect on the basis of:

(i) The ownership of the boxcar used or the reporting marks any such boxcar bears;

(ii) The car hire rate applicable to the boxcar used; or

(iii) Any car hire discounts, in the form of reclaims or otherwise, available to any carriers with respect to the boxcar used.

Except as prohibited above, carriers may use car ownership or car marks for identification purposes when establishing rates.

(5) The provisions of 49 U.S.C. 10705 and 10705a applicable to joint rates and through routes will be effective as to

rates and routes applicable to boxcar traffic originating or terminating at an industry facility served physically by a Class III rail carrier.

(6) The following carriers are not regarded as Class III or unaffiliated Class II carriers for the purpose of this section:

Central New York Railroad Corporation
Cooperstown and Charlotte Valley Railway Corporation
Fonda, Johnstown & Gloversville Railroad Corporation
Lackawaxen and Stourbridge Railroad Corporation
New York, Susquehanna & Western Railway Corporation
Rahway Valley Railroad Company
Staten Island Railway Corporation.

(d) Carriers must continue to comply with Board accounting and reporting requirements. Railroad tariffs pertaining to the exempted transportation of commodities in boxcars will no longer apply. This exemption shall remain in effect, unless modified or revoked by a subsequent order of this Board.

[48 FR 20415, May 6, 1983, as amended at 50 FR 20419, May 16, 1985; 51 FR 32656, Sept. 15, 1986; 51 FR 32922, Sept. 17, 1986; 52 FR 37971, Oct. 13, 1987; 55 FR 41339, Oct. 11, 1990; 57 FR 53451, Nov. 10, 1992; 57 FR 56641, Nov. 30, 1992; 61 FR 26847, May 29, 1996]

§ 1039.16 Exemption of new highway trailers or containers.

The rail transportation of new highway trailers or containers (which is not otherwise exempt) is exempt from the provisions of 49 U.S.C. Subtitle IV, except that carriers must continue to comply with the Board's accounting and reporting requirements. This exemption will remain in effect unless modified or revoked by subsequent order of this Board.

[52 FR 17404, May 8, 1987]

§ 1039.17 Protective service contracts exemption.

Contracts for protective services against heat or cold, provided to or on behalf of rail carriers and express companies, are exempt from the requirements of 49 U.S.C. 11105. Nothing in this exemption shall be construed to affect our jurisdiction under section 10505 or our ability to enforce this decision or any subsequent decision made under authority of this exemption section. This exemption shall remain in effect, unless modified or revoked by a subsequent order of this Board.

[49 FR 19025, May 4, 1984]

§ 1039.20 Storage leases.

Storage leases for all equipment for all carriers are exempt from the provisions of 49 U.S.C. subtitle IV except for 49 U.S.C. 11123. Nothing in this exemption should be construed to affect our jurisdiction under section 10502 or our ability to enforce this decision or any subsequent decision made under authority of this exemption section. This exemption shall remain in effect, unless modified or revoked by a subsequent decision of this Board.

[51 FR 46675, Dec. 24, 1986, as amended at 69 FR 58365, Sept. 30, 2004]

§ 1039.21 International joint through rates.

Rail carriers are exempt from the provisions of § 1312.37 that require the filing of tariffs containing international joint through rates. Rail carriers must continue to comply with Board accounting and reporting requirements. This exemption shall remain in effect, unless modified or revoked by a subsequent order of this Board.

[51 FR 27046, July 29, 1986]

§ 1039.22 Exemption of certain payments, services, and commitments from the Elkins Act and related provisions.

(a) Whenever a rail carrier:

(1) Provides payments or services for industrial development activities; or,

(2) Makes commitments regarding future transportation;

and reasonably determines that such payments, services or commitments would not be eligible for inclusion in rail contracts under 49 U.S.C. 10713, such transaction(s) shall be exempt from 49 U.S.C. 10761(a), 10762(a)(1), 11902, 11903, and 11904(a), subject to the conditions set forth in paragraphs (b) through (e) of this section.

(b) If any interested person(s) believes a transaction is eligible for inclusion in one or more contracts under

49 U.S.C. 10713, that person's exclusive remedy shall be to request the Board to so determine, and if the Board does so, the transaction shall no longer be exempted by this section commencing 60 days after the date of the Board's determination.

(c) Transactions that are exempt under paragraph (a) of this section shall be subject to all other applicable provisions of Title 49 U.S.C. Subtitle IV and to the antitrust laws to the extent that the activity does not fall within the Board's exclusive jurisdiction.

(d) For any actual movement of traffic, a carrier must file any required tariff or section 10713 contract, and conform to all other applicable provisions of the Interstate Commerce Act, but this paragraph shall not be interpreted to limit, revoke, or remove the effect of the exemption granted under paragraph (a) of this section with respect to any payments, services, or commitments made prior to the filing of the rate or contract.

(e) When any person files with the Board a petition to revoke the exemption granted by this section as to any specific transaction, the rail carrier shall have the burden of showing that, with respect to such transaction, all requirements of paragraph (a) of this section were met, and the carrier reasonably expected, before undertaking such payments, services or commitments, that such payments, services or commitments would result, within a reasonable time, in a contribution to the carrier's going concern value.

(f) This exemption shall remain in effect unless modified or revoked by a subsequent order of this Board.

[57 FR 11913, Apr. 8, 1992]

PARTS 1070–1079 [RESERVED]

Parts 1090–1099—Intermodal Transportation

PART 1090—PRACTICES OF CARRIERS INVOLVED IN THE INTERMODAL MOVEMENT OF CONTAINERIZED FREIGHT

Sec.

1090.1 Definition of TOFC/COFC service.
1090.2 Exemption of rail and highway TOFC/COFC service.
1090.3 Use of TOFC/COFC service by motor and water carriers.

AUTHORITY: 49 U.S.C. 721.

§ 1090.1 Definition of TOFC/COFC service.

(a) Rail trailer-on-flatcar/container-on-flatcar (TOFC/COFC) service means the transportation by rail, in interstate or foreign commerce, of—

(1) Any freight-laden highway truck, trailer, or semitrailer,

(2) The freight-laden container portion of any highway truck, trailer, or semitrailer having a demountable chassis,

(3) Any freight-laden multimodal vehicle designed to operate both as a highway truck, trailer, or semitrailer and as a rail car,

(4) Any freight-laden intermodal container comparable in dimensions to a highway truck, trailer, or semitrailer and designed to be transported by more than one mode of transportation, or

(5) Any of the foregoing types of equipment when empty and being transported incidental to its previous or subsequent use in TOFC/COFC service.

(b) Highway TOFC/COFC service means the highway transportation, in interstate or foreign commerce, of any of the types of equipment listed in paragraph (a) of this section as part of a continuous intermodal movement that includes rail TOFC/COFC service, and during which the trailer or container is not unloaded.

[52 FR 23660, June 24, 1987]

§ 1090.2 Exemption of rail and highway TOFC/COFC service.

Except as provided in 49 U.S.C. 10505 (e) and (g), 109229(1), and 10530, rail TOFC/COFC service and highway TOFC/COFC service provided by a rail carrier either itself or jointly with a motor carrier as part of a continuous intermodal freight movement is exempt from the requirements of 49 U.S.C. subtitle IV, regardless of the type, affiliation, or ownership of the carrier performing the highway portion of the service. Motor carrier TOFC/COFC pickup and delivery services arranged independently with the shipper

or receiver (or its representative/agent) and performed immediately before or after a TOFC/COFC movement provided by a rail carrier are similarly exempt. Tariffs heretofore applicable to any transportation service exempted by this section shall no longer apply to such service. The exemption does not apply to a motor carrier service in which a rail carrier participates only as the motor carrier's agent (Plan I TOFC/COFC), nor does the exemption operate to relieve any carrier of any obligation it would otherwise have, absent the exemption, with respect to providing contractual terms for liability and claims.

[54 FR 51746, Dec. 18, 1989]

§ 1090.3 Use of TOFC/COFC service by motor and water carriers.

(a) Except as otherwise prohibited by these rules, motor and water common and contract carriers may use rail TOFC/COFC service in the performance of all or any portion of their authorized service.

(b) Motor and water common carriers may use rail TOFC/COFC service only if their tariff publications give notice that such service may be used at their option, but that the right is reserved to the user of their services to direct that in any particular instance TOFC/COFC service not be used.

(c) Motor and water contract carriers may use rail TOFC/COFC service only if their transportation contracts and tariffs (for water carriers) make appropriate provisions therefor.

(d) Tariffs of motor and water common or water contract carriers providing for the use of rail TOFC/COFC service shall set forth the points between which TOFC/COFC service may be used.

[52 FR 27811, July 24, 1987]

SUBCHAPTER B—RULES OF PRACTICE

Parts 1100–1129—Rules of General Applicability

PART 1100—GENERAL PROVISIONS

Sec.
1100.1 Scope of rules.
1100.2 Applicability.
1100.3 Liberal construction.
1100.4 Information and inquiries.

AUTHORITY: 49 U.S.C. 721.

SOURCE: 47 FR 49548, Nov. 1, 1982, unless otherwise noted.

§ 1100.1 Scope of rules.

These rules govern practice and procedure before the Surface Transportation Board under title 49, subtitle IV of the United States Code (49 U.S.C. 10101 *et seq.*). This subchapter will be referred to as the ''Rules of Practice''.

§ 1100.2 Applicability.

The rules in parts 1100–1129, Rules of General Applicability, establish general rules applicable to all types of proceedings. Other rules in this subchapter establish special rules applicable to particular types of proceedings. When there is a conflict or inconsistency between a rule of general applicability and a special rule, the special rule will govern.

[47 FR 49548, Nov. 1, 1982, as amended at 50 FR 30275, July 25, 1985]

§ 1100.3 Liberal construction.

The rules will be construed liberally to secure just, speedy and inexpensive determination of the issues presented.

§ 1100.4 Information and inquiries.

Persons with questions concerning these rules should either send a written inquiry addressed to the Secretary, Surface Transportation Board or should telephone the Secretary's Office.

[64 FR 53267, Oct. 1, 1999]

PART 1101—DEFINITIONS AND CONSTRUCTION

Sec.
1101.1 Statutory definitions.
1101.2 Definitions applicable to this subchapter.
1101.3 Construction.

AUTHORITY: 49 U.S.C. 721.

SOURCE: 47 FR 49548, Nov. 1, 1982, unless otherwise noted.

§ 1101.1 Statutory definitions.

The definitions contained in section 10102 of the Act (49 U.S.C. 10102) apply in this chapter.

§ 1101.2 Definitions applicable to this subchapter.

(a) *Act* or *Interstate Commerce Act* means subtitle IV of title 49 of the United States Code (49 U.S.C. 10101 *et seq.*).

(b) *Board* means (1) the Surface Transportation Board and (2) any body or individual to which or to whom decision making authority is assigned by the Board or the Chairman of the Board, including the Chairman, another Board Member, employee board, an individual employee, an administrative law judge, or other hearing officer entitled to act in a particular proceeding. See 49 CFR part 1011, Board Organization; Delegations of Authority.

(c) *Decision* means any formal, published action of the Board, including orders and notices.

(d) *Party* means a complainant, defendant, applicant, respondent, protestant, intervener, or petitioner in any proceeding, or other persons permitted or directed by the Board to participate in a proceeding. It will not include persons merely signing certificates of support or witnesses at oral hearing or in modified procedure proceedings, unless they are otherwise a party to the proceeding. Persons on the docket service list merely for the purpose of receiving copies of Board releases are not considered parties to the proceeding.

(e) *Proceeding* includes:

(1) An *informal complaint* filed under §§ 1130.1, or 1130.3 or a *formal complaint* alleging violation of any provision of the Act or of any regulation or requirement made pursuant to a power granted by such Act, including petitions on special dockets;

(2) An *application* for (i) the granting of any right, privilege, authority, or relief under or from any provision of the Act or of any regulation or requirement made pursuant to a power granted by such Act, or (ii) the consideration of any submission required by law to be made to the Board;

(3) An *investigation* instituted by the Board;

(4) A *rulemaking* proposal instituted by the Board; or

(5) A petition for exemption filed under 49 U.S.C. 10502 requesting the Board to exempt from application all or part of subtitle IV of title 49 of the United States Code any person, class of persons, transaction, or service related to a rail carrier.

[47 FR 49548, Nov. 1, 1982, as amended at 50 FR 30275, July 25, 1985; 64 FR 53267, Oct. 1, 1999; 69 FR 58365, Sept. 30, 2004]

§ 1101.3 Construction.

The rules of construction contained in chapter 1 of title 1 of the United States Code (1 U.S.C. 1 *et seq.*) apply in this chapter. Among other things, they provide that the singular includes the plural, and vice versa; that the masculine includes the feminine; that the word ''person'' includes corporations, associations, and the like; that ''county'' includes parish and similar subdivisions; and that ''company'' includes successors and assigns.

PART 1102—COMMUNICATIONS

Sec.
1102.1 How addressed.
1102.2 Ex parte communications prohibited; penalties provided.

AUTHORITY: 49 U.S.C. 721.

§ 1102.1 How addressed.

All communications should be addressed to the Secretary of the Board, Surface Transportation Board, Washington, DC 20423 unless otherwise specifically directed by another Board regulation. All communications should designate the docket number and title, if any. The person communicating shall state his address, and the party he represents.

[47 FR 49548, Nov. 1, 1982]

§ 1102.2 Ex parte communications prohibited; penalties provided.

(a) *Definitions.* (1) ''On-the-record proceeding'' means any matter described in Sections 556–557 of the Administrative Procedure Act (5 U.S.C. 556–557) or any matter required by the Constitution, statute, Board rule, or by decision in the particular case, that is decided solely on the record made in a Board proceeding.

(2) ''Person who intercedes in any proceeding'' means any person, partnership, corporation, or association, private or public, outside of the Board which is neither a party nor party's agent, that volunteers a communication that it has reason to know may advance or adversely affect the interest of a party or party's agent in any proceeding before the Board.

(3) *Ex Parte* communication concerning the merits means an oral or written communication by or on the behalf of a party which is made without the knowledge or consent of any other party that could or is intended to influence anyone who participates or could reasonably be expected to participate in the decision.

(b) *Communications that are not prohibited.* (1) Any communication to which all the parties to the proceeding agree, or on which the Board formally rules, may be made on an *ex parte* basis;

(2) Any communication of facts or contention which has general significance for a regulated industry if the communicator cannot reasonably be expected to have known that the facts or contentions are material to a substantive issue in a pending on-the-record proceeding in which it is interested;

(3) Any communication by means of the news media that in the ordinary course of business of the publisher is intended to inform the general public, members of the organization involved, or subscribers to such publication with respect to pending on-the-record proceedings.

(c) *Prohibitions.* (1) No party, counsel, agent of a party, or person who intercedes in any on-the-record proceeding shall engage in any *ex parte* communication concerning the merits of the proceeding with any Board Member, hearing officer, joint board member, employee board member or employee of the Board who participates, or who may reasonably be expected to participate, in the decision in the proceeding.

(2) No Board Member, hearing officer, joint board member, employee board member or employee of the Board who participates, or is reasonably expected to participate, in the decision in an on-the-record proceeding shall invite or knowingly entertain any *ex parte* communication concerning the merits of a proceeding or engage in any such communication to any party, counsel, agent of a party, or person reasonably expected to transmit the communication to a party or party's agent.

(d) *When prohibitions take effect.* The prohibitions against *ex parte* communications concerning the merits of a proceeding apply from the date on which a proceeding is noticed for oral hearing or for the taking of evidence by modified procedure, or when the person responsible for the communication has knowledge that the proceeding will be so noticed, or at any time the Board, by rule or decision, specifies.

(e) *Procedure required of Board members and employees upon receipt of ex parte communications concerning the merits of a proceeding.* Any person who receives an *ex parte* communication concerning the merits of a proceeding must promptly transmit either the written communication, or a written summary of the oral communication with an outline of the surrounding circumstances to the Secretary of the Board. The Secretary shall place all of the material in the correspondence section of the public docket of the proceeding. A recipient of such *ex parte* communication, who has doubt as to the nature of the communication, may request a ruling on the question from the Board's Designated Agency Ethics Official. The Designated Agency Ethics Official shall promptly reply to such requests. The Secretary shall promptly notify the Chairman of the Board of such *ex parte* communications sent to the Secretary. The Designated Agency Ethics Official shall promptly notify the Chairman of all requests for rulings sent to the Designated Agency Ethics Official. The Chairman may require that any communication be placed in the correspondence section of the docket when fairness requires that it be made public, even if it is not a prohibited communication. The Chairman may direct the taking of such other action as may be appropriate under the circumstances.

(f) *Sanctions.* (1) The Board may censure, suspend, or revoke the privilege of practicing before the agency of any person who knowingly and willfully engages in or solicits prohibited *ex parte* communication concerning the merits of a proceeding.

(2) The relief or benefit sought by a party to a proceeding may be denied if the party, or his agent knowingly and willfully violates the foregoing rules.

(3) The Board may censure, suspend, dismiss, or institute proceedings to suspend or dismiss any Board employee who knowingly and willfully violates the foregoing rules.

[47 FR 49548, Nov. 1, 1982, as amended at 58 FR 42027, Aug. 6, 1993]

PART 1103—PRACTITIONERS

Subpart A—General Information

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1103.33 Responsibility when proposing a person for admission to practice before the Board.
1103.34 Intermediaries.
1103.35 Partnership or professional corporation names and titles.

AUTHORITY: 21 U.S.C. 862; 49 U.S.C. 703(e), 721.

SOURCE: 47 FR 49549, Nov. 1, 1982, unless otherwise noted.

Subpart A—General Information

§ 1103.1 Register of practitioners.

The Board maintains a register containing the names of all non-attorneys entitled to practice before it. The register is maintained according to the individual non-attorney practitioner's name and not by corporate or firm name. Corporations and firms are not admitted or recognized as practitioners before the Board.

§ 1103.2 Attorneys-at-law—qualifications and requirements to practice before the Board.

Any person who is a member in good standing of the bar of the highest court of any State, Commonwealth, possession, territory, or the District of Columbia may represent persons before the Board.

§ 1103.3 Persons not attorneys-at-law—qualifications and requirements for practice before the Board.

(a) *In general.* Any citizen or resident of the United States, not an attorney-at-law, who files an application for admission to practice, accompanied by the payment of the fee prescribed by rule or order of the Board, and who successfully completes the practitioners' examination, and shows that applicant possesses the necessary legal and technical qualifications to enable applicant to render valuable service before the Board and that applicant is competent to advise and assist in the presentation of matters before the Board, may be permitted to practice before the Board.

(b) *Qualifications standards.* A non-attorney applicant for admission to practice must meet one of the following requirements:

(1) An applicant must have completed 2 years (60 semester hours or 90 quarter hours) of post secondary education and must possess technical knowledge, training or experience in the field of transportation which is regarded by the Board as the equivalent of 2 additional years of college education;

(2) An applicant must have worked in the field of transportation for at least 10 years;

(3) An applicant must have received a bachelor's degree with at least 12 semester hours or 18 quarter hours in transportation or business; or

(4) An applicant must have received a bachelor's degree and worked in the field of transportation for at least one year. An applicant's statement of college education must be supported by a transcript of records attached to the original application. Transcripts from any college accredited by the U.S. Department of Education will be accepted without question. With all other institutions, the burden of proof is on the

applicant to establish that the formal education satisfies the standards set forth above. The qualifications standards are intended as general guidelines. Individual situations that vary from the standards will continue to be evaluated on their own merits.

(c)(1) *Application for admission.* An application filed pursuant to this rule under oath for admission to practice shall be submitted between January and May 1 of the year in which the examination is to be taken. The application is to be completed in full on the form provided by the Board, and shall be addressed to the Secretary, Surface Transportation Board, Washington, DC 20423, to the attention of the room number indicated on the form.

(2) *Certification:* All applicants must complete the following certification:

I, _____ (Name) _____, certify under penalty of perjury under the laws of the United States, that I have not been convicted, after September 1, 1989, of any Federal or State offense involving the distribution or possession of a controlled substance, or that if I have been so convicted, I am not ineligible to receive Federal Benefits, either by court order or operation of law, pursuant to 21 U.S.C. 853a.

(d) *Application fee.* Each application filed pursuant to this rule must be accompanied by the non-refundable fee in the amount set forth in 49 CFR 1002.2(f)(100). Payment must be made either by check, money order or credit card payable to the Surface Transportation Board. Cash payment will not be accepted.

(e) *Additional certification.* (1) When an application meets the required standards, a copy will be referred to the Association of Surface Transportation Board Practitioners for a report to the Board as to the reputation and character of the applicant. Inquiry also will be made by the Board of the sponsors as to their knowledge of the applicant's legal and technical qualifications as contemplated by the Board's Rules of Practice. If the Board is satisfied as to the applicant's qualifications, reputation and character, then applicant will be considered eligible to take the examination.

(2) The Board may require an applicant's sponsors to provide a detailed statement of the nature and extent of their knowledge of applicant's qualifications. Upon consideration of this material, if the Board is not satisfied as to the adequacy of applicant's qualifications, the applicant will be notified by registered mail. Applicant may then request a hearing to prove his qualifications. If applicant makes such a request, the Board will allow a hearing. In the absence of a request for a hearing within 20 days after receipt of the notice, the application will be considered withdrawn.

(f) *Scope of examination.* If applicant meets the educational and experience standards, and is found to be of good character, the applicant will be permitted to take the examination. The examination tests the applicant's experience and knowledge of the principal regulations, laws, and economic principles in the field of transportation as well as knowledge of the Board's Rules of Practice and Canons of Ethics.

(g) *Time and place of examination.* The examination will be conducted once a year on the second Tuesday in July. Notice of the time and place to appear for the examination will be mailed to qualifying applicants approximately 30 days prior to the date of the examination.

(h) *Location of examination.* Examinations will ordinarily be conducted in selected cities where Board offices are located. A listing of the available sites will be attached to the application form. Applicants may select their preferred examination site. If a group of prospective applicants (three applicants or more) wishes to take the examination at a location not listed, a letter stating the preferred test site should be included with the application. The Board will make every effort to administer the test at the requested location.

(i) *Cancellation of examination.* If the Board determines that there is an insufficient number of applicants to warrant conducting the examination, the Board will cancel the examination for that year. Notice of the cancellation will be mailed to applicants on or before June 15 and the application fee will be refunded. The Board will conduct the examination the next year following the cancellation of the examination.

(j) *Examination results.* Results will be released within 90 days after the examination. Individual results will be forwarded to the applicants at least 1 week before being publicly released. To protect the privacy of those taking the examination, individual grades will not be released over the telephone to anyone. Requests for grades may, however, be submitted in writing to the Office of the Secretary to the attention of the address stated in the application form.

(k) *Failure to appear for examination.* Applicants who have failed to appear for, or postponed taking an examination, a total of three times without showing good cause will have any subsequently filed application returned.

(l) *Failing or postponing the examination.* Applicants who fail the examination may reapply by submitting a request in writing with an additional filing fee in the amount set forth in 49 CFR 1002.2(f)(100). Applicants who postpone taking the examination three times without showing good cause will have their applications returned.

(m) The filing fee in the amount set forth in 49 CFR 1002.2(f)(100) is not refundable.

(n) Any application resubmitted to the Board after being returned must be accompanied by a filing fee in the amount set forth in 49 CFR 1002.2(f)(100).

(o) *Content and grading of examination.* The Employee Board on Education and Practice is responsible, under the general supervision of the Vice-Chairman, for the examination of non-attorney applicants, for the preparation of examination questions, and for grading examinations. The Board consists of two attorneys and one non-attorney appointed by the Chairman with the approval of the Board. Under the supervision of this Board, a seven-member Committee of Examiners will grade the examination questions. The members of this Committee must have at least 2 years experience with the Board and are appointed for a 2 year term by the Chairman, with the approval of the Board. Members may be reappointed and, to the extent possible, no more than three members of the Committee will be replaced at one time.

(p) *Applicant's oath.* No applicant shall be admitted to practice before the Board until applicant shall subscribe to an oath or affirmation that applicant will conduct practice uprightly and according to the law, as a practitioner before the Board, and that applicant will support the Constitution of the United States and laws of the United States and will conform to the rules and regulations of the Board.

[47 FR 49549, Nov. 1, 1982, as amended at 49 FR 38614, Oct. 1, 1984; 52 FR 46483, Dec. 8, 1987; 54 FR 48250, Nov. 22, 1989; 56 FR 1374, Jan. 14, 1991; 64 FR 53267, Oct. 1, 1999]

§ 1103.4 Initial appearances.

Practitioners shall file a declaration that they are authorized to represent the particular party on whose behalf they appear at the time of making an initial appearance, in all proceedings. This requirement can be met by:

(a) Entering the practitioner's name as the representative of an applicant in the appropriate space on an application form;

(b) Signing any complaint, petition, protest, reply or other pleading with a designation following the practitioner's signature that he is the representative of a party;

(c) Entering an appearance at any hearing on the form provided; or

(d) Filing a letter with the Secretary of the Board stating that practitioner is authorized to represent a party. The party represented, their address, and the docket number of the proceeding must also be identified at the time of the initial appearance.

§ 1103.5 Discipline.

(a) A member of the Board's bar may be subject to suspension, disbarment, or other disciplinary action if it is shown that the practitioner:

(1) Has been suspended or disbarred from practice in any court of record;

(2) Violated any of the Board's rules including the Canons of Ethics set out in §§ 1103.10 through 1103.35; or

(3) Engaged in conduct unbecoming a member of the bar of the Board.

(b) The practitioner will be afforded an opportunity to show why he should not be suspended, disbarred, or otherwise disciplined. Upon the practitioner's timely response to the show cause order after any requested hearing, or upon failure to make a timely

response to the show cause order, the Board shall issue an appropriate decision.

Subpart B—Canons of Ethics

§ 1103.10 Introduction.

The following canons of ethics are adopted as a general guide for those admitted to practice before the Surface Transportation Board. The practitioners before the Board include (a) lawyers, who have been regularly admitted to practice law and (b) others who have fulfilled the requirements set forth in § 1103.3. The former are bound by a broad code of ethics and unwritten rules of professional conduct which apply to every activity of a lawyer. The canons do not release the lawyer from any of the duties or principles of professional conduct by which lawyers are bound. They apply similarly to all practitioners before the Board, but do not negate the applicability of other ethical codes. The canons are organized under three headings, The Practitioner's Duties and Responsibilities to the Board, The Practitioner's Duties and Responsibilities to the Client, The Practitioner's Duties and Responsibilities to Other Litigants, Witnesses and the Public.

THE PRACTITIONER'S DUTIES AND RESPONSIBILITIES TOWARD THE BOARD

§ 1103.11 Standards of ethical conduct in courts of the United States to be observed.

These canons further the purpose of the Board's Rules of Practice which direct all persons appearing in proceedings before it to conform, as nearly as possible, to the standards of ethical conduct required of practice before the courts of the United States. Such standards are taken as the basis for these specifications and are modified as the nature of the practice before the Board requires.

§ 1103.12 The practitioner's duty to and attitude toward the Board.

(a) It is the duty of the practitioner to maintain a respectful attitude toward the Board and for the importance of the functions it administers. In many respects the Board functions as a Court, and practitioners should regard themselves as officers of that Court and uphold its honor and dignity.

(b) It is the right and duty of the practitioner to submit grievances about a member or employee of the Board to the proper authorities when proper grounds for complaint exists. In such cases, charges should be encouraged and the person making them should be protected.

(c) It is the duty of the practitioner to be punctual in attendance, and to be concise and direct in the trial and disposition of causes.

§ 1103.13 Attempts to exert political or personal influence on the Board are prohibited.

(a) It is unethical for a practitioner to attempt to influence the judgment of the Board by threats of political or personal reprisal.

(b) Marked attention and unusual hospitality on the part of a practitioner to a Board Member, administrative law judge, or other representative of the Board, which is unwarranted by the personal relationship of the parties, is subject to misconstruction of motive and should be avoided.

§ 1103.14 Private communications with the Board are prohibited.

To the extent that the Board acts in a quasi-judicial capacity, it is improper for litigants, directly or through any counsel or representative, to communicate privately with a Board Member, administrative law judge, or other representative of the Board about a pending case, or to argue privately the merits thereof in the absence of the adversaries or without notice to them. Practitioners at all times shall scrupulously refrain from going beyond *ex parte* representations which are clearly proper in view of the administrative work of the Board in their communication with the Board and its staff.

THE PRACTITIONER'S DUTIES AND RESPONSIBILITIES TOWARD A CLIENT

§ 1103.15 The practitioner's duty to clients, generally.

The practitioner shall be respectful of the law and its official ministers, and shall not be involved in corruption of public officials or deception of the

public. In giving improper service or advice, the practitioner invites and deserves stern condemnation. The practitioner shall observe and advise all clients to observe the statutory law to the best of his knowledge or as interpreted by competent adjudication. The practitioner owes a general duty to practice candor toward his client with respect to all aspects to his service to the client.

§ 1103.16 Adverse influences and conflicting interests.

(a) At the time of the retainer, the practitioner shall disclose to the client all circumstances of his relations to the parties, and any interest in or connection with the case.

(b) It is unethical for a practitioner to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this section, a practitioner represents conflicting interest, when on behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

(c) The obligation to represent the client with undivided fidelity and not to divulge secrets or confidence forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

§ 1103.17 Joint association of practitioners and conflicts of opinion.

(a) A client's offer of the assistance of an additional practitioner should not be regarded as evidence of lack of confidence, but the matter should be left to the determination of the client. A practitioner shall decline association as colleague if it is objectionable to the practitioner first retained, but if the client should relieve the practitioner first retained, another may come into the case.

(b) When practitioners jointly associated in a case cannot agree as to any matter vital to the interest of the client the conflict of opinion should be frankly stated to the client for final determination. The client's decision should be accepted by them unless the nature of the difference makes it impracticable for the practitioner whose judgment has been overruled to cooperate effectively. In that event, it is the practitioner's duty to ask the client to relieve him of his obligation.

(c) It is the right of any practitioner to give proper advice to those seeking relief against an unfaithful or neglectful practitioner. The practitioner against whom the complaint is made should be notified of such action.

§ 1103.18 Withdrawal from employment.

The right of a practitioner to withdraw from employment, once begun, arises only from good cause. The desire or consent of the client is not always sufficient cause for withdrawal. The practitioner shall not abandon the unfinished task to the detriment of the client except for reasons of honor, or the client's persistence over the practitioner's remonstrance in presenting frivolous defenses, or the client's deliberate disregard of an obligation as to fees or expenses. In these cases, the practitioner may be warranted in withdrawing after due notice to the client with time allowed for the employment of another practitioner. Other reasons for withdrawal might include instances in which a practitioner discovers that his client has no cause and the client is determined to continue the cause, or the practitioner's own inability to conduct a case effectively. Upon withdrawing from a case, the practitioner shall refund any part of a retainer which clearly has not been earned.

§ 1103.19 Advising upon the merits of a client's cause.

A practitioner shall try to obtain full knowledge of his client's cause before advising thereon. The practitioner shall give a candid opinion of the merits and probable result of bringing the case or of any related pending or contemplated litigation. The practitioner shall beware of bold and confident assurances to clients, especially where employment may depend upon such assurances. Whenever a fair settlement can be reached, the client shall be advised to avoid or to end litigation.

§ 1103.20 Practitioner's fees and related practices.

(a) *Establishing fees.* In establishing fees, a practitioner shall avoid charges which overestimate the value of his advice and services. A client's ability to pay cannot justify a charge in excess of the value of the service although a client's poverty may require a lesser charge or even no charge at all. Publicly quoted fees should be adhered to when actual charges are made. Practitioners are bound to charge no more than the quoted rates for 30 days following the date of their quotations unless a different period of time for the effectiveness of such rates is clearly specified when quoted, or unless permission to charge a higher rate is obtained from the Vice Chairman of the Board.

(b) *Compensation, Boards and rebates.* A practitioner shall accept no compensation, Boards, rebates or other advantages from the parties in a proceeding other than his client without the knowledge and consent of his client after full disclosure.

(c) *Contingent fees.* Contingent fees should be only those sanctioned by law. In no case, except a charity case, should fees be entirely contingent upon success.

(d) *Division of fees.* Fees for services should be divided only with another member of the bar of practitioners and should be based upon a division of service or responsibility. It is unethical for a practitioner to retain laymen to solicit his employment in pending or prospective cases, and to reward them by a share of the fees. Such a practice cannot be too severely condemned.

(e) *Suing clients for fees.* Controversies with clients concerning compensation are to be entered into only insofar as they are compatible with self-respect and with the right to receive reasonable compensation for services. Lawsuits against clients should be resorted to only to prevent injustice, imposition or fraud.

(f) *Acquiring interest in litigation.* The practitioner shall not purchase or otherwise acquire any pecuniary interest in the subject matter of litigation which the practitioner is conducting.

(g) *Expenses.* A practitioner may not properly agree with a client that the practitioner shall pay or bear the expenses of litigation. He may in good faith advance expenses as a matter of convenience but must do so subject to reimbursement by the client. A practitioner shall bill and collect from a client, and thereafter retain only such payments and reimbursements for expenses as have actually been incurred in behalf of the client.

(h) *Witnesses' compensation.* Compensation of a witness is not to be made contingent on the success of a case in which the witness is called.

(i) *Dealing with trust property.* Money of the client or other trust property coming into the possession of the practitioner should be reported promptly, and, except with the client's knowledge and consent, should not be commingled with the practitioner's private property or be put to the practitioner's private use.

§ 1103.21 How far a practitioner may go in supporting a client's cause.

A practitioner shall put forth his best effort to maintain and defend the rights of his client. Fear of disfavor of the Board or public unpopularity should not cause a practitioner to refrain from the full discharge of his duty. The client is entitled to the benefit of any and every remedy and defense authorized by law. The client may expect his counsel to assert every such remedy or defense. However, the practitioner shall act within the bounds of the law. A practitioner shall not violate the law or be involved in any manner of fraud or chicanery for any client.

§ 1103.22 Restraining clients from improprieties.

A practitioner should see that his clients act with the same restraint that the practitioner himself uses, particularly with reference to the client's conduct toward the Board, fellow practitioners, witnesses and other litigants. If a client persists in improper conduct, the practitioner should terminate their relationship.

§ 1103.23 Confidences of a client.

(a) The practitioner's duty to preserve his client's confidence outlasts the practitioner's employment by the

client, and this duty extends to the practitioner's employees as well. Neither practitioner nor his employees shall accept employment which involves the disclosure or use of a client's confidences without knowledge and consent of the client even though there are other available sources of information. A practitioner shall not continue employment when he discovers that this obligation presents a conflict in his duty between the former and the new client.

(b) If a practitioner is falsely accused by his client, he is not precluded from disclosing the truth in respect to the false accusation. The announced intention of a client to commit a crime is not included in the confidence which a practitioner is bound to respect. The practitioner may properly make such disclosures to prevent the act or protect those against whom that is threatened.

THE PRACTITIONER'S DUTIES AND RESPONSIBILITIES REGARDING WITNESSES, OTHER LITIGANTS AND THE PUBLIC

§ 1103.24 Use of adverse witnesses.

A practitioner shall not be deterred from seeking information from a witness connected with or reputed to be biased in favor of an adverse party, if the ascertainment of the truth requires that such a person be called as a witness in a proceeding.

§ 1103.25 Treatment of witnesses, litigants and other counsel.

(a) A practitioner shall always treat adverse witnesses and other litigants with fairness and due consideration. He should never minister to the prejudice of a client in a trial or conduct in a cause. The client has no right to demand that the practitioner representing him abuse the opposing party or indulge in offensive personal attacks.

(b) A practitioner shall not attempt to obstruct Board investigations or corruptly to influence witnesses and potential witnesses during an investigation.

(c) In conducting a case it is improper for a practitioner to allude to the personal history or the personal peculiarities or idiosyncracies of practitioners on the other side, or otherwise engage in personal abuse of other practitioners.

§ 1103.26 Discussion of pending litigation in the public press.

Attempts to influence the action and attitude of the members and administrative law judges of the Board through propaganda or through colored or distorted articles in the public press, should be avoided. However, it is not against the public interest or unfair to the Board if the facts of pending litigation are made known to the public through the press in a fair and unbiased manner and in dispassionate terms. When the circumstances of a particular case appear to justify a statement to the public through the press, it is unethical to make it anonymously.

§ 1103.27 Candor and fairness in dealing with other litigants.

(a) The conduct of practitioners before the Board and with other practitioners should be characterized by candor and fairness. The practitioner shall observe scrupulously the principles of fair dealing and just consideration for the rights of others.

(b) It is not candid or fair for a practitioner knowingly to misstate or misquote the contents of a paper, the testimony of a witness, the language or the argument of an opposing practitioner, or the language or effect of a decision or a text book; or, with knowledge of its invalidity to cite as authority a decision which has been overruled or otherwise impaired as a precedent or a statute which has been repealed; or in argument to assert as a fact that which has not been proved, or to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

(c) It is dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of cases.

(d) A practitioner shall not offer evidence which he knows the Board should reject, in order to get the same before

the Board by argument for its admissibility, or arguments upon any point not properly calling for determination. He shall not introduce into an argument remarks or statements intended to influence the bystanders.

(e) A practitioner shall rely on his judgment concerning matters incidental to the trial which may, in some cases, affect the proceeding. For example, a practitioner should not force a matter to trial when there is affliction or bereavement on the part of the opposing practitioner if no harm will come from postponing the proceeding.

(f) A practitioner shall not ignore known customs or practice of the Board, even when the law permits, without giving timely notice to the opposing practitioner.

(g) Insofar as is possible, important agreements affecting the rights of the clients should be made in writing. It is, however, dishonorable to avoid performance of an agreement fairly made only because it is not made in writing.

§ 1103.28 Negotiations with opposing party.

A practitioner shall not in any way communicate upon the subject of controversy with a party represented by another practitioner except upon express agreement with the practitioner representing such party. He shall not negotiate or make compromises with the other party, but shall deal only with the opposing practitioner. The practitioner shall avoid everything that may tend to mislead a party not represented by a practitioner and should not advise that party as to the law.

§ 1103.29 Public communication and solicitation.

(a) A practitioner shall not make any public communication or solicitation for employment containing a false, fraudulent, misleading, or deceptive statement or claim. This prohibition includes, but is not limited to:

(1) The use of statements containing a material misrepresentation of fact or omission of a material fact necessary to keep the statement from being misleading;

(2) Statements intended or likely to create an unjustifiable expectation; statements of fee information which are not complete and accurate;

(3) Statements containing information on past performance or prediction of future success;

(4) Statements of prior Board employment outside the context of biographical information; statements containing a testimonial about or endorsement of a practitioner;

(5) Statements containing an opinion as to the quality of a practitioner's services, or statements intended or likely to attract clients by the use of showmanship, puffery, or self-laudation, including the use of slogans, jingles, or sensational language or format.

(b) A practitioner shall not solicit a potential client who has given the practitioner adequate notice that he does not want to receive communications from the practitioner, nor shall a practitioner make a solicitation which involves the use of undue influence.

(c) A practitioner shall not solicit a potential client who is apparently in a physical or mental condition which would make it unlikely that he could exercise reasonable, considered judgment as to the selection of a practitioner.

(d) A practitioner shall not pay or otherwise assist any other person who is not also a practitioner and a member or associate of the same firm to solicit employment for the practitioner.

(e) If a public communication is to be made through use of radio or television, it must be prerecorded and approved for broadcast by the practitioner. A recording of the actual transmission must be retained by the practitioner for a period of 1 year after the date of the final transmission.

(f) A paid advertisement must be identified as such unless it is apparent from the context that it is a paid advertisement.

(g) A practitioner shall not compensate or give anything of value to a representative of any communication medium in anticipation of or in return for professional publicity in a news item.

§ 1103.30 Acceptance of employment.

(a) The practitioner must decline to conduct a case or to make a defense

when convinced that it is intended merely to harass or to injure the opposing party, or to work oppression or wrong. Otherwise, it is the practitioner's right, and having accepted retainer, it becomes the practitioner's duty, to insist upon the judgment of the Board as to the merits of the client's claim. The practitioner's acceptance of a case is equivalent to the assertion that the client's case is proper for determination.

(b) No practitioner is obliged to act either as adviser or advocate for every potential client. The practitioner has the right to decline employment. Every practitioner shall decide what employment he will accept, what cases he will bring before the Board for complainants, or contest for defendants or respondents.

§ 1103.31 Responsibility for litigation.

The practitioner bears the responsibility for advising as to questionable transactions, bringing questionable proceedings, or urging questionable defenses. Client's instructions cannot be used as an excuse for questionable practices.

§ 1103.32 Discovery of imposition and deception and duty to report corrupt or dishonest conduct.

(a) The practitioner, upon detecting fraud or deception practiced against the Board or a party in a case, shall make every effort to rectify the practice by advising his client to forgo any unjustly earned advantage. If such advice is refused, the practitioner should inform the injured party or that party's practitioner so that appropriate steps may be taken.

(b) Practitioners shall expose without fear or favor before the proper tribunals any corrupt or dishonest conduct and should accept without hesitation employment against a practitioner who has wronged his client. The practitioner upon the trial of a case in which perjury has been committed owes it to the Board and to the public to bring the matter to the knowledge of the prosecuting authorities.

§ 1103.33 Responsibility when proposing a person for admission to practice before the Board.

The practitioner shall aid in guarding the bar of the Board against admission of candidates unfit or unqualified because deficient in either moral character or qualification. A practitioner shall propose no person for admission to practice before the Board unless from personal knowledge or after reasonable inquiry he sincerely believes and is able to vouch that such person possesses the qualifications prescribed in § 1103.3.

§ 1103.34 Intermediaries.

(a) The services of a practitioner should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and practitioner. The responsibility and qualifications of the practitioner are individual. The practitioner shall avoid all relations which direct the performance of his duties in the interest of such intermediaries. The practitioner's relationship and responsibility to the client should be direct.

(b) The practitioner may accept employment from any organization (such as an association, club or trade organization) authorized by law to be a party to proceedings before the Board, to render services in such proceedings in any matter in which the organization, as an entity, is interested. This employment should only include the rendering of such services to the members of the organization in respect to the individual affairs as are consistent with the free and faithful performance of his duties to the Board.

(c) Nothing in this canon shall be construed as conflicting with § 1103.20(d).

§ 1103.35 Partnership or professional corporation names and titles.

In the formation of a partnership or professional corporation among practitioners care should be taken to avoid any misleading name or representation which would create a false impression as to the position or privileges of a member not duly authorized to practice. No person should be held as a practitioner who is not duly qualified under § 1103.2 or § 1103.3 of these rules.

No person who is not duly admitted to practice should be held out in a way which will give the impression that he is so admitted. No false or assumed or trade name should be used to disguise the practitioner or his partnership or professional corporation.

PART 1104—FILING WITH THE BOARD-COPIES-VERIFICATION-SERVICE-PLEADINGS, GENERALLY

Sec.

1104.1 Address, identification, and electronic filing option.
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1104.15 Certification of eligibility for Federal benefits under 21 U.S.C. 862.

AUTHORITY: 5 U.S.C. 553 and 559; 18 U.S.C. 1621; 21 U.S.C. 862; and 49 U.S.C. 721.

SOURCE: 47 FR 49554, Nov. 1, 1982, unless otherwise noted.

§ 1104.1 Address, identification, and electronic filing option.

(a) Except as provided in § 1115.7, pleadings should be addressed to the ''Secretary, Surface Transportation Board, Washington, DC 20423,'' and should designate the docket number and title of the proceeding, if known.

(b) The address of the person filing the pleading should be included on the first page of the pleading.

(c) All envelopes in which a pleading is being submitted should be marked in the lower left hand corner with the docket number, if known, (not the full title) and the pleading type.

(d) All multi-volume pleadings must be sequentially numbered on the cover of each volume to indicate the volume number of the pleading and the total number of volumes filed (e.g., the first volume in a 4-volume set should be labeled ''volume 1 of 4,'' the second volume ''volume 2 of 4'' and so forth).

(e) Persons filing pleadings and documents with the Board have the option of electronically filing (e-filing) certain types of pleadings and documents instead of filing paper copies. Details regarding the types of pleadings and documents eligible for e-filing, the procedures to be followed, and other pertinent information are available on the Board's Web site, *http://www.stb.dot.gov*. If the e-filing option is chosen (for those pleadings and documents that are appropriate for e-filing, as determined by reference to the information on the Board's Web site), then the applicable requirements will be those specified on the Web site, and any requirements of 49 CFR part 1104 that are specifically applicable to filing of paper copies will not apply to the e-filed pleadings and documents (these requirements include, but are not limited to, number of copies, stapling or binding specifications, submission of compact disks or floppy diskettes for documents of 20 pages or more, signature ''in ink,'' etc.). Persons are not required to e-file, and may continue to use the Board's processes for filing paper copies.

[47 FR 49554, Nov. 1, 1982, as amended at 48 FR 34475, July 29, 1983; 53 FR 20854, June 7, 1988; 61 FR 52711, Oct. 8, 1996; 69 FR 18498, Apr. 8, 2004]

§ 1104.2 Document specifications.

(a) Documents, except electronic filings, filed with the Board must be on white paper not larger than 8½ by 11 inches, including any tables, charts, or other documents that may be included. Ink must be dark enough to provide substantial contrast for scanning and photographic reproduction. Text must be double-spaced (except for footnotes and long quotations, which may be single-spaced), using type not smaller than 12 point. Printing may appear only on one side of the paper for original documents, but copies of filings may be printed on both sides of the paper.

(b) In order to facilitate automated processing in document sheet feeders, original documents of more than one

page may not be bound in any permanent form (no metal, plastic, or adhesive staples or binders) but must be held together with removable metal clips or similar retainers. Original documents may not include divider tabs, but copies must if workpapers or expert witness testimony are submitted. All pages of original documents, and each side of pages that are printed on both sides, must be paginated continuously, including cover letters and attachments. Where, as a result of assembly processes, such pagination is impractical, documents may be numbered within the logical sequences of volumes or sections that make up the filing and need not be renumbered to maintain a single numbering sequence throughout the entire filing.

(c) Some filings or portions of filings will not conform to the standard paper specifications set forth in paragraph (a) of this section and may not be scannable. For example, electronic spreadsheets are not susceptible to scanning, but oversized documents, such as oversized maps and blueprints, may or may not be scannable. Filings that are not scannable will be referenced on-line and made available to the public at the Board's offices. If parties file oversized paper documents, they are encouraged to file, in addition to the oversized documents, representations of them that fit on the standard paper, either through reductions in size that do not undermine legibility, or through division of the oversized whole into multiple sequential pages. The standard paper representations must be identified and placed immediately behind the oversized documents they represent.

(d) Color printing may not be used for textual submissions. Use of color in filings is limited to images such as graphs, maps and photographs. To facilitate automated processing of color pages, color pages may not be inserted among pages containing text, but may be filed only as appendices or attachments to filings. Also, the original of any filing that includes color images must bear an obvious notation, on the cover sheet, that the filing contains color.

[67 FR 5514, Feb. 6, 2002, as amended at 69 FR 18499, Apr. 8, 2004]

§ 1104.3 Copies.

(a) An executed original, plus 10 copies, of every paper pleading, document, or paper permitted or required to be filed under this subchapter, including correspondence, must be furnished for the use of the Board, unless otherwise specifically directed by another Board regulation or notice in an individual proceeding. Copies may be reproduced by any duplicating process, provided all copies are clear and legible. Appropriate notes or other indications shall be used so that matters shown in color on the original, but in black and white on the copies, will be accurately identified on all copies.

(b) Electronic submissions accompanying paper filings must be furnished as follows:

(1) Textual submissions of 20 or more pages must be accompanied by three electronic copies submitted on compact discs or 3.5-inch IBM-compatible formatted floppy diskettes.

(2) Three sets of evidence or workpapers consisting of mathematical computations must be submitted as functioning electronic spreadsheets in Lotus 1–2–3 Release 9 or Microsoft Excel 97, or compatible versions, on compact discs or 3.5-inch IBM-compatible formatted floppy diskettes. In order to fully evaluate evidence, all spreadsheets must be fully accessible and manipulable. Electronic databases placed in evidence or offered as support for spreadsheet calculations must be compatible with the Microsoft Open Database Connectivity (ODBC) standard. ODBC is a Windows technology that allows a database software package to import data from a database created using a different software package. We currently use Microsoft Access 97 and databases submitted should be in either this format or another ODBC-compatible format. All databases must be supported with adequate documentation on data attributes, SQL queries, programmed reports, and so forth.

(3) One copy of each diskette or compact disc submitted to the Board should, if possible, be provided to any other party requesting a copy.

(4) Each diskette and compact disc must be clearly labeled with the Docket Number of the proceeding in which

it is filed; the name(s) of the party(ies) on whose behalf the filing is made, and ''CONFIDENTIAL'' or ''REDACTED'' as appropriate. If more than one diskette or disc is submitted for one filing, the label of each must be sequentially numbered to indicate the diskette or disc number and the total number of diskettes or discs filed (e.g., the first disc of a 4-disc set should be labeled ''Disc 1 of 4,'' the second disc ''Disc 2 of 4,'' and so forth).

[67 FR 5515, Feb. 6, 2002, as amended at 69 FR 18499, Apr. 8, 2004]

§ 1104.4 Attestation and verification.

(a) *Signature of attorney or practitioner.* If a party is represented by a practitioner or an attorney, the original of each paper filed should be signed in ink by the practitioner or attorney, whose address should be stated. The signature of a practitioner or attorney constitutes a certification that the representative:

(1) Has read the pleading, document or paper;

(2) Is authorized to file it;

(3) Believes that there is good ground for the document;

(4) Has not interposed the document for delay;

A pleading, document or paper thus signed need not be verified or accompanied by affidavit unless required elsewhere in these rules.

(b) *Signature by one not authorized to represent others before the Board.* The original of each document not signed by a practitioner or attorney must be:

(1) Signed in ink;

(2) Accompanied by the signer's address; and

(3) Verified, if it contains allegations of fact, under oath by the person, in whose behalf it is filed, or by a duly authorized officer of the corporation in whose behalf it is filed. If the pleading is a complaint, at least one complainant must sign and verify the pleading.

[47 FR 49554, Nov. 1, 1982, as amended at 61 FR 52711, Oct. 8, 1996]

§ 1104.5 Affirmation or declarations under penalty of perjury in accordance with 18 U.S.C. 1621 in lieu of oath.

(a) An affirmation will be accepted in lieu of an oath.

(b) Whenever any rule of this Board requires or permits matter to be supported, evidenced, established, or proved by sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, oath of office, or an oath required to be taken before a special official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proven by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury and dated, in the following form:

I _____, declare (certify, verify, or state) under penalty of perjury (''under the laws of the United States,'' if executed outside of the United States) that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this (specify type of document). Executed on (*date*).

Signature

(c) Knowing and willful misstatements or omissions of material facts constitute federal criminal violations punishable under 18 U.S.C. 1001 by imprisonment up to 5 years and fines up to $10,000 for each offense. Additionally, these misstatements are punishable as perjury under 18 U.S.C. 1621 which provides for fines up to $2,000 or imprisonment up to 5 years for each offense.

[47 FR 49554, Nov. 1, 1982, as amended at 61 FR 52711, Oct. 8, 1996]

§ 1104.6 Timely filing required.

Documents must be received for filing at the Board's offices in Washington, DC within the time limits set for filing. The date of receipt at the Board, and not the date of deposit in the mail, determines the timeliness of filing. However, if a document is mailed by United States express mail, postmarked at least one day prior to the due date, it will be accepted as timely. Other express mail, received by the private express mail carrier at least one day prior to the due date, also will be accepted as timely filed. The term express mail means that the carrier or delivery service offers next

day delivery to Washington, DC. If the e-filing option is chosen (for those pleadings and documents that are appropriate for e-filing, as determined by reference to the information on the Board's Web site), then the e-filed pleading or document is timely filed if the e-filing process is completed before 5 p.m. eastern time on the due date.

[47 FR 49554, Nov. 1, 1982, as amended at 61 FR 52711, Oct. 8, 1996; 69 FR 18499, Apr. 8, 2004]

§ 1104.7 Computation and extension of time.

(a) *Computation.* In computing any period of time, the day of the act, event, or default upon which the designated period of time begins to run is not included. The last day of the period is included unless it is Saturday, Sunday, or a legal holiday in the District of Columbia, in which event the period runs until the end of the next day which is not a Saturday, Sunday or holiday. This rule applies to forward and backward measurement of time.

(b) *Extensions.* Any time period, except those provided by law or specified in these rules respecting informal complaints seeking damage may be extended by the Board in its discretion, upon request and for good cause. Requests for extensions must be served on all parties of record at the same time and by the same means as service is made on the Board, except if service is made on the Board in person and personal service on other parties is not feasible, service on other parties should be made by first class or express mail. A request for an extension must be filed not less than 10 days before the due date. Only the original of the request and certificate of service need be filed with the Board. If granted, the party making the request should promptly notify all parties to the proceeding of the extension and so certify to the Board, except that this notification is not required in rulemaking proceedings.

(c) *Exception to time computation rules.* See 49 CFR part 1152 for special abandonment rules.

[47 FR 49554, Nov. 1, 1982, as amended at 61 FR 52711, Oct. 8, 1996]

§ 1104.8 Objectionable matter.

The Board may order that any redundant, irrelevant, immaterial, impertinent, or scandalous matter be stricken from any document.

[47 FR 49554, Nov. 1, 1982, as amended at 61 FR 52711, Oct. 8, 1996]

§ 1104.9 [Reserved]

§ 1104.10 Rejection of a deficient document.

(a) The Board may reject a document, submitted for filing if the Board finds that the document does not comply with the rules.

(b) The Board may either return the material unfiled or tentatively accept the material for filing and advise the person tendering it of the deficiency and require that the deficiency be corrected.

[47 FR 49554, Nov. 1, 1982, as amended at 61 FR 52711, Oct. 8, 1996]

§ 1104.11 Amendments.

Leave to amend any document is a matter of the Board's discretion.

[47 FR 49554, Nov. 1, 1982, as amended at 61 FR 52711, Oct. 8, 1996]

§ 1104.12 Service of pleadings and papers.

(a) *Generally.* Every document filed with the Board should include a certificate showing simultaneous service upon all parties to the proceeding. Service on the parties should be by the same method and class of service used in serving the Board, with charges, if any, prepaid. One copy should be served on each party. If service is made on the Board in person, and personal service on other parties is not feasible, service should be made by first-class or express mail. If a document is filed with the Board through the e-filing process, a copy of the e-filed document should be emailed to other parties if that means of service is acceptable to those other parties, or a paper copy of the document should be personally served on the other parties, but if email is not acceptable to the receiving party and personal service is not feasible, service of a paper copy should be by first-class or express mail. When a party is represented by a practitioner or attorney,

service upon the practitioner is deemed to be service upon the party.

(b) *Exceptions.* Copies of letters to the Board relating to oral argument under part 1116, and subpoenas under §1113.2, need not be served on other parties of the proceeding. Service of comments in rulemaking proceedings is not required, unless specifically directed by the Board.

(c) *Sample Certificate of Service.*

I certify that I have this day served copies of document upon all parties of record in this proceeding, by (here state the method of making service which must be consistent with this part).

_____

Signature Date

(49 U.S.C. 10321, 5 U.S.C. 553)

[47 FR 49554, Nov. 1, 1982, as amended at 48 FR 44827, Sept. 30, 1983; 61 FR 52711, Oct. 8, 1996; 69 FR 18499, Apr. 8, 2004]

§1104.13 Replies and motions.

(a) *Time.* A party may file a reply or motion addressed to any pleading within 20 days after the pleading is filed with the Board, unless otherwise provided.

(b) *Number of copies.* The original of a reply or motion should be accompanied by the same number of copies required to be filed with the pleading to which the reply or motion is addressed.

(c) *Reply to a Reply.* A reply to a reply is not permitted.

[47 FR 49554, Nov. 1, 1982, as amended at 61 FR 52711, Oct. 8, 1996]

§1104.14 Protective orders to maintain confidentiality.

(a) *Segregation of confidential material.* A party submitting materials which it believes are entitled to be kept confidential and not made part of the public docket should submit these materials as a separate package, clearly marked on the outside ''Confidential materials subject to a request for a protective order.''

(b) *Requests for protective orders.* A request that materials submitted to the Board be kept confidential should be submitted as a separate pleading and clearly headed ''Motion for protective order.''

[48 FR 44827, Sept. 30, 1983, as amended at 61 FR 52711, Oct. 8, 1996]

§1104.15 Certification of eligibility for Federal benefits under 21 U.S.C. 862.

(a) An individual who is applying in his or her name for a certificate, license or permit to operate as a rail carrier must complete the certification set forth in paragraph (b) of this section. This certification is required if the transferee in a finance proceeding under 49 U.S.C. 11323 and 11324 is an individual. The certification also is required if an individual applies for authorization to acquire, to construct, to extend, or to operate a rail line.

(b) Certification:

I _____ (Name) _____, certify under penalty of perjury under the laws of the United States, that I have not been convicted, after September 1, 1989, of any Federal or State offense involving the distribution or possession of a controlled substance, or that if I have been so convicted, I am not ineligible to receive Federal Benefits, either by court order or by operation of law, pursuant to 21 U.S.C. 862.

[54 FR 48250, Nov. 22, 1989, as amended at 61 FR 52711, Oct. 8, 1996; 64 FR 53268, Oct. 1, 1999; 67 FR 5515, Feb. 6, 2002]

PART 1105—PROCEDURES FOR IMPLEMENTATION OF ENVIRONMENTAL LAWS

Sec.

1105.1 Purpose.
1105.2 Responsibility for administration of these rules.
1105.3 Information and assistance.
1105.4 Definitions.
1105.5 Determinative criteria.
1105.6 Classification of actions.
1105.7 Environmental reports.
1105.8 Historic reports.
1105.9 Coastal Zone Management Act requirements.
1105.10 Board procedures.
1105.11 Transmittal letter for Applicant's Report.
1105.12 Sample newspaper notices for abandonment exemption cases.

AUTHORITY: 16 U.S.C. 470f, 1456, and 1536; 42 U.S.C. 4332 and 6362(b); and 49 U.S.C. 701 note (1995) (Savings Provisions), 721(a), 10502, and 10903–10905.

SOURCE: 56 FR 36105, July 31, 1991, unless otherwise noted.

§ 1105.1 Purpose.

These rules are designed to assure adequate consideration of environmental and energy factors in the Board's decisionmaking process pursuant to the National Environmental Policy Act, 42 U.S.C. 4332; the Energy Policy and Conservation Act, 42 U.S.C. 6362(b); and related laws, including the National Historic Preservation Act, 16 U.S.C. 470f, the Coastal Zone Management Act, 16 U.S.C. 1451, and the Endangered Species Act, 16 U.S.C. 1531.

§ 1105.2 Responsibility for administration of these rules.

The Director of the Office of Economics, Environmental Analysis, and Administration shall have general responsibility for the overall management and functioning of the Section of Environmental Analysis. The Director is delegated the authority to sign, on behalf of the Board, memoranda of agreement entered into pursuant to 36 CFR 800.5(e)(4) regarding historic preservation matters. The Chief of the Section of Environmental Analysis is responsible for the preparation of documents under these rules and is delegated the authority to provide interpretations of the Board's NEPA process, to render initial decisions on requests for waiver or modification of any of these rules for individual proceedings, and to recommend rejection of environmental reports not in compliance with these rules. This delegated authority shall be used only in a manner consistent with Board policy. The Director may further delegate procedural authority to the Chief of the Section of Environmental Analysis as appropriate. Appeals to the Board will be available as a matter of right.

[56 FR 36105, July 31, 1991, as amended at 64 FR 53268, Oct. 1, 1999]

§ 1105.3 Information and assistance.

Information and assistance regarding the rules and the Board's environmental and historic review process is available by writing or calling the Section of Environmental Analysis, Surface Transportation Board, 1925 K Street, NW, Washington, DC 20423.

[64 FR 53268, Oct. 1, 1999]

§ 1105.4 Definitions.

In addition to the definitions contained in the regulations of the Council on Environmental Quality (40 CFR part 1508), the following definitions apply to these regulations:

(a) *Act* means the Interstate Commerce Act, Subtitle IV of Title 49, U.S. Code, as amended.

(b) *Applicant* means any person or entity seeking Board action, whether by application, petition, notice of exemption, or any other means that initiates a formal Board proceeding.

(c) *Board* means the Surface Transportation Board.

(d) *Environmental Assessment* or ''EA'' means a concise public document for which the Board is responsible that contains sufficient information for determining whether to prepare an Environmental Impact Statement or to make a finding of no significant environmental impact.

(e) *Environmental documentation* means either an Environmental Impact Statement or an Environmental Assessment.

(f) *Environmental Impact Statement* or ''EIS'' means the detailed written statement required by the National Environmental Policy Act, 42 U.S.C. 4332(2)(c), for a major Federal action significantly affecting the quality of the human environment.

(g) *Environmental Report* means a document filed by the applicant(s) that:

(1) Provides notice of the proposed action; and

(2) Evaluates its environmental impacts and any reasonable alternatives to the action. An environmental report may be in the form of a proposed draft Environmental Assessment or proposed draft Environmental Impact Statement.

(h) *Filing* means any request for STB authority, whether by application, petition, notice of exemption, or any other means that initiates a formal Board proceeding.

(i) *Section of Environmental Analysis* or ''SEA'' means the Section that prepares the Board's environmental documents and analyses.

(j) *Third-Party Consultant* means an independent contractor, utilized by the applicant, who works with SEA's approval and under SEA's direction to prepare any necessary environmental documentation. The third party consultant must act on behalf of the Board. The railroad may participate in the selection process, as well as in the subsequent preparation of environmental documents. However, to avoid any impermissible conflict of interest (*i.e.,* essentially any financial or other interest in the outcome of the railroad-sponsored project), the railroad may not be responsible for the selection or control of independent contractors.

[56 FR 36105, July 31, 1991, as amended at 64 FR 53268, Oct. 1, 1999]

§ 1105.5 Determinative criteria.

(a) In determining whether a ''major Federal action'' (as that term is defined by the Council on Environmental Quality in 40 CFR 1508.18) has the potential to affect significantly the quality of the human environment, the Board is guided by the definition of ''significantly'' at 40 CFR 1508.27.

(b) A finding that a service or transaction is not within the STB's jurisdiction does not require an environmental analysis under the National Environmental Policy Act or historic review under the National Historic Preservation Act.

(c) The environmental laws are not triggered where the STB's action is nothing more than a ministerial act, as in:

(1) The processing of abandonments proposed under the Northeast Rail Services Act (45 U.S.C. 744(b)(3));

(2) Statutorily-authorized interim trail use arrangements under 16 U.S.C. 1247(d) [*see,* 49 CFR 1152.29]; or

(3) Financial assistance arrangements under 49 U.S.C. 10905 (*see* 49 CFR 1152.27).

Finally, no environmental analysis is necessary for abandonments that are authorized by a bankruptcy court, or transfers of rail lines under plans of reorganization, where our function is merely advisory under 11 U.S.C. 1166, 1170, and 1172.

[56 FR 36105, July 31, 1991; 56 FR 49821, Oct. 1, 1991]

§ 1105.6 Classification of actions.

(a) Environmental Impact Statements will normally be prepared for rail construction proposals other than those described in paragraph (b)(1) of this section.

(b) Environmental Assessments will normally be prepared for the following proposed actions:

(1) Construction of connecting track within existing rail rights-of-way, or on land owned by the connecting railroads;

(2) Abandonment of a rail line (unless proposed under the Northeast Rail Services Act or the Bankruptcy Act);

(3) Discontinuance of passenger train service or freight service (except for discontinuances of freight service under modified certificates issued under 49 CFR 1150.21 and discontinuances of trackage rights where the affected line will continue to be operated);

(4) An acquisition, lease or operation under 49 U.S.C. 10901 or 10910, or consolidation, merger or acquisition of control under 49 U.S.C. 11343, if it will result in either

(i) Operational changes that would exceed any of the thresholds established in § 1105.7(e) (4) or (5); or

(ii) An action that would normally require environmental documentation (such as a construction or abandonment);

(5) A rulemaking, policy statement, or legislative proposal that has the potential for significant environmental impacts;

(6) Water carrier licensing under 49 U.S.C. 10922 that:

(i) Involves a new operation (*i.e.,* one that adds a significant number of barges to the inland waterway system requiring the addition of towing capacity, or otherwise significantly alters an existing operation, or introduces service to a new waterway that has had no previous traffic, or involves the commencement of a new service that is not statutorily exempt); or

(ii) Involves the transportation of hazardous materials; and

(7) Any other proceeding not listed in paragraphs (a) or (c) of this section.

(c) No environmental documentation will normally be prepared (although a Historic Report may be required under

section 1105.8) for the following actions:

(1) Motor carrier, broker, or freight forwarder licensing and water carrier licensing not included in section 1105.6(b)(6);

(2) Any action that does not result in significant changes in carrier operations (*i.e.*, changes that do not exceed the thresholds established in section 1105.7(e) (4) or (5)), including (but not limited to) all of the following actions that meet this criterion:

(i) An acquisition, lease, or operation under 49 U.S.C. 10901 or 10910, or consolidation, merger, or acquisition of control under 49 U.S.C. 11343 that does not come within subsection (b)(4) of this section.

(ii) Transactions involving corporate changes (such as a change in the ownership or the operator, or the issuance of securities or reorganization) including grants of authority to hold position as an officer or director;

(iii) Declaratory orders, interpretation or clarification of operating authority, substitution of an applicant, name changes, and waiver of lease and interchange regulations;

(iv) Pooling authorizations, approval of rate bureau agreements, and approval of shipper antitrust immunity;

(v) Approval of motor vehicle rental contracts, and self insurance;

(vi) Determinations of the fact of competition;

(3) Rate, fare, and tariff actions;

(4) Common use of rail terminals and trackage rights;

(5) Discontinuance of rail freight service under a modified certificate issued pursuant to 49 CFR 1150.21;

(6) Discontinuance of trackage rights where the affected line will continue to be operated; and

(7) A rulemaking, policy statement, or legislative proposal that has no potential for significant environmental impacts.

(d) The Board may reclassify or modify these requirements for individual proceedings. For actions that generally require no environmental documentation, the Board may decide that a particular action has the potential for significant environmental impacts and that, therefore, the applicant should provide an environmental report and either an EA or an EIS will be prepared. For actions generally requiring an EA, the Board may prepare a full EIS where the probability of significant impacts from the particular proposal is high enough to warrant an EIS. Alternatively, in a rail construction, an applicant can seek to demonstrate (with supporting information addressing the pertinent aspects of § 1105.7(e)) that an EA, rather than an EIS, will be sufficient because the particular proposal is not likely to have a significant environmental impact. Any request for reclassification must be in writing and, in a rail construction, should be presented with the prefiling notice required by § 1105.10(a)(1) (or a request to waive that prefiling notice period).

(e) The classifications in this section apply without regard to whether the action is proposed by application, petition, notice of exemption, or any other means that initiates a formal Board proceeding.

§ 1105.7 Environmental reports.

(a) *Filing.* An applicant for an action identified in § 1105.6 (a) or (b) must submit to the Board (with or prior to its application, petition or notice of exemption) except as provided in paragraph (b) for abandonments and discontinuances) an Environmental Report on the proposed action containing the information set forth in paragraph (e) of this section.

(b) At least 20 days prior to the filing with the Board of a notice of exemption, petition for exemption, or an application for abandonment or discontinuance, the applicant must serve copies of the Environmental Report on:

(1) The State Clearinghouse of each State involved (or other State equivalent agency if the State has no clearinghouse);

(2) The State Environmental Protection Agency of each State involved;

(3) The State Coastal Zone Management Agency for any state where the proposed activity would affect land or water uses within that State's coastal zone;

(4) The head of each county (or comparable political entity including any Indian reservation) through which the line goes;

(5) The appropriate regional offices of the Environmental Protection Agency;

(6) The U.S. Fish and Wildlife Service;

(7) The U.S. Army Corps of Engineers;

(8) The National Park Service;

(9) The U.S. Soil Conservation Service;

(10) The National Geodetic Survey (formerly known as the Coast and Geodetic Survey) as designated agent for the National Geodetic Survey and the U.S. Geological Survey; and

(11) Any other agencies that have been consulted in preparing the report.

For information regarding the names and addresses of the agencies to be contacted, interested parties may contact SEA at the address and telephone number indicated in § 1105.3.

(c) *Certification.* In its Environmental Report, the applicant must certify that it has sent copies of the Environmental Report to the agencies listed and within the time period specified in paragraph (b) of this section and that it has consulted with all appropriate agencies in preparing the report. These consultations should be made far enough in advance to afford those agencies a reasonable opportunity to provide meaningful input. Finally, in every abandonment exemption case, applicant shall certify that it has published in a newspaper of general circulation in each county through which the line passes a notice that alerts the public to the proposed abandonment, to available reuse alternatives, and to how it may participate in the STB proceeding.

(d) *Documentation.* Any written responses received from agencies that were contacted in preparing the Environmental Report shall be attached to the report. Oral responses from such agencies shall be briefly summarized in the report and the names, titles, and telephone numbers of the persons contacted shall be supplied. A copy of, or appropriate citation to, any reference materials relied upon also shall be provided.

(e) *Content.* The Environmental Report shall include all of the information specified in this paragraph, except to the extent that applicant explains why any portion(s) are inapplicable. If an historic report is required under § 1105.8, the Environmental Report should also include the Historic Report required by that section.

(1) *Proposed action and alternatives.* Describe the proposed action, including commodities transported, the planned disposition (if any) of any rail line and other structures that may be involved, and any possible changes in current operations or maintenance practices. Also describe any reasonable alternatives to the proposed action. Include a readable, detailed map and drawings clearly delineating the project.

(2) *Transportation system.* Describe the effects of the proposed action on regional or local transportation systems and patterns. Estimate the amount of traffic (passenger or freight) that will be diverted to other transportation systems or modes as a result of the proposed action.

(3) *Land use.* (i) Based on consultation with local and/or regional planning agencies and/or a review of the official planning documents prepared by such agencies, state whether the proposed action is consistent with existing land use plans. Describe any inconsistencies.

(ii) Based on consultation with the U.S. Soil Conservation Service, state the effect of the proposed action on any prime agricultural land.

(iii) If the action affects land or water uses within a designated coastal zone, include the coastal zone information required by § 1105.9.

(iv) If the proposed action is an abandonment, state whether or not the right-of-way is suitable for alternative public use under 49 U.S.C. 10906 and explain why.

(4) *Energy.* (i) Describe the effect of the proposed action on transportation of energy resources.

(ii) Describe the effect of the proposed action on recyclable commodities.

(iii) State whether the proposed action will result in an increase or decrease in overall energy efficiency and explain why.

(iv) If the proposed action will cause diversions from rail to motor carriage of more than:

(A) 1,000 rail carloads a year; or

(B) An average of 50 rail carloads per mile per year for any part of the affected line, quantify the resulting net change in energy consumption and show the data and methodology used to arrive at the figure given. To minimize the production of repetitive data, the information on overall energy efficiency in §1105.7(e)(4)(iii) need not be supplied if the more detailed information in §1105.7(e)(4)(iv) is required.

(5) *Air.* (i) If the proposed action will result in either:

(A) An increase in rail traffic of at least 100 percent (measured in gross ton miles annually) or an increase of at least eight trains a day on any segment of rail line affected by the proposal, or

(B) An increase in rail yard activity of at least 100 percent (measured by carload activity), or

(C) An average increase in truck traffic of more than 10 percent of the average daily traffic or 50 vehicles a day on any affected road segment, quantify the anticipated effect on air emissions. For a proposal under 49 U.S.C. 10901 (or 10502) to construct a new line or reinstitute service over a previously abandoned line, only the eight train a day provision in subsection (5)(i)(A) will apply.

(ii) If the proposed action affects a class I or nonattainment area under the Clean Air Act, and will result in either:

(A) An increase in rail traffic of at least 50 percent (measured in gross ton miles annually) or an increase of at least three trains a day on any segment of rail line,

(B) An increase in rail yard activity of at least 20 percent (measured by carload activity), or

(C) An average increase in truck traffic of more than 10 percent of the average daily traffic or 50 vehicles a day on a given road segment, then state whether any expected increased emissions are within the parameters established by the State Implementation Plan. However, for a rail construction under 49 U.S.C. 10901 (or 49 U.S.C. 10502), or a case involving the reinstitution of service over a previously abandoned line, only the three train a day threshold in this item shall apply.

(iii) If transportation of ozone depleting materials (such as nitrogen oxide and freon) is contemplated, identify: the materials and quantity; the frequency of service; safety practices (including any speed restrictions); the applicant's safety record (to the extent available) on derailments, accidents and spills; contingency plans to deal with accidental spills; and the likelihood of an accidental release of ozone depleting materials in the event of a collision or derailment.

(6) *Noise.* If any of the thresholds identified in item (5)(i) of this section are surpassed, state whether the proposed action will cause:

(i) An incremental increase in noise levels of three decibels Ldn or more; or

(ii) An increase to a noise level of 65 decibels Ldn or greater. If so, identify sensitive receptors (*e.g.*, schools, libraries, hospitals, residences, retirement communities, and nursing homes) in the project area, and quantify the noise increase for these receptors if the thresholds are surpassed.

(7) *Safety.* (i) Describe any effects of the proposed action on public health and safety (including vehicle delay time at railroad grade crossings).

(ii) If hazardous materials are expected to be transported, identify: the materials and quantity; the frequency of service; whether chemicals are being transported that, if mixed, could react to form more hazardous compounds; safety practices (including any speed restrictions); the applicant's safety record (to the extent available) on derailments, accidents and hazardous spills; the contingency plans to deal with accidental spills; and the likelihood of an accidental release of hazardous materials.

(iii) If there are any known hazardous waste sites or sites where there have been known hazardous materials spills on the right-of-way, identify the location of those sites and the types of hazardous materials involved.

(8) *Biological resources.* (i) Based on consultation with the U.S. Fish and Wildlife Service, state whether the proposed action is likely to adversely affect endangered or threatened species or areas designated as a critical habitat, and if so, describe the effects.

(ii) State whether wildlife sanctuaries or refuges, National or State

parks or forests will be affected, and describe any effects.

(9) *Water.* (i) Based on consultation with State water quality officials, state whether the proposed action is consistent with applicable Federal, State or local water quality standards. Describe any inconsistencies.

(ii) Based on consultation with the U.S. Army Corps of Engineers, state whether permits under section 404 of the Clean Water Act (33 U.S.C. 1344) are required for the proposed action and whether any designated wetlands or 100-year flood plains will be affected. Describe the effects.

(iii) State whether permits under section 402 of the Clean Water Act (33 U.S.C. 1342) are required for the proposed action. (Applicants should contact the U.S. Environmental Protection Agency or the state environmental protection or equivalent agency if they are unsure whether such permits are required.)

(10) *Proposed Mitigation.* Describe any actions that are proposed to mitigate adverse environmental impacts, indicating why the proposed mitigation is appropriate.

(11) *Additional Information for Rail Constructions.* The following additional information should be included for rail construction proposals (including connecting track construction):

(i) Describe the proposed route(s) by State, county, and subdivision, including a plan view, at a scale not to exceed 1:24,000 (7½ minute U.S.G.S. quadrangle map), clearly showing the relationship to the existing transportation network (including the location of all highway and road crossings) and the right-of-way according to ownership and land use requirements.

(ii) Describe any alternative routes considered, and a no-build alternative (or why this would not be applicable), and explain why they were not selected.

(iii) Describe the construction plans, including the effect on the human environment, labor force requirements, the location of borrow pits, if any, and earthwork estimates.

(iv) Describe in detail the rail operations to be conducted upon the line, including estimates of freight (carloads and tonnage) to be transported, the anticipated daily and annual number of train movements, number of cars per train, types of cars, motive power requirements, proposed speeds, labor force, and proposed maintenance-of-way practices.

(v) Describe the effects, including indirect or down-line impacts, of the new or diverted traffic over the line if the thresholds governing energy, noise and air impacts in §§1105.7(e)(4), (5), or (6) are met.

(vi) Describe the effects, including impacts on essential public services (e.g., fire, police, ambulance, neighborhood schools), public roads, and adjoining properties, in communities to be traversed by the line.

(vii) Discuss societal impacts, including expected change in employment during and after construction.

(f) *Additional information.* The Board may require applicants to submit additional information regarding the environmental or energy effects of the proposed action.

(g) *Waivers.* The Board may waive or modify, in whole or in part, the provisions of this section where a railroad applicant shows that the information requested is not necessary for the Board to evaluate the environmental impacts of the proposed action.

[56 FR 36105, July 31, 1991; 56 FR 49821, Oct. 1, 1991, as amended at 58 FR 44619, Aug. 24, 1993; 60 FR 32277, June 21, 1995; 61 FR 67883, Dec. 24, 1996; 64 FR 53268, Oct. 1, 1999; 69 FR 58366, Sept. 30, 2004]

§ 1105.8 Historic Reports.

(a) *Filing.* An applicant proposing an action identified in §1105.6 (a) or (b), or an action in §1105.6(c) that will result in the lease, transfer, or sale of a railroad's line, sites or structures, must submit (with its application, petition or notice) the Historic Report described in paragraph (d) of this section, unless excepted under paragraph (b) of this section. This report should be combined with the Environmental Report where one is required. The purpose of the Historic Report is to provide the Board with sufficient information to conduct the consultation process required by the National Historic Preservation Act.

(b) *Exceptions.* The following proposals do not require an historic report:

(1) A sale, lease or transfer of a rail line for the purpose of continued rail operations where further STB approval is required to abandon any service and there are no plans to dispose of or alter properties subject to STB jurisdiction that are 50 years old or older.

(2) A sale, lease, or transfer of property between corporate affiliates where there will be no significant change in operations.

(3) Trackage rights, common use of rail terminals, common control through stock ownership or similar action which will not substantially change the level of maintenance of railroad property.

(4) A rulemaking, policy statement, petition for declaratory order, petition for waiver of procedural requirements, or proceeding involving transportation rates or classifications.

(c) *Distribution.* The applicant must send the Historic Report to the appropriate State Historic Preservation Officer(s), preferably at least 60 days in advance of filing the application, petition, or notice, but not later than 20 days prior to filing with the Board.

(d) *Content.* The Historic Report should contain the information required by § 1105.7(e)(1) and the following additional historic information:

(1) A U.S.G.S. topographic map (or an alternate map drawn to scale and sufficiently detailed to show buildings and other structures in the vicinity of the proposed action) showing the location of the proposed action, and the locations and approximate dimensions of railroad structures that are 50 years old or older and are part of the proposed action;

(2) A written description of the right-of-way (including approximate widths, to the extent known), and the topography and urban and/or rural characteristics of the surrounding area;

(3) Good quality photographs (actual photographic prints, not photocopies) of railroad structures on the property that are 50 years old or older and of the immediately surrounding area;

(4) The date(s) of construction of the structure(s), and the date(s) and extent of any major alterations, to the extent such information is known;

(5) A brief narrative history of carrier operations in the area, and an explanation of what, if any, changes are contemplated as a result of the proposed action;

(6) A brief summary of documents in the carrier's possession, such as engineering drawings, that might be useful in documenting a structure that is found to be historic;

(7) An opinion (based on readily available information in the railroad's possession) as to whether the site and/or structures meet the criteria for listing on the National Register of Historic Places (36 CFR 60.4), and whether there is a likelihood of archeological resources or any other previously unknown historic properties in the project area, and the basis for these opinions (including any consultations with the State Historic Preservation Office, local historical societies or universities);

(8) A description (based on readily available information in the railroad's possession) of any known prior subsurface ground disturbance or fill, environmental conditions (naturally occurring or manmade) that might affect the archeological recovery of resources (such as swampy conditions or the presence of toxic wastes), and the surrounding terrain.

(9) Within 30 days of receipt of the historic report, the State Historic Preservation Officer may request the following additional information regarding specified nonrailroad owned properties or groups of properties immediately adjacent to the railroad right-of-way: photographs of specified properties that can be readily seen from the railroad right-of-way (or other public rights-of-way adjacent to the property) and a written description of any previously discovered archeological sites, identifying the location and type of the site (*i.e.*, prehistoric or native American).

(e) Any of these requirements may be waived or modified when the information is not necessary to determine the presence of historic properties and the effect of the proposed action on them.

(f) Historic preservation conditions imposed by the Board in rail abandonment cases generally will not extend beyond the 330-day statutory time period in 49 U.S.C. 10904 for abandonment proceedings.

[56 FR 36105, July 31, 1991, as amended at 61 FR 67883, Dec. 24, 1996]

§ 1105.9 Coastal Zone Management Act requirements.

(a) If the proposed action affects land or water uses within a State coastal zone designated pursuant to the Coastal Zone Management Act (16 U.S.C. 1451 *et seq.*) applicant must comply with the following procedures:

(1) If the proposed action is listed as subject to review in the State's coastal zone management plan, applicant (with, or prior to its filing) must certify (pursuant to 15 CFR 930.57 and 930.58) that the proposed action is consistent with the coastal zone management plan.

(2) If the activity is not listed, applicant (with, or prior to its filing) must certify that actual notice of the proposal was given to the State coastal zone manager at least 40 days before the effective date of the requested action.

(b) If there is consistency review under 15 CFR 930.54, the Board and the applicant will comply with the consistency certification procedures of 15 CFR 930. Also, the Board will withhold a decision, stay the effective date of a decision, or impose a condition delaying consummation of the action, until the applicant has submitted a consistency certification and either the state has concurred in the consistency certification, or an appeal to the Secretary of Commerce (under 15 CFR 930.64(e)) is successful.

§ 1105.10 Board procedures.

(a) *Environmental Impact Statements*—(1) *Prefiling Notice.* Where an environmental impact statement is required or contemplated, the prospective applicant must provide the Section of Environmental Analysis with written notice of its forthcoming proposal at least 6 months prior to filing its application.

(2) *Notice and scope of EIS.* When an Environmental Impact Statement is prepared for a proposed action, the Board will publish in the FEDERAL REGISTER a notice of its intent to prepare an EIS, with a description of the proposed action and a request for written comments on the scope of the EIS. Where appropriate, the scoping process may include a meeting open to interested parties and the public. After considering the comments, the Board will publish a notice of the final scope of the EIS. If the Environmental Impact Statement is to be prepared in cooperation with other agencies, this notice will also indicate which agencies will be responsible for the various parts of the Statement.

(3) *Notice of availability.* The Board will serve copies of both the draft Environmental Impact Statement (or an appropriate summary) and the full final Environmental Impact Statement (or an appropriate summary) on all parties to the proceeding and on appropriate Federal, State, and local agencies. A notice that these documents are available to the public will be published (normally by the Environmental Protection Agency) in the FEDERAL REGISTER. (Interested persons may obtain copies of the documents by contacting the Section of Environmental Analysis.)

(4) *Comments.* The notice of availability of the draft Environmental Impact Statement will establish the time for submitting written comments, which will normally be 45 days following service of the document. When the Board decides to hold an oral hearing on the merits of a proposal, the draft Environmental Impact Statement will be made available to the public in advance, normally at least 15 days prior to the portion of the hearing relating to the environmental issues. The draft EIS will discuss relevant environmental and historic preservation issues. The final Environmental Impact Statement will discuss the comments received and any changes made in response to them.

(5) *Supplements.* An Environmental Impact Statement may be supplemented where necessary and appropriate to address substantial changes in the proposed action or significant

new and relevant circumstances or information. If so, the notice and comment procedures outlined above will be followed to the extent practical.

(b) *Environmental Assessments.* In preparing an Environmental Assessment, the Section of Environmental Analysis will verify and independently analyze the Environmental Report and/or Historic Report and related material submitted by an applicant pursuant to sections 1105.7 and 1105.8. The Environmental Assessment will discuss relevant environmental and historic preservation issues. SEA will serve copies of the Environmental Assessment on all parties to the proceeding and appropriate federal, state, and local agencies, and will announce its availability to the public through a notice in the FEDERAL REGISTER. In the case of abandonment applications processed under 49 U.S.C. 10903, the availability of the Environmental Assessment must be announced in the applicant's Notice of Intent filed under 49 CFR 1152.21. The deadline for submission of comments on the Environmental Assessment will generally be within 30 days of its service (15 days in the case of a notice of abandonment under 49 CFR 1152.50). The comments received will be addressed in the Board's decision. A supplemental Environmental Assessment may be issued where appropriate.

(c) *Waivers.* (1) The provisions of paragraphs (a)(1) or (a)(4) of this section or any STB-established time frames in paragraph (b) of this section may be waived or modified where appropriate.

(2) Requests for waiver of § 1105.10(a)(1) must describe as completely as possible the anticipated environmental effects of the proposed action, and the timing of the proposed action, and show that all or part of the six month lead period is not appropriate.

(d) *Third-Party Consultants.* Applicants may utilize independent third-party consultants to prepare any necessary environmental documentation, if approved by SEA. The environmental reporting requirements that would otherwise apply will be waived if a railroad hires a consultant, SEA approves the scope of the consultant's work, and the consultant works under SEA's supervision. In such a case, the consultant acts on behalf of the Board, working under SEA's direction to collect the needed environmental information and compile it into a draft EA or draft EIS, which is then submitted to SEA for its review, verification, and approval. We encourage the use of third-party consultants.

(e) *Service of Environmental Pleadings.* Agencies and interested parties sending material on environmental and historic preservation issues directly to the Board should send copies to the applicant. Copies of Board communications to third-parties involving environmental and historic preservation issues also will be sent to the applicant where appropriate.

(f) *Consideration in decisionmaking.* The environmental documentation (generally an EA or an EIS) and the comments and responses thereto concerning environmental, historic preservation, CZMA, and endangered species issues will be part of the record considered by the Board in the proceeding involved. The Board will decide what, if any, environmental or historic preservation conditions to impose upon the authority it issues based on the environmental record and its substantive responsibilities under the Interstate Commerce Act. The Board will withhold a decision, stay the effective date of an exemption, or impose appropriate conditions upon any authority granted, when an environmental or historic preservation issue has not yet been resolved.

(g) *Finding of No Significant Impact.* In all exemption cases, if no environmental or historic preservation issues are raised by any party or identified by SEA in its independent investigation, the Board will issue a separate decision making a Finding of No Significant Impact (''FONSI'') to show that it has formally considered the environmental record.

[56 FR 36105, July 31, 1991 as amended at 56 FR 49821, Oct. 1, 1991;64 FR 53268, Oct. 1, 1999]

§ 1105.11 Transmittal letter for Applicant's Report.

A carrier shall send a copy of its Environmental and/or Historic Report to the agencies identified in section 1105.7(b) and/or the appropriate State

Historic Preservation Officer(s) and certify to the Board that it has done this. The form letter contained in the Appendix to this section should be used in transmitting the Environmental and/or Historic Reports.

APPENDIX TO § 1105.11—TRANSMITTAL LETTER FOR APPLICANT'S REPORT

(*Carrier Letterhead*)
(Addresses)
Re: (Brief description of proposed action with STB docket number, if available)
(Date)

On (date), we are (or expect to be) filing with the Surface Transportation Board a (type of proceeding) seeking authority to ( ) located in (state) (city or town) and (mileposts, if applicable). Attached is an Environmental Report (and/or Historic Report) describing the proposed action and any expected environmental (and/or historic) effects, as well as a map of the affected area.

We are providing this report so that you may review the information that will form the basis for the STB's independent environmental analysis of this proceeding. If any of the information is misleading or incorrect, if you believe that pertinent information is missing, or if you have any questions about the Board's environmental review process, please contact the Section of Environmental Analysis (SEA), Surface Transportation Board, 1925 K Street, NW, Washington, DC 20423, telephone [INSERT TELEPHONE NUMBER] and refer to the above *Docket No.* (if available). Because the applicable statutes and regulations impose stringent deadlines for processing this action, your written comments to SEA (with a copy to our representative) would be appreciated within 3 weeks.

Your comments will be considered by the Board in evaluating the environmental and/or historic preservation impacts of the contemplated action. If there are any questions concerning this proposal, please contact our representative directly. Our representative in this matter is (name) who may be contacted by telephone at (telephone number) or by mail at (address).

(Complimentary close)
(Name and title of author of letter)

[56 FR 36105, July 31, 1991, as amended at 58 FR 44619, Aug. 24, 1993; 64 FR 53268, Oct. 1, 1999]

§ 1105.12 Sample newspaper notices for abandonment exemption cases.

In every abandonment exemption case, the applicant shall publish a notice in a newspaper of general circulation in each county in which the line is located and certify to the Board that it has done this by the date its notice of (or petition for) exemption is filed. The notice shall alert the public to the proposed abandonment, to available reuse alternatives, such as trail use and public use, and to how it may participate in a Board proceeding. Sample newspaper notices are provided in the Appendix to this section for guidance to the railroads.

APPENDIX TO § 1105.12—SAMPLE NEWSPAPER NOTICES

SAMPLE LOCAL NEWSPAPER NOTICE FOR OUT-OF-SERVICE ABANDONMENT EXEMPTIONS NOTICE OF INTENT TO ABANDON OR TO DISCONTINUE RAIL SERVICE

(Name of railroad) gives notice that on or about (insert date notice of exemption will be filed with the Surface Transportation Board), it intends to file with the Surface Transportation Board, Washington, DC 20423, a notice of exemption under 49 CFR 1152 Subpart F—*Exempt Abandonments* permitting the (abandonment of or discontinuance of service on) a _____ mile line of railroad between railroad milepost _____, near (station name), which traverses through United States Postal Service ZIP Codes (ZIP Codes) and railroad milepost _____, near (station name) which traverses through United States Postal Service ZIP Codes (ZIP Codes) in _____ County(ies), (State). The proceeding will be docketed as No. AB _____ (Sub-No. _____ X).

The Board's Section of Environmental Analysis (SEA) will generally prepare an Environmental Assessment (EA), which will normally be available 25 days after the filing of the notice of exemption. Comments on environmental and energy matters should be filed no later than 15 days after the EA becomes available to the public and will be addressed in a Board decision. Interested persons may obtain a copy of the EA or make inquiries regarding environmental matters by writing to the Section of Environmental Analysis (SEA), Surface Transportation Board, Washington, DC 20423 or by calling that office at [INSERT TELEPHONE NUMBER].

Appropriate offers of financial assistance to continue rail service can be filed with the Board. Requests for environmental conditions, public use conditions, or rail banking/trails use also can be filed with the Board. An original and 10 copies of any pleading that raises matters other than environmental issues (such as trails use, public use, and offers of financial assistance) must be filed directly with the Board's Office of the Secretary, 1925 K Street, NW., Washington, DC 20423 [See 49 CFR 1104.1(a) and 1104.3(a)], and one copy must be served on applicants'

representative [See 49 CFR 1104.12(a)]. Questions regarding offers of financial assistance, public use or trails use may be directed to the Board's Office of Congressional and Public Services at [INSERT TELEPHONE NUMBER]. Copies of any comments or requests for conditions should be served on the applicant's representative: (name, address and phone number).

SAMPLE LOCAL NEWSPAPER NOTICE FOR PETITIONS FOR ABANDONMENT EXEMPTIONS NOTICE OF INTENT TO ABANDON OR TO DISCONTINUE RAIL SERVICE

(Name of railroad) gives notice that on or about (insert date petition for abandonment exemption will be filed with the Surface Transportation Board) it intends to file with the Surface Transportation Board, Washington, DC 20423, a petition for exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903, et seq., permitting the (abandonment of or discontinuance of service on) a _____ mile line of railroad between railroad milepost _____, near (station name) which traverses through United States Postal Service ZIP Codes (ZIP Codes), and railroad milepost _____, near (station name) which traverses through United States Postal Service ZIP Codes (ZIP Codes) in _____ County(ies), (State). The proceeding has been docketed as No. AB _____ (Sub-No. _____ X).

The Board's Section of Environmental Analysis (SEA) will generally prepare an Environmental Assessment (EA), which will normally be available 60 days after the filing of the petition for abandonment exemption. Comments on environmental and energy matters should be filed no later than 30 days after the EA becomes available to the public and will be addressed in a Board decision. Interested persons may obtain a copy of the EA or make inquiries regarding environmental matters by writing to SEA, Surface Transportation Board, Washington, DC 20423 or by calling SEA at [INSERT TELEPHONE NUMBER].

Appropriate offers of financial assistance to continue rail service can be filed with the Board. Requests for environmental conditions, public use conditions, or rail banking/trails use also can be filed with the Board. An original and 10 copies of any pleading that raises matters other than environmental issues (such as trails use, public use, and offers of financial assistance) must be filed directly with the Board's Office of the Secretary, 1925 K Street, NW., Washington, DC 20423 [See 49 CFR 1104.1(a) and 1104.3(a)], and one copy must be served on applicants' representative [See 49 CFR 1104.12(a)]. Questions regarding offers of financial assistance, public use or trails use may be directed to the Board's Office of Congressional and Public Services at [INSERT TELEPHONE NUMBER]. Copies of any comments or requests for conditions should be served on the applicant's representative (name and address).

[56 FR 36105, July 31, 1991, as amended at 56 FR 49821, Oct. 1, 1991; 58 FR 44619, Aug. 24, 1993; 61 FR 67883, Dec. 24, 1996; 64 FR 53268, Oct. 1, 1999; 69 FR 58366, Sept. 30, 2004]

PART 1106—PROCEDURES FOR SURFACE TRANSPORTATION BOARD CONSIDERATION OF SAFETY INTEGRATION PLANS IN CASES INVOLVING RAILROAD CONSOLIDATIONS, MERGERS, AND ACQUISITIONS OF CONTROL

Sec.
1106.1 Purpose.
1106.2 Definitions.
1106.3 Actions for which Safety Integration Plan is Required.
1106.4 The Safety Integration Plan Process.
1106.5 Waiver.
1106.6 Reservation of jurisdiction.

AUTHORITY: 5 U.S.C. 553; 5 U.S.C. 559; 49 U.S.C. 721; 49 U.S.C. 10101; 49 U.S.C. 11323–11325; 42 U.S.C. 4332.

SOURCE: 67 FR 11607, Mar. 15, 2002, unless otherwise noted.

§ 1106.1 Purpose.

This part is designed to ensure adequate and coordinated consideration of safety integration issues, by both the Board and the Federal Railroad Administration, the agency within the Department of Transportation responsible for the enforcement of railroad safety, in the implementation of rail transactions subject to the Board's jurisdiction. It establishes the procedures by which the Board will consider safety integration plans in connection with its approval and authorization of transactions for which the Board has concluded such consideration is required.

§ 1106.2 Definitions.

The following definitions apply to this part:

Act means the ICC Termination Act of 1995, Pub. L. 104–88, 109 Stat. 803 (1995).

Amalgamation of operations, as defined by the Federal Railroad Administration at 49 CFR 244.9, means the migration, combination, or unification of one set of railroad operations with another

set of railroad operations, including, but not limited to, the allocation of resources affecting railroad operations (*e.g.*, changes in personnel, track, bridges, or communication or signal systems; or use or deployment of maintenance-of-way equipment, locomotives, or freight or passenger cars).

Applicant means a Class I railroad or a Class II railroad engaging in a transaction subject to this part.

Board means the Surface Transportation Board.

Class I or Class II railroad has the meaning assigned by the Board's regulations (49 CFR part 1201; General Instructions 1–1), as those regulations may be revised by the Board (including modifications in class thresholds based on the revenue deflator formula) from time to time.

Environmental documentation means either an Environmental Assessment or an Environmental Impact Statement prepared in accordance with the National Environmental Policy Act and Board's environmental rules at 49 CFR part 1105.

Federal Railroad Administration (''FRA'') means the agency within the Department of Transportation responsible for railroad safety.

Safety Integration Plan (''SIP'') means a comprehensive written plan, prepared in accordance with FRA guidelines or regulations, explaining the process by which Applicants intend to integrate the operation of the properties involved in a manner that would maintain safety at every step of the integration process, in the event the Board approves the transaction that requires a SIP.

Section of Environmental Analysis (''SEA'') means the Section that prepares the Board's environmental documents and analyses.

Transaction means an application by a Class I railroad that proposes to consolidate with, merge with, or acquire control under 49 U.S.C. 11323(a) of another Class I railroad, or with a Class II railroad where there is a proposed amalgamation of operations, as defined by FRA's regulations at 49 CFR 244.9. ''Transaction'' also includes a proceeding other than those specified above if the Board concludes that a SIP is necessary in its proper consideration of the application or other request for authority.

§ 1106.3 Actions for which Safety Integration Plan is required.

A SIP shall be filed by any applicant requesting authority to undertake a transaction as defined under § 1106.2 of this part.

§ 1106.4 The Safety Integration Plan process.

(a) Each applicant in a transaction subject to this part shall file a proposed SIP in accordance with the informational requirements prescribed at 49 CFR part 244, or other FRA guidelines or requirements regarding the contents of a SIP, with SEA and FRA no later than 60 days from the date the application is filed with the Board.

(b) The proposed SIP shall be made part of the environmental record in the Board proceeding and dealt with in the ongoing environmental review process under 49 CFR part 1105. The procedures governing the process shall be as follows:

(1) In accordance with 49 CFR 244.17, FRA will provide its findings and conclusions on the adequacy of the proposed SIP (*i.e.*, assess whether the proposed SIP establishes a process that provides a reasonable assurance of safety in executing the proposed transaction) to SEA at a date sufficiently in advance of the Board's issuance of its draft environmental documentation in the case to permit incorporation in the draft environmental document.

(2) The draft environmental documentation shall incorporate the proposed SIP, any revisions or modifications to it based on further consultations with FRA, and FRA's written comments regarding the SIP. The public may review and comment on the draft environmental documentation within the time limits prescribed by SEA.

(3) SEA will independently review each proposed SIP. In its final environmental documentation, SEA will address written comments on the proposed SIP received during the time established for submitting comments on the draft environmental documentation. The Board then will consider the full environmental record, including

the information concerning the SIP, in arriving at its decision in the case.

(4) If the Board approves the transaction and adopts the SIP, it will require compliance with the SIP as a condition to its approval. Each applicant involved in the transaction then shall coordinate with FRA in implementing the approved SIP, including any amendments thereto. FRA has provided in its rules at 49 CFR 244.17(g) for submitting information to the Board during implementation of an approved transaction that will assist the Board in exercising its continuing jurisdiction over the transaction. FRA also has agreed to advise the Board when, in its view, the integration of the applicants' operations has been safely completed.

(c) If a SIP is required in transactions that would not be subject to environmental review under the Board's environmental rules at 49 CFR part 1105, the Board will develop appropriate case-specific SIP procedures based on the facts and circumstances presented.

§ 1106.5 Waiver.

The SIP requirements established by this part may be waived or modified by the Board where a railroad shows that relief is warranted or appropriate.

§ 1106.6 Reservation of Jurisdiction.

The Board reserves the right to require a SIP in cases other than those enumerated in this part, or to adopt modified SIP requirements in individual cases, if it concludes that doing so is necessary in its proper consideration of the application or other request for authority.

PART 1107 [RESERVED]

PART 1108—ARBITRATION OF CERTAIN DISPUTES SUBJECT TO THE STATUTORY JURISDICTION OF THE SURFACE TRANSPORTATION BOARD

Sec.

1108.1 Definitions.
1108.2 Statement of purpose, organization, and jurisdiction.
1108.3 Matters subject to arbitration.
1108.4 Relief.
1108.5 Fees and costs.
1108.6 Arbitrators.
1108.7 Arbitration commencement procedures.
1108.8 Arbitration procedures.
1108.9 Decisions.
1108.10 Precedent.
1108.11 Enforcement and appeals.
1108.12 Additional matters.

AUTHORITY: 49 U.S.C. 721(a).

SOURCE: 62 FR 46217, Sept. 2, 1997, unless otherwise noted.

§ 1108.1 Definitions.

(a) *Arbitrator* means an arbitrator appointed pursuant to these provisions.

(b) *ICC* means the Interstate Commerce Commission.

(c) *Interstate Commerce Act* means the Interstate Commerce Act as amended from time to time, including the amendments made by the ICC Termination Act of 1995.

(d) *RSTAC* means the Rail-Shipper Transportation Advisory Council established pursuant to 49 U.S.C. 726.

(e) *STB* means the Surface Transportation Board.

(f) *Statutory jurisdiction* means the jurisdiction conferred on the STB by the Interstate Commerce Act, including jurisdiction over rail transportation or services that have been exempted from regulation.

§ 1108.2 Statement of purpose, organization, and jurisdiction.

(a) These provisions are intended to provide a means for the binding, voluntary arbitration of certain disputes subject to the statutory jurisdiction of the STB, either between two or more railroads subject to the jurisdiction of the STB or between any such railroad and any other person.

(b) These procedures shall not be available to obtain the grant, denial, stay or revocation of any license, authorization (e.g., construction, abandonment, purchase, trackage rights, merger, pooling) or exemption, or to prescribe for the future any conduct, rules, or results of general, industry-wide applicability. Nor are they available for arbitration that is conducted pursuant to labor protective conditions. These procedures are intended for the resolution of specific disputes between specific parties involving the payment of money or involving rates

or practices related to rail transportation or service subject to the statutory jurisdiction of the STB.

(c) The alternative means of dispute resolution provided for herein are established pursuant to the authority of the STB to take such actions as are necessary and appropriate to fulfill its jurisdictional mandate and not pursuant to the Administrative Dispute Resolution Act, 5 U.S.C. 571 *et seq.*

(d) On January 1, 1996, the STB replaced the ICC. For purposes of these procedures, it is immaterial whether an exemption from regulation was granted by the ICC or the STB.

§ 1108.3 Matters subject to arbitration.

(a) Any controversy between two or more parties, subject to resolution by the STB, and subject to the limitations in § 1108.2 hereof, may be processed pursuant to the provisions of this part 1108, if all necessary parties voluntarily subject themselves to arbitration under these provisions after notice as provided herein.

(b) Arbitration under these provisions is limited to matters over which the STB has statutory jurisdiction and may include disputes arising in connection with jurisdictional transportation, including service being conducted pursuant to an exemption. An Arbitrator should decline to accept, or to render a decision regarding, any dispute that exceeds the STB's statutory jurisdiction. Such Arbitrator may resolve any dispute properly before him/her in the manner and to the extent provided herein, but only to the extent of and within the limits of the STB's statutory jurisdiction. In so resolving any such dispute, the Arbitrator will not be bound by any procedural rules or regulations adopted by the STB for the resolution of similar disputes, except as specifically provided in this part 1108; provided, however, that the Arbitrator will be guided by the Interstate Commerce Act and by STB and ICC precedent.

§ 1108.4 Relief.

(a) Subject to specification in the complaint, as provided in § 1108.7 herein, an Arbitrator may grant the following types of relief:

(1) Monetary damages, to the extent available under the Interstate Commerce Act, with interest at a reasonable rate to be specified by the Arbitrator.

(2) Specific performance of statutory obligations (including the prescription of reasonable rates), but for a period not to exceed 3 years from the effective date of the Arbitrator's award.

(b) A party may petition an Arbitrator to modify or vacate an arbitral award in effect that directs future specific performance, based on materially changed circumstances or the criteria for vacation of an award contained in 9 U.S.C. 10.

(1) A petition to modify or vacate an award in effect should be filed with the STB. The petition will be assigned to the Arbitrator that rendered the award unless that Arbitrator is unavailable, in which event the matter will be assigned to another Arbitrator.

(2) Any such award shall continue in effect pending disposition of the request to modify or vacate. Any such request shall be handled as expeditiously as practicable with due regard to providing an opportunity for the presentation of the parties' views.

§ 1108.5 Fees and costs.

(a) Fees will be utilized to defray the costs of the STB in administering this alternate dispute resolution program in accordance with 31 U.S.C. 9701. The fees for filing a complaint, answer, third party complaint, third party answer, appeals of arbitration decisions, and petitions to modify or vacate an arbitration award will be as set forth in 49 CFR 1002.2(f)(87). All fees are nonrefundable except as specifically provided and are due with the paying party's first filing in any proceeding.

(b) The parties may agree among themselves who will bear the expenses of arbitration, including compensation of the arbitrator. Absent an agreement, each party will bear its own expenses, including, without limitation, fees of experts or counsel. Absent an agreement, the fees of the Arbitrator will be paid by the party or parties losing an arbitration entirely. If no party loses an arbitration entirely (as determined by the Arbitrator), the parties shall share equally (or pro rata if more than

two parties) the fees and expenses, if any, of the Arbitrator, absent an agreement otherwise.

§ 1108.6 Arbitrators.

(a) Arbitration shall be conducted by an arbitrator (or panel of arbitrators) selected, as provided herein, from a roster of persons (other than active government officials) experienced in rail transportation or economic issues similar to those capable of arising before the STB. The initial roster of arbitrators shall be established by the RSTAC in consultation with the Chairman of the STB, and shall contain not fewer than 21 names. The roster shall thereafter be maintained by the Chairman of the STB, who may augment the roster at any time to include other eligible arbitrators and may remove from the roster any arbitrators who are no longer available. The initial roster shall be published; thereafter the roster shall be available to the public, upon request, at all times. For each arbitrator on the roster, the roster shall disclose the level of the fee (or fee range) charged by that arbitrator.

(b) The parties to a dispute may select an arbitrator (or panel of arbitrators) and submit the name(s) (and, if not already on the roster of arbitrators, the qualifications) of the agreed-upon person(s) in writing to the Chairman of the STB. Any person(s) so designated who is not already on the roster, if found to be qualified, will be added to the roster and may be used as the arbitrator(s) for that dispute.

(c) If the parties cannot agree upon an arbitrator (or panel of arbitrators), then each party shall, using the roster of arbitrators, strike through the names of any arbitrators to whom they object, number the remaining arbitrators on the list in order of preference, and submit its marked roster to the Chairman of the STB. The Chairman will then designate the arbitrator (or panel of arbitrators, if mutually preferred by the parties) in order of the highest combined ranking of all of the parties to the arbitration.

(d) The process of selecting an Arbitrator pursuant to this section shall be conducted confidentially following the completion of the Arbitration Commencement Procedures set forth in § 1108.7 hereof.

(e) If, at any time during the arbitration process, a selected Arbitrator becomes incapacitated, unwilling or unable to fulfill his/her duties, or if both parties agree that the arbitrator should be replaced, a replacement Arbitrator will be promptly selected under the process set forth in paragraphs (b) and (c) of this section.

§ 1108.7 Arbitration commencement procedures.

(a) Each demand for arbitration shall be commenced with a written complaint. Because arbitration under these procedures is both voluntary and binding, the complaint must set forth in detail: the nature of the dispute; the statutory basis of STB jurisdiction; a clear, separate statement of each issue as to which arbitration is sought; and the specific relief sought. Each complaint shall contain a sworn, notarized verification, by a responsible official of the complaining party, that the factual allegations contained in the complaint are true and accurate. Each complaint must contain a statement that the complainant is willing to arbitrate pursuant to these arbitration rules and be bound by the result thereof in accordance with those rules, and must contain a demand that the defendants likewise agree to arbitrate and be so bound.

(b) The complaining party shall serve, by overnight mail or hand delivery, a signed and dated original of the complaint on each defendant (on a responsible official at his or her usual place of business), and an original and two copies on the STB, accompanied by the filing fee prescribed under § 1108.5(a) and set forth in 49 CFR 1002.2(f)(87). Each complaint served on a defendant shall be accompanied by a copy of this part 1108.

(c) Any defendant willing to enter into arbitration under these rules must, within 30 days of the date of a complaint, answer the complaint in writing. The answer must contain a statement that the defendant is willing to arbitrate each arbitration issue set forth in the complaint or specify which such issues the defendant is willing to arbitrate. If the answer contains an

agreement to arbitrate some but not all of the arbitration issues in the complaint, the complainant will have 10 days from the date of the answer to advise the defendant and the STB in writing whether the complainant is willing to arbitrate on that basis. Upon the agreement of the parties to arbitrate, these rules will be deemed incorporated by reference into the arbitration agreement.

(d) The answer of a party willing to arbitrate shall also contain that party's specific admissions or denials of each factual allegation contained in the complaint, affirmative defenses, and any counterclaims or set-offs which the defendant wishes to assert against the complainant. The right of a defendant to advance any counterclaims or set-offs, and the capacity of an Arbitrator to entertain and render an award with respect thereto, is subject to the same jurisdictional limits as govern the complaint.

(e) A defendant's answer must be served on the complainant, other parties, and the STB in the same manner as the complaint.

(f) A defendant willing to enter into arbitration under these procedures only if it is able to obtain cross-relief against another defendant or a nonparty may serve an answer containing an agreement to arbitrate that is conditioned upon the willingness of any such third party to enter into arbitration as a third party defendant. Simultaneously with the service of any such conditional answer, the defendant making such answer shall serve a complaint and demand for arbitration on the party whose presence that defendant deems to be essential, such complaint and demand to be drawn and served in the same manner as provided in paragraphs (a) and (b) of this section. A defendant receiving such a complaint and demand for arbitration and that is willing to so arbitrate shall respond in the same manner as provided in paragraphs (c), (d), and (e) of this section.

(g) Upon receipt of a complaint and demand for arbitration served by a complainant on a defendant, or by a defendant on a third-party defendant, the STB promptly will notify the parties serving and receiving such documents of any patent deficiencies, jurisdictional or otherwise, which the STB deems fatal to the processing of the complaint, and will suspend the timetable for processing the arbitration until further notice. If the complainant is unwilling or unable to remedy such deficiencies to the satisfaction of the STB within such time as the STB may specify, the complaint shall be deemed to be withdrawn without prejudice. Upon satisfaction that two or more parties have unconditionally agreed to arbitrate under these procedures, the STB will so notify the parties and commence procedures for the selection of an Arbitrator.

(h) An agreement to arbitrate pursuant to these rules will be deemed a contract to arbitrate, subject to limited review by the STB pursuant to § 1108.11(c), for the purpose of subjecting the arbitration award to the provisions of 9 U.S.C. 9 (court enforcement of an arbitration award), and 9 U.S.C. 10 (vacation of an arbitration award by a court on certain limited grounds).

§ 1108.8 Arbitration procedures.

(a) The Arbitrator will establish rules, including timetables, for each arbitration proceeding.

(1) The evidentiary process will be completed within 90 days from the start date established by the arbitrator, and the arbitrator's decision will be issued within 30 days from the close of the record. The parties may agree to vary these timetables, however, subject to the approval of the arbitrator. Matters handled through arbitration under these rules are exempted from any applicable statutory time limits, pursuant to 49 U.S.C. 10502.

(2) Discovery will be available only upon the agreement of the parties.

(b) Evidence will be submitted under oath. Evidence may be submitted in writing or orally, at the direction of the Arbitrator. Hearings for the purpose of cross-examining witnesses will be permitted at the sound discretion of the Arbitrator. The Arbitrator, at his/her discretion, may require additional evidence.

(c) Subject to alteration by the Arbitrator or by agreement of the parties in individual proceedings, as a general

rule, where evidence is submitted in written form, the complaining party will proceed first, and the defendant will proceed next. The complainant will then be given an opportunity to submit a reply. At the discretion of the Arbitrator, argument may be submitted with each evidentiary filing or in the form of a brief after the submission of all evidence. Page limits will be set by each Arbitrator for all written submissions of other than an evidentiary nature.

(d) Any written document, such as a common carrier rate schedule, upon which a party relies should be submitted as part of that party's proof, in whole or in relevant part. The Arbitrator will not be bound by formal rules of evidence, but will avoid basing a decision entirely or largely on unreliable proof.

(e) Where proof submitted to an Arbitrator addresses railroad costs, such proof should be prepared in accordance with the standards employed by the STB in ascertaining the costs at issue. Discovery should be sufficient to enable parties to meet these standards.

(f) Where the Arbitrator is advised that any party to an arbitration proceeding wishes to keep matters relating to the arbitration confidential, the Arbitrator shall take such measures as are reasonably necessary to ensure that such matters are treated confidentially by the parties or their representatives and are not disclosed by the Arbitrator to non-authorized persons. If the Arbitrator regards any confidential submission as being essential to his/her written decision, such information may be considered in the decision, but the Arbitrator will make every effort to omit confidential information from his/her written decision.

§ 1108.9 Decisions.

(a) Decisions of the Arbitrator shall be in writing and shall contain findings of fact and conclusions. All such decisions shall be served by the Arbitrator by hand delivery or overnight mail on the parties. At the same time, the arbitrator shall notify the STB, in writing, that a decision has been rendered.

(b) By agreeing to arbitrate pursuant to these procedures, each party agrees that the decision and award of the Arbitrator shall be binding and judicially enforceable in law and equity in any court of appropriate jurisdiction, subject to a limited right of appeal to the STB as provided below.

§ 1108.10 Precedent.

Decisions rendered by arbitrators pursuant to these procedures shall have no precedential value.

§ 1108.11 Enforcement and appeals.

(a) An arbitration decision rendered pursuant to these procedures may be appealed to the STB within 20 days of service of such decision. Any such appeal shall be served by hand delivery or overnight mail on the parties and on the STB, together with a copy of the arbitration decision. Replies to such appeals may be filed within 20 days of the filing of the appeal with the Board. An appeal or a reply under this paragraph shall not exceed 20 pages in length. The parties shall furnish to the STB an original and 10 copies of appeals and replies filed pursuant to this section. The filing fee for an appeal will be as set forth in 49 CFR 1002.2(f)(87).

(b) The filing of an appeal, as allowed in paragraph (a) of this § 1108.11, automatically will stay an arbitration decision pending disposition of the appeal. The STB will decide any such appeal within 50 days after the appeal is filed. Such decision by the STB shall be served in accordance with normal STB service procedures.

(c) The STB will review, and may vacate or amend, an arbitration award, in whole or in part, only on the grounds that such award

(1) Exceeds the STB's statutory jurisdiction; or

(2) Does not take its essence from the Interstate Commerce Act.

(d) Effective arbitration decisions rendered pursuant to these procedures, whether or not appealed to the STB, may only be enforced in accordance with 9 U.S.C. 9 and vacated by a court in accordance with 9 U.S.C. 10, except that an STB decision vacating an arbitration award is reviewable under the Hobbs Act, 28 U.S.C. 2321, 2342.

§ 1108.12 Additional matters.

Where an arbitration demand is filed by one or more complainants against one or more defendants, the complainants as a group and the defendants as a group shall be entitled to exercise those rights, with respect to the selection of arbitrators, as are conferred on individual arbitration parties.

PART 1109—USE OF ALTERNATIVE DISPUTE RESOLUTION IN BOARD PROCEEDINGS AND THOSE IN WHICH THE BOARD IS A PARTY

Sec.

1109.1 Invoking ADR in Board proceedings.
1109.2 Appeals from arbitration decisions.
1109.3 Confidentiality in ADR matters.
1109.4 Mandatory mediation in rate cases to be considered under the stand-alone cost methodology.

AUTHORITY: 5 U.S.C. 571 *et seq.*

SOURCE: 57 FR 32451, July 22, 1992, unless otherwise noted.

§ 1109.1 Invoking ADR in Board proceedings.

Any proceeding may be held in abeyance for 90 days while administrative dispute resolution (ADR) procedures (such as arbitration and mediation) are pursued. (Additional 90 day periods can be requested.) The period while any proceeding is held in abeyance to facilitate ADR will not be counted towards the statutory deadlines. All parties are required to indicate their written consent for ADR treatment. Requests that a proceeding be held in abeyance while ADR procedures are pursued should be submitted to the Office of the Secretary. The Secretary shall promptly issue an order in response to such requests. Unless arbitration or some other binding process involving a neutral has been undertaken, any party believing that ADR procedures are not yielding the intended results shall inform the Secretary and all parties in writing, and normal agency procedures will be reactivated by the Secretary by notice served on all the parties.

§ 1109.2 Appeals from arbitration decisions.

Appeals are limited to clear errors of general transportation importance, and not issues of causation or fact. Arbitration awards can be challenged on the basis that they do not take their essence from the Interstate Commerce Act, or are not limited to the matters the parties have referred for arbitration. Appeals are limited to 10 typewritten pages. Parties will have 20 days from the service date of the decision to file, and opposing parties 20 days to answer. Arbitration decisions will become effective in 30 days unless a party seeks a stay of the decision within 10 days of its issuance, and we grant the stay. Appeals and stay petitions should be limited to extraordinary circumstances.

[57 FR 32451, July 22, 1992; 57 FR 35628, Aug. 10, 1992]

§ 1109.3 Confidentiality in ADR Matters

In all ADR matters involving the Board, whether under the Administrative Dispute Resolution Act or not, the confidentiality provisions of that Act (5 U.S.C. 574) shall bind the Board and all parties and neutrals in those ADR matters.

[67 FR 36822, May 28, 2002]

§ 1109.4 Mandatory mediation in rate cases to be considered under the stand-alone cost methodology.

(a) A shipper seeking rate relief from a railroad or railroads in a case involving the stand-alone cost methodology must engage in non-binding mediation of its dispute with the railroad upon filing a formal complaint under 49 CFR Part 1111.

(b) Within 10 business days after the shipper files its formal complaint, the Board will assign a mediator to the case. Within 5 business days of the assignment to mediate, the mediator shall contact the parties to discuss ground rules and the time and location of any meeting. At least one principal of each party, who has the authority to bind that party, shall participate in the mediation and be present at any session at which the mediator requests that the principal be present.

(c) The mediator will work with the parties to try to reach a settlement of all or some of their dispute or to narrow the issues in dispute, and reach stipulations that may be incorporated into any adjudication before the Board if mediation does not fully resolve the dispute. If the parties reach a settlement, the mediator may assist in preparing a settlement agreement.

(d) The entire mediation process shall be private and confidential. No party may use any concessions made or information disclosed to either the mediator or the opposing party before the Board or in any other forum without the consent of the other party.

(e) The mediation shall be completed within 60 days of the appointment of the mediator. The mediation may be terminated prior to the end of the 60-day period only with the certification of the mediator to the Board. Requests to extend mediation, or to re-engage it later, will be entertained on a case-by-case basis, but only if filed by all interested parties.

(f) Absent a specific order from the Board, the onset of mediation will not affect the procedural schedule in standalone cost rate cases, set forth at 49 CFR 1111.8(a).

[68 FR 17313, Apr. 9, 2003]

PART 1110—PROCEDURES GOVERNING INFORMAL RULEMAKING PROCEEDINGS

Sec.

1110.1 Applicability.
1110.2 Opening of proceeding.
1110.3 Publication of notices.
1110.4 Participation.
1110.5 Consideration of comments received.
1110.6 Petitions for extension of time to comment.
1110.7 Availability of dockets.
1110.8 Adoption of final rules.
1110.9 Petition for waiver.
1110.10 Petitions for reconsideration.

AUTHORITY: 49 U.S.C. 721.

SOURCE: 47 FR 49556, Nov. 1, 1982, unless otherwise noted.

§ 1110.1 Applicability.

This part contains general rulemaking procedures that apply to the issuance, amendment, and repeal of rules, general policy statement, or other interpretation of rules or law of the Surface Transportation Board, adopted under the procedures of section 553 of title 5 of the United States Code (the Administrative Procedure Act).

§ 1110.2 Opening of proceeding.

(a) The Board may open a rulemaking proceeding on its own motion. In doing so, it may consider the recommendations of other agencies of the United States and of other persons.

(b) Any person may petition the Board to issue, amend, or repeal a rule.

(c) Each petition seeking the institution of a proceeding, filed under this section must:

(1) Be submitted, along with 15 copies if possible, to the Secretary, Surface Transportation Board, Washington, DC 20423;

(2) Set forth the text or substance of the rule or amendment proposed or specify the rule that the petitioner wants to have repealed or modified;

(3) Explain the interest of the petitioner in the action requested; and

(4) Contain any information and arguments available to the petitioner to support the action sought and may detail any environmental, energy, or small business considerations.

(d) In rail cases, the Board will grant or deny a petition within 120 days of its receipt.

(e) If the Board determines that a petition contains adequate justification, it will open a rulemaking proceeding pursuant to § 1110.3 and will notify the petitioner of its action.

(f) If the Board determines that the petition does not contain adequate justification for opening a rulemaking proceeding, the petition will be denied, with a brief statement of the grounds for denial, and the petitioner will be notified of the Board's action.

(g) If a petition under this section concerning a common carrier by railroad is granted, the Board will proceed as soon as it is practicable. If the petition is denied, the Board will publish a statement of the reasons for the denial in the FEDERAL REGISTER.

§ 1110.3 Publication of notices.

(a) Interpretive rules, general statements of policy, and rules relating to

organization, procedure, or practice may be issued as final without notice or other public rulemaking proceedings.

(b) General rulemaking proceedings will be opened by the issuance of either a notice of intent to institute a rulemaking proceeding, an advance notice of proposed rulemaking, or a notice of proposed rules. The Board will publish the notice in the FEDERAL REGISTER, and it will invite the public to participate in the rulemaking proceeding. No notice will be issued when the Board finds for good cause, that notice is impractical or unnecessary or contrary to the public interest.

(c) Notices of proposed rulemakings will include:

(1) The proposed rules, if prepared;

(2) A discussion of why the rulemakings are needed and what they are intended to accomplish;

(3) Identification of significant dates in the proceedings, such as dates by which comments must be filed or on which the rules are proposed to take effect;

(4) Any relevant addresses;

(5) The name and phone number of an individual within the Board who can provide further information concerning the proceedings;

(6) Any supplementary information required; and

(7) Reference to the legal authority under which the rules are proposed.

(d) In addition to being published in the FEDERAL REGISTER, notices of proposed rulemaking and subsequent notices and decisions in rulemaking proceedings, will be served on the parties and made available to the public through the Office of the Secretary. To the extent possible, the date of service will be the same as the date of publication in the FEDERAL REGISTER. When the service and publication dates are not the same, the date of publication in the FEDERAL REGISTER is controlling for the purpose of determining time periods set by these procedures or by notices issued in individual proceedings.

§ 1110.4 Participation.

Any person may participate in rulemaking proceedings by submitting written information or views. In addition, the Board may invite persons to present oral arguments, participate in informal conferences, appear at informal fact-finding hearings, or participate in any other proceedings. Information contained in written submissions will be given the same consideration.

§ 1110.5 Consideration of comments received.

All timely comments will be considered before final action is taken on a rulemaking proposal. Comments which are filed late will be considered so far as possible without incurring additional expense, delay, or prejudice to other parties.

§ 1110.6 Petitions for extension of time to comment.

(a) Any person may petition the Board for an extension of time to submit comments in response to a notice of proposed rulemaking. The petition and one copy must be submitted at least 10 days prior to the deadline for filing comments. The filing of the petition does not automatically extend the time for the filing of petitioner's comments.

(b) The Board will grant the petition only if the petitioner shows a substantive interest in the proposed rule and good cause for the extension, and if the extension is in the public interest. If an extension is granted, notice of it will be published in the FEDERAL REGISTER, and it will apply to all persons.

§ 1110.7 Availability of dockets.

Dockets of pending rulemaking proceedings are maintained in the Office of the Secretary. These dockets are available for inspection by any person, and copies may be obtained upon payment of the prescribed fee.

§ 1110.8 Adoption of final rules.

If, after consideration of all comments received, final rules are adopted, notice will be published in the FEDERAL REGISTER.

§ 1110.9 Petition for waiver.

Any person may petition the Board for a permanent or temporary waiver of any rule. Petitions should be filed with the Secretary, Surface Transportation Board, Washington, DC 20423, and should identify the rule involved

and the arguments in favor of granting the waiver.

[48 FR 44827, Sept. 30, 1983]

§ 1110.10 Petitions for reconsideration.

Any person may file a petition for reconsideration of the Board's decision in a rulemaking proceeding. Petitions should be filed within 20 days of the date that the final decision is published in the FEDERAL REGISTER and should identify the interest of the petitioner, the specific action sought, and the arguments favoring that action.

PART 1111—COMPLAINT AND INVESTIGATION PROCEDURES

Sec.

1111.1 Content of formal complaints; joinder.
1111.2 Amended and supplemental complaints.
1111.3 Service.
1111.4 Answers and cross complaints.
1111.5 Motions to dismiss or to make more definite.
1111.6 Satisfaction of complaint.
1111.7 Investigations on the Board's own motion.
1111.8 Procedural schedule in stand-alone cost cases.
1111.9 Procedural schedule to determine whether to use simplified procedures.
1111.10 Meeting to discuss procedural matters.

AUTHORITY: 49 U.S.C. 721, 10704, and 11701.

SOURCE: 61 FR 52711, Oct. 8, 1996, unless otherwise noted.

§ 1111.1 Content of formal complaints; joinder.

(a) *General.* A formal complaint must contain the correct, unabbreviated names and addresses of each complainant and defendant. It should set forth briefly and in plain language the facts upon which it is based. It should include specific reference to pertinent statutory provisions and Board regulations, and should advise the Board and the defendant fully in what respects these provisions or regulations have been violated. The complaint should contain a detailed statement of the relief requested. Relief in the alternative or of several different types may be demanded, but the issues raised in the formal complaint should not be broader than those to which complainant's evidence is to be directed at the hearing. In a complaint challenging the reasonableness of a rail rate, the complainant should indicate whether, in its view, the reasonableness of the rate should be examined using constrained market pricing or using the simplified standards adopted pursuant to 49 U.S.C. 10701(d)(3). If the complainant seeks to use the simplified standards, it should support this request by submitting, at a minimum, the following information:

(1) A general history of the traffic at issue, including how the traffic has moved in the past, how it currently moves, and how it can and will be moved in the future. This information should address not only the physical movement of the traffic, but the type and level of rates actually used. It should include all carriers (rail and nonrail) that have participated in the transportation of this traffic or could do so.

(2) The specific commodity description(s) for the traffic at issue, the shipping characteristics and requirements of the traffic, and the type of railroad cars required or used for the traffic.

(3) All origins, destinations, and origin-destination (O-D) pairs involved in the complaint, by commodity type.

(4) The amount of traffic involved (by commodity type), including total annual carloadings, average tons per car, number of carloads per shipment, and number of carloads per week or month.

(5) Total or average revenue per carload paid to the defendant railroad(s), by commodity type.

(6) The feasibility and anticipated cost of preparing a stand-alone cost presentation in the case.

(7) An estimate of the other costs to be incurred in pursuing the rate complaint, including preparing necessary jurisdictional threshold and market dominance evidence.

(8) The relief sought, including all reparations as well as the level and duration of any rate prescription.

(9) The present value of the relief sought.

(10) The assumptions, calculations and any documentation necessary to support the responses to the above listed factors.

(11) For matters for which voluntary, binding arbitration is available pursuant to 49 CFR part 1108, the complaint shall state that arbitration was considered, but rejected, as a means of resolving the dispute.

(b) *Multiple causes of action.* Two or more grounds of complaint concerning the same principle, subject, or statement of facts may be included in one complaint, but should be stated and numbered separately.

(c) *Joinder.* Two or more complainants may join in one complaint against one or more defendants if their respective causes of action concern substantially the same alleged violations and like facts.

(d) *Request for access to waybill data.* Parties needing access to the Waybill Sample to prepare their case should follow the procedures set forth at 49 CFR 1244.8.

[61 FR 52711, Oct. 8, 1996, as amended at 63 FR 2639, Jan. 16, 1998; 67 FR 36822, May 28, 2002]

§ 1111.2 Amended and supplemental complaints.

An amended or supplemental complaint may be tendered for filing by a complainant against a defendant or defendants named in the original complaint, stating a cause of action alleged to have accrued within the statutory period immediately preceding the date of such tender, in favor of complainant and against the defendant or defendants. The time limits for responding to an amended or supplemental complaint are computed pursuant to §§ 1111.4 and 1111.5 of this part, as if the amended or supplemental complaint was an original complaint.

§ 1111.3 Service.

A complainant is responsible for serving formal complaints, amended or supplemental complaints, and cross complaints on the defendant(s). Service shall be made by sending a copy of such complaint to the chief legal officer of each defendant by either confirmed facsimile and first-class mail or express overnight courier. The cover page of each such facsimile and the front of each such first-class mail or overnight express courier envelope shall include the following legend: ''Service of STB Complaint''. Service of the complaint shall be deemed completed on the date on which the complaint is served by confirmed facsimile or, if service is made by express overnight courier, on the date such complaint is actually received by the defendant. When the complaint involves more than one defendant, service of the complaint shall be deemed completed on the date on which all defendants have been served. An original and ten copies of the complaint should be filed with the Board together with an acknowledgment of service by the persons served or proof of service in the form of a statement of the date and manner of service, of the names of the persons served, and of the addresses to which the papers were mailed or at which they were delivered, certified by the person who made service. If complainant cannot serve the complaint, an original of each complaint accompanied by a sufficient number of copies to enable the Board to serve one upon each defendant and to retain 10 copies in addition to the original should be filed with the Board.

[61 FR 52711, Oct. 8, 1996, as amended at 61 FR 58491, Nov. 15, 1996]

§ 1111.4 Answers and cross complaints.

(a) *Generally.* An answer shall be filed within the time provided in paragraph (b) of this section. An answer should be responsive to the complaint and should fully advise the Board and the parties of the nature of the defense. In answering a complaint challenging the reasonableness of a rail rate, the defendant should indicate whether it will contend that the Board is deprived of jurisdiction to hear the complaint because the revenue-variable cost percentage generated by the traffic is less than 180 percent, or the traffic is subject to effective product or geographic competition.

(b) *Time for filing; copies; service.* An answer must be filed within 20 days after the service of the complaint or within such additional time as the Board may provide. The original and 10 copies of an answer must be filed with the Board. The defendant must serve copies of the answer upon the complainant and any other defendants.

(c) *Cross complaints.* A cross complaint alleging violations by other parties to the proceeding or seeking relief

against them may be filed with the answer. An answer to a cross complaint shall be filed within 20 days after the service date of the cross complaint. The party shall serve copies of an answer to a cross complaint upon the other parties.

(d) *Failure to answer complaint.* Averments in a complaint are admitted when not denied in an answer to the complaint.

§ 1111.5 Motions to dismiss or to make more definite.

An answer to a complaint or cross complaint may be accompanied by a motion to dismiss the complaint or cross complaint or a motion to make the complaint or cross complaint more definite. A motion to dismiss can be filed at anytime during a proceeding. A complainant or cross complainant may, within 10 days after an answer is filed, file a motion to make the answer more definite. Any motion to make more definite must specify the defects in the particular pleading and must describe fully the additional information or details thought to be necessary.

§ 1111.6 Satisfaction of complaint.

If a defendant satisfies a formal complaint, either before or after answering, a statement to that effect signed by the complainant must be filed (original only need be filed), setting forth when and how the complaint has been satisfied. This action should be taken as expeditiously as possible.

§ 1111.7 Investigations on the Board's own motion.

(a) *Service of decision.* A decision instituting an investigation on the Board's own motion will be served by the Board upon respondents.

(b) *Default.* If within the time period stated in the decision instituting an investigation, a respondent fails to comply with any requirement specified in the decision, the respondent will be deemed in default and to have waived any further proceedings, and the investigation may be decided forthwith.

§ 1111.8 Procedural schedule in stand-alone cost cases.

(a) *Procedural schedule.* Absent a specific order by the Board, the following general procedural schedule will apply in stand-alone cost cases:

Day 0—Complaint filed, discovery period begins.

Day 7 or before—Conference of the parties convened pursuant to § 1111.10(b).

Day 20—Defendant's answer to complaint due.

Day 75—Discovery completed.

Day 120—Complainant files opening evidence on absence of intermodal and intramodal competition, variable cost, and stand-alone cost issues. Defendant files opening evidence on existence of product and geographic competition, and revenue-variable cost percentage generated by complainant's traffic.

Day 180—Complainant and defendant file reply evidence to opponent's opening evidence.

Day 210—Complainant and defendant file rebuttal evidence to opponent's reply evidence.

(b) *Conferences with parties.* (1) The Board will convene a technical conference of the parties with Board staff prior to the filing of any evidence in a stand-alone cost rate case, for the purpose of reaching agreement on the operating characteristics that are used in the variable cost calculations for the movements at issue. The parties should jointly propose a schedule for this technical conference.

(2) In addition, the Board may convene a conference of the parties with Board staff, after discovery requests are served but before any motions to compel may be filed, to discuss discovery matters in stand-alone cost rate cases. The parties should jointly propose a schedule for this discovery conference.

[61 FR 52711, Oct. 8, 1996; 61 FR 53996, Oct. 16, 1996, as amended at 63 FR 2639, Jan. 16, 1998; 68 FR 17313, Apr. 9, 2003]

§ 1111.9 Procedural schedule to determine whether to use simplified procedures.

Absent a specific order by the Board, the following procedural schedule will apply in determining whether to grant a request under § 1111.1(a) to use the simplified procedures (with the remainder of the procedural schedule to be determined on a case-by-case basis):

Day 0—Complaint filed, discovery period begins.

Day 20—Defendant's answer to complaint and opposition to use of simplified procedures due.
Day 30—Complainant's response to use of simplified procedures due.
Day 50—Board's determination of whether simplified procedures should be used.

[63 FR 2639, Jan. 16, 1998]

§ 1111.10 Meeting to discuss procedural matters.

(a) *Generally.* In all complaint proceedings, other than those challenging the reasonableness of a rail rate based on stand-alone cost, the parties shall meet, or discuss by telephone, discovery and procedural matters within 12 days after an answer to a complaint is filed. Within 19 days after an answer to a complaint is filed, the parties, either jointly or separately, shall file a report with the Board setting forth a proposed procedural schedule to govern future activities and deadlines in the case.

(b) *Stand-alone cost complaints.* In complaints challenging the reasonableness of a rail rate based on stand-alone cost, the parties shall meet, or discuss by telephone, discovery and procedural matters within 7 days after a complaint is filed. The parties should inform the Board as soon as possible thereafter whether there are unresolved disputes that require Board intervention and, if so, the nature of such disputes.

[61 FR 52711, Oct. 8, 1996. Redesignated and amended at 63 FR 2639, Jan. 16, 1998]

PART 1112—MODIFIED PROCEDURES

Sec.
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1112.11 Authority of officers.

AUTHORITY: 5 U.S.C. 559; 49 U.S.C. 721.

SOURCE: 47 FR 49558, Nov. 1, 1982, unless otherwise noted.

§ 1112.1 When modified procedure is used.

The Board may decide that a proceeding be heard under modified procedure when it appears that substantially all material issues of fact can be resolved through submission of written statements, and efficient disposition of the proceeding can be accomplished without oral testimony. Modified procedure may be ordered on the Board's initiative, or upon approval of a request by any party.

[47 FR 49558, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1112.2 Decisions directing modified procedure.

A decision directing that modified procedure be used will set out the schedule for filing verified statements by all parties and will list the names and addresses of all persons who at that time are on the service list in the proceeding. In this part, a statement responding to an opening statement is referred to as a ''reply'', and a statement responding to a reply is referred to as a ''rebuttal''. Replies to rebuttal material are not permitted. The filing of motions or other pleadings will not automatically stay or delay the established procedural schedule. Parties will adhere to this schedule unless the Board issues an order modifying the schedule.

[47 FR 49558, Nov. 1, 1982, as amended at 61 FR 58491, Nov. 15, 1996]

§ 1112.3 Default for failure to comply with schedule; effect of default.

If a party fails to comply with the schedule for submission of verified statements, or any other requirements established by the modified procedure decision, that party will be deemed to be in default and to have waived any further participation in the proceeding. Thereafter, the proceeding may be disposed of without notice to and without participation by parties in default.

§ 1112.4 Petitions to intervene.

(a) The Board may grant a petition to intervene in a proceeding set for modified procedure if intervention:

(1) Will not unduly disrupt the schedule for filing verified statements, except for good cause shown; and

(2) Would not unduly broaden the issues raised in the proceeding.

(b) The petition to intervene shall set out:

(1) The petitioner's interest in the proceeding;

(2) Whether the petitioner supports or opposes the relief sought or the action proposed or is otherwise concerned with the issues presented in the proceeding; and

(3) The petitioner's request, if any, for relief.

[47 FR 49558, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1112.5 Joint pleadings.

Parties with common interests are encouraged to prepare joint pleadings whenever possible.

§ 1112.6 Verified statements; contents.

A verified statement should contain all the facts upon which the witness relies, and to the extent that it contains arguments, they should be based only on those facts. Parties filing reply and rebuttal verified statements will be considered to have admitted the truth of material allegations of fact contained in their opponents' statements unless those allegations are specifically challenged. Rebuttal statements shall be confined to issues raised in the reply statements to which they are directed.

§ 1112.7 Records in other Board proceedings.

If any portion of the record before the Board in any proceeding other than the proceeding at issue is offered in evidence, a true copy should be presented for the record.

[47 FR 49558, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1112.8 Verification.

The original of any pleading filed must show the signature, capacity, and seal, if any, of the person administering the oath, and the date thereof.

§ 1112.9 Sample verification for statement of fact under modified procedure.

State of _____,
County of _____,
SS:
_____ being duly sworn, deposes and says that he has read the foregoing statement, knows the facts asserted there are true and that the same are true as stated.
Signed _____.
Subscribed and sworn to before me this _____ day of _____.
Notary Public of _____.
My Commission expires _____.

§ 1112.10 Requests for oral hearings and cross examination.

(a) *Requests.* Requests for oral hearings in matters originally assigned for handling under modified procedure must include the reasons why the matter cannot be properly resolved under modified procedure. Requests for cross examination of witnesses must include the name of the witness and the subject matter of the desired cross examination.

(b) *Disposition.* Unless material facts are in dispute, oral hearings will not be held. If held, oral hearings will normally be confined to material issues upon which the parties disagree. The decision setting a matter for oral hearing will define the scope of the hearing.

[61 FR 52712, Oct. 8, 1996]

§ 1112.11 Authority of officers.

Except to the extent that they apply only to the conduct of a public hearing, the officer assigned to handle a proceeding under the modified procedure shall have the same authority as officers assigned to conduct oral hearings as described in § 1113.3(a) and (b).

PART 1113—ORAL HEARING

Sec.

1113.1 Scheduling hearings; continued hearings.
1113.2 Subpoenas.
1113.3 Authority of officers.
1113.4 Prehearing conferences.
1113.5 Stipulations.
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1113.14 Objections to rulings.
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1113.16 Oral argument before the hearing officer.
1113.17 Transcript of record.
1113.18 Briefs.
1113.19 Pleadings: part of the record.
1113.20–1113.30 [Reserved]

AUTHORITY: 5 U.S.C. 559; 49 U.S.C. 721.

SOURCE: 47 FR 49559, Nov. 1, 1982, unless otherwise noted.

§ 1113.1 Scheduling hearings; continued hearings.

(a) *Assignment; service and posting of notice.* In those proceedings in which an oral hearing is to be held, the Board will assign a time and place for hearing. Notice of hearings will be posted in the Office of the Secretary of the Board and will be served upon the parties and such other persons as may be entitled to receive notice under the Act.

(b) *Requests for changes in assignment.* Requests for postponements of date of hearing will be granted only in exceptional circumstances.

(c) *Continuances.* (1) A continuance may be granted at the discretion of the presiding officer.

(2) If the presiding officer announces the time and place of a continued hearing on the record, no further notice need be given.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1113.2 Subpoenas.

(a) *Issuance.* A subpoena may be issued upon the direction of the Board on its own motion or upon request. A subpoena may be issued by the Board or by the officer presiding at a hearing and must be signed by the Secretary or a member of the Board.

(b) *Requests.* (1) A request for a subpoena to compel the appearance of a person at a hearing to give oral testimony, but not to produce documents, may be made either by letter (only the original need be filed with the Board) or orally upon the record at the hearing. A showing of general relevance and reasonable scope of the evidence sought to be introduced through the subpoenaed person may be required.

(2) A request for a subpoena to compel a witness to produce documentary evidence should be made in writing by petition. The petition should specify with particularity the books, papers, or documents desired and facts expected to be proved, and should show the general relevance and reasonable scope of the evidence sought. The officer presiding at a hearing may grant a request for such a subpoena made orally upon the record.

(c) *Service.* The original subpoena should be exhibited to the person served, should be read to him if he is unable to read, and a copy should be delivered to him by the officer or person making service.

(d) *Return.* If service of subpoena is made by a United States marshal or his deputy, service should be evidenced by his return on the subpoena. If made by any other person, such person shall make an affidavit stating the date, time and manner of service; and return such affidavit on, or with, the original subpoena in accordance with the form thereon. In case of failure to make service the reasons for the failure should be stated on the original subpoena. The written acceptance of service of a subpoena by the person subpoenaed will be sufficient without other evidence of return. The original subpoena bearing or accompanied by the required return, affidavit, statement, or acceptance of service, should be returned forthwith to the Secretary of the Board, unless otherwise directed.

(e) *Witness fees.* A witness who is summoned and responds to the summons is entitled to the same fee as is paid for like service in the courts of the United States. Such fee is to be paid by the party at whose instance the testimony is taken at the time the subpoena is served, except that when the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered at the time of service.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1113.3 Authority of officers.

(a) *General.* (1) The presiding officer has the authority to regulate the procedure in the hearing before him, and has authority to take all measures necessary or proper for the efficient performance of the duties assigned him. These include authority: (i) To hold hearings; (ii) to administer oaths and affirmations; (iii) to grant intervention; (iv) to accept any pleading; (v) to establish special rules of procedure appropriate to the effective handling of the particular proceeding; (vi) to examine witnesses; (vii) to issue subpoenas at the hearing; (viii) to dispose of requests for discovery; (ix) to hold conferences for the settlement and simplification of issues; (x) to rule on motions and dispose of procedural requests; (xi) to make initial decisions; (xii) to exclude any person from the hearing for contemptuous conduct; and (xiii) to take any other action authorized by this part, by the Administrative Procedure Act, or by the Interstate Commerce Act and related acts.

(2) The presiding officer has the authority: (i) To terminate examination or cross-examination of repetitious or cumulative nature; (ii) to limit direct examination to material matters; (iii) to limit cross-examination to disputed material facts; (iv) to require that principal examination or cross-examination be conducted by one or more counsel representing similar interests in proceedings where several parties are involved; (v) to set reasonable schedules for the presentation of witnesses; (vi) and to set reasonable time limits for the examination or cross-examination of witnesses. In order to enforce this paragraph, the officer may require a clear statement on the record of the nature of the testimony to be given by any witness.

(b) *Motions to dismiss; amendments.* (1) The presiding officer shall have power to decide any motion to dismiss the proceeding or other motion which involves final determination of the merits of the proceeding.

(2) The presiding officer may grant leave to amend any application or complaint.

(c) *Preparation of the decision by the prevailing party.* Any proceeding in which an oral hearing is held and in which the officer is able to announce his decision either:

(1) On the record after the close of the taking of testimony and the hearing of arguments by the officer, or

(2) By appropriate notification to the parties after the close of hearing, may be made the subject of an initial decision prepared by a party or parties in whose favor the officer decides, within a period specified by the officer, and subject to such changes as the officer considers appropriate in the draft prepared for him.

(d) *Recording; media coverage.* The presiding officer shall have authority to permit or to refuse to permit the recording of the hearing by means of live or delayed television or radio broadcast, or the use of a tape recorder or other electronic or photographic equipment by any person other than the official reporter.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1113.4 Prehearing conferences.

(a) *Purposes.* Upon written notice by the Board in any proceeding, or upon written or oral instruction of an officer, parties or their representatives may be directed to appear before an officer at a specified time and place for a conference, prior to or during the course of a hearing, or in lieu of personally appearing, to submit suggestions in writing, for the purpose of formulating issues and considering:

(1) The simplification of issues;

(2) The necessity or desirability of amending the pleadings either for the purpose of clarification, amplification, or limitation;

(3) The possibility of making admissions of certain averments of fact or stipulations concerning the use by any or all parties of matters of public record, such as annual reports and the like, to avoid the unnecessary introduction of proof;

(4) The procedure at the hearing;

(5) The limitation of the number of witnesses;

(6) The propriety of prior mutual exchange between or among the parties of prepared testimony and exhibits; and

(7) Such other matters, including disposition of requests for discovery, as

may aid in the simplification of the evidence and disposition of the proceeding. Parties may request a prehearing conference.

(b) *Facts disclosed privileged.* Facts disclosed in the course of the prehearing conference are privileged and, except by agreement, will not be used against participating parties either before the Board or elsewhere unless fully corroborated by other evidence.

(c) *Recordation and decision.* Action taken at the conference, including a recitation of the amendments allowed to the pleadings, the agreements made by the parties as to any of the matters considered, and defining the issues, will be recorded in an appropriate decision unless the parties enter into a written stipulation as to such matters, or agree to a statement thereof made on the record by the officer.

(d) *Objection to the decision; subsequent proceedings.* If a decision is entered, the parties may, within 20 days of the date of service, or within such lesser time as is set by the officer, present objections on the grounds that the decision does not fully or correctly embody the agreements reached at the conference. Thereafter the terms of the written stipulation or statement of the officer, as the case may be, will determine the subsequent course of the proceedings, unless modified to prevent manifest injustice.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1113.5 Stipulations.

Apart from the procedure contemplated by the prehearing provisions, the parties may, by stipulation in writing filed with the Board at any stage of the proceeding, or orally made at the hearing, agree upon any pertinent facts in the proceeding. The parties should agree to facts in this manner whenever practicable.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1113.6 Appearances; withdrawal or absence from hearing.

(a) *Who may appear.* Any individual may appear for himself. Any member of a partnership which is a party to any proceeding may appear for such partnerships upon adequate identification. A bona fide officer or a full-time employee of a corporation, association, or of an individual may appear for such corporation, association, or individual by permission of the officer presiding at the hearing. A party also may be represented by a practitioner.

(b) *Withdrawal or absence from hearing.* A practitioner who has entered his appearance at the hearing shall not be permitted to withdraw from the hearing, or willfully be absent therefrom, except for good cause and, wherever practicable, only with the permission of the presiding officer. If a person who has entered an appearance withdraws from the hearing in a manner other than that specified, the Board or the Officer may take such action as, in the interest of justice and the protection of the lawful rights of all parties to the proceeding, the circumstances of the case may warrant, including the striking out of all or any part of any pleading of the offending party, and including the possible dismissal of the action or proceeding, or any part thereof, the entry of an order of default against that party, or if the withdrawal is without the permission of the presiding officer, disciplining of the practitioner concerned.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1113.7 Intervention; petitions.

(a) *How requested.* Intervention will normally be granted only upon petition. In exceptional circumstances, where the issues would not be broadened or the proceeding delayed, an officer may, at his or her discretion, allow intervention upon motion made orally at the hearing.

(b) *Content generally.* A petition for leave to intervene must set forth the grounds for the proposed intervention, the position and interest of the petitioner in the proceeding, and whether petitioner's position is in support of or in opposition to the relief sought. If the proceeding is by formal complaint and affirmative relief is sought by petitioner, the petition should conform to the requirements for a formal complaint.

(c) *When filed.* A petition for leave to intervene in any proceeding should be

filed prior to or at the time the proceeding is called for hearing, but not after, except for good cause shown.

(d) *Broadening issues; filing.* If the petition seeks a broadening of the issues and shows that they would not thereby be unduly broadened, and in respect thereof seeks affirmative relief, the petition should be filed in time to permit service upon and answer by the parties in advance of the hearing.

(e) *Copies; service; replies.* When a petition for leave to intervene is tendered at the hearing, sufficient copies of the petition must be provided for distribution to the parties represented at the hearing. If leave is granted at the hearing, 10 copies of the petition must be furnished for the use of the Board. When a petition for leave to intervene is not tendered at the hearing, the original and 10 copies of the petition should be submitted to the Board together with a certificate that service has been made by petitioner. Any reply in opposition to a petition for leave to intervene not tendered at the hearing must be filed within 20 days after service of the petition to intervene. At the discretion of the Board leave to intervene may be granted or denied before the expiration of the time allowed for replies.

(f) *Disposition.* Leave to intervene will be granted only when the petitioner addresses issues reasonably pertinent to the issues already presented and which do not unduly broaden them. If leave is granted the petitioner becomes an intervener and a party to the proceeding.

[47 FR 49559, Nov. 1, 1982, as amended at 53 FR 19301, May 27, 1988; 61 FR 52712, Oct. 8, 1996]

§ 1113.8 Witness examination; order of procedure.

Witnesses will be orally examined under oath before the officer unless the facts are presented to the Board in the manner provided under modified procedure. In formal complaint, application, and investigation proceedings, complainant, applicant, and respondent, respectively, shall open and close at the hearing. In the event of further hearings granted on petition, the petitioners requesting further hearing shall open and close the proceeding. Instances exist in which parties other than the respondent may open and close in investigations where the burden of proof is not upon the respondent. Interveners shall follow the party in whose behalf the intervention is made. The foregoing order of presentation may be varied by the officer.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1113.9 Prepared statements.

With the approval of the officer, a witness may read into the record, as his testimony, statements of fact or expressions of opinion prepared by the witness, or written answers to interrogatories of counsel. A prepared statement of a witness who is present at the hearing may be received as an exhibit, provided that the statement does not include argument. Before any such statement is read or admitted in evidence, the witness shall deliver to the officer, the reporter, and to opposing counsel, as may be directed by the officer, a copy of such statement or of such interrogatories and the written answers thereto. The admissibility of the evidence contained in such statement will be subject to the same rules as if such testimony was produced orally, including the right of cross-examination of the witness. The officer may require that the witness testify orally if, in the officer's opinion, the memory or demeanor of the witness may be of importance.

§ 1113.10 Records in other Board proceedings.

A portion of the record before the Board in another proceeding may be offered in evidence at an oral hearing. A party making such an offer must provide, as an exhibit, a certified copy of the material sought to be introduced. A hearing officer may waive the requirement that a copy be provided, subject to such conditions as he or she may impose to assure that a copy will be available later, if needed, at no expense to the Board and to assure that the interests of other parties are not prejudiced. An offer of evidence under

this section will be subject to objection by other parties.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1113.11 Abstracts of documents.

When documents, such as freight bills or bills of lading, are numerous, the officer may refuse to receive all the documents in evidence and instead admit only a limited number of representative documents. He may instruct, if the proffer be for the purpose of proving damage, that introduction be deferred until there is opportunity to comply with § 1133.2. If the proffer be for another purpose the officer may require the party in orderly fashion to abstract the relevant data from the documents, affording other parties reasonable opportunity to examine both the documents and the abstract, and thereupon offer such abstract in evidence in exhibit form.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52713, Oct. 8, 1996]

§ 1113.12 Exhibits.

(a) *Copies.* Unless the officer otherwise directs, the original and 10 copies of each exhibit of a documentary character should be furnished for the use of the Board. The original will be delivered to the reporter, and the copy to the officer. If the hearing is before a board, a copy of the exhibit should be furnished to each member of the board, unless the board otherwise directs. Unless the officer for cause directs otherwise, a reasonable number of copies should be furnished to counsel in attendance at the hearing.

(b) *Interchange prior to hearing.* Whenever practicable, the parties should interchange copies of exhibits or other pertinent material or matter before or at the commencement of the hearing; and the Board or presiding officer may so direct.

(c) *When excluded how treated.* When exhibit has been identified, objected to, and excluded, the officer will develop whether the party offering the exhibit withdraws the offer, and if so, permit the return of the exhibit to him. If the excluded exhibit is not withdrawn, it should be given an exhibit number for identification and be incorporated in the record. Exhibit numbers once used for identification will not be duplicated thereafter.

[47 FR 49559, Nov. 1, 1982, as amended at 53 FR 19301, May 27, 1988; 61 FR 52712, Oct. 8, 1996]

§ 1113.13 Filing evidence subsequent to hearing; copies.

Except as provided in this section or as expressly may be permitted in a particular instance, the Board will not receive in evidence or consider as part of the record any documents, letters, or other writings submitted for consideration in connection with any proceeding after close of the hearing, and may return any such documents to the sender. Before the close of a hearing the officer may, at the request of a party or upon his own motion, or upon agreement of the parties, require that a party furnish additional documentary evidence that supplements the existing record, within a stated period of time. Documentary evidence to be furnished in this way will be given an exhibit number at the time of filing and the parties advised accordingly. Unless otherwise directed by the officer, the original and 10 copies of such submission should be filed with the Board.

[47 FR 49559, Nov. 1, 1982, as amended at 53 FR 19301, May 27, 1988; 61 FR 52712, Oct. 8, 1996]

§ 1113.14 Objections to rulings.

It is sufficient that a party, at the time the ruling is made or sought, make known to the officer on the record the action which he desires the officer to take or his objection to the action of the officer and his grounds for that objection. An objection not pressed in brief will be considered as waived. Where no brief is filed an objection will be considered as waived if not pressed in an appeal or reply to an appeal, if filed, or in a separate petition dealing only with that objection.

§ 1113.15 Interlocutory appeals.

Rulings of the presiding officer may be appealed prior to service of the initial decision only if:

(a) The ruling denies or terminates any person's participation,

(b) The ruling grants a request for the inspection of documents not ordinarily available for public inspection,

(c) The ruling overrules an objection based on privilege, the result of which ruling is to require the presentation of testimony or documents, or

(d) The presiding officer finds that the ruling may result in substantial irreparable harm, substantial detriment to the public interest, or undue prejudice to a party.

§ 1113.16 Oral argument before the hearing officer.

At the discretion of the hearing officer and upon reasonable notice to the parties, oral argument may be made at the close of testimony before him as an alternative to the filing of written briefs. Such argument, which should include requested findings and conclusions, will be recorded and made a part of the transcript of testimony, and will be available to the Board for consideration in deciding the case. The making of such argument will not preclude oral argument before the Board.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1113.17 Transcript of record.

(a) *Filing.* After the close of the hearing, the complete transcript of the testimony taken and the exhibits shall be part of the record in the proceeding.

(b) *Corrections.* A suggested correction in a transcript ordinarily will be considered only if offered not later than 20 days after the date each transcript is filed with the Board. A copy of the letter (original only need be filed with the Board) requesting the suggested corrections should be served upon all parties of record and with 2 copies to the official reporter.

(c) *Objections to corrections.* Parties disagreeing with corrections suggested pursuant to paragraph (b) of this section should file written objections in the same manner as suggested corrections are to be filed. Objections to suggested corrections should be filed not later than 15 days after the filing with the Board of suggested corrections. If no objections are timely filed, the Secretary of the Board shall make the suggested corrections to the transcript. If objections are timely filed, the officer who presided at the hearing shall determine the merits of the suggested correction and enter an appropriate decision in the proceeding.

(d) *No free copies.* The Board will not furnish free copies of the transcript to any party to any proceeding.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1113.18 Briefs.

(a) *When filed.* In a proceeding which has been the subject of oral hearing, and in which briefs are to be filed, that fact will be stated by the officer on the record. The officer shall fix the time for filing briefs. Simultaneous filing will normally be required, and reply briefs will not normally be permitted.

(b) *Evidence abstract.* A brief filed after a hearing may contain an abstract of the evidence relied upon by the party filing it, preferably assembled by subjects, with reference to the pages of the record, if written, or exhibit where the evidence appears. In the event the party elects not to include a separate abstract in his brief, he should give specific reference to the portions of the record, whether transcript or otherwise, relied upon in support of the respective statements of fact made throughout the brief.

(c) *Requested findings.* Each brief should include such requests for specific findings, separately stated and numbered, as the party desires the Board to make.

(d) *Exhibit reproduction.* Exhibits should not be reproduced in the brief, but may be shown, within reasonable limits, in an appendix to the brief. Analysis of such exhibits should be included in the brief where pertinent.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1113.19 Pleadings: part of the record.

Matters of fact that are verified and filed prior to oral hearing and that are not specifically denied constitute evidence and are part of the record. A witness, who would present such evidence, must be made available for cross-examination if a request is reasonably made.

This rule does not apply to protests against tariffs or schedules.

[47 FR 49559, Nov. 1, 1982, as amended at 64 FR 53268, Oct. 1, 1999]

§§ 1113.20–1113.30 [Reserved]

PART 1114—EVIDENCE; DISCOVERY

Subpart A—General Rules of Evidence

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AUTHORITY: 5 U.S.C. 559; 49 U.S.C. 721.

SOURCE: 47 FR 49562, Nov. 1, 1982, unless otherwise noted.

Subpart A—General Rules of Evidence

§ 1114.1 Admissibility.

Any evidence which is sufficiently reliable and probative to support a decision under the provisions of the Administrative Procedure Act, or which would be admissible under the general statutes of the United States, or under the rules of evidence governing proceedings in matters not involving trial by jury in the courts of the United States, will be admissible in hearings before the Board. The rules of evidence will be applied in any proceeding to the end that necessary and proper evidence will be conveniently, inexpensively, and speedily produced, while preserving the substantial rights of the parties.

[47 FR 49562, Nov. 1, 1982, as amended at 61 FR 52713, Oct. 8, 1996]

§ 1114.2 Official records.

An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by a deputy, and accompanied with a certificate that such officer has the custody. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent or by officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office. A written statement signed by an officer having the custody of an official record or by his deputy that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of this office contain no such record or entry. This section does not prevent the proof of official records or of entry or lack of entry therein or official notice thereof by a method authorized by any applicable statute or by the rules of evidence.

§ 1114.3 Admissibility of business records.

Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or

event, will be admissible as evidence thereof if it appears that it was made in the regular course of business, and that it was the regular course of business to make such memorandum or record at the time such record was made, or within a reasonable time thereafter.

§ 1114.4 Documents in Board's files.

If a party offers in evidence any matter contained in a report or other document open to public inspection in the files of the Board, such report or other document need not be made available at the hearing.

[47 FR 49562, Nov. 1, 1982, as amended at 61 FR 52713, Oct. 8, 1996]

§ 1114.5 Records in other Board proceedings.

If any portion of the record before the Board in any proceeding other than the proceeding at issue is offered in evidence, a true copy will be presented for the record.

[47 FR 49562, Nov. 1, 1982, as amended at 61 FR 52713, Oct. 8, 1996]

§ 1114.6 Official notice of corroborative material.

The Board or a hearing officer may take notice of official records, records in other Board proceedings, or other materials which are otherwise subject to specific rules governing admissibility regardless of compliance with the full technical provisions of such rules, where the admissibility of the evidence is for purposes of corroboration of testimony presented or to evaluate the credibility of testimony or allegations made in proceedings where the public interest is not otherwise adequately represented by counsel capable of fully complying with such rules.

[47 FR 49562, Nov. 1, 1982, as amended at 61 FR 52713, Oct. 8, 1996]

§ 1114.7 Exhibits.

Whenever practical the sheets of each exhibit and the lines of each sheet should be numbered. If the exhibit consists of five or more sheets, the first sheet or title-page should be confined to a brief statement of what the exhibit purports to show with reference by sheet and line to illustrative or typical examples contained therein. The exhibit should bear an identifying number, letter, or short title which will readily distinguish it from other exhibits offered by the same party. It is desirable that, whenever practicable, evidence should be condensed into tables. Whenever practicable, especially in proceedings in which it is likely that many documents will be offered, all the documents produced by a single witness should be assembled and bound together, suitably arranged and indexed, so that they may be identified and offered as one exhibit. Exhibits should not be argumentative and should be limited to statements of facts, and be relevant and material to the issue, which can better be shown in that form than by oral testimony.

[47 FR 49562, Nov. 1, 1982, as amended at 61 FR 52713, Oct. 8, 1996]

Subpart B—Discovery

§ 1114.21 Applicability; general provisions.

(a) *When discovery is available.* (1) Parties may obtain discovery under this subpart regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding other than an informal proceeding. For the purpose of this subchapter, informal proceedings are those not required to be determined on the record after hearing and include informal complaints and all proceedings assigned for initial disposition to employee boards under § 1011.6.

(2) It is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(b) *How discovery is obtained.* All discovery procedures may be used by parties without filing a petition and obtaining prior Board approval.

(c) *Protective conditions.* Upon motion by any party, by the person from whom discovery is sought, or by any person with a reasonable interest in the data, information, or material sought to be discovered and for good cause shown, any order which justice requires may be entered to protect a party or person

from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent the raising of issues untimely or inappropriate to the proceeding. Relief through a protective order may include one or more of the following:

(1) That the discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time and place;

(3) That the discovery may be had only upon such terms and conditions as the Board may impose to insure financial responsibility indemnifying the party or person against whom discovery is sought to cover the reasonable expenses incurred;

(4) That the discovery may be had only by a method other than that selected by the party seeking discovery;

(5) That certain matters not be inquired into or that the scope of discovery be limited to certain matters;

(6) That discovery be conducted with no one present except persons designated in the protective order;

(7) That a deposition after being sealed be opened only by order of the Board;

(8) That a trade secret or other confidential research development or commercial information not be disclosed or be disclosed only in a designated way; and

(9) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened only upon direction or order of the Board.

If the motion for a protective order is denied in whole or in part, the Board may, on such terms and conditions as it deems just, enter an order requiring any party or person to provide or permit discovery. A protective order under this paragraph may only be sought after, or in conjunction with, an effort by any party to obtain relief under §§ 1114.24(a), 1114.26(a), or 1114.31.

(d) *Sequence and timing of discovery.* Unless the Board upon motion, for the convenience of parties and witnesses and in the interest of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, should not operate to delay any party's discovery.

(e) *Stipulations regarding discovery.* Unless otherwise ordered, a written stipulation entered into by all the parties and filed with the Board may:

(1) Provide that depositions be taken before any person, at any time or place, upon sufficient notice, and in any manner and when so taken may be used like other depositions; and

(2) Modify the procedures provided by these rules for other methods of discovery.

(f) *Service of discovery materials.* Unless otherwise ordered by the Board, depositions, interrogatories, requests for documents, requests for admissions, and answers and responses thereto, shall be served on other counsel and parties, but shall not be filed with the Board. Any such materials, or portions thereof, should be appended to the appropriate pleading when used to support or to reply to a motion, or when used as an evidentiary submission.

[47 FR 49562, Nov. 1, 1982, as amended at 61 FR 52713, Oct. 8, 1996]

§ 1114.22 Deposition.

(a) *Purpose.* The testimony of any person, including a party, may be taken by deposition upon oral examination.

(b) *Request.* A party requesting to take a deposition and perpetuate testimony:

(1) Should notify all parties to the proceeding and the person sought to be deposed; and

(2) Should set forth the name and address of the witness, the place where, the time when, the name and office of the officer before whom, and the cause or reason why such deposition will be taken.

[61 FR 52713, Oct. 8, 1996]

§ 1114.23 Depositions; location, officer, time, fees, absence, disqualification.

(a) *Where deposition should be taken.* Unless otherwise ordered or agreed to by stipulation, depositions should be taken in the city or municipality where the deponent is located.

(b) *Officer before whom taken.* Within the United States or within a territory

or insular possession subject to the dominion of the United States, depositions should be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held. Within a foreign country, depositions may be taken before an officer or person designated by the Board or agreed upon by the parties by stipulation in writing to be filed with the Board.

(c) *Fees.* A witness whose deposition is taken pursuant to these rules and the officer taking same, unless he be employed by the Board, shall be entitled to the same fee paid for like service in the courts of the United States, which fee should be paid by the party at whose instance the deposition is taken.

(d) *Failure to attend or to serve subpoena; expenses.* (1) If the party who filed a petition for discovery fails to attend and proceed with the taking of the deposition and another party attends in person or by representative pursuant to an order of the Board granting discovery the Board may order the party who filed the petition to pay to such other party the reasonable expenses incurred by him and his representative in so attending, including reasonable attorney's fees.

(2) If the party who filed a petition for discovery fails to serve a subpoena upon the witness and the witness because of such failure does not attend, and if another party attends in person or by representative because he expects the deposition of the witness to be taken, the Board may order the party who filed the petition to pay to such other party the reasonable expenses incurred by him and his representative in so attending, including reasonable attorney's fees.

(e) *Disqualification for interest.* No deposition should be taken before a person who is a relative or employee or representative or counsel of any of the parties, or is a relative or employee of such representative or counsel or is financially interested in the proceeding.

[47 FR 49562, Nov. 1, 1982, as amended at 61 FR 52713, Oct. 8, 1996]

§ 1114.24 Depositions; procedures.

(a) *Examination.* Examination and cross-examination of witnesses should proceed as permitted at a hearing and should be limited to the subject matter specified in the order granting discovery. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, should be noted by the officer upon the deposition. Evidence objected to should be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition, and shall transmit them to the officer, who shall open the sealed envelope, propound the questions to the witness, and record the answers verbatim.

(b) *Use of depositions.* At the hearings, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated to testify on behalf of a public or private corporation, partnership, association or governmental agency (other than this Board, except in those instances where the Board itself is a party to the proceeding) which is a party, may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the presiding officer or Board finds:

(i) That the witness is dead; or

(ii) That the witness is at a greater distance than 100 miles from the place of hearing or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(iii) That the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or

(iv) That the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(v) Upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witness orally at public hearing, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts. Substitution of parties does not affect the right to use depositions previously taken.

(c) *Effect of taking or using depositions.* A party should not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this should not apply to the use of an adverse party of a deposition under paragraph (b)(2) of this section. At the hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

(d) *Motions to protect.* At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the Board may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in § 1114.21(c). If the order made terminates the examination, it should be resumed thereafter only if so ordered. Upon demand of the objecting party or deponent, the taking of the deposition should be suspended for the time necessary to make a motion for an order.

(e) *Recordation.* The officer before whom the deposition is to be taken shall observe the provisions of § 1113.6 respecting appearances and typographical specifications, shall put the witness under oath, and shall personally, or by someone acting under his direction and in his presence, record and transcribe the testimony of the witness as required by these rules.

(f) *Signing.* When the testimony is fully transcribed or otherwise recorded, the deposition should be submitted to the witness for examination and should be read to or by him unless such examination and reading are waived by the witness and the parties. Any changes in form or substance which the witness desires to make should be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The witness shall then sign the deposition, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 15 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used fully as though signed, unless, on a motion to suppress, it is found that the reasons given for refusal to sign require rejection of the deposition in whole or in part.

(g) *Attestation.* The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness, and that the officer is: (1) Not a relative, employee, representative or counsel of any of the parties, (2) not a relative or employee of such representative or counsel, and (3) not financially interested in the proceeding.

(h) *Return.* The officer shall securely seal the deposition in an envelope endorsed with sufficient information to identify the proceeding and marked ''Deposition of (here insert name of witness)'' and shall either personally deliver or promptly send the original and one copy of all exhibits by registered mail to the Secretary of the Board. A deposition to be offered in evidence must reach the Board not

later than 5 days before the date it is to be so offered.

(i) *Notice.* The party taking the deposition shall give prompt notice of its filing to all other parties.

(j) *Copies.* Upon payment of reasonable charges, the officer before whom the deposition is taken shall furnish a copy of it to any interested party or to the deponent.

[47 FR 49562, Nov. 1, 1982, as amended at 61 FR 52713, Oct. 8, 1996]

§ 1114.25 Effect of errors and irregularities in depositions.

(a) *As to disqualification of officer.* Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(b) *As to taking of deposition.* (1) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(c) *As to completion and return of deposition.* Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer under § 1114.23 and 1114.24 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

§ 1114.26 Written interrogatories to parties.

(a) *Availability; procedures for use.* Subject to the provisions of § 1114.21(b)(2), any party may serve upon any other party written interrogatories to be answered by the party served, or if the party served is a public or private corporation, partnership, association, or Governmental agency (other than this Board, except in those instances where the Board itself is a party to the proceeding), by any officer or agent, who shall furnish such information as is available to the party. Each interrogatory should be answered separately and fully in writing, unless it is objected to, in which event the reasons for objection should be stated in lieu of an answer. The answers are to be signed by the person making them and subscribed by an appropriate verification generally in the form prescribed in § 1112.9. Objections are to be signed by the representative or counsel making them. The person upon whom the interrogatories have been served shall serve a copy of the answers and objections within the time period designated by the party submitting the interrogatories, but not less than 15 days after the service thereof.

(b) *Option to produce business records.* Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such business records or from a compilation, abstract, or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies thereof, or compilation, abstracts, or summaries therefrom. If information sought is contained in computer runs, punchcards, or tapes which also contain privileged or proprietary information or information the disclosure of which is proscribed by the act, it will be sufficient response under

these rules that the person upon whom the interrogatory has been served is willing to make available to and permit an independent professional organization not interested in the proceeding and paid by the party serving the interrogatory to extract from such runs, punchcards, or tapes the information sought in the interrogatory that is not privileged or proprietary information or information the disclosure of which is proscribed by the act.

(c) *Service of interrogatories in those proceedings not requiring a petition.* No written interrogatories shall be served within 20 days prior to the date assigned for commencement of hearing or the filing of opening statements of fact and argument under the modified procedure, and when the written interrogatories are to be served in a foreign country, they shall not be served within 40 days prior to such date.

[47 FR 49562, Nov. 1, 1982, as amended at 61 FR 52713, Oct. 8, 1996]

§ 1114.27 Request for admission.

(a) *Availability; procedures for use.* Subject to the provisions of § 1114.21(b)(2), a party may serve upon any other party a written request for the admission, for purposes of the pending proceeding only, of the truth of any matters within the scope of § 1114.21 set forth in the request, including the genuineness of any documents described in the request for admission. Copies of documents should be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Each matter of which an admission is requested should be separately set forth. The matter is admitted unless, within a period designated in the request, not less than 15 days after service thereof, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or his representative or counsel. If objection is made, the reasons therefor should be stated. The answer should specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial should fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for hearing may not, on that ground alone, object to the request; he may, subject to the provisions of § 1114.31, deny the matter or set forth reasons why he cannot admit or deny it.

(b) *Effect of admission.* Any matter admitted under this rule is conclusively established unless upon petition and a showing of good cause the Board enters an order permitting withdrawal or amendment of the admission. Any admission made by a party under this rule is for the purpose of the pending proceeding only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

(c) *Service of written requests for admission in those proceedings not requiring a petition.* No requests for admission should be served within 20 days prior to the date assigned for commencement of hearing or the filing of opening statements of fact and argument under the modified procedure, and when requests for admission are to be served in a foreign country they should not be served within 40 days prior to such date.

[47 FR 49562, Nov. 1, 1982, as amended at 61 FR 52713, Oct. 8, 1996]

§ 1114.28 Depositions, requests for admission, written interrogatories, and responses thereto: inclusion in record.

At the oral hearing, or upon the submission of statements under the modified procedure, depositions, requests for admission and written interrogatories, and respective responses may be offered in evidence by the party at whose instance they were taken. If not

offered by such party, they may be offered in whole or in part by any other party. If only part of a deposition, request for admission or written interrogatory, or response thereto is offered in evidence by a party, any other party (where the matter is being heard orally) may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts. Such depositions, requests for admission and written interrogatories, and responses thereto should be admissible in evidence subject to such objections as to competency of the witness, or competency, relevancy, or materiality of the testimony as were noted at the time of their taking or are made at the time they are offered in evidence.

§ 1114.29 Supplementation of responses.

A party who has responded to a request for discovery with a response that was complete when made is under a duty to supplement his response to include information thereafter acquired in the following instances:

(a) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to:

(1) The identity and locations of persons having knowledge of discoverable matters, and

(2) The identity of each person expected to be called as an expert witness at the hearing, the subject matter on which he is expected to testify, and the substance of his testimony.

(b) A party who knows or later learns that his response is incorrect is under a duty seasonably to correct his response.

(c) A duty to supplement responses may be imposed by order, agreement of the parties, or at any time prior to the hearing or the submission of verified statements under the modified procedure through new requests for supplementation of prior responses.

§ 1114.30 Production of documents and records and entry upon land for inspection and other purposes.

(a) *Scope.* Any party may serve on any other party a request:

(1) To produce and permit the party making the request to inspect any designated documents (including writings, drawings, graphs, charts, photographs, phonograph records, tapes, and other data compilations from which information can be obtained, translated, if necessary, with or without the use of detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which are in the possession, custody, or control of the party upon whom the request is served, but if the writings or data compilations include privileged or proprietary information or information the disclosure of which is proscribed by the Act, such writings or data compilations need not be produced under this rule but may be provided pursuant to § 1114.26(b) of this part; or

(2) To permit, subject to appropriate liability releases and safety and operating considerations, entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspecting and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon.

(b) *Procedure.* Any request filed pursuant to this rule should set forth the items to be inspected either by individual item or by category and describe each item and category with reasonable particularity. The request should specify a reasonable time, place, and manner of making the inspection and performing the related acts.

[61 FR 52713, Oct. 8, 1996]

§ 1114.31 Failure to respond to discovery.

(a) *Failure to answer.* If a deponent fails to answer or gives an evasive answer or incomplete answer to a question propounded under § 1114.24(a), or a party fails to answer or gives evasive or incomplete answers to written interrogatories served pursuant to § 1114.26(a), the party seeking discovery may apply for an order compelling an answer by motion filed with the Board and served on all parties and deponents. Such motion to compel an answer must be filed with the Board and served on all parties and deponents. Such motion to compel an answer must

be filed with the Board within 10 days after the failure to obtain a responsive answer upon deposition, or within 10 days after expiration of the period allowed for submission of answers to interrogatories. On matters relating to a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

(1) *Reply to motion to compel generally.* Except in rate cases to be considered under the stand-alone cost methodology, the time for filing a reply to a motion to compel is governed by 49 CFR 1104.13.

(2) *Reply to motion to compel in stand-alone cost rate cases.* A reply to a motion to compel must be filed with the Board within 10 days thereafter in a rate case to be considered under the stand-alone cost methodology.

(3) *Conference with parties on motion to compel.* Within 5 business days after the filing of a reply to a motion to compel in a rate case to be considered under the stand-alone cost methodology, Board staff may convene a conference with the parties to discuss the dispute, attempt to narrow the issues, and gather any further information needed to render a ruling.

(4) *Ruling on motion to compel in stand-alone cost rate cases.* Within 5 business days after a conference with the parties convened pursuant to paragraph (a)(3) of this section, the Secretary will issue a summary ruling on the motion to compel discovery in a stand-alone cost rate case. If no conference is convened, the Secretary will issue this summary ruling within 10 business days after the filing of the reply to the motion to compel. Appeals of a Secretary's ruling will proceed under 49 CFR 1115.9, and the Board will attempt to rule on such appeals within 20 days after the filing of the reply to the appeal.

(b) *Failure to comply with order.* (1) If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the Board, such refusal may subject the refusing party or person to action by the Board under 49 U.S.C. 721(c) and (d) to compel appearance and compliance with the Board's order.

(2) If any party or an officer, director, managing agent, or employee of a party or person refuses to obey an order made under paragraph (a) of this section requiring him to answer designated questions, or an order made under § 1114.30 requiring him to produce any document or other thing for inspection, copying, testing, sampling, or photographing or to permit it to be done, or to permit entry upon land or other property, the Board may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which questions were asked, or the character or description of the thing or land, or the contents of the paper, or any other designated facts should be taken to be established for the purposes of the proceeding in accordance with the claim of the party obtaining the order:

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony:

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the proceedings or any party thereof.

(iv) In lieu of any of the foregoing orders, or in addition thereto, the Board shall require the party failing to obey the order or the attorney advising that party, or both, to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the Board finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) *Expenses on refusal to admit.* If a party, after being served with a request under § 1114.27 to admit the genuineness of any document or the truth of any matter of fact, serves a sworn denial thereof, and if the party requesting the admission thereafter proves the genuineness of any such document or the truth of any such matter of fact the Board may order the party making such denial to pay to such other party the reasonable expenses incurred in making that proof, including reasonable attorney's fees.

(d) *Failure of party to attend or serve answers.* If a party or a person or an officer, director, managing agent, or employee of a party or person willfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under §1114.26, after proper service of such interrogatories, the Board on motion and notice may strike out all or any part of any pleading of that party or person, or dismiss the proceeding or any part thereof. In lieu of any such order or in addition thereto, the Board shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the Board finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(e) *Expenses against United States.* Expenses and attorney's fees are not to be imposed upon the United States under this rule.

[47 FR 49562, Nov. 1, 1982, as amended at 61 FR 52713, Oct. 8, 1996; 68 FR 17313, Apr. 9, 2003; 69 FR 58366, Sept. 30, 2004]

PART 1115—APPELLATE PROCEDURES

Sec.

1115.1 Scope of rule.
1115.2 Initial decisions.
1115.3 Board actions other than initial decisions.
1115.4 Petitions to reopen administratively final actions.
1115.5 Petitions for other relief.
1115.6 Exhaustion of remedies and judicial review.
1115.7 Petitions for judicial review; mailing address.
1115.8 Petitions to review arbitration decisions.
1115.9 Interlocutory appeals.

AUTHORITY: 5 U.S.C. 559; 49 U.S.C. 721.

SOURCE: 47 FR 49568, Nov. 1, 1982, unless otherwise noted.

§1115.1 Scope of rule.

(a) These appellate procedures apply in cases where a hearing is required by law or Board action. They do not apply to informal matters such as car service, temporary authority, suspension, special permission actions, or to other matters of an interlocutory nature. Abandonments and discontinuance proceedings instituted under 49 U.S.C. 10903 are governed by separate appellate procedures exclusive to those proceedings. (See 49 CFR part 1152)

(b) Requests for appellate relief may relate either to initial decisions or to Board actions other than initial decisions. For each category, this rule describes the types of appeal permitted, the requirements to be observed in filing an appeal, provisions for stay of the action, and the status of the action in the absence of a stay.

(c) Appeals from the decisions of employees acting under authority delegated to them by the Chairman of the Board pursuant to §1011.6 will be acted upon by the entire Board. Appeals must be filed within 10 days of the date of the action taken by the employee, and responses to appeals must be filed within 10 days thereafter. Such appeals are not favored; they will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice.

[47 FR 49568, Nov. 1, 1982, as amended at 61 FR 52714, Oct. 8, 1996; 69 FR 12806, Mar. 18, 2004]

§1115.2 Initial decisions.

This category includes the initial decision of an administrative law judge, individual Board Member, or employee board.

(a) An appeal of right is permitted.

(b) Appeals must be based on one or more of the following grounds:

(1) That a necessary finding of fact is omitted, erroneous, or unsupported by substantial evidence of record;

(2) That a necessary legal conclusion, or finding is contrary to law, Board precedent, or policy;

(3) That an important question of law, policy, or discretion is involved which is without governing precedent;

(4) That prejudicial procedural error has occurred.

(c) Appeals must detail the assailed findings with supporting citations to the record and authorities.

(d) Appeals and replies shall not exceed 30 pages in length, including argument, and appendices or other attachments, but excluding a table of cases and an index of subject matter.

(e) Appeals must be filed within 20 days after the service date of the decision or within any further period (not to exceed 20 days) the Board may authorize. Replies must be filed within 20 days of the date the appeal is filed.

(f) The timely filing of an appeal to an initial decision will stay the effect of the action pending determination of the appeal.

(g) If an appeal of an initial decision is not timely filed or the Board does not stay the effectiveness on its own motion, the order set forth in the initial decision shall become the action of the Board and be effective at the expiration of the time for filing, unless otherwise provided.

[47 FR 49568, Nov. 1, 1982, as amended at 54 FR 19894, May 9, 1989; 61 FR 52714, Oct. 8, 1996]

§ 1115.3 Board actions other than initial decisions.

(a) A discretionary appeal of an entire Board action is permitted. Such an appeal should be designated a ''petition for reconsideration.''

(b) The petition will be granted only upon a showing of one or more of the following points:

(1) The prior action will be affected materially because of new evidence or changed circumstances.

(2) The prior action involves material error.

(c) The petition must state in detail the nature of and reasons for the relief requested. When, in a petition filed under this section, a party seeks an opportunity to introduce evidence, the evidence must be stated briefly and must not appear to be cumulative, and an explanation must be given why it was not previously adduced.

(d) The petition and any reply must not exceed 20 pages in length. A separate preface and summary of argument, not exceeding 3 pages, may accompany petitions and replies and must accompany those that exceed 10 pages in length.

(e) Petitions must be filed within 20 days after the service of the action or within any further period (not to exceed 20 days) as the Board may authorize.

(f) The filing of a petition will not automatically stay the effect of a prior action, but the Board may stay the effect of the action on its own motion or on petition. A petition to stay may be filed in advance of the petition for reconsideration and shall be filed within 10 days of service of the action. No reply need be filed. However, if a party elects to file a reply, it must reach the Board no later than 16 days after service of the action. In all proceedings, the action, if not stayed, will become effective 30 days after it is served, unless the Board provides for the action to become effective at a different date. On the day the action is served parties may initiate judicial review.

[61 FR 52714, Oct. 8, 1996, as amended at 61 FR 58491, Nov. 15, 1996]

§ 1115.4 Petitions to reopen administratively final actions.

A person at any time may file a petition to reopen any administratively final action of the Board pursuant to the requirements of § 1115.3 (c) and (d) of this part. A petition to reopen must state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances and must include a request that the Board make such a determination.

[61 FR 52714, Oct. 8, 1996]

§ 1115.5 Petitions for other relief.

(a) A party may petition for a stay of an action pending a request for judicial review, for extension of the compliance date, or for modification of the date the terms of the decision take effect. The reasons for the desired relief must be stated in the petition, and the petition must be filed not less than 10 days prior to the date the terms of the action take effect. No reply need be filed. If a party elects to file a reply, the reply must reach the Board no later than 5 days after the petition is filed.

(b) When the terms of a Board action take effect on less than 15 days' notice, a petition for stay pending a request for judicial review must be filed prior to the institution of court action and

as close to the service date as practicable. No reply need be filed. Where time permits, a party may elect to file a reply.

(c) A petition or reply must not exceed 10 pages in length.

[47 FR 49568, Nov. 1, 1982, as amended at 61 FR 52714, Oct. 8, 1996]

§ 1115.6 Exhaustion of remedies and judicial review.

These rules do not relieve the requirement that a party exhaust its administrative remedies before going to court. Any action appealable as of right must be timely appealed. If an appeal, discretionary appeal, or petition seeking reopening is filed under § 1115.2 or § 1115.3 of this part, before or after a petition seeking judicial review is filed with the courts, the Board will act upon the appeal or petition after advising the court of its pendency unless action might interfere with the court's jurisdiction.

[47 FR 49568, Nov. 1, 1982, as amended at 61 FR 52714, Oct. 8, 1996]

§ 1115.7 Petitions for judicial review; mailing address.

Petitions for judicial review of final agency orders may be served on the Board pursuant to 28 U.S.C. 2112(a) and be addressed to ''General Counsel, Office of the General Counsel, Surface Transportation Board, Washington, DC 20423.''

[53 FR 20854, June 7, 1988, as amended at 61 FR 52714, Oct. 8, 1996]

§ 1115.8 Petitions to review arbitration decisions.

An appeal of right is permitted. The appeal must be filed within 20 days of a final arbitration decision, unless a later date is authorized by the Board, and is subject to the page limitations of § 1115.2(d). Standards for Board review of arbitration decisions are set forth in *Chicago and North Western Transp. Co.—Abandonment,* 3 I.C.C.2d 729 (1987), *aff'd sub nom. International Brotherhood of Electrical Workers* v. *STB,* No. 87–1629 (D.C. Cir. November 25, 1988). The timely filing of a petition will not automatically stay the effect of the arbitration decision. A stay may be requested under § 1115.5.

[54 FR 19894, May 9, 1989, as amended at 61 FR 52714, Oct. 8, 1996]

§ 1115.9 Interlocutory appeals.

(a) Rulings of Board employees, including administrative law judges, may be appealed prior to service of the initial decision only if:

(1) The ruling denies or terminates any person's participation;

(2) The ruling grants a request for the inspection of documents not ordinarily available for public inspection;

(3) The ruling overrules an objection based on privilege, the result of which ruling is to require the presentation of testimony or documents; or

(4) The ruling may result in substantial irreparable harm, substantial detriment to the public interest, or undue prejudice to a party.

(b) In stand-alone cost complaints, any interlocutory appeal of a ruling shall be filed with the Board within three (3) business days of the ruling. Replies to any interlocutory appeal shall be filed with the Board within three (3) business days after the filing of any such appeal. In all other cases, interlocutory appeals shall be filed with the Board within seven (7) calendar days of the ruling and replies to interlocutory appeals shall be filed with Board within seven (7) calendar days after the filing of any such appeal as computed under 49 CFR 1104.7.

[61 FR 52714, Oct. 8, 1996, as amended at 61 FR 58491, Nov. 15, 1996]

PART 1116—ORAL ARGUMENT BEFORE THE BOARD

Sec.
1116.1 Requests.
1116.2 Manner of presentation.

AUTHORITY: 49 U.S.C. 721.

SOURCE: 47 FR 49569, Nov. 1, 1982, unless otherwise noted.

§ 1116.1 Requests.

(a) *Addressee.* Requests for oral argument should be addressed to the Secretary, Surface Transportation Board, Washington, DC 20423.

(b) *Who may request?* Any party may submit a written request for oral argument and state the reasons for the request. No replies from other parties to the request shall be made.

(c) *When to file a request.* Requests for oral argument should be filed within 20 days after the date of service of the decision, order, or requirement being appealed, unless the Board by order prescribes a different time period.

(d) *Granting of request.* The Board will rule upon requests by decision, and the granting of requests is entirely at the discretion of the Board.

§ 1116.2 Manner of presentation.

Proponents of a rule or order will be heard first, and opponents will be heard second. One counsel only will usually be heard for each of the opposing interests, unless additional presentations are specifically authorized.

PART 1117—PETITIONS (FOR RELIEF) NOT OTHERWISE COVERED

AUTHORITY: 49 U.S.C. 721.

§ 1117.1 Petitions.

A party seeking relief not provided for in any other rule may file a petition for such relief. The petition should contain (a) a short, plain statement of the grounds upon which the Board's jurisdiction is based; (b) a short plain statement of the claim showing that the petitioner is entitled to relief; and (c) a demand for the relief the petitioner believes is appropriate.

[47 FR 49569, Nov. 1, 1982]

PART 1118—PROCEDURES IN INFORMAL PROCEEDINGS BEFORE EMPLOYEE BOARDS

Sec.
1118.1 Scope.
1118.2 Proceedings to be informal.
1118.3 Appeals.

AUTHORITY: 49 CFR 721.

SOURCE: 62 FR 50884, Sept. 29, 1997, unless otherwise noted.

§ 1118.1 Scope.

The rules in this part govern proceedings before employee boards.

§ 1118.2 Proceedings to be informal.

The proceedings in all matters governed by this part will be informal. No transcript of these proceedings will be made. Subpoenas will not be issued and, except when applications, petitions, or statements are required to be attested, oaths will not be administered.

§ 1118.3 Appeals.

(a) *Standing to appeal.* Appeals of the decisions of the employee boards subject to this part and replies to appeals may be filed by any person.

(b) *Number of copies.* The original and 10 copies of each pleading or paper permitted or required to be filed under this section should be furnished for the use of the Board.

(c) *Time for filing.* Appeals in proceedings governed by this part must be filed within 20 days after the date of service of the decision.

(d) *Where filed.* Appeals and replies to appeals of decisions issued by employee boards must be filed with the Secretary, Surface Transportation Board, 1925 K St., NW., Washington, DC 20423–0001.

(e) *Decisions on appeal.* An appeal from an employee board's initial decision in a matter subject to this part will be reviewed by the employee board, which may elect to modify its decision in light of new facts or arguments presented on appeal. If the employee board elects not to modify its prior decision, the appeal will be forwarded to the entire Board for determination. If a modified decision is issued by the employee board, a further appeal lies under this part.

PART 1119—COMPLIANCE WITH BOARD DECISIONS

AUTHORITY: 49 U.S.C. 721.

§ 1119.1 Compliance.

A defendant or respondent directed by the Board to do or desist from doing a particular thing must notify the Board on or before the compliance date specified in the decision of the manner of compliance. Notification should be by verified affidavit showing simultaneous service upon all parties to the

proceeding. Where a change in rates or schedules is directed, notification specifying the Surface Transportation Board tariff or schedule numbers must be given in addition to the filing of proper tariffs or schedules.

[47 FR 49570, Nov. 1, 1982]

PART 1120—USE OF 1977–1978 STUDY OF MOTOR CARRIER PLATFORM HANDLING FACTORS

Sec.
1120.1 Scope.
1120.2 Purpose.

AUTHORITY: 49 U.S.C. 721, 13701, 13703.

§ 1120.1 Scope.

The provisions of this part apply only to Class I and II motor common carriers of general freight subject to accounting instruction number 27 of the Board's Uniform System of Accounts (49 CFR Part 1207).

[47 FR 36184, Aug. 19, 1982. Redesignated at 47 FR 49570, Nov. 1, 1982]

§ 1120.2 Purpose.

In any proceeding requiring the development of platform handling times for distribution of platform expense, carriers may use the results of the national weight formula contained in the Board's study, *entitled 1977–1978 Motor Carrier Platform Study,* Statement 2S1–79.

[47 FR 36184, Aug. 19, 1982. Redesignated at 47 FR 49570, Nov. 1, 1982]

PART 1121—RAIL EXEMPTION PROCEDURES

Sec.
1121.1 Scope.
1121.2 Discovery.
1121.3 Content.
1121.4 Procedures.

AUTHORITY: 49 U.S.C. 10502 and 10704.

SOURCE: 61 FR 52714, Oct. 8, 1996, unless otherwise noted.

§ 1121.1 Scope.

These procedures generally govern petitions filed under 49 U.S.C. 10502 to exempt a transaction or service from 49 U.S.C. subtitle IV, or any provision of 49 U.S.C. subtitle IV, or to revoke an exemption previously granted. These procedures also apply to notices of exemption.

§ 1121.2 Discovery.

Discovery shall follow the procedures set forth at 49 CFR part 1114, subpart B. Discovery may begin upon the filing of the petition for exemption or petition for revocation of an exemption. In petitions to revoke an exemption, a party must indicate in the petition whether it is seeking discovery. If it is, the party must file its discovery requests at the same time it files its petition to revoke. Discovery shall be completed 30 days after the petition to revoke is filed. The party seeking discovery may supplement its petition to revoke 45 days after the petition is filed. Replies to the supplemental petition are due 15 days after the supplemental petition is filed.

§ 1121.3 Content.

(a) A party filing a petition for exemption shall provide its case-in-chief, along with its supporting evidence, workpapers, and related documents at the time it files its petition.

(b) A petition must comply with environmental or historic reporting and notice requirements of 49 CFR part 1105, if applicable.

(c) A party seeking revocation of an exemption or a notice of exemption shall provide all of its supporting information at the time it files its petition. Information later obtained through discovery can be submitted in a supplemental petition pursuant to 49 CFR 1121.2.

§ 1121.4 Procedures.

(a) Exemption proceedings are informal, and public comments are generally not sought during consideration of exemption petition proposals, except as provided in § 1121.4(c). However, the Board may consider during its deliberation any public comments filed in response to a petition for exemption.

(b) If the Board determines that the criteria in 49 U.S.C. 10502 are met for the proposed exemption, it will issue the exemption and publish a notice of exemption in the FEDERAL REGISTER.

(c)(1) If the impact of the proposed individual exemption cannot be

ascertained from the information contained in the petition or accompanying submissions, or significant adverse impacts might occur if the proposed exemption were granted, the Board may, in its discretion:

(i) Direct that additional information be filed; or

(ii) Publish a notice in the FEDERAL REGISTER requesting public comments.

(2) If a petition for a new class exemption is filed, the Board will publish a notice in the FEDERAL REGISTER requesting public comments before granting the class exemption. This requirement does not pertain to individual notices of exemption filed under existing class exemptions. The Board may deny a request for a class exemption without seeking public comments.

(d) Exemption petitions containing proposals that are directly related to and concurrently filed with a primary application will be considered along with that primary application.

(e) Unless otherwise specified in the decision, an exemption generally will be effective 30 days from the service date of the decision granting the exemption. Unless otherwise provided in the decision, petitions to stay must be filed within 10 days of the service date, and petitions for reconsideration or petitions to reopen under 49 CFR part 1115 or 49 CFR 1152.25(e) must be filed within 20 days of the service date.

(f) Petitions to revoke an exemption or the notice of exemption may be filed at any time. The person seeking revocation has the burden of showing that the revocation criteria of 49 U.S.C. 10502(d) have been met.

(g) In abandonment exemptions, petitions to revoke in part to impose public use conditions under 49 CFR 1152.28, or to invoke the Trails Act, 16 U.S.C. 1247(d), may be filed at any time prior to the consummation of the abandonment, except that public use conditions may not prohibit disposal of the properties for any more than the statutory limit of 180 days after the effective date of the decision granting the exemption.

(h) In transactions for the acquisition or operation of rail lines by Class II rail carriers under 49 U.S.C. 10902, the exemption may not become effective until 60 days after applicant certifies to the Board that it has posted at the workplace of the employees on the affected line(s) and served a notice of the transaction on the national offices of the labor unions with employees on the affected line(s), setting forth the types and numbers of jobs expected to be available, the terms of employment and principles of employee selection, and the lines that are to be transferred.

[61 FR 52714, Oct. 8, 1996, as amended at 61 FR 58491, Nov. 15, 1996; 62 FR 47583, Sept. 10, 1997; 64 FR 46595, Aug. 26, 1999]

PARTS 1122–1129 [RESERVED]

Parts 1130–1149—Rate Procedures

PART 1130—INFORMAL COMPLAINTS

Sec.
1130.1 When no damages sought.
1130.2 When damages sought.

AUTHORITY: 49 U.S.C. 721, 13301(f), 14709.

§ 1130.1 When no damages sought.

(a) *Form and content; copies.* Informal complaint may be by letter or other writing and will be serially numbered as filed. The complaint must contain the essential elements of a formal complaint as specified at 49 CFR 1111.1(a) and may embrace supporting papers. The original and one copy must be filed with the Board.

(b) *Correspondence handling.* When an informal complaint appears susceptible of informal adjustment, the Board will send a copy or statement of the complaint to each subject of the complaint in an attempt to have it satisfied by correspondence, thereby avoiding the filing of a formal complaint.

(c) *Discontinuance of informal proceeding.* The filing of an informal complaint does not preclude complainant from filing a formal complaint. If a formal complaint is filed, the informal proceeding will be discontinued.

[47 FR 49570, Nov. 1, 1982, as amended at 48 FR 44827, Sept. 30, 1983; 69 FR 12806, Mar. 18, 2004]

§ 1130.2 When damages sought.

(a) *Actual filing required.* Notification to the Board that an informal complaint may or will be filed later seeking damages is not a filing within the meaning of the statute.

(b) *Content.* An informal complaint seeking damages must be filed within the statutory period, and should identify with reasonable definiteness the involved shipments or transportation services. The complaint should include:

(1) A statement that complainant seeks to recover damages;

(2) The names of each individual seeking damages;

(3) The names and addresses of defendants against which claim is made;

(4) The commodities, the rate applied, the date on which the charges were paid, the names of the parties paying the charges, and, if different, the names of the parties bearing the charges;

(5) The period of time within which or the specific dates upon which the shipments were made, and the dates when they were delivered or tendered for delivery;

(6) The specific origin and destination points or, where they are numerous, the territorial or rate group of the origin and destination points and, if known, the routes of movement; and

(7) The nature and amount of the injury sustained by each claimant.

(c) *Statement of prior claim.* A complaint filed under paragraph (b) of this section containing a claim which has been the subject of a previous informal or formal complaint must specifically refer to the previous complaint.

(d) *Copies.* The original of an informal complaint seeking damages must be accompanied by a sufficient number of copies to enable the Board to send one to each defendant named.

(e) [Reserved]

(f) *Notification to the parties; six months' rule.* If an informal complaint seeking damages (other than a contested tariff reconciliation petition) cannot be disposed of informally or is denied or withdrawn by complainant, the parties affected will be so notified in writing by the Board. Contested tariff reconciliation petitions either will be granted or denied by the entry of a decision. Unless within six months after the date on which a notice is mailed or a decision is served, a party either files a formal complaint or resubmits its informal complaint on an additional-fact basis, the matter in the complaint or petition will not be reconsidered. The claim will be considered abandoned and no complaint seeking damages on the same cause of action will be accepted unless filed within the statutory period. Any filing or resubmission satisfying the six months' requirement will be considered filed as of the date of the original filing and must specifically refer to that date and to the Board's file number. An original and 10 copies of a petition for reconsideration should be filed.

(g) *Tariff reconciliation proceedings for motor common carriers*—(1) *Petitions to waive collection or permit payment.* Subject to Board review and approval, motor common carriers (other than household goods carriers) and shippers may resolve, by mutual consent, overcharge and undercharge claims under the provisions of 49 U.S.C. 14709. Petitions for appropriate authority may be filed by either the carrier, shipper or consignee on the Board's tariff reconciliation docket by submitting a letter of intent to depart from the filed rate. The petitions will be deemed the equivalent of an informal complaint and answer admitting the matters stated in the petition. Petitions shall be sent to the Office of Compliance and Enforcement, Surface Transportation Board, Washington, DC 20423. The petitions shall contain, at a minimum, the following information:

(i) The name(s) and address(es) of the payer(s) of the freight charges;

(ii) The name(s) of the carrier(s) involved in the traffic;

(iii) An estimate of the amount(s) involved;

(iv) The time period when the shipment(s) involved were delivered or tendered for delivery;

(v) A general description of the point(s) of origin and destination of the shipment(s);

(vi) A general description of the commodity(ies) transported;

(vii) A statement certifying that the carrier(s) and shipper(s) participating in the shipment(s) or the payer(s) of the freight charges concur(s) with the

intent to depart from the filed rate; and

(viii) A brief explanation of the incorrect tariff provision(s) or billing error(s) causing the request to depart from the filed rate.

(2) *Public notice and protest.* Tariff reconciliation petitions (letters of intent) shall be served on all parties named in the petition by the party that files the petition and will be made available by the Board for public inspection in the Office of Compliance and Enforcement Public File, Surface Transportation Board, Washington, DC 20423. Any interested person may protest the granting of a petition by filing a letter of objection with the Office of Compliance and Enforcement within 30 days of Board receipt of the petition. Letters of objection shall identify the tariff reconciliation proceeding, shall clearly state the reasons for the objection, and shall certify that a copy of the letter of objection has been served on all parties named in the petition. The Board may initiate an investigation of the petition on its own motion.

(3) *Uncontested petitions.* If a petition is not contested, and if the Board does not initiate an investigation of the petition on its own motion, approval is deemed granted without further action by the Board, effective 45 days after Board receipt of the petition.

(4) *Contested petitions.* If a petition is contested or the Board initiates an investigation of the petition on its own motion, 15 days will be allowed for reply. The 15-day period will commence on the date of service of the objections or, if the Board initiates an investigation on its own motion, on the date of service of the decision initiating the investigation. After the period for reply has expired, the Board will issue a decision approving or disapproving the petition, or requesting further submissions from the parties, and then will issue a decision based on the further submissions.

[47 FR 49570, Nov. 1, 1982, as amended at 50 FR 15901, Apr. 23, 1985; 51 FR 5713, Feb. 18, 1986; 52 FR 26479, July 15, 1987; 53 FR 19301, May 27, 1988; 60 FR 2544, Jan. 10, 1995; 62 FR 50884, Sept. 29, 1997]

PART 1132—PROTESTS REQUESTING SUSPENSION AND INVESTIGATION OF COLLECTIVE RATEMAKING ACTIONS

Sec.

1132.1 Protests against collective ratemaking actions.
1132.2 Procedures in certain suspension matters.

AUTHORITY: 49 U.S.C. 721, 13301(f), and 13703.

SOURCE: 62 FR 50885, Sept. 29, 1997, unless otherwise noted.

§ 1132.1 Protests against collective ratemaking actions.

(a) *Content.* The protested collective ratemaking action sought to be suspended, whether or not contained in a tariff filed with the Board, should be identified by making reference to: The name of the publishing carrier or collective ratemaking organization; the identification of the tariff, if applicable, or the identification of the collective ratemaking action publication if it is not contained in a tariff filed with the Board; the specific items or particular provisions protested; and the effective date of the tariff or other collective ratemaking action publication. Reference should also be made to the tariff or collective ratemaking action, and the specific provisions proposed to be superseded. The protest should state the grounds in support thereof, and indicate in what respect the protested collective ratemaking action is considered to be unlawful. Such protests will be considered as addressed to the discretion of the Board. Should a protestant desire to proceed further against a collective ratemaking action which is not suspended, or which has been suspended and the suspension vacated, a separate later formal complaint or petition should be filed.

(b) *When filed.* Protests against, and requests for suspension of, collective ratemaking actions will not be considered unless made in writing and filed with the Board at Washington, DC. If the protestant desires action by the Board before the effective date of the collective action, protests and requests for suspension shall reach the Board at least 12 days (except as provided in paragraph (c) of this section) before such effective date. If the protested

collective ratemaking action is already in effect, or if the protestant does not desire action before its effective date, protests and requests for suspension can be filed at any time.

(c) *Motor carrier tariff bureau filings.* When motor common carrier tariff bureaus take collective actions subject to the special procedures adopted in Ex Parte No. MC–82, *New Procedures in Motor Carrier Rev. Proc.* 340 I.C.C. 1 (1971), and set forth at 49 CFR part 1139, protests must reach the Board at least 22 days before the effective dates of those actions if protestants desire action by the Board before such effective dates. All statements should be served by express mail or an equivalent expedited delivery service upon any party undertaking to bear the cost. Written request for this expedited service must be made no less than 5 days before the statement is due to be filed with the Board.

(d) *Copies; service.* In connection with proceedings involving proposals subject to the special procedures in Ex Parte No. MC–82, *New Procedures in Motor Carrier Rev. Proc.* 339 I.C.C. 324, and set forth at 49 CFR part 1139, an original and 10 copies of every protest or reply filed under this section should be furnished for the use of the Board. Except as provided for proposals subject to the special procedures in Ex Parte No. MC–82, the original and 10 copies of each protest, or of each reply filed under this section, must be filed with the Board, and one copy simultaneously must be served upon the publishing carrier or collective ratemaking organization, and upon other persons known by protestant to be interested. These pleadings should be directed to the attention of the Secretary, Surface Transportation Board.

(e) *Reply to protest.* A reply to a protest filed at least 12 days before the effective date of proposed collective action provisions must reach the Board not later than the fourth working day prior to the scheduled effective date of the protested provisions unless otherwise provided. Replies to protests against motor carrier rate bureau proposals subject to Ex Parte No. MC–82 procedures, to be assured of consideration, must reach the Board no later than 14 days before the scheduled effective date of the protested provisions.

§ 1132.2 Procedures in certain suspension matters.

(a) A petition for reconsideration may be filed by any interested person within 20 days after the date of service of a Board decision which results in an order for:

(1) Investigation and suspension of collective ratemaking actions, or

(2) Investigation (without suspension) of collective ratemaking actions.

(b) Any interested person may file and serve a reply to any petition for reconsideration permitted under paragraph (a) of this section within 20 days after the filing of such petition with the Board, but if the facts stated in any such petition disclose a need for accelerated action, such action may be taken before expiration of the time allowed for reply. In all other respects, such petitions and replies thereto will be governed by the rules of general applicability of the Rules of Practice.

PART 1133—RECOVERY OF DAMAGES

Sec.
1133.1 Freight bill filing requirement under modified procedure.
1133.2 Statement of claimed damages based on Board findings.

AUTHORITY: 49 U.S.C. 721.

SOURCE: 47 FR 49575, Nov. 1, 1982, unless otherwise noted.

§ 1133.1 Freight bill filing requirement under modified procedure.

If, under modified procedure (for general rules governing modified procedure, see part 1112), an award of damages is sought, complainant should submit the paid freight bills or properly certified copies with its statement when there are not more than 10 shipments; if more than 10 shipments are involved, complainant should retain the documents.

§ 1133.2 Statement of claimed damages based on Board findings.

(a) When the Board finds that damages are due, but that the amount cannot be ascertained upon the record before it, the complainant should immediately prepare a statement showing details of the shipments on which damages are claimed, in accordance with the following form:

Claim of _____ under decision of the Surface Transportation Board in Docket No. _____.

_____ Date of shipment.

_____ Date of delivery or tender of delivery.

_____ Date charges were paid.

_____ Car (or vessel) initials.

_____ Car (or voyage) number.

_____ Origin.

_____ Destination.

_____ Route.

_____ Commodity.

_____ Weight.

_____ Rate.

_____ Amount.

_____ Rate.

_____ Amount.

_____ Reparation on basis of Board's decision.

_____ Charges paid by.[1]

Claimant hereby certifies that this statement includes claims only on shipments covered by the findings in the docket above described and contains no claim for reparation previously filed with the Board by or on behalf of claimant or, so far as claimant knows, by or on behalf of any person, in any other proceedings, except as follows: (Here indicate any exceptions, and explanation thereof).

_____
(Claimant)

By _____
(Practitioner)

_____
(Address)

_____
(Date)

Total amount of reparation $_____. The undersigned hereby certifies that this statement has been checked against the records of this company and found correct.

Date _____ Concurred[2] in: _____ Company _____ Company, Defendant Collecting Carrier, Defendant[3]. _____

By _____, Auditor. By _____, Auditor.

(b) The statement should not include any shipment not covered by the Board's findings, or any shipment on which complaint was not filed with the Board within the statutory period. The filing of a statement will not stop the running of the statute of limitations as to shipments not covered by complaint or supplemental complaint. If the shipments moved over more than one route, a separate statement should be prepared for each route, and separately numbered, except that shipments as to which the collecting carrier is in each instance the same may be listed in a single statement if grouped according to routes. The statement, together with the paid freight bills on the shipments, or true copies thereof, should then be forwarded to the carrier which collected the charges, for verification and certification as to its accuracy. If the statement is not forwarded immediately to the collecting carrier for certification, a letter request from defendants that forwarding be expedited will be considered to the end that steps be taken to have the statement forwarded immediately. All discrepancies, duplications, or other errors in the statements should be adjusted by the parties and corrected agreed statements submitted to the Board. The certificate must be signed in ink by a general accounting officer of the carrier and should cover all of the information shown in the statement. If the carrier which collected the charges is not a defendant in the case, its certificate must be concurred in by like signature on behalf of a carrier defendant. Statements so prepared and certified shall be filed with the Board whereupon it will consider entry of a decision awarding damages.

[47 FR 49575, Nov. 1, 1982, as amended at 64 FR 53268, Oct. 1, 1999]

[1] Here insert name of person paying charges in the first instance, and state whether as consignor, consignee, or in what other capacity.

[2] For concurring certificate in case collecting carrier is not a defendant.

[3] If not a defendant, strike out the word ''defendant.''

PART 1135—RAILROAD COST RECOVERY PROCEDURES

AUTHORITY: : 5 U.S.C. 553 and 49 U.S.C. 721 and 10708.

§ 1135.1 Quarterly adjustment.

To enable the Board to publish the rail cost adjustment factor (RCAF) as required by 49 U.S.C. 10708, the Association of American Railroads (AAR) shall calculate and file with the Board by the fifth day of December, March, June and September of each year its forecast for the next calendar quarter of the all-inclusive index of railroad costs and calculate and file the RCAF unadjusted for changes in railroad productivity as prescribed in *Railroad Cost Recovery Procedures*, 1 I.C.C.2d 207 (1984), and any subsequent amendments thereto. In addition, the AAR shall calculate the productivity-adjusted RCAF as prescribed in *Railroad Cost Recovery Procedures*, 5 I.C.C.2d 434 (1989), and any subsequent amendments thereto. The AAR shall submit workpapers detailing its calculations. The Board will review and verify the AAR submissions and make its RCAF publication by the twentieth day of December, March, June and September of each year.

[67 FR 55166, Aug. 28, 2002]

PART 1139—PROCEDURES IN MOTOR CARRIER REVENUE PROCEEDINGS

Subpart A—Common Carriers of General Commodities

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1139.1 Application.
1139.2 Traffic study.
1139.3 Cost study.
1139.4 Revenue need.
1139.5 Affiliate data.
1139.6 Official notice.
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1139.8 Availability of underlying data.
APPENDIX I TO SUBPART A—REVENUE NEED AND ALLOCATION TO TRAFFIC AT ISSUE
APPENDIX II TO SUBPART A—FINANCIAL RATIOS (TRAFFIC AND COST STUDY CARRIER

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1139.20 Application.
1139.21 Study carriers.
1139.22 Revenue data for study carriers.
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SCHEDULE A TO SUBPART B—CLASS I PARTICIPATING CARRIERS' REVENUE DATA
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SCHEDULE F TO SUBPART B—AFFILIATE REVENUE DATA FOR SERVICES RENDERED
SCHEDULE G TO SUBPART B—SELECTED STATISTICAL DATA
APPENDIX I TO SUBPART B

AUTHORITY: 49 U.S.C. 721, 13703.

Subpart A—Common Carriers of General Commodities

SOURCE: 47 FR 49577, Nov. 1, 1982, unless otherwise noted.

§ 1139.1 Application.

(a) Upon the filing by the tariff publishing agencies named hereinafter on behalf of their motor common carrier members, or by such other agencies as the Board may by order otherwise designate, of agency tariff schedules which contain (1) proposed general increases in rates or charges on general freight where such proposal would result in an increase of $1 million or more in the annual operating revenues on the tariff affected by the proposal, or (2) a proposed general adjustment with the objective of restructuring the rates on a wide range of traffic, involving both increases and reductions in rates and charges, where such proposal would result in a net increase of $1 million or more in annual operating revenues, the motor common carriers of general freight on whose behalf such schedules are filed shall, concurrently with the filing of those tariff schedules, file and serve, as provided hereinafter, a verified statement presenting and comprising the entire evidential case which is relied upon to support the proposed general increase or rate restructuring. Carriers thus required to submit their evidence when they file their schedules are hereby notified that special permission to file those schedules shall be conditioned upon the publishing of an effective date at least 45 days later

than the date of filing, to enable proper evaluation of the evidence presented. Data to be submitted in accordance with §§1139.2 through 1139.5 of this part represent the minimum data required to be filed and served, and in no way shall be considered as limiting the type of evidence that may be presented at the time of filing of the schedules. If a formal proceeding is instituted, the carriers are not precluded from updating the evidence submitted at the time of filing of the schedules to reflect the contemporary situation.

(b) The motor common carriers of general freight which are subject to the provisions of this section are those which are members of the following tariff publishing agencies:

Central and Southern Motor Freight Tariff Association, Inc.
Central States Motor Freight Bureau, Inc.
The Eastern Central Motor Carriers Association, Inc.
Middle Atlantic Conference
Middlewest Motor Freight Bureau
The New England Motor Rate Bureau, Inc.
Pacific Inland Tariff Bureau, Inc.
Rocky Mountain Motor Tariff Bureau, Inc.
Southern Motor Carriers Rate Conference

(c) Upon the filing of tariff schedules other than those described hereinabove, the carriers or their tariff publishing agencies shall be required to comply with such procedures as the Board may direct in the event an investigation is instituted. In any proceeding involving a proposed rate restructuring which would produce additional net revenue of less than $1 million the carriers will be required to submit only the data sought in §§1139.2 and 1139.3. Nothing stated in this part shall relieve the carriers of their burden of proof imposed under the Interstate Commerce Act.

§1139.2 Traffic study.

(a) The respondents shall submit a traffic study for the most current 12-month calendar year available, which shall be referred to as the ''base-calendar year—actual.'' This year shall be the calendar year that has ended at least 7 months prior to the published effective date of the tariff schedules. If the effective date is less than 7 months following the end of the preceding calendar year, than the second preceding calendar year shall be considered at the ''base-calendar year—actual.'' The study shall include a probability sampling of the actual traffic handled during identical time periods for each study carrier.

(b) The study carriers shall consist of those carriers subject to the requirements for allocation of expenses between line-haul and pickup and delivery services, as provided in Part 1207 of this chapter, Instructions 27 and 9002, which participate in one of the motor carrier industry's Continuous Traffic Studies, and which derive either $1 million or more in annual operating revenues from this issue traffic or 1 percent or more of the total annual operating revenues of all carriers from the issue traffic. A list of such carriers and the appropriate revenue data shall be submitted to corroborate the selection of the study carriers. ''Issue traffic'' consists of those shipments on which the freight rates or charges would be affected by the rate proposal.

(c) Respondents shall take a sample of the traffic handled by the study carriers according to acceptable standards of probability sampling principles and practices, and shall explain and evaluate the probability sample from the standpoint of: Purpose, sample design (including explanation of estimation procedure and disclosure of sampling errors for derived characteristics), quality control aspects involved in processing and tabulating data and any statistical analysis performed on the sampled data.[4]

(d) For cost and revenue purposes, the ''carried'' tariff basis shall be used. ''Carried'' tariff means the issue traffic handled solely by the study carriers, either single-line or interline. Estimates of current revenues applicable to the issue traffic should reflect all rates and charges in effect no later than 45 days prior to the date of tariff filing.

§1139.3 Cost study.

(a) The respondents shall submit a cost study. Highway Form B may be

[4] Although not adopted by the Board, attention is called to a staff report, ''Guidelines for the Presentation of the Results of Sample Studies,'' February 1, 1971, available from the Superintendent of Documents.

used for this purpose. Service unit-costs shall be developed for each individual study carrier, adjusted by size of shipment and length of haul, and shall be applied to respective individual carrier's traffic service units as developed from its traffic study. Operating ratios shall be determined for the issue traffic handled by the study carriers on the ''carried'' basis by individual weight brackets included within the rate proposal, for: (1) The traffic study year, that is, the ''base-calendar year—actual,'' as hereinbefore defined, (2) a ''present proforma year'' reflecting conditions prevailing on a date no later than 45 days prior to the date of the tariff filing, and (3) a ''restated proforma year'' based on conditions anticipated on the effective date of the proposed rates, with a separation indicating projected operating ratios on two bases, namely, ''based on current revenues,'' and ''based on proposed revenues''. Operating ratios shall also be shown for all other traffic not affected by the rate proposal for the same weight brackets as shown for the issue traffic, but only for the period indicated in paragraph (a)(1) of this section.

(b) In addition to the operating ratios, the cost study shall also be used to develop and provide the revenue-to-cost comparisons required in Appendix I hereto for the same time periods indicated for the operating ratios plus a ''restated proforma year'' based on constructed revenue need.

(c) For both the operating ratios and the revenue-to-cost comparisons in Appendix I, the ''each-to-each'' costing method, i.e., the application of each individual study carrier's unit-cost to its traffic service units, applies only to the ''base calendar year—actual.'' The application of possible labor and nonlabor cost increases for the purpose of updating the ''base calendar year—actual'' cost data may be accomplished by the use of either individual carrier data for each of the study carriers, or the composite carrier data for those study carriers whose revenue from the issue traffic amount to 50 percent or more of their total system revenues for the ''base calendar year—actual.'' The sample values for expenses and revenues shall be expanded to full year values without adjustments to known annual report figures of any carrier.

(d) Where cost studies are developed through the use of computer processing techniques, there shall be submitted a manual application of the costing procedures used for one traffic and cost study carrier (study carrier) in order to demonstrate the procedures by which the computer program distributes the annual report statistics, and applies service unit-costs to each shipment. An illustration of the application of service unit-costs to the applicable traffic service units generated by one single-line sample shipment and by one interline sample shipment shall also be submitted. These sample shipments shall be on the ''Carried'' basis.

§ 1139.4 Revenue need.

Traffic and cost study carrier, i.e., the study carriers, shall submit evidence of the sum of money, in addition to operating expenses, including that needed to attract debt and equity capital, which they require to insure financial stability and the capacity to render service. This evidence shall include data required by Appendix I, parts I and II, and Appendix II.

§ 1139.5 Affiliate data.

Each individual traffic and cost study carrier having transactions with affiliates, subject to the reporting requirements of schedules 9009–A and 9009–B in the annual report for class I motor carriers, shall submit appropriate data and analyses reflecting the effect on the parent carrier's profits of transactions with affiliates. Such data and analyses shall be adequately supported, and there shall be submitted such underlying data as will permit a reconciliation of these data to the data supplied in the appropriate schedules of each carrier's annual report.

[47 FR 49577, Nov. 1, 1982; 47 FR 54082, Dec. 1, 1982]

§ 1139.6 Official notice.

The Board will take official notice of all of the proponent carriers' annual and quarterly reports on file with the Board.

§ 1139.7 Service.

The detailed information called for herein shall be in writing and shall be verified by a person or persons having knowledge thereof. The original and 10 copies of each verified statement for the use of the Board shall be filed with the Secretary, Surface Transportation Board, Washington, DC 20423. One copy of each statement shall be sent by first-class mail to each of the regional offices of the Board in the area affected by the proposed increase, where it will be open to public inspection. A copy of each statement shall be mailed by first-class mail to each party of record in the last formal proceeding concerning a general rate increase in the affected area or territory. However, one copy of each statement shall be sent by express mail to any person undertaking to bear the cost. Written request for this expedited service must be made no less than 5 days before the statement is due to be filed with the Board. Otherwise, the service requirements of 49 CFR 1104.12 should be observed. Information with respect to carrier affiliates may be served on the parties in summary form, if so desired. A copy of each statement shall be furnished to any interested person on request.

[47 FR 49577, Nov. 1, 1982, as amended at 53 FR 19302, May 27, 1988]

§ 1139.8 Availability of underlying data.

All underlying data used in preparation of the material outlined above shall be made available in the office of the party serving such verified matter during usual office hours for inspection by any party of record desiring to do so, and shall be made available to the Board upon request therefor. The underlying data shall be made available also at the hearing, but only if and to the extent specifically requested in writing and required by any party for the purpose of cross-examination. Since appendix I data are to be submitted on a combined carrier basis, any underlying individual carrier data used to complete appendix I should be furnished to the Board for its use as well as for the use of parties opposing the sought increases.

APPENDIX I TO SUBPART A OF PART 1139—REVENUE NEED AND ALLOCATION TO TRAFFIC AT ISSUE

[Cost allocation—see part II, line 13, □ Method A, □ Method B; check one; provide both]

Line No.	Item	Source [1]	Base calendar year—actual [2]	Present proforma year [3]	Restated proforma year [4]		
					Based on current revenues	Based on proposed revenues	Based on constructed revenue need [5]
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
	Part I. Revenue Need						
1	Operating revenue	A.R. Sch. 2998, L. 3	$	$	$	$	$
2	Operating expenses	A.R. Sch. 2998, L. 10.					
3	Lease of distinct operating unit (net)	A.R. Sch. 2998, Net of Ls. 12 and 13.					
4	Miscellaneous deductions less other income	A.R. Sch. 2998 (L. 27 minus L. 20).					
5	Interest included in miscellaneous deductions.	A.R. Sch. 2998, L. 23.					
6	Income taxes on ordinary income [6]	A.R. Sch. 2998, L. 29.					
7	Extraordinary and prior period items	A.R. Sch. 2998, L. 34.					
8	Net income or loss [7]	A.R. Sch. 2998, L. 35.					
9	Sum of money above operating expenses	Sum of Ls. 4, 6 and 8.					
10	Percent owned and leased property to net tangible property (3 decimals).	A.R. Sch. 100, Col. (c) (L. 21+L. 23)÷L. 26.	%	%	%	%	%
11	Sum of money related to transportation	(L. 9×—% in L. 10) plus L. 3.					
12	System revenue need items and projected revenue need.	L. 2 plus L. 11.					

[Cost allocation—see part II, line 13, □ Method A, □ Method B; check one; provide both]

Line No.	Item	Source [1]	Base calendar year—actual [2]	Present proforma year [3]	Restated proforma year [4]		
					Based on current revenues	Based on proposed revenues	Based on constructed revenue need [5]
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
	Part II. Allocation to Traffic at Issue						
13	Constant costs and sum of money allocated to issue traffic.	See Method A ( ) and Method B ( ), check one; provide both.					
14	Variable expenses from traffic at issue (90% variable excluding return on investment)[8].	From traffic and cost study.					
15	Operating revenues from traffic at issue [8] ...	From traffic study.					
16	Constant costs and sum of money allocated to issue traffic plus variable expenses.	L. 13 plus L. 14	$	$	$	$	$
17	Revenue to cost comparison (1 decimal)	L. 15÷L. 16	%	%	%	%	%

See Methods A and B and footnotes on following pages.

METHOD A—CONSTANT COSTS AND SUM OF MONEY ALLOCATED TO ISSUE TRAFFIC BASED ON TON AND TON-MILE METHOD (SEE NOTE A)

Line No.	Item	Source for columns 3 and 4	Base calendar year—actual	Present proforma year	Restated proforma year		
					Based on current revenues	Based on proposed revenues	Based on constructed revenue need
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
(a)	System constant costs	L. (b)+L. (c)	$	$	$	$	$
(b)	Not related to distance	(See Note B).					
(c)	Related to distance	(See Note B)	$	$	$	$	$
(d)	Percent not related to distance (3 decimals).	L. (b)÷L. (a)	%	%	%	%	%
(e)	Percent related to distance (3 decimals) ...	L. (c)÷L. (a)	%	%	%	%	%
(f)	System sum of money	Appendix I, part I, L. 11.	$	$	$	$	$
(g)	Not related to distance	L. (f)×L. (d).					
(h)	Related to distance	L. (f)×L. (e).					
(i)	Total system constant costs plus sum of money.	L. (a)+L. (f).					
(j)	Not related to distance	L. (b)+L. (g).					
(k)	Related to distance	L. (c)+L. (h)	$	$	$	$	$
(l)	Tons carried on issue and nonissue traffic combined.	From traffic study (see Note C).					
(m)	Ton-miles	.....do.					
(n)	Issue traffic tons carried	.....do.					
(o)	Issue traffic ton-miles	.....do.					
(p)	Percent of issue traffic tons to system tons (3 decimals).	L. (n)÷L. (l)	%	%	%	%	%
(q)	Percent of issue traffic ton-miles to system ton-miles (3 decimals).	L. (o)÷L. (m)	%	%	%	%	%
	Constant Costs and Sum of Money Allocated To Issue Traffic						
(r)	Not related to distance	L. (p)×L. (j)	$	$	$	$	$
(s)	Related to distance	L. (q)×L. (k).					
(t)	Total (enter amount in Appendix I, part II, line 13).	L. (r)+L. (s)	$	$	$	$	$

NOTE A: This procedure allocates constant costs and the sum of money based on the ton and ton-mile method and should be submitted for the information of the Board. How much of the constant and sum of money costs may or should be recovered by any specific segment of traffic rest on (1) considerations including value of service, demand, and ability to pay, and (2) considerations which involve matters relating to regulatory policy.

NOTE B: Separate the amount of constant costs, including unrelated, by using Statement No. 6–68, Highway Form B, Schedule A, Line III. Assign the dollars in columns (6), (7), (8), and (9) times 10 percent to line (b), and the dollars in columns (4) and (5) times 10 percent to line (c).

NOTE C: Show tons and ton-miles on issue and nonissue traffic based on an expansion of the sample to a full year.

METHOD B—CONSTANT COSTS AND SUM OF MONEY ALLOCATED TO ISSUE TRAFFIC BASED ON DOLLAR (EXPENSE) METHOD (SEE NOTE A)

Line No.	Item	Source for columns 3 and 4	Base calendar year—actual	Present proforma year	Restated proforma year		
					Based on current revenues	Based on proposed revenues	Based on constructed revenue need
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
(a)	System constant cost (excluding	Note B	$	$	$	$	$
(b)	System sum of money	Appendix I, part I, line II.					
(c)	Total system constant costs plus sum of money.	Line (a) plus line (b).					
(d)	Variable expenses on issue traffic	From traffic and cost study; Note C-.					
(e)	Variable expenses on issue and nonissue traffic combined.	From traffic and cost study; Note D-.					
(f)	Percent relationship (3 decimals)	Line (d) ÷ line (e)	%	%	%	%	%
(g)	Constant costs and sum of money allocated to issue traffic (enter amount in Appendix I, part II, line 13).	Line (c) × line (f)	$	$	$	$	$

NOTE A: This procedure allocates constant costs and the sum of money based on the dollar (expense) method and should be submitted for the information of the Board. How much of the constant and sum of money costs may or should be recovered by any specific segment of traffic rests on (1) considerations including value of service, demand, and ability to pay, and (2) consideration which involve matters relating to regulatory policy.

NOTE B: Determine the amount of constant costs, including unrelated, by using Statement No. 6–68, Highway Form B, Schedule A, Line 111, column (3) multiplied by 10 percent; insert this amount on line (a).

NOTE C: Determine the amount of variable costs, including unrelated, by using Statement No. 6–68, Highway Form B, Schedule A, line 111, column (3) multiplied by 90 percent to obtain the variable portion.

NOTE D: Show variable expenses allocated to the issue traffic based on an expansion of a sample to a full year.

FOOTNOTES TO APPENDIX I:

Explanatory: The Purpose of Appendix I is twofold, namely: (1) to obtain, through part 1, *Revenue Need,* an indication of the past actual, present, and restated system revenue needs of the traffic and cost study carriers, which, along with the financial data required in appendix B, will facilitate an analysis of the financial stability of these carriers, and (2) to allocate a part of these system revenue needs to the traffic at issue as provided for in part II, line 13. It is that portion of constant and sum of money costs resulting from this allocation plus the related variable expenses (line 14) which produces the total costs assigned to the issue traffic (line 16) which is then compared to the issue traffic revenues in the revenue-to-cost comparison shown on line 17. This comparison provides some indication of how much the total issue traffic is contributing to the carriers' overall revenue needs; and serves as a reference point for the consideration of ratemaking factors, other than costs, which may influence the appropriateness of the issue traffic's contribution.

Appendix I data should be completed and submitted for all traffic and cost study carriers combined. However, data for the ''base calendar year—actual,'' column (3), should be developed and completed for each traffic and cost study carrier and the results combined for all such carriers. The data in part I, columns (4) through (7), which reflect an updating of revenue need data for the ''base calendar year—actual'' to present and restated levels, should be developed on either an individual carrier basis, or on a composite carrier basis comprised of all traffic and cost study carriers. Data in part II, line 14 columns (4) through (7), which reflect an updating of the cost and traffic study data for the ''base calendar year—actual'' to present and restated levels, should be developed by the use of either individual carrier data for each of the study carriers, or the composite carrier data for those study carriers whose revenues from the issue traffic amount to 50 percent or more of their total system revenues for the ''base calendar year—actual.'' However, for line 14, the method selected should be the same as that used to update the operating ratios to present and restated levels as required in .3 *Cost study.* As indicated above, appendix I data should be completed and submitted only for all traffic and cost study carriers combined. Since appendix I are to be submitted on a combined carrier basis, any underlying individual carrier data used to complete this appendix should be furnished to the Board for its use as well as for the use of parties opposing the sought increases. Data in columns (4) through (7) must be appropriately explained and supported. Each of the dollar figures called for in these columns shall be accompanied by an explanation of the bases or methods of restatement, including explicit identification of all projected or assumed changes in revenues, in wage rates, in price levels of other expenses and property items, and in productivity, as compared with the preceeding (actual) year results. Note that the time periods referred to in appendix I, that is, ''Base calendar year—actual,'' ''Present proforma year'' and ''Restated proforma year'' are the same time periods indicated in § 1139.3, *Cost study.*

[1] Sources in this column apply to column (3) ''Base calendar year—actual.'' Data for columns (4) through (7) should rely on column (3) as a base in order to reflect data for the ''Present proforma year'' and the ''Restated proforma year.'' Annual report sources apply to class I motor carriers for class II carriers use comparable sources.

[2] The data in column (3) should reflect the revenue need data (part 1), and the traffic and cost study data (part II), for the traffic study year. That is, the ''Base calendar year—actual,'' which should coincide with the ''Base calendar year—actual'' referred to in the *Cost study* (§ 1139.3). Parts I and II should be completed for each individual study carrier—the purpose being to allocate a portion of each carrier's system revenue need to the traffic at issue as provided for in part II. The results for all study carriers should then be aggregated and submitted on a combined carrier basis.

[3] The data in column (4) should be based on present wage, price and productivity levels and reflect conditions prevailing on a date no later than the 45 days prior to the date of the tariff filing.

[4] The data in columns (5), (6), and (7) should be based on wage, price, and productivity levels anticipated on the effective date of the proposed rates.

[5] The purpose of this column is to obtain data on what system revenue needs of the study carriers *should* be at a giving time. Part I should consider the sum of money in addition to operating expenses (including that needed to attract debt and equity capital) which the carriers feel they require to insure financial stability and the capacity to render service.

[6] In columns (4) through (7), show income taxes based on estimated taxable income reduced by the taxes applicable to other income such as, for example, capital gains transactions.

[7] In columns (4) through (7), determine the net income based on data shown for lines 1 though 7. In column (7), the estimate of the net income needed should be supported by evidence that it is a just and reasonable amount.

[8] Show expenses and revenues allocated to the total issue traffic based on an expansion of the sample to a full year. The amount shown on line 14 for variable expenses should agree with that shown in Method B, line (d).

[47 FR 49579, Nov. 1, 1982; 47 FR 54081, Dec. 1, 1982]

APPENDIX II TO SUBPART A OF PART 1139—FINANCIAL RATIOS (TRAFFIC AND COST STUDY CARRIER _____)

[Complete appendix II for each traffic and cost study carrier and for all such carriers combined]

Line No.	Item	Source [1]	Third preceding calendar year (actual)	Second preceding calendar year (actual)	First preceding calendar year (actual or estimated)
	(1)	(2)	(3)	(4)	(5)
1	Current assets [2]	A.R. Sch. 100, L. 18	$	$	$
2	Net carrier operating property (owned) [2]	A.R. Sch. 100, L. 21.			
3	Net carrier operating property (owned plus leased to others) [2].	A.R. Sch. 100, L. 21+L. 23.			
4	Net tangible property [2]	A.R. Sch. 100, L. 26.			
5	Intangibles [2]	A.R. Sch. 100, L. 32.			
6	Current liabilities [2]	A.R. Sch. 101, L. 13.			
7	Long-term debt [2]	A.R. Sch. 101, L. 15+L. 25.			
8	Shareholders' equity [2]	A.R. Sch. 101, L. 55.			
9	Operating revenues	A.R. Sch. 2998, L. 3.			
10	Depreciation plus or minus depreciation adjustment.	A.R. Sch. 2998, L. 6+ or – L. 7.			
11	Operating expenses	A.R. Sch. 2998, L. 10.			
12	Net carrier operating income	A.R. Sch. 2998, L. 14.			
13	Ordinary income before income taxes	A.R. Sch. 2998, L. 28.			
14	Net income or loss	A.R. Sch. 2998, L. 35.			
15	Net income or loss plus or minus depreciation [3]	L. 10 Plus L. 14	$	$	$
16	Percent owned and leased property to net tangible property (3 decimals).	L. 3÷L. 4	%	%	%
17	Investment in owned and leased property plus working capital [4].		$	$	$
18	Shareholders' equity less intangibles	L. 8 – L. 5	$	$	$
19	Long-term debt plus shareholders' equity less intangibles.	L. 7+L. 18	$	$	$
20	Operating ratio (2 decimals)	L. 11÷L. 9	%	%	%
21	Current ratio (2 decimals)	L. 1÷L. 6.			
22	Ratio net income or loss to operating revenue (2 decimals).	L. 14÷L. 9	%	%	%
23	Rate of return on owned and leased operating property plus working capital (2 decimals).	L. 12÷L. 17	%	%	%
24	Rate of return on shareholders' equity less intangibles (2 decimals).	L. 14÷L. 18	%	%	%
25	Capital structure ratio (2 decimals)	L. 7÷L. 19	%	%	%
26	Throwoff to debt ratio (2 decimals)	L. 15÷L. 7	%	%	%
27	Ratio long-term debt to shareholders' equity less intangibles (2 decimals).	L. 7÷L. 18	%	%	%

[1] Annual report sources refer to 1970 Motor Carrier Annual Report Form A for Class I Motor Carriers of Property. For class II carriers use the comparable sources. For years prior to 1970 use the comparable annual report sources.
[2] Show average of beginning and end of year figures.
[3] If carrier shows a net income, the amount shown for depreciation should be added to it; if a net loss, then the net loss and the amount for depreciation should be netted and the appropriate figure shown.
[4] Multiply the percent on line 16 by the difference between line 1 and line 6. Add the resulting amount to line 3.

[47 FR 49580, Nov. 1, 1982; 47 FR 54081, Dec. 1, 1982]

Subpart B—Intercity Bus Industry

SOURCE: 42 FR 32541, June 27, 1977, unless otherwise noted. Redesignated at 47 FR 49571, Nov. 1, 1982.

§ 1139.20 Application.

(a) Upon the filing by the National Bus Traffic Association, Inc., (NBTA) on behalf of its carrier members, or by such other agencies as the Board may by order otherwise designate, of agency tariff schedules which contain proposed general increases in fares or charges where such proposal would result in an increase of $1 million or more in the annual operating revenues on the traffic affected by the proposal, the motor common carriers of passengers on whose behalf such schedules are filed shall, concurrently with the filing of

those schedules, file and serve, as provided hereinafter, a verified statement presenting and comprising the entire evidential case which is relied upon to support the proposed general increase. Carriers thus required to submit their evidence when they file their schedules are hereby notified that special permission to file those schedules shall be conditioned upon the publishing of an effective date at least 30 days later than the date of filing, to enable proper evaluation of the evidence presented. Data to be submitted in accordance with §§1139.21 through 1139.23 represent the minimum data required to be filed and served, and in no way shall be considered as limiting the type of evidence that may be presented at the time of filing of the schedules. If a formal proceeding is instituted, the carriers are not precluded from updating the evidence submitted at the time of filing of the schedules to reflect the current situation.

(b) When filing tariff schedules other than those described hereinabove, the carriers or their tariff publishing agencies shall be required to comply with such procedures as the Board may direct in the event an investigation is instituted. Nothing stated in this part shall relieve the carriers of their burden of proof imposed under the Interstate Commerce Act.

[42 FR 40860, Aug. 12, 1977. Redesignated at 47 FR 49577, Nov. 1, 1982, and amended at 51 FR 6238, Feb. 21, 1986]

§ 1139.21 Study carriers.

(a) For the purposes of this proceeding the ''study carriers'' shall consist of those Class I motor common carriers of passengers which are members of NBTA and which, during the latest calendar year available preceding the filing date of the proposed increase in fares and/or charges, derived $500,000 or more in annual operating revenues from the issue traffic, or 1 percent or more of the total annual operating revenues received by all Class I carriers from the issue traffic. Issue traffic is defined as that traffic (services) directly affected by the proposed increases in fares and/or charges.

(b) To corroborate the selection of the above study carriers, and to provide a data base for a continuing evaluation of the validity and usefulness of those carriers as a study group, respondents shall submit, as a part of their verified statement (justification), a list of all Class I motor common carriers of passengers participating in the issue traffic (services). For the above specified calendar year, the dollar amounts of total system operating revenues for each such carrier shall be arrayed in descending order; and, there shall be shown the amount of annual operating revenues received by each carrier from the total traffic at issue. Also, to be shown is the percent that each such carrier's total issue traffic revenue is to its total system revenues, and the percent that each carrier's total issue traffic revenue is to the total issue traffic revenues for all Class I carriers indicated in the above list. This list of carriers and the carrier's applicable revenues shall be referred to as Schedule A, Class I Participating Carriers' Revenue Data.

[42 FR 40860, Aug. 12, 1977. Redesignated at 47 FR 49577, Nov. 1, 1982]

§ 1139.22 Revenue data for study carriers.

The study carriers, as identified above, shall submit the revenue data called for in Schedule B herein, the purpose of which is to determine the amount of increased revenues which might be expected under the proposed increase in fares and/or charges on the issue traffic, and to evaluate the revenue aspects of the non-issue traffic, including that traffic subject to Surface Transportation Board rate regulation but not here at issue, and that traffic which is intrastate in character and under the jurisdiction of state public commissions.

[42 FR 40860, Aug. 12, 1977, as amended at 42 FR 56333, Oct. 25, 1977. Redesignated at 47 FR 49577, Nov. 1, 1982; 64 FR 53268, Oct. 1, 1999]

§ 1139.23 Revenue need.

The ''study carriers'' shall submit evidence of the sum of money, in addition to operating expenses, including that needed to attract debt and equity capital, which they require to insure financial stability and the capability to render service. This evidence shall include data required by Schedules C through G.

§ 1139.24 Official notice.

The Board will take official notice of all of the proponent carriers' annual and quarterly reports on file with the Board.

§ 1139.25 Service.

The detailed information called for herein shall be in writing and shall be verified by a person or persons having knowledge thereof. The original and 16 copies of each verified statement for the use of the Board shall be filed with the Secretary, Surface Transportation Board, Washington, DC 20423. One copy of each statement shall be sent first-class mail to each of the regional offices of the Board in the area affected by the proposed increase, where it will be open to public inspection. A copy of each statement shall be mailed by first-class mail to each party of record in the last formal proceeding concerning a general increase in bus passenger fares in the affected area or territory. Otherwise, the service requirements of § 1130.1 shall be observed.

§ 1139.26 Availability of underlying data.

All underlying data used in preparation of the material outlined above shall be made available in the office of the party serving such verified matter during usual office hours for inspection by any party of record desiring to do so, and shall be made available to the Board upon request therefor. The underlying data shall be made available also at the hearing, but only if, and to the extent, specifically requested in writing and required by any party for the purpose of cross-examination.

SCHEDULE A TO SUBPART B OF PART 1139—CLASS I PARTICIPATING CARRIERS' REVENUE DATA

[Dollars in thousands]

Line No. and carrier annual report No. (a)	Carrier (b)	Study code (c)	Total system operating revenue (d)	Total issue traffic revenue (e)	Percent of carrier's issue traffic revenue to—	
					Total system revenues, col, (e)÷col. (d) (2 Dec.) (f)	Total issue traffic revenues (percent dist. of col. (e) (2 Dec.) (g)
1						
2						
3						
4						
5						
6						
7						
9						
10						
11						
12						
13						
14						
15						
16						
17						
18						
19						
20						
21						
22						
23						
24						
25						

EXPLANATORY—SCHEDULE A

Purpose. The purpose of Schedule A is to corroborate the selection of the ''study carriers'', as defined in § 1139.21 of the prescribed procedures, and to provide a data base for

the continuing evaluation of the validity and usefulness of the ''study carrier'' group.

Calendar Year. For the purpose of this schedule use the latest calendar year available preceding the filing date of the proposed increased fares and/or charges.

Column (a). The annual report number is that number assigned to the carrier by the Surface Transportation Board for identification purposes.

Column (b). List Class I carrier members of national Bus Traffic Association and other interested Class I carriers participating in the tariffs of NBTA which will be affected by the proposal, in descending order of total system operating revenues.

Column (c). Use the following code for this column. For study carriers (as defined in §1139.21) insert ''S''. For non-study carriers insert ''NS''.

Column (d). Use amount shown in carrier's Annual Report, Schedule 2998, Line 9.

Column (e). Issue traffic is defined as that traffic (services) directly affected by the proposed increase in fares and/or charges.

Columns (f) and (g). These columns are self-explanatory and are obtained by calculations using columns (d) and (e).

SCHEDULE B TO SUBPART B OF PART 1139—STUDY CARRIERS' REVENUE DATA

[Dollars in thousands]

Line No. and study carrier (a)	Total operating revenue (b)	Issue traffic (services) revenue		Total issue traffic revenue (d)	Total nonissue traffic revenue (e)	Miscellaneous station and other operating revenues (f)
		(C–1)	(C–2)			
Base year actual: 4-quarter period ending _____						
1						
2						
3						
4						
5						
6						
7						
9						
10						
11						
12						
13						
14						
15						
16						
17						
18						
19						
20						
21						
22						
23						
24						
25						
Total, all study carriers.						
Pro forma year based on proposed revenues						
1						
2						
3						
4						
5						
6						
7						
9						
10						
11						
12						
13						
14						
15						
16						
17						
18						
19						

[Dollars in thousands]

Line No. and study carrier (a)	Total operating revenue (b)	Issue traffic (services) revenue		Total issue traffic revenue (d)	Total nonissue traffic revenue (e)	Miscellaneous station and other operating revenues (f)
		(C–1)	(C–2)			
20						
21						
22						
23						
24						
25						
Total, all study carriers.						
Pro forma year based on current revenues						
1						
2						
3						
4						
5						
6						
7						
9						
10						
11						
12						
13						
14						
15						
16						
17						
18						
19						
20						
21						
22						
23						
24						
25						
Total, all study carriers.						

EXPLANATORY—SCHEDULE B

Purpose. The purpose of this schedule is to obtain—for each study carrier and by totals for all study carriers—(1) total operating revenue, (2) revenues attributable to the various types of traffic at issue, (3) revenue attributable to the total non-issue traffic, and (4) miscellaneous station and other operating revenues. These data shall be provided for the specified study periods, namely: Base year actual, pro forma year based on current revenues, and pro forma year based on proposed revenues.

The pro forma year based on proposed revenues for the traffic at issue will be compared to the issue traffic revenues for the pro forma year based on current revenues and for the base year actual to determine the amount of the proposed revenue increase being sought over these two periods. In addition, the revenue data for the total issue traffic (column (d)), will be used in Schedule C, Part III as a basis for allocating increased costs, i.e., the increased operating expenses and the increased ''sum of money'' costs.

Base Year Actual. Data to be reported in this and other schedules herein for the base year actual shall be based on the 4-quarter calendar year periods identified below:

FILING MONTH OF VERIFIED STATEMENT

January	Sept. 30, preceding year.
February	Do.
March	Do.
April	Dec. 31, preceding year.
May	Do.
June	Do.
July	Mar. 31, filing-month year.
August	Do.
September	Do.
October	June 30, filing-month year.
November	Do.
December	June 30, filing-month year.

The 4-quarter calendar year periods identified above represent the minimum requirement. However, in event a proposed fare/charge increase is filed at a time when data for a more current quarter than that specified are obtainable then that more current quarter may be used in the base year actual. For example, if an increase is filed in late March and data for the 4th quarter of the

preceding year are obtainable, then the base year actual ending December 31 may be used in lieu of the base year actual ending September 30.

Pro forma year data. Revenue data for the pro forma year shall be reported in two ways, namely: Based on current revenues and based on proposed revenues. Separate schedules are required for each pro forma year. These data do not represent a forecast but reflect the results of 12 months of operation at particular rate levels. Thus, data for the pro forma year based on current revenues should be based on a restatement of the revenue data for the base year actual to reflect fares and/or charges which are currently in effect. Similarly data for the pro forma year based on proposed revenues should reflect a restatement of the base year actual data but at levels reflecting the proposed fares and/or charges.

Column (a). Insert in this column the company name of each ''study carrier'' as defined in §1139.21 of the prescribed procedures.

Column (b). Use carrier's Annual Report, Schedule 2998, Line 9. The dollar amount in this column, for each study carrier, should equal the total of columns (d), (e), and (f).

Columns (c-1), (c-2), etc. As defined in §1139.21, ''issue traffic'' means that traffic (service) affected by the proposed increase in fares and/or charges, and is limited to the fares and/or charges published in schedules and tariffs filed with the Surface Transportation Board. For the purpose of the proposed increases filed under the prescribed procedures of this proceeding, column (c) should be subdivided into columns (c-1), (c-2), etc. to show separately the revenue for each type of traffic in issue and each column should be appropriately headed. For instance, a proposal to increase passenger fares and express rates would call for Intercity Passenger Revenue in column (c-1), and Express Revenue in column (c-2). If a third basic service is included in the proposed increase, column (c-3) should show revenue from that traffic with an appropriate identification in this column heading.

Column (d). The total issue traffic revenues in this column should equal the sum of columns (c-1), (c-2), etc.

Column (e). The revenues to be reported in this column shall consist of those revenues other than ''total issue traffic revenue'' (Column (d)), and ''miscellaneous station and other operating revenues'' (Column (f)). Thus, ''non-issue traffic revenue'' means those revenues accruing from providing the types of services indicated in columns (c-1), etc., but which may be ''intrastate'' in nature, are ''exempt'' as provided under 49 U.S.C. 10721, 10722, 10723 and 10724, or which are otherwise not at issue in a proposed fare and/or charge increase. Such non-issue traffic may also include a commuter or mass transportation service, which is the transportation of passengers generally performed within a city or town and the suburban areas contiguous thereto. However, in some instances this service may also be intercity in character where the cities involved are within relatively short distances of each other and the primary purpose is the mass transportation of commuter passengers to and from these cities.

Column (f). For the purpose of this schedule the revenues to be reported in this column shall consist of those in Account 3600, Miscellaneous Station Revenue, and in Account 3900, Other Operating Revenue. (See 49 CFR Part 1206.)

Presentation of statement on revenue sample studies. Historically, in order to separate interstate from intrastate revenues, it has not been necessary for annual report purposes for each carrier to conduct studies of its traffic operations, whether based upon sampling or otherwise, however, many of the Class I carriers make such studies for managerial purposes. In order to permit the evaluation of such studies, and the evidence derived therefrom, each study carrier, as defined in section 1139.21, shall submit an affidavit explaining how its study was conducted and how it appraises the reliability of the results. Carriers having studies based upon sampling should conform with the staff report entitled ''Guidelines for the Presentation of the Results of Sample Studies,'' February 1, 1971.

[42 FR 32541, June 27, 1977. Redesignated and amended at 47 FR 49577, Nov. 1, 1982; 64 FR 53268, Oct. 1, 1999]

SCHEDULE C TO SUBPART B OF PART 1139

Attachment 1

SCHEDULE C

PART I—CONDENSED INCOME STATEMENT

[Dollars in thousands]

( ) Greyhound Lines, Inc. ( )Trailways combined ( ) All study carriers

Line No. and Item (a)	Source A.R. schedule 250(b)	Base year-actual (c)	Pro forma year				
			Current revenue and projected expense (d)	Proposed revenue and projected expense (e)	Proposed revenue and future expense (f)	Constructed revenue need projected expense (g)	Constructed revenue need future expense (h)
1. Passenger revenue	L. 1						
2. Special bus revenue	L. 2						
3. Baggage revenue	L. 3						
4. Mail revenue	L. 4						
5. Express revenue	L. 5						
6. Newspaper revenue	L. 6						
7. Miscellaneous station revenue	L. 7						
8. Other operating revenue	L. 8						
9. Total revenues	L. 12						
10. Total expenses	L. 18						
11. Net operating revenue	L. 19						
12. Rent for lease of carrier property-debt	L. 20						
13. Income from lease of carrier property-credit	L. 21						
14. Net carrier operating income	L. 22						
15. Total other income	L. 33						
16. Gross income	L. 34						
17. Interest and amortization of debt discount expenses and premium.	Sums of lines 35, 38, and 39.						
18. Total income deductions	L. 42						
19. Income (loss) from continuing operations before income taxes.	L. 43						
20. Income taxes on income from continuing operations.	L. 44						
21. Provision for deferred taxes	L. 45						
22. Income (loss) from continuing operations	L. 46						
23. Total income (loss) from discontinued operations.	L. 49						
24. Total extraordinary items and accounting changes (debit) credit.	L. 56						
25. Net income (loss) transferred to retained income-unappropriated.	L. 57						

PART II—SYSTEM OPERATING EXPENSES AND SUM OF MONEY ASSIGNED TO TRANSPORTATION SERVICE

[Dollars in thousands]

Line No. and Item (a)	Source (b)	Base year-actual (c)	Pro-forma year				
			Current revenue and projected expense (d)	Proposed revenue and projected expense (e)	Proposed revenue and future expense (f)	Constructed revenue need projected expense (g)	Constructed revenue need future expense (h)
1. Operating expenses ''Sum of money'' items	Pt. I, L. 10						
2. Rent for, and from, lease of carrier property (net).	Pt. I, net of ls. 12 and 13						
3. Interest and amortization of debt discount and expense and premium on debt.	Pt. I, L. 17						
4. Percent of carrier operating property to total tangible property.	A. R. Sch. 200 col. (b) (ls. 19 and 21)÷(L. 26) (2 dec.).						
5. Interest and related expenses assigned to transportation service.	L. 3xl, 4, above						
6. Taxable income assigned to transportation service.	(Pt. I, L. 14) minus (pt. II, L. 5)						
7. Taxable income from continuing operations	Pt. I, L. 19						
8. Percent of taxable income assigned to transportation service to taxable income from continuing operations.	L. 6÷ L. 7, above (2 dec.)						
9. Total income taxes	Pt. I, L. 20						
10. Income taxes assigned to transportation service.	L. 8xL. 9, above						
11. Income (loss) assigned to transportation service.	L. 6 minus L. 10 above						
12. Total ''sum of money'' items assigned to transportation service.	Ls. 2, 5, 10 and 11						
13. Operating expenses and ''sum of money'' assigned to transportation service.	Ls. 1 and 12, above						
14. Ratio of income (loss) assigned to transportation to income (loss) from continuing operations (1 det.).	Pt. II, L. 11÷ Pt. I, L. 22						

PART III—ALLOCATION OF INCREASED SYSTEM OPERATING EXPENSES AND SUM OF MONEY TO TRAFFIC AT ISSUE

[Dollars in thousands]

Line No. and Item (a)	Source (b)	Base year-actual (c)	Pro-forma year				
			Current revenue and projected expense (d)	Proposed revenue and projected expense (e)	Proposed revenue and future expense (f)	Constructed revenue need projected expense (g)	Constructed revenue need future expense (h)
A.—Revenue distribution							
1. Revenues applicable to traffic at issue	From revenue study						

PART III—ALLOCATION OF INCREASED SYSTEM OPERATING EXPENSES AND SUM OF MONEY TO TRAFFIC AT ISSUE—Continued

[Dollars in thousands]

Line No. and Item (a)	Source (b)	Base year-actual (c)	Pro-forma year				
			Current revenue and projected expense (d)	Proposed revenue and projected expense (e)	Proposed revenue and future expense (f)	Constructed revenue need projected expense (g)	Constructed revenue need future expense (h)
2. System operating revenues, less miscellaneous station revenues (3600) and other operating revenues (2900).	Sch. C, pt. I, L. 9÷ Ls. 7 and 8	.....	.....	.....	.....	.....	.....
3. Percent of total issue traffic revenues to L. 2 revenues.	L. 1÷ L. 2 (percent to 2 dec.) ..	.....	.....	.....	.....	.....	.....
B.—Allocation to traffic at issue							
4. Increased system operating expenses	Pt. II, line 1	.....	.....	.....	.....	.....	.....
5. Increased system ''sum of money''	Pt. II, line 12	.....	.....	.....	.....	.....	.....
6. Total increased system operating expenses and ''sum of money''.	L. 4÷ L. 5, above	.....	.....	.....	.....	.....	.....
7. Allocation of line 6 to traffic at issue	L. 3×L. 6 above	.....	.....	.....	.....	.....	.....
8. Increased revenues on traffic at issue	L. 1, above	.....	.....	.....	.....	.....	.....
9. Ratio of increased revenues to increased costs on traffic at issue.	L. 8÷ L. 7, above (2 dec.)	.....	.....	.....	.....	.....	.....

EXPLANATORY—SCHEDULE C (PARTS I, II, AND III)

Columns (d) through (h). These columns shall contain the pro forma year data.

The data reported in column (d) shall be the base year actual (column (c)) restated to reflect conditions (wage, price, and productivity, etc.) prevailing on or near the effective date of the proposed increase. Revenues in column (d) shall be based on fares and charges which are currently in effect.

The data reported in column (e) shall also be the base year actual (column (c)) restated to reflect conditions (wage, price, and productivity, etc.) prevailing on or near the effective date of the proposed increase. Unlike column (d), however, revenues in column (e) shall be based on the proposed fares and charges.

The data reported in column (f) shall also be the base year actual (column (c)) restated to reflect conditions (wage, price, and productivity, etc.) prevailing on or near the effective date of the proposed increase plus allowable foreseeable future costs. Revenues shall be based on the proposed fares and charges.

The data reported in columns (g) and (h) shall be based on what the system revenue needs of the study carriers should be at a given time, including the constructed projected and future operating expenses and the constructed ''sum of money'' above these expenses. The constructed ''sum of money'' should be supported by evidence that it is a just and reasonable amount and is that needed to attract debt and equity capital and to insure financial stability and the capacity to render service. Such evidence should include an analysis of the adequacy of the carriers' earnings, the carriers' cost of debt and equity capital, the various kinds of risk attending their operations and the financing thereof, and the carriers' ongoing needs for working capital, new equipment and facilities.

[47 FR 53281, Nov. 24, 1982]

SCHEDULE D TO SUBPART B OF PART 1139

[Dollars in thousands]

( ) Greyhound Lines, Inc. ( ) Trailways combined ( ) All study carriers

Line No. and Item (a)	Source (b)	Calendar year 19___ (c)	Calendar year 19___ (d)	Base year actual (e)
PART I.—Selected financial data				
Income statement data:				
1 Total revenues	Sch. 2998, L. 9			
2 Total expenses	Sch. 2998, L. 15			
3 Depreciation expense and amortization of carrier operating property.	Sch. 2998, L. 11 + L. 12			
4 Lease of carrier property (net)	Sch. 2998, L. 17 + L. 18			
5 Net carrier operating income	Sch. 2998, L. 19			
6 Equity in earnings (losses) of associated companys.	Sch. 2998, L. 29			
7 Interest on long-term obligations	Sch. 2998, L. 32			
8 Amortization of debt discount and expense and premium on debt (net).	Sch. 2998, L. 35 + L. 36			
9 Pretax income (loss)	Sch. 2998, L. 40			
10 Tax on income from continuing operations	Sch. 2998, L. 41			
11 Provision for deferred taxes	Sch. 2998, L. 42			
12 Income (loss) from continuing operations	Sch. 2998, L. 43			
13 Total income (loss) from discontinued operations.	Sch. 2998, L. 46			
14 Total extraordinary items and accounting changes—(debit) credit.	Sch. 2998, L. 53			
15 Net income (loss)	Sch. 2998, L. 54			
Balance sheet data:				
16 Current assets	Sch. 100, L. 17, col. (b)			
17 Current liabilities	Sch. 101, L. 14, col. (b)			
18 Current assets [1]	Sch. 100, L. 17			
19 Current liabilities [1]	Sch. 101, L. 14			
20 Long-term debt due within 1 yr	Sch. 101, L. 15, col. (b)			
21 Long-term debt due after 1 yr	Sch. 101, L. 24, col. (b)			
22 Long-term debt due within 1 yr [1]	Sch. 101, L. 15			
23 Long-term debt due after 1 yr [1]	Sch. 101, L. 24			
24 Owners' equity	Sch. 101, L. 38 + L. 41 + L. 44—L. 45, col. (b).			
25 Owners' equity [1]	Sch. 101, L. 38 + L. 41 + L. 44—L. 45.			
26 Total intangible property [1]	Sch. 100, L. 31			

[Dollars in thousands]

( ) Greyhound Lines, Inc. ( ) Trailways combined ( ) All study carriers

Line No. and Item (a)	Source (b)	Calendar year 19___ (c)	Calendar year 19___ (d)	Base year actual (e)
27 Net carrier operating property (owned plus leased to others) [1].	Sch. 100, L. 19 + L. 21			
28 Investment in owned and leased property plus working capital.	L. 27 + L. 18—L. 19			
Miscellaneous and financial ratios:				
29 Cash dividend appropriations	Sch. 2930, L. 16			
30 Operating ratio (percent)	L. 2 ÷ L. 1			
31 Current ratio	L. 16 ÷ L. 17			
32 Dividend payout ratio (percent)	L. 29 ÷ L. 15			
33 Throwoff to debt ratio (percent)	(L. 3 + L. 15) ÷ (L. 20 + L. 21).			
34 Capital structure ratio (percent)	(L. 20 + L. 21) ÷ (L. 20 + L. 21 + L. 24).			
35 Working capital	L. 18—L. 19			
36 Rate of return on owned and leased operating property plus working capital (percent).	L. 5 ÷ L. 28			
37 Rate of return on owners' equity, less intangibles (percent).	L. 15 ÷ (L. 25—L. 26)			
38 Rate of return on total capitalization (percent)	(L. 7 + L. 8 + L. 15) ÷ (L. 22 + L. 23 + L. 25).			
PART II. Accounts giving effect to interperiod tax allocation (deferred taxes) and impact of investment tax credit				
Balance sheets accounts:				
1 Deferred income tax charges	Sch. 100, L. 16, col. (b)			
2 Accumulated deferred income tax charges	Sch. 100, L. 44, col. (b)			
3 Deferred income tax credits	Sch. 101, L. 13, col. (b)			
4 Accumulated deferred income tax credits	Sch. 101, L. 27, col. (b)			
Income statement accounts:				
5 Provision for deferred taxes	Sch. 2998, L. 42			
6 Provision for deferred taxes—Extraordinary items.	Sch. 2998, L. 50			
7 Impact of investment tax credit on continuing operations.	See explanatory			

[1] Show average of beginning and end-of-year figures.

EXPLANATORY—SCHEDULE D (PART I)

Purpose. The purpose of Schedule D (Part I) is to ascertain the financial posture of Greyhound Lines, Inc. and all the study carrier carriers by an analysis of certain key financial data, with a view to determining revenue needs.

Study Carrier Groupings. Schedule D (Part I) shall be prepared on the following two bases:

1. Greyhound Lines, Inc.
2. Trailways Combined (study carriers, only)
3. All Study Carriers

Column (b). The annual report sources in this column refer to the 1976 Annual Report Form MP–1. For years prior or subsequent to 1976, use comparable sources.

Column (c). If the fare/charge increase is filed during the first six months of the calendar year, the data reported in column (c) shall be based on the 3rd calendar year preceding the filing year. For example, if the rate increase is filed on May 15, 1977, column (c) shall report data for calendar year 1974.

If the fare/charge increase is filed during the last six months of the calendar year, the data reported in column (c) shall be based on the 2nd calendar year preceding the filing year. For example, if the rate increase is filed on Nov. 15, 1977, column (c) should report data for calendar year 1975.

Column (d). If the fare/charge increase is filed during the first six months of the calendar year, the data reported in column (d) should be based on the 2nd calendar year preceding the filing year. For example, if the rate increase is filed on May 15, 1977, column (d) should report data for calendar year 1975.

If the rate increase is filed during the last six months of the calendar year, the data reported in column (d) shall be based on the 1st calendar year preceding the filing year. If, for example, the fare/charge increase is filed on November 15, 1977, column (d) should report data for calendar year 1976.

Column (e). Data to be reported in this column for the base year actual shall be based on the 4-quarter calendar year periods identified below:

Filing month of verified statement	Four-quarter calendar year period ending
January	Sept. 30, preceding year.
February	Do.
March	Do.
April	Dec. 31, preceding year.
May	Do.
June	Do.
July	Mar. 31, filing-month year.
August	Do.
September	Do.
October	June 30, filing-month year.
November	Do.
December	Do.

The 4-quarter calendar year periods identified above represent the minimum requirement. However, in event a proposed fare/charge increase is filed at a time when data for a more current quarter than that specified are obtainable, the more current quarter may be used in the base year-actual. For example, if an increase is filed in late March and data for the 4th quarter of the preceding year is obtainable, the base year-actual ending December 31, may be used in lieu of the base year-actual ending September 30.

EXPLANATORY—SCHEDULE D (PART II)

Purpose. Schedule D (Part II) is designed to segregate the impacts of: (1) The Board's deferred tax accounting rule change; and (2) the impact of the investment tax credit on continuing operations.

Study Carrier Groupings. The study carrier groups for Part II shall be the same as those designated for Part I.

Column (b). The annual report sources in this column refer to the 1976 Annual Report Form MP–1. For years prior or subsequent to 1976, use comparable sources.

Columns (c), (d) and (e). The reporting periods for Part II shall correspond to those in Part I.

Investment Tax Credit Impact. This impact is: (1) The amount by which Account 8000, Income Taxes on Income from Continuing Operations, was credited for the investment tax credit if the flow-through accounting method was elected or (2) the amount by which Account 8040, Provision for Deferred Taxes, was credited for the amortization of the investment tax credit if the deferral accounting method was elected.

[42 FR 32541, June 27, 1977; 42 FR 40861, Aug. 12, 1977. Redesignated at 47 FR 49577, Nov. 1, 1982]

SCHEDULE E TO SUBPART B OF PART 1139—STATEMENT OF CHANGES IN FINANCIAL POSITION

[Dollars in thousands]

( ) Greyhound Lines, Inc. ( ) Trailways combined ( ) All study carriers

Line No. and item (a)	Source (b)	Calendar year 19____ (c)	Calendar year 19____ (d)	Base year-actual (e)
SOURCES OF WORKING CAPITAL				
Working capital provided by operations:				
1 Net income (loss) before extraordinary items	Sch. 2998, L. 47, col. (b)			
Add expenses not requiring outlay of working capital (subtract) credits not generating working capital:				
2 Loss (gain) on sale or disposal of tangible property.	Sch. 5091, L. 7, col. (b)			
3 Add depreciation and amortization expense	Sch. 2998, Ls. 11+12+35+36, col. (b).			
4 Net increase (decrease) in deferred income taxes.	Sch. 2998, L. 42, col. (b)			
5 Net decrease (increase) in parent's share of subsidiary's undistributed income for the year.	Sch. 2998, L. 28			
6 Net increase (decrease) in noncurrent portion of estimated liabilities.	Sch. 101, L. 31, cols. (b)-(c)			
7 Other (specify):				
8				
9				
10				
11				
12				
13				
14				
15				
16				
17				
18 Total working capital from operations before extraordinary items.				
19 Extraordinary items and accounting changes	Sch. 2998, L. 53, col. (b)			

[Dollars in thousands]

( ) Greyhound Lines, Inc. ( ) Trailways combined ( ) All study carriers

Line No. and item (a)	Source (b)	Calendar year 19____ (c)	Calendar year 19____ (d)	Base year-actual (e)
Add expenses not requiring outlay of working capital (subtract) credits not generating working capital.				
20 Loss (gain) on extraordinary items	Sch. 2998, L. 48, col. (b)			
21 Net increase (decrease) in deferred income taxes.	Sch. 2998, L. 50, col (b)			
22 Cumulative effect of changes in accounting principles.	Sch. 2998, L. 52, col. (b)			
Other (specify):				
23				
24				
25				
26				
27				
28 Total working capital from extraordinary items and accounting changes.				
29 Total working capital from operations (lines 18 and 28).				
Working capital from sources other than operating:				
30 Proceeds from issuance of long-term liabilities				
31 Proceeds from sale/disposition of carrier operating property.	Sch. 1200-A, L. 9			
32 Proceeds from sale/disposition of other tangible property.				
33 Proceeds from sale/repayment of investments advances.	Sch. 1600/1650, ls. 23+47			
34 Net decrease in sinking and other special funds.	Sch. 1700, ls. 15+31+50, cols. (d)–(j).			
35 Proceeds from issue of capital stock	Sch. 2700A/2710A, L. 12, cols. (e)+(f)—(i).			
Other (specify):				
36				
37				
38				
39				
40				
41 Total working capital from sources other than operating.				
42 Total sources of working capital (lines 29 and 41).				
APPLICATION OF WORKING CAPITAL				
43 Amount paid to acquire/retire long-term liabilities.				
44 Cash dividends	Sch. 2930, L. 16			
45 Purchase price of carrier operating property	Sch. 1200, L. 11, col. (c)			
46 Purchase price of other tangible property				
47 Purchase price of long-term investments and advances.	Sch. 1600/1650, ls. 23+47, col. (e).			
48 Net increase in sinking or other special funds	Sch. 1700, ls. 15+31+50, cols. (j)–(d).			
49 Purchase price of acquiring treasury stock	Sch. 2700B/2710B, L. 12, col. (c).			
Other (specify):				
50				
51				
52				
53				
54				
55 Total application of working capital				
56 Net increase (decrease) in working capital (line 42 less line 55).				

EXPLANATORY—SCHEDULE E

Purpose. Schedule E is designed to provide the Board with an indication of the carrier's sources and uses of funds over the recent past.

Study Carrier Groupings. Schedule E shall be prepared on the following two bases:

1. Greyhound Lines, Inc.
2. Trailways Combined (study carriers, only)
3. All Study Carriers

''Funds''. The term ''Funds'' for the purpose of this schedule shall include all assets or financial resources even though a transaction may not directly affect cash or working capital. For example, the purchase of property in exchange for bonds or shares of stock would be an application of funds for investment in property provided by the issue of securities.

Sources and uses of funds should be individually disclosed. For example, outlays for fixed assets should not be reported net of retirements.

Column (b). The annual report sources in this column refer to the 1976 Annual Report Form MP–1. For years prior or subsequent to 1976, use comparable sources.

Column (c). If the fare/charge increase is filed during the first six months of the calendar year, the data reported in column (c) shall be based on the 3rd calendar year preceding the filing year. For example, if the rate increase is filed on May 15, 1977, column (c) shall report data for calendar year 1974.

If the fare/charge increase is filed during the last six months of the calendar year, the data reported in column (c) shall be based on the 2nd calendar year preceding the filing year. For example, if the rate increase is filed on Nov. 15, 1977, column (c) should report data for calendar year 1975.

Column (d). If the fare/charge increase is filed during the first six months of the calendar year, the data reported in column (d) should be based on the 2nd calendar year preceding the filing year. For example, if the rate increase is filed on May 15, 1977, column (d) should report data for calendar year 1975.

If the rate increase is filed during the last six months of the calendar year, the data reported in column (d) shall be based on the 1st calendar year preceding the filing year. If, for example, the fare/charge increase is filed on November 15, 1977, column (d) should report data for calendar year 1976.

Column (e). Data to be reported in this column for the base year-actual shall be based on the 4-quarter calendar year periods identified below:

Filing month of verified statement	Four-quarter calendar year period ending
January	Sept. 30, preceding year.
February	Do.
March	Do.
April	Dec. 31, preceding year.
May	Do.
June	Do.
July	Mar. 31, filing-month year.
August	Do.
September	Do.
October	June 30, filing-month year.
November	Do.
December	Do.

The 4-quarter calendar year periods identified above represent the minimum requirement. However, in event a proposed fare/charge increase is filed at a time when data for a more current quarter than that specified are obtainable, the more current quarter may be used in the base year-actual. For example, if an increase is filed in late March and data for the 4th quarter of the preceding year is obtainable, the base year-actual ending December 31, may be used in lieu of the base year-actual ending September 30.

[42 FR 32541, June 27, 1977; 42 FR 40861, Aug. 12, 1977. Redesignated at 47 FR 49577, Nov. 1, 1982]

SCHEDULE F TO SUBPART B OF PART 1139—AFFILIATE REVENUE DATA FOR SERVICES RENDERED

[Dollars in thousands]

( ) Greyhound Lines, Inc. ( ) Trailways combined ( ) All study carriers

Line No. and Item (a)	Calendar year 19____ (b)	Calender year 19____ (c)	Base year-actual (d)
affiliate revenues for services rendered to respondents			
1 Engineering			
2 Management			
3 Legal			
4 Accounting			
5 Financial			
6 Furnishing of materials and supplies			
7 Leasing of land, structures, and vehicles			
8 Purchase of equipment			
9 Construction			
10 All other services			
11 Total affiliate revenues for services rendered to respondent (lines 1 through 10)			
12 Total affiliate revenues for services rendered to other than respondents			
13 Total affiliate revenues (lines 11 and 12)			

[Dollars in thousands]

( ) Greyhound Lines, Inc. ( ) Trailways combined ( ) All study carriers

Line No. and Item (a)	Calendar year 19___ (b)	Calender year 19___ (c)	Base year-actual (d)
14 Total affiliate income from operations before income taxes	.....	.....	.....

EXPLANATORY—SCHEDULE F

Purpose. Schedule F is designed to facilitate an assessment of the effect on the carriers' profits of transactions with affiliates.

Affiliate transactions aggregating less than $30,000 need not be reported in this Schedule.

Study Carrier Groupings. A separate Schedule F shall be prepared for each of the following:

1. Greyhound Lines, Inc.
2. Trailways Combined (study carriers, only)
3. All Study Carriers

Column (b). If the fare/charge increase is filed during the first six months of the calendar year, the data reported in column (b) shall be based on the 3rd calendar year preceding the filing year. If the fare/charge increase is filed during the last six months of the calendar year, the data reported in column (b) shall be based on the 2nd calendar year preceding the filing year.

Column (c). If the fare/charge increase is filed during the first six months of the calendar year, the data reported in column (c) shall be based on the 2nd calendar year preceding the filing year. If the fare/charge increase is filed during the last six months of the calendar year, the data reported in column (c) shall be based on the 1st calendar year preceding the filing year.

Column (d). Data to be reported in this column for the base year-actual shall be based on the 4-quarter calendar year periods identified below:

Filing month of verified statement	Four-quarter calendar year period ending
January	Sept. 30, preceding year.
February	Do.
March	Do.
April	Dec. 31, preceding year.
May	Do.
June	Do.
July	Mar. 31, filing-month year
August	Do.
September	Do.
October	June 30, filing-month year.
November	Do.
December	Do.

The 4-quarter calendar year periods identified above represent the minimum requirement. However, in event a proposed fare/charge increase is filed at a time when data for a more current quarter than that specified are obtainable, the more current may be used in the base year-actual. For example, if an increase is filed in late March and data for the 4th quarter of the preceding year is obtainable then the base year-actual ending December 31, may be used in lieu of the base year-actual ending September 30.

SCHEDULE G TO SUBPART B OF PART 1139—SELECTED STATISTICAL DATA

[Dollars in thousands]

( ) Greyhound Lines, Inc. ( ) Trailways combined ( ) All study carriers

Line No. and Item (a)	Source (b)	1972 (c)	1973 (d)	1974 (e)	1975 (f)	1976 (g)	Cols. (h)–(l) (1977)–(1981) (h)
Operating revenues, expenses, and operating ratios:							
1 Passenger revenue	Sch. 2998, L. 1, col. (b)	.....	.....	.....	.....	.....	.....
2 Special bus revenue	Sch. 2998, L. 2, col. (b)	.....	.....	.....	.....	.....	.....
3 Express revenue	Sch. 2998, L. 5, col. (b)	.....	.....	.....	.....	.....	.....
4 Total operating revenues	Sch. 2998, L. 9, col. (b)	.....	.....	.....	.....	.....	.....
5 Total operating expenses	Sch. 2998, L. 15, col. (b).	.....	.....	.....	.....	.....	.....
6 Operating ratio	Line 5÷line 4	.....	.....	.....	.....	.....	.....
Carrier operating property:							
7 Structures	Sch. 1200, L. 2, col. (c)	.....	.....	.....	.....	.....	.....
8 Revenue equipment	Sch. 1200, L. 3, col. (c)	.....	.....	.....	.....	.....	.....
9 Improvements of leasehold property.	Sch. 1200, L. 8, col. (c)	.....	.....	.....	.....	.....	.....
10 Total carrier operating property	Sch. 1200, L. 11, col. (c).	.....	.....	.....	.....	.....	.....

[Dollars in thousands]

( ) Greyhound Lines, Inc. ( ) Trailways combined ( ) All study carriers

Line No. and Item (a)	Source (b)	1972 (c)	1973 (d)	1974 (e)	1975 (f)	1976 (g)	Cols. (h)–(l) (1977)–(1981) (h)
Number and cost of buses:							
11 Number of buses acquired	Sch. 1221, L. 22, col. (c).						
12 Cost of buses acquired	Sch. 1221, L. 22, col. (d).						
13 Number of buses retired	Sch. 1221, L. 22, col. (e).						
14 Cost of buses retired	Sch. 1221, L. 22, col. (f)						
15 Average age of buses [1]	Sch. 1221, L. 22, col. (i)						
Employee compensation:							
16 Total daily basis	Sch. 9002, L. 20, col. (c).						
17 Total hourly basis	Sch. 9002, L. 21, col. (c).						
Man-hours or days paid for:							
18 Total—Daily basis	Sch. 9002, L. 20, col. (e).						
19 Total—Hourly basis	Sch. 9002, L. 21, col. (e).						
Revenue bus-miles operated:							
20 Intercity service (regular route)	Sch. 9002, L. 1, col. (e)						
21 Charter, sightseeing and other special service.	Sch. 9002, L. 3, col. (e)						
22 Vehicle miles operated exclusively in baggage, mail express, and/or newspaper service.	Sch. 9002, L. 4, col. (e)						
Revenue passengers carried:							
23 Number of intercity revenue passengers carried (regular route).	Sch. 9002, L. 6, col. (b)						
24 Total number of revenue passengers carried.	Sch. 9002, L. 9, col. (b)						
Other Statistics:							
25 Number of regulator route intercity passenger miles.	Sch. 9002, L. 12, col. (b).						
26 Total passenger revenue	Sch. 9002, L. 16, col. (b).						
27 Passenger-miles per bus mile (average load).	25÷L. 20						
28 Passenger-miles per passenger carried-intercity service (average journey).	25÷L. 23						

[1] *Line No. 15:* The weighted average age of buses for ''All Study Carriers'' is computed by:

(a) Calculating the average age of buses for each study carrier.

(b) Calculating the number of buses which each study carrier has on hand at the end of the year as a percentage of the total number of buses which all study carriers as a group have on hand at the end of the year.

(c) Multiplying the average age for each study carrier by that carrier's percentage of total buses on hand at the end of the year.

(d) Summing the result of calculation (c) above for each study carrier. The summation gives the weighted average age of buses for ''All Study Carriers'' taken together as a group.

EXPLANATORY—SCHEDULE G

Purpose. The purpose of Schedule G is to develop selected property, labor and operational data for use in evaluating the influence and relationship of these data to the income and other financial data contained in Schedules C through F. This schedule requires data commencing with the year 1972 through 1976, and thereafter, adding each calendar year's data until a 10-year moving period is reached. A ten-year time period is useful for analyzing the industry's operations during all phases of the business cycle.

Study Carrier Groupings. Schedule G shall be prepared for each of the following:

1. Greyhound Lines, Inc.
2. Trailways Combined (study carriers, only).
3. All Study Carriers.

Column (b). The annual report sources in this column refer to the 1976 Annual Report Form MP–1. For years prior or subsequent to 1976, use comparable sources.

Columns (c) through (g). These columns refer to successive calendar years from 1972 through 1976, each ending December 31.

Columns (*h*) to (l). These columns refer to successive calendar years which become applicable as the time period of record is expanded to the ultimate 10 year moving time period.

APPENDIX I TO SUBPART B OF PART 1139

Excerpt from National Bus Traffic Association's brief (pages 18–23) in I&S M–29089 increased bus passenger fares and express/rates-nationwide.

NBTA WILL UNDERTAKE THE DEVELOPMENT OF A COST ALLOCATION SYSTEM FOR MOTOR CARRIERS OF PASSENGERS

At the conclusion of the hearing in this proceeding, the Administrative Law Judge requested a discussion of the feasibility of NBTA undertaking the traffic and cost studies necessary to permit the separation of bus carrier expenses by types of service. As the record in this case indicates, no such studies have ever been undertaken and there is no present capability on the part of either the Board or the carriers themselves to allocate total operating expenses by types of carrier service. As the testimony of Mr. Bilz reveals, data derived from traffic studies is the source of only a few of the factors which must be developed to permit the identification of cost.[18] Consequently, the development of a carefully conceived overall cost allocation system must be accomplished first, and then a determination must be made of the types and kinds of studies needed to develop the specific factors required for implementation to the system.

At its annual meeting held in Newton, Massachusetts, on September 27–28, 1976, the members of the National Bus Traffic Association considered the question of undertaking the analyses, planning, and studies leading to the development and implementation of a cost allocation system and agreed to undertake such a program. Mr. Bilz, the cost analyst retained by the Association, has been request to work with appropriate carrier personnel and an initial meeting to outline the first steps is scheduled to be held during November of this year. In the meantime, after consultation with Mr. Bilz, we set forth the following discussion of what will be involved.

In assessing the problems and complexities involved in formulating a procedure to develop costs by types of service for the bus lines, some parallels may be drawn with the procedure which has evolved over the years for general commodity motor carriers. Cost formulas for general commodity carriers were developed by the Cost Finding Section of the Interstate Commerce Commission more than thirty years ago. These cost formulas have been modified and refined from time-to-time in order to adjust for changing operating practices and conditions, improvements in accounting technology or the need to develop costs for particular kinds of service or types of traffic. At a later point in time when the need arose in general revenue increase cases for more detailed separations of the expenses of the general commodity carriers among types of service and types of traffic, procedures were developed whereby a continuing sample of traffic data could be developed to tie in with unit costs produced by the motor carrier cost formulas.[19] Thus, the detailed separation of traffic data developed in the continuing traffic studies was designed to tie in with existing cost allocation formulas. More recently, a complete revision of the Uniform System of Accounts for general commodity motor carriers necessitated further modification of the cost formulas; however, at the same time, such revisions served to increase the amount of expenses allocated in the formulas on a direct basis and reduced the amount of expenses which could only be allocated by means of factors derived from special studies or other means.

At the present time, the bus industry has committed itself to a review of its Uniform System of Accounts, jointly with the Bureau of Accounts of the Interstate Commerce Commission, to determine the need for revising the accounts to conform more closely with generally accepted accounting principles and, most importantly, to facilitate cost finding and financial analysis. In the review and analysis of the Uniform System of Accounts, consideration should be given to possible benefits from a matrix approach in accumulating operating expenses, similar in some respects but not necessarily as detailed as the approach used in redesigning the system of accounts for general commodity carriers. The separations of expenses for bus lines need not be as detailed as those made for general commodity carriers since the needs for expense segregations are not the same. However, use of a matrix system by the bus lines to accumulate operating expenses would result in the direct assignment of various categories of expense which would otherwise be included in a common pool of expense to be allocated on the basis of the best available data. Therefore, as a necessary preliminary step toward the development of a cost allocation system for the bus lines,

[18] Tr. 183–186.

[19] Probability sampling of general freight motor carrier traffic did not develop until some 20 years after the Board's cost formulas for truck lines.

the Uniform System of Accounts must be examined for the purpose of identifying expenses which can be directly assigned to particular services or operations.

Basically, a cost study for the bus lines involves, first, a determination of the expenses chargeable to each of the various services provided by the carriers. These services include regular route intercity service, involving transportation of passengers, express, baggage, newspapers and mail, local service and special services including charter operations and tours. Secondly, the need for further separations within these categories must be explored. An all-out study would involve the allocation of expenses for regular route service among passengers and their baggage, express traffic and all other traffic; however, such detailed separations—which can only be made by means of specially-designed allocating procedures and special studies—may not be necessary, at least in the initial design of a cost allocation system for the bus lines. From the standpoint of current and potential use to be made of cost study data, it is reasonable, at this point, to design a system which will separate expenses for regular route service involving passenger and express traffic (including baggage) on the one hand, and all other services on the other. Finally, an additional separation of the expenses for regular route service between interstate and intrastate traffic is necessary.

In connection with the first step, i.e., allocation of expenses among services, although a number of the various categories of expense incurred by the bus lines may be directly allocated to various services, there are additional items of expense which are jointly incurred in connection with two or more services and can only be separated among services on the basis of appropriate allocation factors. The same problems arise in the second and third steps, to an even greater extent, in determining the extent to which expenses assigned to a particular service must be allocated among the various types of traffic handled in that service and in making the further separation between interstate and intrastate traffic. These separations should be made by means of cost allocation factors which are functionally related to the fullest extent possible to each item of expense. This calls for the development of additional allocation factors which are not presently maintained by the bus lines.

At the present time, the carriers can accurately determine from their regularly maintained accounting records the amount of revenue accruing from regular route operations, separately for passenger and express service, and from operations in connection with charter and special service. By means of established probability sampling procedures, Greyhound and Continental Trailways can further separate passenger revenue in intercity service between interstate and intrastate traffic. Other carriers are able to make the latter separation of revenue on various bases consistent with the size of their operations. It is possible that the probability sampling procedure and other bases employed by the smaller carriers may be expanded to include statistical data as well as revenue information. The bus lines currently maintain records, for the purpose of their annual reports to the Surface Transportation Board, of the number of bus miles operated separately for intercity service, local service and special services. Such data will undoubtedly come into use in allocating expenses among services. Similarly, records of the number of passengers carried in various services, maintained by the bus lines, may be used in some of the expense allocations. However, no continuing records are maintained showing the number of passengers carried separately in interstate and intrastate commerce nor are any separations made of the number of passenger miles in each category. Such statistical separations are required regardless of the methodology followed in the cost study, that is, whether the separations of expenses between interstate and intrastate traffic are made within the framework of a cost allocation formula or whether the expenses in each category are developed on the basis of average mileage-related and non-mileage unit costs developed from a cost formula and applied to traffic service units developed for interstate and intrastate traffic, i.e., number of passengers and number of passenger miles.

As noted above, expenses for each type of traffic must be separated between those which are related to mileage operated and those which are not related to mileage. This brings in the problem of segregating the terminal activities of the carriers among services and types of traffic. Segregation of such expenses will probably require time and motion analyses, calculation of space utilization factors at various representative terminals and other special studies.

The formulation of a cost allocation system and the gathering of input data for the system will require an extensive amount of work and expense on the part of the bus lines. If the amount of time required in developing acceptable cost allocation procedures for general freight motor carriers is any indication, several years may be required before a cost system for the bus lines can be formulated, applied and tested. The bus industry recognizes that, because of its workload and limited staff, the Cost Finding Section of the Board cannot take on the task of developing a cost allocation system for the bus lines as it did in connection with general freight motor carriers; however, it is hoped that the efforts of the bus lines in this

regard will receive the full support and guidance of the Board's staff so that the best possible results may be achieved in the shortest possible time.

H. G. HOMME,
Secretary.

[42 FR 32541, June 27, 1977. Redesignated at 47 FR 49571, Nov. 1, 1982 and amended at 64 FR 53268, Oct. 1, 1999]

PART 1141—PROCEDURES TO CALCULATE INTEREST RATES

AUTHORITY: 49 U.S.C. 721.

§ 1141.1 Procedures to calculate interest rates.

(a) For purposes of complying with a Board decision in a complaint or investigation proceeding, interest rates to be computed shall be the coupon equivalent yield (investment rate) of marketable securities of the United States Government having a duration of 91 days (3 months). The rate levels will be determined as follows:

(1) For investigation proceedings, the interest rate shall be the coupon equivalent yield in effect on the date the statement is filed accounting for all amounts received under the new rates (See 49 U.S.C. 10707(d)(1)).

(2) For complaint proceedings, the interest rate shall be the coupon equivalent yield in effect on the first day of the calendar quarter in which an unlawful charge is paid. The interest rate in complaint proceedings shall be updated as of the first day of all subsequent calendar quarters, at the coupon equivalent yields in effect on those days. Updating will continue until the required reparation payments are made.

(3) For purposes of this section, coupon equivalent yields shall be considered ''in effect'' on the date the securities are issued, not on the date they are auctioned. If the date the statement is filed (for investigation proceedings) or if the first day of the calendar quarter (for complaint proceedings) is the same as the issue date, then the yield on that date shall be used.

(b) Interest in a complaint or investigation proceeding shall be compounded quarterly, as follows:

(1) For investigation proceedings, the reparations period shall begin on the date the investigation is started. Thus, unless by coincidence, the quarterly compounding periods in investigation proceedings will not coincide with the calendar quarters.

(2) For complaint proceedings, the reparations period shall begin on the date the unlawful charge is paid. However, in order for the quarterly compounding periods in complaint cases to coincide with the calendar quarters (so that only one interest rate is in effect during each compounding period), the first compounding period shall run from the date the unlawful charge is paid to the last day of the current calendar quarter, and all subsequent compounding periods shall coincide with the calendar quarters.

(3) For both investigation and complaint proceedings, the annual effective interest rate shall be the same as the annual nominal (or stated) rate. Thus, the nominal rate must be factored exponentially to the power representing the portion of the year covered by the interest rate. A simple multiplication of the nominal rate by the portion of the year covered by the interest rate would not be appropriate because it would result in an effective rate in excess of the nominal rate. Under this ''exponential'' approach, the total cumulative reparations payment (including interest) is calculated by multiplying the interest factor for each quarterly period (or part thereof) by the principal amount for that period plus any accumulated interest from previous periods. The ''interest factor'' for each period is 1.0 plus the interest rate for that period to the power representing the portion of the year covered by the interest rate. As an example, if the annual interest rate for the quarter is 5.6 percent, then the interest factor would be 1.01368, or 1.056 to the power of 91/365.

[58 FR 19360, Apr. 14, 1993]

PART 1144—INTRAMODAL RAIL COMPETITION

Sec.
1144.1 Negotiation.
1144.2 Prescription.
1144.3 General.

AUTHORITY: 49 U.S.C. 721, 10703, 10705, and 11102.

SOURCE: 67 FR 61290, Sept. 30, 2002, unless otherwise noted.

§ 1144.1 Negotiation.

(a) *Timing.* At least 5 days prior to seeking the prescription of a through route, joint rate, or reciprocal switching, the party intending to initiate such action must first seek to engage in negotiations to resolve its dispute with the prospective defendants.

(b) *Participation.* Participation or failure to participate in negotiations does not waive a party's right to file a timely request for prescription.

(c) *Arbitration.* The parties may use arbitration as part of the negotiation process, or in lieu of litigation before the Board.

§ 1144.2 Prescription.

(a) *General.* A through route or a through rate shall be prescribed under 49 U.S.C. 10705, or a switching arrangement shall be established under 49 U.S.C. 11102, if the Board determines:

(1) That the prescription or establishment is necessary to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. 10101 or is otherwise anticompetitive, and otherwise satisfies the criteria of 49 U.S.C. 10705 and 11102, as appropriate. In making its determination, the Board shall take into account all relevant factors, including:

(i) The revenues of the involved railroads on the affected traffic via the rail routes in question.

(ii) The efficiency of the rail routes in question, including the costs of operating via those routes.

(iii) The rates or compensation charged or sought to be charged by the railroad or railroads from which prescription or establishment is sought.

(iv) The revenues, following the prescription, of the involved railroads for the traffic in question via the affected route; the costs of the involved railroads for that traffic via that route; the ratios of those revenues to those costs; and all circumstances relevant to any difference in those ratios; provided that the mere loss of revenue to an affected carrier shall not be a basis for finding that a prescription or establishment is necessary to remedy or prevent an act contrary to the competitive standards of this section; and

(2) That either:

(i) The complaining shipper has used or would use the through route, through rate, or reciprocal switching to meet a significant portion of its current or future railroad transportation needs between the origin and destination; or

(ii) The complaining carrier has used or would use the affected through route, through rate, or reciprocal switching for a significant amount of traffic.

(b) Other considerations. (1) The Board will not consider product competition.

(2) If a railroad wishes to rely in any way on geographic competition, it will have the burden of proving the existence of effective geographic competition by clear and convincing evidence.

(3) When prescription of a through route, a through rate, or reciprocal switching is necessary to remedy or prevent an act contrary to the competitive standards of this section, the overall revenue inadequacy of the defendant railroad(s) will not be a basis for denying the prescription.

(4) Any proceeding under the terms of this section will be conducted and concluded by the Board on an expedited basis.

§ 1144.3 General.

(a) These rules will govern the Board's adjudication of individual cases pending on or after the effective date of these rules (October 31, 1985).

(b) Discovery under these rules is governed by the Board's general rules of discovery at 49 CFR part 1114.

(c) Any Board determinations or findings under this part with respect to compliance or non-compliance with the standards of § 1144.2 shall not be given any res judicata or collateral estoppel effect in any litigation involving the same facts or controversy arising under the antitrust laws of the United States.

PART 1146—EXPEDITED RELIEF FOR SERVICE EMERGENCIES

AUTHORITY: 49 U.S.C. 721, 11101, and 11123.

§ 1146.1 Prescription of alternative rail service.

(a) *General.* Alternative rail service will be prescribed under 49 U.S.C. 11123(a) if the Board determines that, over an identified period of time, there has been a substantial, measurable deterioration or other demonstrated inadequacy in rail service provided by the incumbent carrier.

(b)(1) *Petition for Relief.* Affected shippers or railroads may seek the relief described in paragraph (a) of this section by filing an appropriate petition containing:

(i) A full explanation, together with all supporting evidence, to demonstrate that the standard for relief contained in paragraph (a) of this section is met;

(ii) A summary of the petitioner's discussions with the incumbent carrier of the service problems and the reasons why the incumbent carrier is unlikely to restore adequate rail service consistent with current transportation needs within a reasonable period of time;

(iii) A commitment from another available railroad to provide alternative service that would meet current transportation needs (or, if the petitioner is a railroad and does not have an agreement from the alternative carrier, an explanation as to why it does not), and an explanation of how the alternative service would be provided safely without degrading service to the existing customers of the alternative carrier and without unreasonably interfering with the incumbent's overall ability to provide service; and

(iv) A certification of service of the petition, by hand or by overnight delivery, on the incumbent carrier, the proposed alternative carrier, and the Federal Railroad Administration.

(2) *Reply.* The incumbent carrier must file a reply to a petition under this paragraph within five (5) business days.

(3) *Rebuttal.* The party requesting relief may file rebuttal no more than three (3) business days later.

(c) *Presumption of continuing need.* Unless otherwise indicated in the Board's order, a Board order issued under paragraph (a) of this section shall establish a rebuttable presumption that the transportation emergency will continue for more than 30 days from the date of that order.

(d)(1) *Petition to terminate relief.* Should the Board prescribe alternative rail service under paragraph (a), of this section the incumbent carrier may subsequently file a petition to terminate that relief. Such a petition shall contain a full explanation, together with all supporting evidence, to demonstrate that the carrier is providing, or is prepared to provide, adequate service. Carrier are admonished not to file such a petition prematurely.

(2) *Reply.* Parties must file replies to petitions to terminate filed under this subsection within five (5) business days.

(3) *Rebuttal.* The incumbent carrier may file any rebuttal no more than three (3) business days later.

(e) *Service.* All pleadings under this part shall be served by hand or overnight delivery on the Board, the other parties, and the Federal Railroad Administration.

[63 FR 71401, Dec. 28, 1998]

PART 1147—TEMPORARY RELIEF UNDER 49 U.S.C. 10705 AND 11102 FOR SERVICE INADEQUACIES

AUTHORITY: 49 U.S.C. 721, 10705, 11101, and 11102.

§ 1147.1 Prescription of alternative rail service.

(a) *General.* Alternative rail service will be prescribed under 49 U.S.C. 11102(a), 11102(c) or 10705(a) if the Board determines that, over an identified period of time, there has been a substantial, measurable deterioration or other demonstrated inadequacy in rail service provided by the incumbent carrier.

(b)(1) *Petition for Relief.* Affected shippers or railroads may seek relief described in paragraph (a) of this section

by filing an appropriate petition containing:

(i) A full explanation, together with all supporting evidence, to demonstrate that the standard for relief contained in paragraph (a) of this section is met;

(ii) A summary of the petitioner's discussions with the incumbent carrier of the service problems and the reasons why the incumbent carrier is unlikely to restore adequate rail service consistent with current transportation needs within a reasonable period of time;

(iii) A commitment from another available railroad to provide alternative service that would meet current transportation needs (or, if the petitioner is a railroad and does not have an agreement from the alternative carrier, an explanation as to why it does not), and an explanation of how the alternative service would be provided safely without degrading service to the existing customers of the alternative carrier and without unreasonably interfering with the incumbent's overall ability to provide service; and

(iv) A certification of service of the petition, by hand or by overnight delivery, on the incumbent carrier, the proposed alternative carrier, and the Federal Railroad Administration.

(2) *Reply*. The incumbent carrier must file a reply to a petition under this paragraph within thirty (30) days.

(3) *Rebuttal*. The party requesting relief may file rebuttal no more than fifteen (15) days later.

(c)(1) *Petition to terminate relief*. Should the Board prescribe alternative rail service under paragraph (a) of this section, the incumbent carrier may subsequently file a petition to terminate that relief. Such a petition shall contain a full explanation, together with all supporting evidence, to demonstrate that the carrier is providing, or is prepared to provide, adequate service to affected shippers. Carriers are admonished not to file such a petition prematurely.

(2) *Reply*. Parties must file replies to petitions to terminate filed under this subsection within five (5) business days.

(3) *Rebuttal*. The incumbent carrier may file any rebuttal no more than three (3) business days later.

(d) *Service*. All pleadings under this part shall be served by hand or by overnight delivery on the Board, other parties, and the Federal Railroad Administration.

[63 FR 71401, Dec. 28, 1998]

PARTS 1148–1149 [RESERVED]

Parts 1150–1174—Licensing Procedures

Parts 1150–1159—Rail Licensing Procedures

PART 1150—CERTIFICATE TO CONSTRUCT, ACQUIRE, OR OPERATE RAILROAD LINES

Subpart A—Applications Under 49 U.S.C. 10901

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AUTHORITY: 49 U.S.C. 721(a), 10502, 10901, and 10902.

SOURCE: 47 FR 8199, Feb. 25, 1982, unless otherwise noted. Redesignated at 47 FR 49581, Nov. 1, 1982.

Subpart A—Applications Under 49 U.S.C. 10901

§ 1150.1 Introduction.

(a) *When an application is required.* This subpart governs applications under 49 U.S.C. 10901 for a certificate of public convenience and necessity authorizing the construction, acquisition or operation of railroad lines. Noncarriers require Board approval under section 10901 to construct, acquire or operate a rail line in interstate commerce. Existing carriers require approval under section 10901 only to construct a new rail line or operate a line owned by a noncarrier, since acquisition by a carrier of an active rail line owned by a carrier is covered by 49 U.S.C. 11323. We have exempted from these requirements the acquisition by a State entity of a rail line that has been approved for abandonment, as well as operations over these lines. See subpart C of this part. In addition, where appropriate, we have granted individual exemptions from these certification requirements. See 49 U.S.C. 10502.

(b) *Content of the application.* Applications filed under this subpart shall include the information set forth in §§1150.2 through 1150.9. The applicant must also comply with the Energy and Environmental Regulations at 49 CFR parts 1106 and 1105 (including consulting with the Board's Section of Environmental Analysis at least 6 months prior to filing an application, to begin the scoping process to identify environmental issues and outline procedures for analysis of this aspect of the proposal).

[47 FR 8199, Feb. 25, 1982, as amended at 64 FR 53268, Oct. 1, 1999; 69 FR 58366, Sept. 30, 2004]

§ 1150.2 Overview.

(a) A brief narrative description of the proposal.

(b) The full name and address of applicant(s).

§ 1150.3 Information about applicant(s).

(a) The name, address, and phone number of the representative to receive correspondence concerning this application.

(b) Facts showing that applicant is either a common carrier by railroad or has been organized to implement the proposal for which approval is being sought.

(c) A statement indicating whether the rail line will be operated by applicant. If not, the operator which has been selected must join in the application, and provide all information required for an applicant. If the operator has not yet been selected, state who is being considered.

(d) A statement indicating whether applicant is affiliated by stock ownership or otherwise with any industry to be served by the line. If so, provide details about the nature and extent of the affiliation.

(e) Date and place of organization, applicable State statutes, and a brief description of the nature and objectives of the organization.

(f) If a corporation, submit:

(1) A list of officers, directors, and 10 principal stockholders of the corporation and their respective holdings. A statement whether any of these officers, directors or major shareholders

control other regulated carriers. Also a list of entities, corporation(s) individual(s), or group(s) who control applicant, the extent of control, and whether any of them control other common carriers.

(2) As exhibit A, any resolution of the stockholders or directors authorizing the proposal.

(g) If a partnership or individual, submit the name and address of all general partners and their respective interests, and whether any of them control other carriers.

(h) If applicant is an entity other than as described in paragraphs (e) or (f) of this section, submit name, title, and business address of principals or trustee, and whether the entity controls any other common carriers.

(i) If applicant is a trustee, receiver, assignee, or a personal representative of the real party in interest, details about the appointment (including supporting documents, such as the court order authorizing the appointment and the filing) and about the real party in interest.

(j) If applicant is an existing carrier, it may satisfy the informational requirements of paragraphs (f) through (i) of this section by making appropriate reference to the docket number of prior applications that have been filed within the previous three years in which the information has been submitted.

§ 1150.4 Information about the proposal.

(a) A description of the proposal and the significant terms and conditions, including consideration to be paid (monetary or otherwise). As exhibit B, copies of all relevant agreements.

(b) Details about the amount of traffic and a general description of commodities.

(c) The purposes of the proposal and an explanation of why the public convenience and necessity require or permit the proposal.

(d) As exhibit C, a map which clearly delineates the area to be served including origins, termini and stations, and cities, counties and States. The map should also delineate principal highways, rail routes and any possible interchange points with other railroads. If alternative routes are proposed for construction, the map should clearly indicate each route.

(e) A list of the counties and cities to be served under the proposal, and whether there is other rail service available to them. The names of the railroads with which the line would connect, and the proposed connecting points; the volume of traffic estimated to be interchanged; and a description of the principal terms of agreements with carriers covering operation, interchange of traffic, division of rates or trackage rights.

(f) The time schedule for consummation or completion of the proposal.

(g) If a new line is proposed for construction:

(1) The approximate area to be served by the line.

(2) The nature or type of existing and prospective industries (e.g., agriculture, manufacturing, mining, warehousing, forestry) in the area, with general information about the age, size, growth potential and projected rail use of these industries.

(3) Whether the construction will cross another rail line and the name of the railroad(s) owning the line(s) to be crossed. If the crossing will be accomplished with the permission of the railroad(s), include supporting agreements. If a Board determination under 49 U.S.C. 10901(d)(1) will be sought, include such requests.

§ 1150.5 Operational data.

As exhibit D, an operating plan, including traffic projection studies; a schedule of the operations; information about the crews to be used and where employees will be obtained; the rolling stock requirements and where it will be obtained; information about the operating experience and record of the proposed operator unless it is an operating railroad; any significant change in patterns of service; any associated discontinuance or abandonments; and expected operating economies.

§ 1150.6 Financial information.

(a) The manner in which applicant proposes to finance construction or acquisition, the kind and amount of securities to be issued, the approximate terms of their sale and total fixed

charges, the extent to which funds for financing are now available, and whether any of the securities issued would be underwritten by industries to be served by the proposed line. Explain how the fixed charges will be met.

(b) As exhibit E a recent balance sheet. As exhibit F, an income statement for the latest available calendar year prior to filing the application.

(c) A present value determination of the full costs of the proposal. If construction is proposed, the costs for each year of such construction (in a short narrative or by chart).

(d) A statement of projected net income for 2 years, based upon traffic projections. Where construction is contemplated, the statement should represent the 2 years following completion of construction.

§ 1150.7 Environmental and energy data.

As exhibit H, information and data prepared under 49 CFR Part 1105, and the ''Revision of the Nat'l. Guidelines Environmental Policy Act of 1969,'' 363 I.C.C. 653 (1980), and in accordance with ''Implementation of the Energy Policy and Conservation Act of 1975,'' 49 CFR Part 1106.

§ 1150.8 Additional support.

Any additional facts or reasons to show that the public convenience and necessity require or permit approval of this application. The Board may require additional information to be filed where appropriate.

§ 1150.9 Notice.

A summary of the proposal which will be used to provide notice under § 1150.10(f).

§ 1150.10 Procedures.

(a) *Waivers.* Prior to filing an application, prospective applicants may seek an advance waiver, either on a permanent or temporary basis, of required information which is unavailable or not necessary or useful in analysis of the proposal. However, if the information is clearly not applicable to the individual proposal, a waiver is not necessary and need not be sought. A petition must specify the sections for which waiver or clarification is sought and the reasons why it should be granted. No replies will be permitted. Parties may, upon an appropriate showing, demonstrate their need to examine data which have previously been waived. In such circumstances, the Board only requires that it be produced under § 1150.8 above.

(b) *Filing procedures.* The original and 10 copies of the application and all documents shall be filed with the Secretary. A filing fee in the amount set forth in 49 CFR 1002.2(f)(33) is required to file an application. Copies of documents shall be furnished promptly to interested parties upon request. The application shall include a stamped self-addressed envelope to be used to notify applicant of the docket number. Additionally, if possible, telephonic communication of the docket number shall be made.

(c) *Signatures.* The original of the application shall be signed by applicants (if a partnership, all general partners must sign; and if a corporation, association, or other similar form of organization, the signature should be that of the executive officer having knowledge of the matters and designated for that purpose). Applications shall be made under oath and shall contain an appropriate certification (if a corporation, by its secretary) showing that the affiant is duly authorized to verify and file the application. Any persons controlling an applicant shall also sign the application.

(d) *Related applications.* Applicant shall file concurrently all directly related applications (e.g., to issue securities, control motor carriers, obtain access to terminal operations, acquire trackage rights). All such applications will be considered with the main application.

(e) *Service.* As soon as the docket number is obtained the applicant shall serve a conformed copy of the application by first-class mail upon the Governor (or Executive Officer), Public Service Board, and Department of Transportation of each State in which any part of the properties involved in the proposed transaction is located. Within 2 weeks of filing, applicant shall submit to the Board a copy of the certificate of service indicating that

all persons so designated have been served a copy of the application.

(f) *Publication.* Within 2 weeks of filing, applicant shall have published the summary of the application (prepared under § 1150.9) in a newspaper of general circulation in each county in which the line is located. The notice should inform interested parties of the date by which they must advise the Board of their interest in the proceeding. This date shall be calculated as the 35th day after the filing of the application which is neither a Saturday, Sunday, or legal holiday in the District of Columbia. Applicant must file an affidavit of publication immediately after the publication has been completed. The Board will, as soon as practicable, either publish the notice summary in the FEDERAL REGISTER or reject the application if it is incomplete.

(g) *Public participation.* Written comments (with 10 copies) must be filed within 35 days of the filing of the application. Comments must contain the basis for the party's position either in support or opposition. Applicant must be served with a copy of each comment. On the basis of the comments and the assessment by the Section of Environmental Analysis, the Board will decide if a hearing is necessary. A hearing may be either oral or through receipt of written statements (modified procedure). (See 49 CFR 1112.1 *et seq.*) If there is no opposition to the application, additional evidence normally need not be filed, and a decision will be reached using the information in the application.

(h) *Replies to written comments.* Applicant's replies will be considered by the Board provided they are filed and served within 5 days of the due date of the pleadings they address.

[47 FR 8199, Feb. 25, 1982. Redesignated at 47 FR 49581, Nov. 1, 1982, and amended at 52 FR 46483, Dec. 8, 1987; 53 FR 19302, May 27, 1988; 64 FR 53268, Oct. 1, 1999]

Subpart B—Designated Operators

§ 1150.11 Introduction.

A certificate of designated operator will be issued to an operator providing service pursuant to a rail service continuation agreement under section 304 of the Regional Rail Reorganization Act of 1973, as amended by the Railroad Revitalization and Regulatory Reform Act of 1976. The designated operator (D-OP) may commence and terminate the service in accordance with the terms of the agreement. When service is terminated the D-OP must notify all shippers on the line. To obtain a D-OP certificate, the information in this subpart must be filed with the Board. A copy of the certificate of designated operator shall be served on the Association of American Railroads.

§ 1150.12 Information about the designated operator.

(a) The name and address of the D-OP.

(b) If a new corporation or other new business entity, a copy of the certificate of incorporation or, if unincorporated, the facts and official organizational documents relating to the business entity.

(c) The names and addresses of all officers and directors, with a statement from each which indicates present affiliation, if any, with a railroad.

(d) Sufficient information to establish its financial responsibility for the proposed undertaking, unless the D-OP is a common carrier by railroad. The nature and extent of all liability insurance coverage, including insurance binder or policy number, and name of insurer.

§ 1150.13 Relevant dates.

The exact dates of the period of operation which have been agreed upon by the D-OP, the offeror of the rail service continuation payment, and the owner of the line to be operated, in their lease and operating agreements.

§ 1150.14 Proposed service.

(a) A copy of all agreements between the D-OP, the offeror of the rail service continuation payment, and the owner of the line to be operated.

(b) Any additional information which is necessary to provide the Board with a description of:

(1) The line over which service is to be provided (e.g., U.S.R.A. Line); and

(2) All interline connections, including the names of the connecting railroads.

§ 1150.15 Information about offeror.

(a) The name and address of the offeror of the rail service continuation payment.

(b) Sufficient information to establish the financial responsibility of the offeror for the proposed undertaking, or if the offeror is a State or municipal corporation or authority, a statement that it has authority to perform the service or enter into the agreement for subsidy.

§ 1150.16 Procedures.

Upon receipt of this information, the matter will be docketed by the prefix initials ''D-OP.'' Operators may begin operating immediately upon the filing of the necessary information (plus three copies). Although the designated operator will not be required to seek and obtain authority from the Board either to commence or to terminate operations, the designated operator is a common carrier by railroad subject to all other applicable provisions of 49 U.S.C. Subtitle IV. However, we have exempted designated operators from some aspects of regulation. *See Exemption of Certain Designated Operators from Section 11343,* 361 ICC 379 (1979), as modified by *McGinness* v. *I.C.C.,* 662 F.2d 853 (D.C. Cir. 1981).

[47 FR 8199, Feb. 25, 1982. Redesignated at 47 FR 49581, Nov. 1, 1982, and amended at 64 FR 53268, Oct. 1, 1999]

Subpart C—Modified Certificate of Public Convenience and Necessity

§ 1150.21 Scope of rules.

These special rules apply to operations over abandoned rail lines, which have been acquired (through purchase or lease) by a State. The rail line must have fully abandoned, or approved for abandonment by the Board or a bankruptcy court. As used in these rules, the term ''State'' includes States, political subdivisions of States, and all instrumentalities through which the State can act. An operator has the option of applying for a modified certificate of public convenience and necessity under this subpart or a common carrier certificate under Subpart A of this part. A copy of the modified certificate shall be served on the Association of American Railroads.

§ 1150.22 Exemptions and common carrier status.

The acquisition by a State of a fully abandoned line is not subject to the jurisdiction of the Surface Transportation Board. The acquisition by a State of a line approved for abandonment and not yet fully abandoned is exempted from the Board's jurisdiction. If the State intends to operate the line itself, it will be considered a common carrier. However, when a State acquires a rail line described under § 1150.21 and contracts with an operator to provide service over the line, only the operator incurs a common carrier obligation. The operators of these lines are exempted from 49 U.S.C. 10901 and 10903 which are the statutory requirements governing the start up and termination of operations. Operators exempted from these requirements must comply with the requirements of this part and must apply for a modified certificate of public convenience and necessity. The operator is a common carrier and incurs all benefits and responsibilities under 49 U.S.C. subtitle IV; however, the State through its operational agreement or the operator of the line may determine certain preconditions, such as payment of a subsidy, which must be met by shippers to obtain service over the line. The operator must notify the shippers on the line of any preconditions. The modified certificate will authorize service to shippers who meet these preconditions and the operator will be required to provide complete common carrier service under this certificate only to those shippers. (See 363 ICC 132.)

§ 1150.23 Modified certificate of public convenience and necessity.

(a) The operator must file a notice with the Board for a modified certificate of public convenience and necessity. Operations may commence immediately upon the filing; however, the Board will review the information filed, and if complete, will issue a modified certificate notice.

(b) A notice for a modified certificate of public convenience and necessity

shall include the following information:

(1) The name and address of the operator and, unless the operator is an existing rail carrier:

(i) Its articles of incorporation or, if it is unincorporated, the facts and organizational documents relating to its formation;

(ii) The names and addresses of all of its officers and directors and a statement indicating any present affiliation each may have with a rail carrier; and

(iii) Sufficient information to establish the financial responsibility of the operator.

(2) Information about the prior abandonment, including docket number, status and date of the first decision approving the abandonment.

(3) The exact dates of the period of operation which have been agreed upon by the operator and the State which owns the line (if there is any agreement, it should be provided);

(4) A description of the service to be performed including, where applicable, a description of:

(i) The line over which service is to be performed;

(ii) All interline connections including the names of the connecting railroads;

(iii) The nature and extent of all liability insurance coverage, including binder or policy number and name of insurer; and

(iv) Any preconditions which shippers must meet to receive service.

(5) The name and address of any subsidizers, and

(6) Sufficient information to establish the financial responsibility of any subsidizers (if the subsidizer is a State, the information should show that it has authority to enter into the agreement for subsidized operations).

(c) The service offered and the applicable rates, charges, and conditions must be described in tariffs published by the operator to the Board's rules.

§ 1150.24 Termination of service.

The duration of the service may be determined in the contract between the State and the operator. An operator may not terminate service over a line unless it first provides 60 days' notice of its intent to terminate the service. The notice of intent must be:

(a) Filed with the State and the Board, and

(b) Mailed to all persons that have used the line within the 6 months preceding the date of the notice.

Subpart D—Exempt Transactions Under 49 U.S.C. 10901

SOURCE: 51 FR 2504, Jan. 17, 1986, unless otherwise noted.

§ 1150.31 Scope of exemption.

(a) Except as indicated below, this exemption applies to all acquisitions and operations under section 10901 (*See* 1150.1, *supra*). This exemption also includes:

(1) Acquisition by a noncarrier of rail property that would be operated by a third party;

(2) Operation by a new carrier of rail property acquired by a third party;

(3) A change in operators on the line; and

(4) Acquisition of incidental trackage rights. Incidental trackage rights include the grant of trackage rights by the seller, or the assignment of trackage rights to operate over the line of a third party that occur at the time of the exempt acquisition or operation. This exemption does not apply when a class I railroad abandons a line and another class I railroad then acquires the line in a proposal that would result in a major market extension as defined at § 1180.3(c).

(b) Other exemptions that may be relevant to a proposal under this subpart are the exemption for control at § 1180.2(d)(1) and (2), and the from securities regulation at 49 CFR part 1175.

§ 1150.32 Procedures and relevant dates—transactions that involve creation of Class III carriers.

(a) To qualify for this exemption, applicant must file a verified notice providing details about the transaction, and a brief caption summary, conforming to the format in § 1150.34, for publication in the FEDERAL REGISTER.

(b) The exemption will be effective 7 days after the notice is filed. The

Board, through the Director of the Office of Proceedings, will publish a notice in the FEDERAL REGISTER within 30 days of the filing. A change in operators would follow the provisions at § 1150.34, and notice must be given to shippers.

(c) If the notice contains false or misleading information, the exemption is void *ab initio.* A petition to revoke under 49 U.S.C. 10502(d) does not automatically stay the exemption.

(d) Applicant must preserve intact all sites and structures more than 50 years old until compliance with the requirements of Section 106 of the National Historic Preservation Act, 16 U.S.C. 470 is achieved.

(e) If the projected annual revenue of the carrier to be created by a transaction under this exemption exceeds $5 million, applicant must, at least 60 days before the exemption becomes effective, post a notice of intent to undertake the proposed transaction at the workplace of the employees on the affected line(s) and serve a copy of the notice on the national offices of the labor unions with employees on the affected line(s), setting forth the types and numbers of jobs expected to be available, the terms of employment and principles of employee selection, and the lines that are to be transferred, and certify to the Board that it has done so.

[51 FR 2504, Jan. 17, 1986, as amended at 53 FR 4626, Feb. 17, 1988; 53 FR 5982, Feb. 29, 1988; 62 FR 47584, Sept. 10, 1997; 69 FR 58366, Sept. 30, 2004]

§ 1150.33 Information to be contained in notice—transactions that involve creation of Class III carriers.

(a) The full name and address of the applicant;

(b) The name, address, and telephone number of the representative of the applicant who should receive correspondence;

(c) A statement that an agreement has been reached or details about when an agreement will be reached;

(d) The operator of the property;

(e) A brief summary of the proposed transaction, including:

(1) The name and address of the railroad transferring the subject property,

(2) The proposed time schedule for consummation of the transaction,

(3) The mile-posts of the subject property, including any branch lines, and

(4) The total route miles being acquired;

(f) A map that clearly indicates the area to be served, including origins, termini, stations, cities, counties, and States; and

(g) A certificate that applicant's projected revenues do not exceed those that would qualify it as a Class III carrier.

[51 FR 2504, Jan. 17, 1986, as amended at 51 FR 25207, July 11, 1986; 53 FR 4626, Feb. 17, 1988; 53 FR 5982, Feb. 29, 1988; 56 FR 36111, July 31, 1991]

§ 1150.34 Caption summary—transactions that involve creation of Class III carriers.

The caption summary must be in the following form. The information symbolized by numbers is identified in the key below:

SURFACE TRANSPORTATION BOARD

Notice of Exemption

FINANCE DOCKET NO.

(1)—EXEMPTION (2)–(3)

(1) Has filed a notice of exemption to (2) (3)'s line between (4). Comments must be filed with the Board and served on (5). (6).

Key to symbols:

(1) Name of entity acquiring or operating the line, or both.

(2) The type of transaction, *e.g.,* to acquire, operate, or both.

(3) The transferor.

(4) Describe the line.

(5) Petitioners representative, address, and telephone number.

(6) Cross reference to other class exemptions being used.

The notice is filed under § 1150.31. If the notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be

filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

[47 FR 8199, Feb. 25, 1982. Redesignated at 47 FR 49581, Nov. 1, 1982, as amended at 53 FR 5982, Feb. 29, 1988; 69 FR 58366, Sept. 30, 2004]

§ 1150.35 Procedures and relevant dates—transactions that involve creation of Class I or Class II carriers.

(a) To qualify for this exemption, applicant must serve a notice of intent to file a notice of exemption no later than 14 days before the notice of exemption is filed with the Board, and applicant must comply with the notice requirement of § 1150.32(e).

(b) The notice of intent must contain all the information required in § 1150.33 plus:

(1) A general statement of service intentions; and

(2) A general statement of labor impacts.

(c) The notice of intent must be served on:

(1) The Governor of each State in which track is to be sold;

(2) The State(s) Department of Transportation or equivalent agency;

(3) The national offices of the labor unions with employees on the affected line(s); and

(4) Shippers representing at least 50 percent of the volume of local traffic and traffic originating or terminating on the line(s) in the most recent 12 months for which data is available (beginning with the largest shipper and working down).

(d) Applicant must also file a verified notice of exemption conforming to the requirements of (b) above and of § 1150.34, and certify compliance with § 1150.35 (a), (b), and (c), attaching a copy of the notice of intent.

(e) The exemption will be effective 21 days after the notice is filed. The Board, through the Director of the Office of Proceedings, will publish a notice in the FEDERAL REGISTER within 30 days of the filing.

(f) If the notice contains false or misleading information, the exemption is void *ab initio*. A petition to revoke under 49 U.S.C. 10502(d) does not automatically stay the transaction. Stay petitions must be filed within 7 days of the filing of the notice of exemption. Replies will be due 7 days thereafter. To be considered, stay petitions must be timely served on the applicant.

(g) Applicant must comply with § 1150.33(g) regarding section 106 of the National Historic Preservation Act, 16 U.S.C. 470.

[53 FR 5982, Feb. 29, 1988, as amended at 53 FR 31341, Aug. 18, 1988; 62 FR 47584, Sept. 10, 1997; 69 FR 58366, Sept. 30, 2004]

§ 1150.36 Exempt construction of connecting track.

(a) *Scope.* This class exemption applies to proceedings involving the construction and operation of connecting lines of railroad within existing rail rights-of-way, or on land owned by connecting railroads, under 49 U.S.C. 10901 (a), (b), and (c). (See the reference to connecting track in 49 CFR 1105.6(b)(1).) This class exemption is designed to expedite and facilitate connecting track construction while ensuring full and timely environmental review. The Surface Transportation Board (Board) has found that its prior review of connecting track construction and operation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; that continued regulation is not necessary to protect shippers from abuse of market power; and that the construction of connecting track would be of limited scope. *See* 49 U.S.C. 10502. To use this class exemption, a pre-filing notice, environmental report, historic report, and notice of exemption must be filed that complies with the procedures in § 1150.36 (b) and (c), and the Board's environmental rules, codified at 49 CFR part 1105.

(b) *Environmental requirements.* The environmental regulations at 49 CFR part 1105 must be complied with fully. An environmental report containing the information specified at 49 CFR 1105.7(e), as well as an historic report containing the information specified at 49 CFR 1105.8(d), must be filed either before or at the same time as the notice of exemption is filed. *See* 49 CFR 1105.7(a). The entity seeking the exemption authority must also serve copies of the environmental report on the agencies listed at 49 CFR 1105.7(b). Because the environmental report must include a certification that appropriate

agencies have been consulted in its preparation (*see* 49 CFR 1105.7(c)), parties should begin environmental and historic consultations well before the notice of exemption is filed. Environmental requirements may be waived or modified where a petitioner demonstrates in writing that such action is appropriate. *See* 49 CFR 1105.10(c). It is to the advantage of parties to consult with the Board's Section of Environmental Analysis (SEA) at the earliest possible date to begin environmental review.

(c) *Procedures and dates.* (1) At least 20 days prior to the filing of a notice of exemption with the Board, the party seeking the exemption authority must notify in writing: the State Public Service Commission, the State Department of Transportation (or equivalent agency), and the State Clearinghouse (if there is no clearinghouse, the State Environmental Protection Agency), of each State involved. The pre-filing notice shall include: the name and address of the railroad (or other entity proposing to construct the line) and the proposed operator; a complete description of the proposed construction and operation, including a map; an indication that the class exemption procedure is being used; and the approximate date that construction is proposed to begin. This pre-filing notice shall include a certification that the petitioner will comply with the Board's environmental regulations, codified at 49 CFR part 1105, and a statement that those regulations generally require the Board to:

(i) Prepare an environmental assessment (EA) (or environmental impact statement (EIS) if necessary),

(ii) Make the document (EA or EIS, as appropriate) available to the parties (and to the public, upon request to SEA); and

(iii) Accept for filing and consideration comments on the environmental document as well as petitions for stay and reconsideration.

(2) Petitioner must file a verified notice of exemption with the Board at least 90 days before the construction is proposed to begin. In addition to the information contained in § 1150.36(c)(1), the notice shall include a statement certifying compliance with the environmental rules at 49 CFR part 1105 and the pre-filing notice requirements of 49 CFR 1150.36(c)(1).

(3) The Board, through the Director of the Office of Proceedings, shall publish a notice in the FEDERAL REGISTER within 20 days after the notice of exemption is received that describes the construction project and invites comments. SEA will then prepare an EA (or, if necessary, an EIS). The EA generally will be made available 15 days after the FEDERAL REGISTER notice. It will be served on all parties and appropriate agencies. Others may request a copy from SEA. The deadline for submission of comments on the EA will generally be within 30 days of its availability (*see* 49 CFR 1105.10(b)). If an EIS is prepared, the time frames and procedures set forth in 49 CFR 1105.10(a) generally will apply.

(4) The Board's environmental document (together with any comments and SEA's recommendations) shall be used in deciding whether to allow the particular construction project to proceed under the class exemption and whether to impose appropriate mitigating conditions upon its use (including use of an environmentally preferable route). If the Board concludes that a particular project will result in serious adverse environmental consequences that cannot be adequately mitigated, it may deny authority to proceed with the construction under the class exemption (the ''no-build'' alternative). Persons believing that they can show that the need for a particular line outweighs the adverse environmental consequences can file an application for approval of the proposed construction under 49 U.S.C. 10901.

(5) No construction may begin until the Board has completed its environmental review and issued a final decision.

(6) Petitions to stay the effective date of the notice of exemption on other than environmental and/or historic preservation grounds must be filed within 10 days of the FEDERAL REGISTER publication. Petitions to stay the effective date of the notice on environmental and/or historic preservation grounds may be filed at any time but must be filed sufficiently in advance of the effective date to allow the Board to

consider and act on the petition before the notice becomes effective. Petitions for reconsideration must be filed within 20 days of the FEDERAL REGISTER publication.

(7) The exemption generally will be effective 70 days after publication in the FEDERAL REGISTER, unless stayed. If the notice of exemption contains false or misleading information, the exemption is void *ab initio* and the Board shall summarily reject the exemption notice.

(8) Where significant environmental issues have been raised or discovered during the environmental review process, the Board shall issue, on or before the effective date of the exemption, a final decision allowing the exemption to become effective and imposing appropriate mitigating conditions or taking other appropriate action such as selecting the ''no build'' alternative.

(9) Where there has been full environmental review and no significant environmental issues have been raised or discovered, the Board, through the Director of the Office of Proceedings, shall issue, on or before the effective date of the exemption, a final decision consisting of a Finding of No Significant Impact (FONSI) to show that the environmental record has been considered (*see* 49 CFR 1105.10(g)).

(10) The Board, on its own motion or at the request of a party to the case, will stay the effective date of individual notices of exemption when an informed decision on environmental issues cannot be made prior to the date that the exemption authority would otherwise become effective. Stays will be granted initially for a period of 60 days to permit resolution of environmental issues and issuance of a final decision. The Board expects that this 60-day period will usually be sufficient for these purposes unless preparation of an EIS is required. If, however, environmental issues remain unresolved upon expiration of this 60-day period, the Board, upon its own motion, or at the request of a party to the case, will extend the stay, as necessary to permit completion of environmental review and issuance of a final decision. The Board's order will specify the duration of each extension of the initial stay period. In cases requiring the preparation of an EIS, the Board will extend the stay for a period sufficient to permit compliance with the procedural guidelines established by the Board's environmental regulations.

(d) *Third-Party Consultants.* An environmental and historic report required under 49 CFR 1105.7 and 1105.8 will not be required where a petitioner engages a third-party consultant who is approved by SEA and acts under SEA's direction and supervision in preparing the EA or EIS. In such a case, the third-party consultant must act on behalf of the Board, working under SEA's direction to collect the environmental information that is needed and to compile it into a draft EA or EIS, which is prepared under SEA's direction and then submitted to SEA for its final review and approval. *See* 49 CFR 1105.10(d).

[61 FR 29974, June 13, 1996, as amended at 64 FR 53268, Oct. 1, 1999]

Subpart E—Exempt Transactions Under 49 U.S.C. 10902 for Class III Rail Carriers

SOURCE: 61 FR 32355, June 24, 1996, unless otherwise noted.

§ 1150.41 Scope of exemption.

Except as indicated in paragraphs (a) through (d) of this section, this exemption applies to acquisitions or operations by Class III rail carriers under section 10902. This exemption also includes:

(a) Acquisition by a Class III rail carrier of rail property that would be operated by a third party;

(b) Operation by a Class III carrier of rail property acquired by a third party;

(c) A change in operators on such a line; and

(d) Acquisition of incidental trackage rights. Incidental trackage rights include the grant of trackage rights by the seller, or the acquisition of trackage rights to operate over the line of a third party, that occurs at the time of the purchase.

§ 1150.42 Procedures and relevant dates for small line acquisitions.

(a) This exemption applies to the acquisition of rail lines with projected

annual revenues which, together with the acquiring carrier's projected annual revenue, do not exceed the annual revenue of a Class III railroad. To qualify for this exemption, the Class III rail carrier applicant must file a verified notice providing details about the transaction, and a brief caption summary, conforming to the format in § 1150.44, for publication in the FEDERAL REGISTER. In addition to the written submission, the notice and summary must be submitted on a 3.5-inch diskette formatted for WordPerfect 5.1.

(b) The exemption will be effective 7 days after the notice is filed. The Board, through the Director of the Office of Proceedings, will publish a notice in the FEDERAL REGISTER within 30 days of the filing. A change in operators must follow the provisions at § 1150.44, and notice must be given to shippers.

(c) If the notice contains false or misleading information, the exemption is void *ab initio.* A petition to revoke under 49 U.S.C. 10502(d) does not automatically stay the exemption.

(d) Applicant must preserve intact all sites and structures more than 50 years old until compliance with the requirements of section 106 of the National Historic Preservation Act, 16 U.S.C. 470f, is achieved.

(e) If the projected annual revenue of the rail lines to be acquired or operated, together with the acquiring carrier's projected annual revenue, exceeds $5 million, the applicant must, at least 60 days before the exemption becomes effective, post a notice of applicant's intent to undertake the proposed transaction at the workplace of the employees on the affected line(s) and serve a copy of the notice on the national offices of the labor unions with employees on the affected line(s), setting forth the types and numbers of jobs expected to be available, the terms of employment and principles of employee selection, and the lines that are to be transferred, and certify to the Board that it has done so.

[61 FR 32355, June 24, 1996, as amended at 62 FR 47584, Sept. 10, 1997]

§ 1150.43 Information to be contained in notice for small line acquisitions.

(a) The full name and address of the Class III rail carrier applicant;

(b) The name, address, and telephone number of the representative of the applicant who should receive correspondence;

(c) A statement that an agreement has been reached or details about when an agreement will be reached;

(d) The operator of the property;

(e) A brief summary of the proposed transaction, including:

(1) The name and address of the railroad transferring the subject property to the Class III rail carrier applicant;

(2) The proposed time schedule for consummation of the transaction;

(3) The mileposts of the subject property, including any branch lines; and

(4) The total route miles being acquired;

(f) A map that clearly indicates the area to be served, including origins, termini, stations, cities, counties, and states; and

(g) A certificate that applicant's projected revenues as a result of the transaction will not result in the creation of a Class II or Class I rail carrier so as to require processing under § 1150.45.

§ 1150.44 Caption summary.

The caption summary must be in the following form. The information symbolized by numbers is identified in the key as follows:

SURFACE TRANSPORTATION BOARD

Notice of Exemption

STB FINANCE DOCKET NO.

(1)—EXEMPTION (2)–(3)

(1) Has filed a notice of exemption to (2) (3)'s line between (4). Comments must be filed with the Board and served on (5). (6). Key to symbols:

(1) Name of carrier acquiring or operating the line.

(2) The type of transaction, e.g., to acquire or operate.

(3) The transferor.

(4) Describe the line.

(5) Petitioner's representative, address, and telephone number.

(6) Cross reference to other class exemptions being used.

The notice is filed under 49 CFR 1150.41. If the notice contains false or misleading information, the exemption is void *ab initio*. The filing of a petition to revoke will not automatically stay the transaction.

[61 FR 32355, June 24, 1996; 61 FR 36965, July 15, 1996]

§ 1150.45 Procedures and relevant dates—transactions under section 10902 that involve creation of Class I or Class II rail carriers.

(a) To qualify for this exemption, applicant must serve a notice of intent to file a notice of exemption no later than 14 days before the notice of exemption is filed with the Board, and applicant must comply with the notice requirement of § 1150.42(e).

(b) The notice of intent must contain all the information required in § 1150.43 plus:

(1) A general statement of service intentions; and

(2) A general statement of labor impacts.

(c) The notice of intent must be served on:

(1) The Governor of each state in which track is to be sold;

(2) The state(s) Department of Transportation or equivalent agency;

(3) The national offices of the labor unions with employees on the affected line(s); and

(4) Shippers representing at least 50 percent of the volume of local traffic and traffic originating or terminating on the line(s) in the most recent 12 months for which data are available (beginning with the largest shipper and working down).

(d) Applicant must also file a verified notice of exemption conforming to the requirements of paragraph (b) of this section and of § 1150.44, and certify compliance with paragraphs (a), (b), and (c) of this section, attaching a copy of the notice of intent. In addition to the written submission, the notice must be submitted on a 3.5-inch diskette formatted for WordPerfect 5.1.

(e) The exemption will be effective 21 days after the notice is filed. The Board, through the Director of the Office of Proceedings, will publish a notice in the FEDERAL REGISTER within 30 days of the filing.

(f) If the notice contains false or misleading information, the exemption is void *ab initio*. A petition to revoke under 49 U.S.C. 10502(d) does not automatically stay the transaction. Stay petitions must be filed within 7 days of the filing of the notice of exemption. Replies will be due 7 days thereafter. To be considered, stay petitions must be timely served on the applicant.

(g) Applicant must preserve intact all sites and structures more than 50 years old until compliance with the requirements of section 106 of the National Historic Preservation Act, 16 U.S.C. 470f, is achieved.

[61 FR 32355, June 24, 1996, as amended at 62 FR 47584, Sept. 10, 1997]

PART 1151—FEEDER RAILROAD DEVELOPMENT PROGRAM

Sec.
1151.1 Scope.
1151.2 Procedures.
1151.3 Contents of application.
1151.4 Board determination.

AUTHORITY: 49 U.S.C. 10907.

SOURCE: 48 FR 9654, Mar. 8, 1983, unless otherwise noted.

§ 1151.1 Scope.

This part governs applications filed under 49 U.S.C. 10907. The Board can require the sale of a rail line to a financially responsible person. A rail line is eligible for a forced sale if it appears in category 1 or 2 of the owning railroad's system diagram map (but the railroad has not filed an application to abandon the line), or the public convenience and necessity, as defined in 49 U.S.C. 10907(c)(1), permit or require the sale of the line.

[48 FR 9654, Mar. 8, 1983, as amended at 56 FR 37861, Aug. 9, 1991; 64 FR 53268, Oct. 1, 1999]

§ 1151.2 Procedures.

(a) Service. When an application is filed, applicant must concurrently serve a copy of the application by first class mail on:

(1) The owning railroad;

(2) All rail patrons who originated and/or received traffic on the line during the 12-month period preceding the month in which the application is filed;

(3) The designated State agency in the State(s) where the property is located;

(4) County governments where the line is located;

(5) The National Railroad Passenger Corporation (Amtrak) (if Amtrak operates on the line);

(6) And the national offices of rail unions with employees on the line.

(b) Acceptance or rejection of an application.

(1) The Board, through the Director of the Office of Proceedings, will accept a complete application no later than 30 days after the application is filed by publishing a notice in the FEDERAL REGISTER. An application is complete if it has been properly served and contains substantially all information required by § 1151.3, except as modified by advance waiver. The notice will also announce the schedule for filing of competing applications and responses.

(2) The Board, through the Director of the Office of Proceedings, will reject an incomplete application by serving a decision no later than 30 days after the application is filed. The decision will explain specifically why the application was incomplete. A revised application may be submitted, incorporating portions of the prior application by reference.

(c) Competing applications.

(1) Unless otherwise scheduled in the notice, competing applications by other parties seeking to acquire all or any portion of the line sought in the initial application are due within 30 days after the initial application is accepted.

(2) The Board, through the Director of the Office of Proceedings, will issue a decision accepting or rejecting a competing application no later than 15 days after it is filed. A competing application will be rejected if it does not substantially contain the information required by § 1151.3, except as modified by advance waiver.

(d) Incomplete applications.

(1) If an applicant seeking to file an initial or competing application is unable to obtain required information that is primarily or exclusively within the personal knowledge of the owning carrier, the applicant may file an incomplete application if it files at the same time a request for discovery under 49 CFR part 1114 to obtain the needed information from the owning carrier.

(2) The Board, through the Director of the Office of Proceedings, will by decision conditionally accept incomplete initial or competing applications, if the Director determines that the discovery sought is necessary for the application and primarily or exclusively within the knowledge of the owning carrier.

(3) When the information sought through discovery has been filed for an initial application, FEDERAL REGISTER notice under paragraph (b) of this section will be published.

(4) When the information sought through discovery has been filed for a competing application, a decision will be issued under paragraph (c) of this section.

(e) Comments. Unless otherwise scheduled in the notice, verified statements and comments addressing both the initial and competing applications must be filed within 60 days after the initial application is accepted.

(f) Replies. Unless otherwise scheduled in the notice, verified replies by applicants and other interested parties must be filed within 80 days after the initial application is accepted.

(g) Publication. If the Board finds that the public convenience and necessity require or permit sale of the line, the Board shall concurrently publish this finding in the FEDERAL REGISTER.

(h) Acceptance or rejection. If the Board concludes that sale of the line should be required, the applicant(s) must file a notice with the Board and the owning railroad accepting or rejecting the Board's determination. The notice must be filed within 10 days of the service date of the decision.

(i) Selection. If two or more applicants timely file notices accepting the Board's determination, the owning railroad must select the applicant to which it will sell the line and file notice of its selection with the Board and serve a copy on the applicants within

15 days of the service date of the Board decision.

(j) Waiver. Prior to filing an initial or competing application, an applicant may file a petition to waive or clarify specific portions of part 1151. A decision by the Director of the Office of Proceedings granting or denying a petition for waiver or clarification will be issued within 30 days of the date the petition is filed. Appeals from the Director's decision will be decided by the entire Board.

(k) Extension. Extensions of filing dates may be granted for good cause.

[56 FR 37861, Aug. 9, 1991]

§ 1151.3 Contents of application.

(a) The initial application and all competing applications must include the following information in the form of verified statements:

(1) Identification of the line to be purchased including:

(i) The name of the owning carrier; and

(ii) The exact location of the line to be purchased including milepost designations, origin and termination points, stations located on the line, and cities, counties and States traversed by the line.

(2) Identification of applicant including:

(i) The applicant's name and address;

(ii) The name, address, and phone number of the representative to receive correspondence concerning this application;

(iii) A description of applicant's affiliation with any railroad; and

(iv) If the applicant is a corporation, the names and addresses of its officers and directors.

(3) Information sufficient to demonstrate that the applicant is a financially responsible person. In this regard, the applicant must demonstrate its ability:

(i) To pay the higher of the net liquidation value (NLV) or going concern value (GCV) of the line; and

(ii) To cover expenses associated with providing services over the line (including, but not limited to, operating costs, rents, and taxes) for at least the first 3 years after acquisition of the line.

(4) An estimate of the NLV and the GCV of the line and evidence in support of these estimates.

(5) An offer to purchase the line at the higher of the two estimates submitted pursuant to paragraph (a)(4) of this section.

(6) The dates for the proposed period of operation of the line covered by the application.

(7) An operating plan that identifies the proposed operator; attaches any contract that the applicant may have with the proposed operator; describes in detail the service that is to be provided over the line, including all interline connections; and demonstrates that adequate transportation will be provided over the line for at least 3 years from the date of acquisition.

(8) A description of the liability insurance coverage carried by applicant or any proposed operator. If trackage rights are requested, the insurance must be at a level sufficient to indemnify the owning railroad against all personal and property damage that may result from negligence on the part of the operator in exercising the trackage rights.

(9) Any preconditions (such as assuming a share of any subsidy payments) that will be placed on shippers in order for them to receive service, and a statement that if the application is approved, no further preconditions will be placed on shippers without Board approval. (This Statement Will Be Binding Upon Applicant if the Application is Approved.)

(10) The name and address of any person(s) who will subsidize the operation of the line.

(11) A statement that the applicant will seek a finding by the Board that the public convenience and necessity permit or require acquisition, or a statement that the line is currently in category 1 or 2 of the owning railroad's system diagram map.

(i) If the applicant seeks a finding of public convenience and necessity, the application must contain detailed evidence that permits the Board to find that:

(A) The rail carrier operating the line refused within a reasonable time to make the necessary efforts to provide

adequate service to shippers who transport traffic over the line;

(B) The transportation over the line is inadequate for the majority of shippers who transport traffic over the line;

(C) The sale of the line will not have a significantly adverse financial effect on the rail carrier operating the line;

(D) The sale of the line will not have an adverse effect on the overall operational performance of the rail carrier operating the line; and

(E) The sale of the line will be likely to result in improved railroad transportation for shippers who transport traffic over the line.

(ii) If the applicant seeks a finding that the line is currently in category 1 or 2 of the owning carrier's system diagram map, the relevant portion of the current map must be attached to the application.

(12) A statement detailing applicant's election of exemption from the provisions of Title 49, United States Code, and a statement that if the application is approved, no further exemptions will be elected. (This Statement Will Be Binding Upon the Applicant if the Application is Approved.)

(13) A description of any trackage rights sought over the owning railroad that are required to allow reasonable interchange or to move power equipment or empty rolling stock between noncontiguous feeder lines operated by the applicant, and an estimate of the reasonable compensation for such rights, including full explanation of how the estimate was reached. The description of the trackage rights shall include the following information: Milepost or other identification for each segment of track; the need for the trackage rights (interchange of traffic, movement of equipment, etc.); frequency of operations; times of operation; any alternative to the use of trackage rights; and any other pertinent data. Trackage rights that are necessary for the interchange of traffic shall be limited to the closest point to the junction with the owning railroad's line that allows the efficient interchange of traffic. A statement shall be included that the applicant agrees to have its train and crew personnel take the operating rules examination of the railroad over which the operating rights are exercised.

(14) If applicant requests Board prescribed joint rates and divisions in the feeder line proceeding, a description of any joint rate and division agreement that must be established. The description must contain the following information:

(i) The railroad(s) involved;

(ii) The estimated revenues that will result from the division(s);

(iii) The total costs of operating the line segment purchased (including any trackage rights fees).

(iv) Information sufficient to allow the Board to determine that the line sought to be acquired carried less than 3 million gross ton-miles of traffic per mile in the preceding calendar year[1]; and

(v) Any other pertinent information.

(15) The extent to which the owning railroad's employees who normally service the line will be used.

(16) A certificate stating that the service requirements of § 1151.2(a) have been met.

(b) Applicant must make copies of the application available to interested parties upon request.

[48 FR 9654, Mar. 8, 1983, as amended at 56 FR 37862, Aug. 9, 1991; 64 FR 53268, Oct. 1, 1999]

§ 1151.4 Board determination.

(a) The Board shall determine whether each applicant is a financially responsible person. To be a financially responsible person, the Board must find that:

(1) The applicant is capable of paying the constitutional minimum value of the line and able to assure that adequate transportation will be provided over the line for at least 3 years;

(2) The applicant is not a class I or class II railroad or an entity affiliated with a class I or class II railroad.

[1] Gross ton-miles are calculated by adding the ton-miles of the cargo and the ton-miles related to the tare (empty) weight of the freight cars used to transport the cargo in the loaded movement. In calculating the gross ton-miles, only those related to the portion of the segment purchased shall be included.

(b) If the Board finds that one or more applicants are financially responsible parties, it shall determine whether the involved line or line segment is a qualified line. A line is a qualified line if:

(1) Either

(i) The public convenience and necessity require or permit the sale of line or line segment; or

(ii) The line or line segment is classified in category 1 or 2 of the owning carrier's system diagram map; and

(2) The traffic level on the line or line segment sought to be acquired was less than 3 million gross ton-miles of traffic per mile in the preceding calendar year (Note: This finding will not be required for applications filed after October 1, 1983).

(c) If the Board finds that one or more financially responsible parties have offered to buy a qualifying line of railroad, the Board shall set the acquisition cost of the line at the higher of NLV or GCV, order the owning carrier to sell the rail line to one of the financially responsible applicants, and resolve any related issues raised in the application. If an applicant and the owning railroad agree on an acquisition price, that price shall be the final price.

(d) If trackage rights are sought in the application, the Board shall, based on the evidence of record, set the adequate compensation for such rights, if the parties have not agreed.

(e) If the applicant requests the Board to set joint rates or divisions and the line carried less than 3 million gross ton-miles of traffic per mile during the preceding calendar year, the Board shall, pursuant to 49 U.S.C. 10705(a), establish joint rates and divisions based on the evidence of record in the proceeding. Unless specifically requested to do so by the selling carrier, the Board will not set the rate for the selling railroad's share of the joint rate at less than the applicable level (for the year in which the acquisition is made) set by 49 U.S.C. 10709(d)(2), which limits Board maximum ratemaking jurisdiction to rates above certain cost/price ratios.

PART 1152—ABANDONMENT AND DISCONTINUANCE OF RAIL LINES AND RAIL TRANSPORTATION UNDER 49 U.S.C. 10903

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1152.50 Exempt abandonments and discontinuances of service and trackage rights.

Subpart G—Special Rules Applicable to Petitions for Abandonments or Discontinuances of Service or Trackage Rights Filed Under the 49 U.S.C. 10502 Exemption Procedure

1152.60 Special rules.

AUTHORITY: 11 U.S.C. 1170; 16 U.S.C. 1247(d) and 1248; 45 U.S.C. 744; and 49 U.S.C. 701 note (1995) (section 204 of the ICC Termination Act of 1995), 721(a), 10502, 10903–10905, and 11161.

SOURCE: 61 FR 67883, Dec. 24, 1996, unless otherwise noted.

Subpart A—General

§ 1152.1 Purpose and scope.

(a) 49 U.S.C. 10903 *et seq.* governs abandonment of rail lines and discontinuance of rail service by common carriers. Section 10903(d) provides that no line of railroad may be abandoned and no rail service discontinued unless the Board finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance.

(b) Part 1152 contains regulations governing abandonment of, and discontinuance of service over, rail lines. This part also sets forth procedures for providing financial assistance to assure continued rail freight service under 49 U.S.C. 10904, for acquiring rail lines for alternate public use under 49 U.S.C. 10905, and for acquiring or using a rail right-of-way for interim trail use and rail banking.

§ 1152.2 Definitions.

Unless otherwise provided in the text of the regulations, the following definitions apply in this part:

(a) *Account* means an account in the Board's Uniform System of Accounts for Railroad Companies (49 CFR part 1201).

(b) *Act* means the ICC Termination Act of 1995 (Pub. L. 104–88, 109 Stat. 803), as amended.

(c) *Base year* means the latest 12-month period, ending no earlier than 6 months prior to the filing of the abandonment or discontinuance application, for which data have been collected at the branch level as prescribed in § 1152.30(b).

(d) *Board* means the Surface Transportation Board.

(e) *Branch* means a segment of line for which an application for abandonment or discontinuance, pursuant to 49 U.S.C. 10903, has been filed.

(f) *Carrier* means a railroad company or the trustee or trustees of a railroad company subject to regulation under 49 U.S.C., Subtitle IV, chapter 105.

(g) *Designated state agency* means the instrumentality created by a state or designated by appropriate authority to administer or coordinate its state rail plan.

(h) *Forecast Year* means the 12-month period, beginning with the first day of the month in which the application is filed with the Board, for which future revenues and costs are estimated.

(i) *Form R–1* means the railroad's annual report filed with the Board in accordance with the requirements of 49 U.S.C. 11145.

(j) *Offeror* means a shipper, a state, the United States, a local or regional transportation authority, or any financially responsible person offering rail service continuation assistance under 49 U.S.C. 10904.

(k) *URCS* means the Uniform Railroad Costing System.

(l) *Significant user* means:

(1) Each of the 10 rail patrons which originated and/or received the largest number of carloads (or each patron if there are less than 10); and

(2) Any other rail patron which originated and/or received 50 or more carloads, on the line proposed for abandonment or discontinuance, during the 12-month period preceding the month in which notice is given of the abandonment or discontinuance application.

(m) *Subsidy year* means any 12-month period for which a subsidy agreement has been negotiated and is in operation.

Subpart B—System Diagram

§ 1152.10 System diagram map.

(a) Each carrier shall prepare a diagram of its rail system on a map, designating all lines in its system by the categories established in paragraph (b) of this section. A Class III carrier shall either prepare the aforementioned map of its rail system or file only a narrative description of its lines that provides all of the information required in this subpart.

(b) All lines in each carrier's rail system shall be separated into the following categories:

(1) All lines or portions of lines which the carrier anticipates will be the subject of an abandonment or discontinuance application to be filed within the 3-year period following the date upon which the diagram or narrative, or any amended diagram or narrative, is filed with the Board;

(2) All lines or portions of lines which are potentially subject to abandonment, defined as those which the carrier has under study and believes may be the subject of a future abandonment application because of either anticipated operating losses or excessive rehabilitation costs, as compared to potential revenues;

(3) All lines or portions of lines for which an abandonment or discontinuance application is pending before the Board on the date upon which the diagram or narrative, or any amended diagram or narrative, is filed with the Board;

(4) All lines or portions of lines which are being operated under the rail service continuation provisions of 49 U.S.C. 10904 (and former 49 U.S.C. 10905) on the date upon which the diagram or narrative, or any amended diagram or narrative, is filed with the Board; and

(5) All other lines or portions of lines which the carrier owns and operates, directly or indirectly.

(c) The system diagram map shall be color-coded to show the 5 categories of lines as follows:

(1) Red shall designate those lines described in § 1152.10(b)(1);

(2) Green shall designate those lines described in § 1152.10(b)(2);

(3) Yellow shall designate those lines described in § 1152.10(b)(3);

(4) Brown shall designate those lines described in § 1152.10(b)(4); and

(5) Black or dark blue shall designate those lines described in § 1152.10(b)(5).

(d) The system diagram map shall also identify, and shall be drawn to a scale sufficient to depict clearly, the location of:

(1) All state boundary lines;

(2) Boundaries of every county in which is situated a rail line owned or operated by the carrier which is listed in categories 1 thru 4 (§ 1152.10(b)(1) thru (4));

(3) Every Standard Metropolitan Statistical Area (SMSA) any portion of which is located within 5 air miles of a rail line owned or operated by the carrier; and

(4) Every city outside an SMSA which has a population of 5,000 or more persons (according to the latest published United States census reports) and which has any portion located within 5 air miles of a rail line owned or operated by the carrier. A series of interrelated maps may be used where the system serves a very large or congested area. An explanation of the interrelationship must be furnished.

§ 1152.11 Description of lines to accompany the system diagram map or information to be contained in the narrative.

Each carrier required to file a system diagram map or narrative shall list and describe, separately by category and within each category by state, all lines or portions of lines identified on its system diagram map or to be included in its narrative as falling within categories 1 thru 3 (§ 1152.10(b)(1) thru (3)) as follows:

(a) Carrier's designation for each line (for example, the Zanesville Secondary Track);

(b) State or states in which each line is located;

(c) County or counties in which each line is located;

(d) Mileposts delineating each line or portion of line; and

(e) Agency or terminal stations located on each line or portion of line with milepost designations.

§ 1152.12 Filing and publication.

(a) Each carrier required to file a system diagram map or a narrative shall file with the Board three copies of a complete and up-dated color-coded system diagram map or narrative (identified by its ''AB number'') and the accompanying line descriptions in conformance with the filing and publication requirements of this section. If a revised map or narrative is filed, the line descriptions for the lines which were revised must be filed.

(b) The color-coded system diagram map or narrative, any amendments, and accompanying line descriptions shall be served upon the Governor, the Public Service Commission (or equivalent agency) and the designated state agency of each state within which the carrier operates or owns a line of railroad.

(c) The carrier shall: (1) Publish in a newspaper of general circulation in each county containing category 1 through 3 lines or lines being revised, a notice containing:

(i) A black-and-white copy of the system diagram map (or a portion of the map clearly depicting its lines in that county); and

(ii) A description of each line (in the case of Class III carriers only the line description is required);

(2) Post a copy of the newspaper notice:

(i) In each agency station or terminal on each line in categories 1 through 3 and on each line which has been revised; or

(ii) If there is no agency station on the line, at any station through which business for the line is received or forwarded;

(3) Furnish, at reasonable cost, upon request of any interested person, a copy of its system diagram map (either color-coded or black-and-white) or narrative; and

(4) Notify interested persons of this availability through its publication in the appropriate county newspaper.

(d) Each carrier required to file a system diagram map or narrative shall file with the Board an affidavit of service and publication stating the date each was accomplished. A copy of each newspaper notice published shall be attached to the affidavit. The effective date of the filing of the initial system diagram map or narrative and each amended system diagram map or narrative as required in paragraph (a) of this section shall be deemed to be the date upon which the Board receives the affidavit required in this paragraph.

(e) The Board shall require republication of the notice if it is found to be inadequate.

[61 FR 67883, Dec. 24, 1996 as amended at 64 FR 53268, Oct. 1, 1999]

§ 1152.13 Amendment of the system diagram map or narrative.

(a) Each carrier shall be responsible for maintaining the continuing accuracy of its system diagram map and the accompanying line descriptions or narrative. Amendments may be filed at any time and will be subject to all carrier filing and publication requirements of § 1152.12.

(b) By March 24, 1997, each carrier shall file with the Board a revised and updated color-coded system diagram map and line descriptions or narrative which shall be subject to the filing and publication requirements of § 1152.12. Thereafter, each carrier shall file amendments as line designations change and update its map or narrative, as appropriate. Also, each carrier shall file an updated or amended map or narrative upon order of the Board. Each new rail carrier shall comply with the requirements of this subsection within 60 days after it becomes a carrier.

(c) The Board will reject an abandonment or discontinuance application filed by a rail carrier if any part of the application includes a line that has not been identified and described, by amendment or otherwise, on the carrier's system diagram map or narrative, as appropriate, as a line in category 1 (§ 1152.10(b)(1)) for at least 60 days.

§ 1152.14 Availability of data.

Each carrier shall provide to the designated state agency, upon request, information concerning the net liquidation value (as defined in § 1152.34(c)) of any line placed in category 1 (§ 1152.10(b)(1)) on its system diagram

map or narrative together with a description of such a line and any appurtenant facilities and of their condition.

§ 1152.15 Reservation of jurisdiction.

49 U.S.C. 10903(c)(1) authorizes the Board, at its discretion, to provide for designation of lines as ''potentially subject to abandonment'' under standards which vary by region of the United States, by railroad, or by group of railroads. The Board expressly reserves the right to adopt such varying standards in the future.

Subpart C—Procedures Governing Notice, Applications, Financial Assistance, Acquisition for Public Use, and Trail Use

§ 1152.20 Notice of intent to abandon or discontinue service.

(a) *Filing and publication requirements.* An applicant shall give Notice of Intent to file an abandonment or discontinuance application by complying with the following procedures:

(1) *Filing.* Applicant must serve its Notice of Intent on the Board, by certified letter, in the format prescribed in § 1152.21. The Notice shall be filed in accordance with the time requirements of paragraph (b) of this section.

(2) *Service.* Applicant must serve, by first-class mail (unless otherwise specified), its Notice of Intent upon:

(i) Significant users of the line;

(ii) The Governor (by certified mail) of each state directly affected by the abandonment or discontinuance. (For the purposes of this section ''states directly affected'' are those in which any part of the line sought to be abandoned is located).

(iii) The Public Service Commission (or equivalent agency) in these states;

(iv) The designated state agency in these states;

(v) The State Cooperative Extension Service in these states;

(vi) The U.S. Department of Transportation (Federal Railroad Administration);

(vii) Department of Defense (Military Traffic Management Command, Transportation Engineering Agency, Railroads for National Defense Program);

(viii) The U.S. Department of Interior (Recreation Resources Assistance Division, National Park Service);

(ix) The U.S. Railroad Retirement Board;

(x) The National Railroad Passenger Corporation (''Amtrak'') (if Amtrak operates over the involved line);

(xi) The U.S. Department of Agriculture, Chief of the Forest Service; and

(xii) The headquarters of all duly certified labor organizations that represent employees on the affected rail line.

(3) *Posting.* Applicant must post a copy of its Notice of Intent at each agency station and terminal on the line to be abandoned. (If there are no agency stations on the line, the Notice of Intent should be posted at any agency station through which business for the involved line is received or forwarded.)

(4) *Newspaper publication.* Applicant must publish its Notice of Intent at least once during each of 3 consecutive weeks in a newspaper of general circulation in each county in which any part of the involved line is located.

(b) *Time limits.* (1) The Notice of Intent must be served at least 15 days, but not more than 30 days, prior to the filing of the abandonment application;

(2) The Notice must be posted and fully published within the 30-day period prior to the filing of the application; and

(3) The Notice must be filed with the Board either concurrently with service or when the Notice is first published (whichever occurs first).

(c) *Environmental and Historic Reports.* Applicant must also submit the Environmental and Historic Reports described at §§ 1105.7 and 1105.8 at least 20 days prior to filing an application.

[61 FR 67883, Dec. 24, 1996, as amended at 68 FR 67810, Dec. 4, 2003]

§ 1152.21 Form of notice.

The Notice of Intent to abandon or to discontinue service shall be in the following form:

STB No. AB _____(Sub-No. _____)
Notice of Intent to Abandon or to Discontinue Service

(Name of Applicant) gives notice that on or about (insert date application will be filed

with the Board) it intends to file with the Surface Transportation Board, Washington, D.C. 20423, an application for permission for the abandonment of (the discontinuance of service on), a line of railroad known as _____ extending from railroad milepost near (station name) to (the end of line or rail milepost) near (station name), which traverses through United States Postal Service ZIP Codes (ZIP Codes), a distance of _____ miles, in [County(ies), State(s)]. The line includes the stations of (list all stations on the line in order of milepost number, indicating milepost location).

The reason(s) for the proposed abandonment (or discontinuance) is (are) _____ (explain briefly and clearly why the proposed action is being undertaken by the applicant). Based on information in our possession, the line (does) (does not) contain federally granted rights-of-way. Any documentation in the railroad's possession will be made available promptly to those requesting it.

This line of railroad has appeared on the system diagram map or included in the narrative in category 1 since (insert date).

The interest of railroad employees will be protected by (specify the appropriate conditions).

The application will include the applicant's entire case for abandonment (or discontinuance) (case in chief). Any interested person, after the application is filed on (insert date), may file with the Surface Transportation Board written comments concerning the proposed abandonment (or discontinuance) or protests to it. These filings are due 45 days from the date of filing of the application. All interested persons should be aware that following any abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use. Any request for a public use condition under 49 U.S.C. 10905 (§ 1152.28 of the Board's rules) and any request for a trail use condition under 16 U.S.C. 1247(d) (§ 1152.29 of the Board's rules) must also be filed within 45 days from the date of filing of the application. Persons who may oppose the abandonment or discontinuance but who do not wish to participate fully in the process by appearing at any oral hearings or by submitting verified statements of witnesses, containing detailed evidence, should file comments. Persons interested only in seeking public use or trail use conditions should also file comments. Persons opposing the proposed abandonment or discontinuance that do wish to participate actively and fully in the process should file a protest.

Protests must contain that party's entire case in opposition (case in chief) including the following:

(1) Protestant's name, address and business.

(2) A statement describing protestant's interest in the proceeding including:

(i) A description of protestant's use of the line;

(ii) If protestant does not use the line, information concerning the group or public interest it represents; and

(iii) If protestant's interest is limited to the retention of service over a portion of the line, a description of the portion of the line subject to protestant's interest (with milepost designations if available) and evidence showing that the applicant can operate the portion of the line profitably, including an appropriate return on its investment for those operations.

(3) Specific reasons why protestant opposes the application including information regarding protestant's reliance on the involved service [this information must be supported by affidavits of persons with personal knowledge of the fact(s)].

(4) Any rebuttal of material submitted by applicant.

In addition, a commenting party or protestant may provide a statement of position and evidence regarding:

(i) Intent to offer financial assistance pursuant to 49 U.S.C. 10904;

(ii) Environmental impact;

(iii) Impact on rural and community development;

(iv) Recommended provisions for protection of the interests of employees;

(v) Suitability of the properties for other public purposes pursuant to 49 U.S.C. 10905; and

(vi) Prospective use of the right-of-way for interim trail use and rail banking under 16 U.S.C. 1247(d) and § 1152.29.

A protest may demonstrate that: (1) the protestant filed a feeder line application under 49 U.S.C. 10907; (2) the feeder line application involves any portion of the rail line involved in the abandonment or discontinuance application; (3) the feeder line application was filed prior to the date the abandonment or discontinuance application was filed; and (4) the feeder line application is pending before the Board.

Written comments and protests will be considered by the Board in determining what disposition to make of the application. The commenting party or protestant may participate in the proceeding as its interests may appear.

If an oral hearing is desired, the requester must make a request for an oral hearing and provide reasons why an oral hearing is necessary. Oral hearing requests must be filed with the Board no later than 10 days after the application is filed.

Those parties filing protests to the proposed abandonment (or discontinuance) should be prepared to participate actively either in an oral hearing or through the submission of their entire opposition case in the

form of verified statements and arguments at the time they file a protest. Parties seeking information concerning the filing of protests should refer to § 1152.25.

Written comments and protests, including all requests for public use and trail use conditions, should indicate the proceeding designation STB No. AB _____ (Sub-No. _____) and must be filed with the Secretary, Surface Transportation Board, Washington, DC 20423, no later than (insert the date 45 days after the date applicant intends to file its application). Interested persons may file a written comment or protest with the Board to become a party to this abandonment (or discontinuance) proceeding. A copy of each written comment or protest shall be served upon the representative of the applicant (insert name, address, and phone number). The original and 10 copies of all comments or protests shall be filed with the Board with a certificate of service. Except as otherwise set forth in part 1152, each document filed with the Board must be served on all parties to the abandonment proceeding. 49 CFR 1104.12(a).

The line sought to be abandoned (or discontinued) will be available for subsidy or sale for continued rail use, if the Board decides to permit the abandonment (or discontinuance), in accordance with applicable laws and regulations (49 U.S.C. 10904 and 49 CFR 1152.27). No subsidy arrangement approved under 49 U.S.C. 10904 shall remain in effect for more than 1 year unless otherwise mutually agreed by the parties (49 U.S.C. 10904(f)(4)(B)). Applicant will promptly provide upon request to each interested party an estimate of the subsidy and minimum purchase price required to keep the line in operation. The carrier's representative to whom inquiries may be made concerning sale or subsidy terms is (insert name and business address).

Persons seeking further information concerning abandonment procedures may contact the Surface Transportation Board or refer to the full abandonment or discontinuance regulations at 49 CFR part 1152. Questions concerning environmental issues may be directed to the Board's Section of Environmental Analysis.

A copy of the application will be available for public inspection on or after (insert date abandonment application is to be filed with Board) at each agency station or terminal on the line proposed to be abandoned or discontinued [if there is no agency station on the line, the application shall be deposited at any agency station through which business for the line is received or forwarded (insert name, address, location, and business hours)]. The carrier shall furnish a copy of the application to any interested person proposing to file a protest or comment, upon request.

An environmental assessment (EA) (or environmental impact statement (EIS), if necessary) prepared by the Section of Environmental Analysis will be served upon all parties of record and upon any agencies or other persons who commented during its preparation. Any other persons who would like to obtain a copy of the EA (or EIS) may contact the Section of Environmental Analysis. EAs in these abandonment proceedings normally will be made available within 33 days of the filing of the application. The deadline for submission of comments on the EA will generally be within 30 days of its service. The comments received will be addressed in the Board's decision. A supplemental EA or EIS may be issued where appropriate.

§ 1152.22 Contents of application.

Applications for the abandonment of railroad lines or the discontinuance of rail service shall contain the following information, including workpapers and supporting documents, and each paragraph (a) through (j) of this section shall be attested to by a person having personal knowledge of the matters contained therein:

(a) *General.* (1) Exact name of applicant.

(2) Whether applicant is a common carrier by railroad subject to 49 U.S.C. Subtitle IV, chapter 105.

(3) Relief sought (abandonment of line or discontinuance of service).

(4) Detailed map of the subject line on a sheet not larger than 8×10½ inches, drawn to scale, and with the scale shown thereon. The map must show, in clear relief, the exact location of the rail line to be abandoned or over which service is to be discontinued and its relation to other rail lines in the area, highways, water routes, and population centers.

(5) Reference to inclusion of the rail line to be abandoned or over which service is to be discontinued on the carrier's system diagram map or narrative, in compliance with §§ 1152.10 through 1152.13, and the date upon which such line was first listed on the system diagram map or included in the narrative in category 1 in accordance with § 1152.10(b)(1). A copy of the line description which accompanies the system diagram map shall also be submitted.

(6) Detailed statement of reasons for filing application.

(7) Name, title, and address of representative of applicant to whom correspondence should be sent.

(8) List of all United States Postal Service ZIP Codes that the line proposed for abandonment traverses.

(b) *Condition of properties.* The present physical condition of the line including any operating restrictions and estimate of deferred maintenance and rehabilitation costs (e.g., number of ties that need replacing, miles of rail that need replacing and/or new ballast, bridge repairs or replacement needed, and estimated labor expenses necessary to upgrade the line to minimum Federal Railroad Administration class 1 safety standards). The bases for the estimates shall be stated with particularity, and workpapers shall be filed with the application.

(c) *Service provided.* Description of the service performed on the line during the Base Year (as defined by §1152.2(c)), including the actual:

(1) Number of trains operated and their frequency.

(2) Miles of track operated (include main line and all railroad-owned sidings).

(3) Average number of locomotive units operated.

(4) Total tonnage and carloads by each commodity group on the line.

(5) Overhead or bridge traffic by carload commodity group that will not be retained by the carrier.

(6) Average crew size.

(7) Level of maintenance.

(8) Any important changes in train service undertaken in the 2 calendar years immediately preceding the filing of the application.

(9) Reasons for decline in traffic, if any, in the best judgment of applicant.

(d) *Revenue and cost data.* (1) Computation of the revenues attributable and avoidable costs for the line to be abandoned for the Base Year (as defined by §1152.2(c) and to the extent such branch level data are available), in accordance with the methodology prescribed in §§1152.31 through 1152.33, as applicable, and submitted in the form called for in §1152.36, as Exhibit 1.

(2) The carrier shall compute an estimate of the future revenues attributable, avoidable costs and reasonable return on the value for the line to be abandoned, for the Forecast Year (as defined in §1152.2(h)) in the form called for in Exhibit 1. The carrier shall fully support and document all dollar amounts shown in the Forecast Year column including an explanation of the rationale and key assumptions used to determine the Forecast Year amounts.

(3) The carrier shall also compute an ''Estimated Subsidy Payment'' for the Base Year in the form called for in Exhibit 1 and an alternate payment to reflect:

(i) Increases or decreases in attributable revenues and avoidable costs projected for the subsidy year; and

(ii) An estimate, in reasonable detail, of the cash income tax reductions, Federal and state, to be realized in the subsidy year. The bases for the adjustment, e.g., rate increase, changes in traffic level, necessary maintenance to comply with minimum Federal Railroad Administration class 1 safety standards, shall be stated with particularity.

(e) *Rural and community impact.* (1) The name and population (identify source and date of figures) of each community in which a station on the line is located.

(2) Identification of significant users, as defined in §1152.2(l), by name, address, principal commodity, and by tonnage and carloads for each of the 2 calendar years immediately preceding the filing of the abandonment or discontinuance application, for that part of the current year for which information is available, and for the Base Year. In addition, the total tonnage and carloads for each commodity group originating and/or terminating on the line segment shall also be shown for the same time periods as those of the significant users.

(3) General description of the alternate sources of transportation service (rail, motor, water, air) available, and the highway network in the proximate area.

(4) Statement of whether the properties proposed to be abandoned are appropriate for use for other public purposes, including roads or highways, other forms of mass transportation, conservation, energy production or transmission, or recreation. If the applicant is aware of any restriction on

the title to the property, including any reversionary interest, which would affect the transfer of title or the use of property for other than rail purposes, this shall be disclosed.

(f) *Environmental impact.* The applicant shall submit information regarding the environmental impact of the proposed abandonment or discontinuance in compliance with §§1105.7 and 1105.8. If certain information required by the environmental regulations duplicates information required elsewhere in the application, the environmental information requirements may be met by a specific reference to the location of the information elsewhere in the application.

(g) *Passenger service.* If passenger service is provided on the line, the applicant shall state whether appropriate steps have been taken for discontinuance pursuant to the Rail Passenger Service Act. (45 U.S.C. 501 *et seq.*)

(h) *Additional information.* The applicant shall submit such additional information to support its application as the Board may require.

(i) *Draft Federal Register notice.* The applicant shall submit a draft notice of its application to be published by the Board. In addition to the regular number of copies that must be filed with the Board, the applicant must submit a copy of the draft notice as data contained on a computer diskette compatible with the Board's current word processing capabilities. The Board will publish the notice in the FEDERAL REGISTER within 20 days of the application's filing with the Board. The draft notice shall be in the form set forth below:

STB No. AB–_____ (Sub-No. _____)

Notice of Application to Abandon or to Discontinue Service

On (insert date application was filed with the Board) (name of applicant) filed with the Surface Transportation Board, Washington, D.C. 20423, an application for permission for the abandonment of (the discontinuance of service on) a line of railroad known as _____ extending from railroad milepost near (station name) to (the end of line or rail milepost) near (station name), a distance of _____ miles, in [County(ies), State(s)]. The line includes the stations of (list all stations on the line in order of milepost number, indicating milepost location) and traverses through _____ (ZIP Codes) United States Postal Service ZIP Codes.

The line (does) (does not) contain federally granted rights-of-way. Any documentation in the railroad's possession will be made available promptly to those requesting it. The applicant's entire case for abandonment (or discontinuance) (case in chief) was filed with the application.

This line of railroad has appeared on the applicant's system diagram map or has been included in its narrative in category 1 since (insert date).

The interest of railroad employees will be protected by (specify the appropriate conditions).

Any interested person may file with the Surface Transportation Board written comments concerning the proposed abandonment (or discontinuance) or protests (including the protestant's entire opposition case), within 45 days after the application is filed. All interested persons should be aware that following any abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use. Any request for a public use condition under 49 U.S.C. 10905 (§1152.28 of the Board's rules) and any request for a trail use condition under 16 U.S.C. 1247(d) (§1152.29 of the Board's rules) must be filed within 45 days after the application is filed. Persons who may oppose the abandonment or discontinuance but who do not wish to participate fully in the process by appearing at any oral hearings or by submitting verified statements of witnesses, containing detailed evidence should file comments. Persons interested only in seeking public use or trail use conditions should also file comments. Persons opposing the proposed abandonment or discontinuance that do wish to participate actively and fully in the process should file a protest.

In addition, a commenting party or protestant may provide:

(i) An offer of financial assistance, pursuant to 49 U.S.C. 10904 (due 120 days after the application is filed or 10 days after the application is granted by the Board, whichever occurs sooner);

(ii) Recommended provisions for protection of the interests of employees;

(iii) A request for a public use condition under 49 U.S.C. 10905; and

(iv) A statement pertaining to prospective use of the right-of-way for interim trail use and rail banking under 16 U.S.C. 1247(d) and §1152.29.

Parties seeking information concerning the filing of protests should refer to §1152.25.

Written comments and protests, including all requests for public use and trail use conditions, must indicate the proceeding designation STB No. AB–____ (Sub-No. ____) and should be filed with the Secretary, Surface Transportation Board (Board), Washington,

DC 20423, no later than (insert the date 45 days after the date applicant intends to file its application). Interested persons may file a written comment or protest with the Board to become a party to this abandonment (or discontinuance) proceeding. A copy of each written comment or protest shall be served upon the representative of the applicant (insert name, address, and phone number). The original and 10 copies of all comments or protests shall be filed with the Board with a certificate of service. Except as otherwise set forth in part 1152, every document filed with the Board must be served on all parties to the abandonment proceeding. 49 CFR 1104.12(a).

The line sought to be abandoned (or discontinued) will be available for subsidy or sale for continued rail use, if the Board decides to permit the abandonment (or discontinuance), in accordance with applicable laws and regulations (49 U.S.C. 10904 and 49 CFR 1152.27). No subsidy arrangement approved under 49 U.S.C. 10904 shall remain in effect for more than 1 year unless otherwise mutually agreed by the parties (49 U.S.C. 10904(f)(4)(B)). Applicant will promptly provide upon request to each interested party an estimate of the subsidy and minimum purchase price required to keep the line in operation. The carrier's representative to whom inquiries may be made concerning sale or subsidy terms is (insert name and business address).

Persons seeking further information concerning abandonment procedures may contact the Surface Transportation Board or refer to the full abandonment or discontinuance regulations at 49 CFR part 1152. Questions concerning environmental issues may be directed to the Board's Section of Environmental Analysis.

An environmental assessment (EA) (or environmental impact statement (EIS), if necessary) prepared by the Section of Environmental Analysis will be served upon all parties of record and upon any agencies or other persons who commented during its preparation. Any other persons who would like to obtain a copy of the EA (or EIS) may contact the Section of Environmental Analysis. EAs in these abandonment proceedings normally will be made available within 33 days of the filing of the application. The deadline for submission of comments on the EA will generally be within 30 days of its service. The comments received will be addressed in the Board's decision. A supplemental EA or EIS may be issued where appropriate.

(j) *Verification*. The original application shall be executed and verified in the form set forth below by an officer of the carrier having knowledge of the facts and matters relied upon.

Verification

State of _____ ss.
County of _____

_____ (Name of affiant) makes oath and says that (s)he is the _____ (title of affiant) of the _____ (name of applicant) applicant herein; that (s)he has been authorized by the applicant (or as appropriate, a court) to verify and file with the Surface Transportation Board the foregoing application in STB AB–___ (Sub-No. ___); that (s)he has carefully examined all of the statements in the application as well as the exhibits attached thereto and made a part thereof; that (s)he has knowledge of the facts and matters relied upon in the application; and that all representations set forth therein are true and correct to the best of his(her) knowledge, information, and belief.

(Signature)

Subscribed and sworn to before me _____ in and for the State and County above named, this _____ day of _____, 19___.

My Commission expires

§ 1152.23 [Reserved]

§ 1152.24 Filing and service of application.

(a) An original and 10 copies of applications, typewritten or printed on paper approximately 8½ inches by 11 inches with 1½ inch left margin, shall be filed with the Secretary of the Surface Transportation Board, Washington, DC 20423. The original shall bear the date and signature and shall be complete in itself; the signature may be stamped or typed and the notarial seal may be omitted on the copies. A check, money order or payment by credit card payable to the Surface Transportation Board must also be submitted to cover the applicable filing fee. If the applicant carrier is in bankruptcy, the application shall also be filed on the bankruptcy court.

(b) The applicant shall tender with its application an affidavit attesting to its compliance with the notice requirement of § 1152.20. The affidavit shall include the dates of service, posting, and publication of the notice.

(c) When the application is filed with the Board, the applicant shall serve, by first class mail, a copy on the Governor, the Public Service Commission (or equivalent agency), and the designated state agency of each state in which any part of the line of railroad

sought to be abandoned or discontinued is situated. A copy of the application will be available for public inspection, on or after the date the abandonment application is filed with the Board, at each agency station or terminal on the line proposed to be abandoned or discontinued (if there is no agency station on the line, the application shall be deposited at any agency station through which business for the line is received or forwarded). A certificate of service shall be promptly filed with the Board.

(d) The applicant shall promptly furnish by first class mail a copy of the application to any interested person proposing to file a written comment or protest upon request. A certificate of service shall promptly be filed with the Board.

(e)(1) The Board shall reject any abandonment or discontinuance application which does not substantially conform to the regulations in this subpart C regarding notice, form, and content, or which applies to a line which has not properly been published on the carrier's system diagram map (or included in a narrative in the case of a Class III carrier), in conformance with the regulations of subpart B of this part.

(2) Upon the filing of an abandonment or discontinuance application, the Board will review the application and determine whether it conforms with all applicable regulations. If the application is substantially incomplete or its filing otherwise defective, the Board shall reject the application for stated reasons by order (which order will be administratively final) within 20 days from the date of filing of the application. If the Board does not reject the application, notice of the filing of the application shall be published in the FEDERAL REGISTER by the Board, through the Director of the Office of Proceedings, within 20 days of the filing of the application.

(3) If the application is rejected, a revised application may be submitted, and the Board will determine whether the resubmitted application conforms with all prescribed regulations. A properly revised application submitted within 60 days of the order rejecting the incomplete or improper application need not be subjected to new notice and publication under § 1152.20, unless the defect causing the rejection was in the notice and/or publication. A revised application submitted after such 60-day period must be newly published and noticed.

(4) The resubmission of an abandonment or discontinuance application shall be considered a de novo filing for the purposes of computation of the time period for filing an offer of financial assistance under 49 U.S.C. 10904, and for other time periods prescribed in the regulations contained in this part (49 CFR part 1152), provided, that a resubmitted application is deemed complete and proper.

(5) An applicant may seek waiver of specific regulations listed in subpart C of this part by filing a petition for waiver with the Board. A decision by the Director of the Office of Proceedings granting or denying a waiver petition will be issued within 30 days of the date the petition is filed. Appeals from the Director's decision will be decided by the entire Board. If waiver is not obtained prior to the filing of the application, the application may be subject to rejection under paragraphs (e) (1) and (2) of this section.

(f) As provided in § 1152.29(e)(2), rail carriers authorized to abandon a line under 49 U.S.C. 10903 must file with the Board a notice that abandonment has been consummated.

[61 FR 67883, Dec. 24, 1996, as amended at 62 FR 34669, June 27, 1997; 64 FR 53268, Oct. 1, 1999]

§ 1152.25 Participation in abandonment or discontinuance proceedings.

(a) *Public participation*—(1) *Protests and comments.* Interested persons may become parties to an abandonment or discontinuance proceeding by filing written comments or protests with the Board. Any request for a public use condition under 49 U.S.C. 10905 (§ 1152.28 of the Board's rules) and any request for a trail use condition under 16 U.S.C. 1247(d) (§ 1152.29 of the Board's rules) must be included in these filings. Persons who may oppose the abandonment or discontinuance, but who do not wish to participate fully in the process by appearing at any oral hearings or by

submitting verified statements of witnesses containing detailed evidence, should file comments. Persons interested only in seeking public use or trail use conditions should also file comments. Persons opposing the proposed abandonment or discontinuance that do wish to participate actively and fully in the process should file a protest. Protests shall include all evidence and argument in support of protestant's position (protestant's case in chief). Protests must contain the following information:

(i) Protestant's name, address and business.

(ii) A statement describing protestant's interest in the proceeding including:

(A) A description of protestant's use of the line;

(B) If protestant does not use the line, information concerning the group or public interest it represents; and

(C) If protestant's interest is limited to the retention of service over a portion of the line, a description of the portion of the line subject to protestant's interest (with milepost designations if available) and evidence showing that the applicant can operate the portion of the line profitably, including an appropriate return on its investment for those operations.

(iii) Specific reasons why protestant opposes the application including information regarding protestant's reliance on the involved service (this information must be supported by affidavits of persons with personal knowledge of the fact(s)).

(iv) Any rebuttal of material submitted by applicant.

(v) Any request for a public use condition under 49 U.S.C. 10905 (§ 1152.28 of the Board's rules) and any request for a trail use condition under 16 U.S.C. 1247(d) (§ 1152.29 of the Board's rules).

(2) *Additional information.* In addition to the information required in paragraph (a)(1) of this section, a commenting party or protestant may provide a statement of position and a summary of evidence regarding:

(i) Intent to offer financial assistance under 49 U.S.C. 10904;

(ii) Environmental impact;

(iii) Impact on rural and community development;

(iv) Recommended provisions for protection of the interests of employees;

(v) A request for a public use condition under 49 U.S.C. 10905; and

(vi) Prospective use of the right-of-way for interim trail use and rail banking under 16 U.S.C. 1247(d) and 49 CFR 1152.29.

(3) *Feeder line application for all or part of the line subject to the abandonment application.* In addition to the information required in paragraphs (a)(1) and (2) of this section, a commenting party or protestant must provide information that:

(i) The protestant filed a feeder line application under 49 U.S.C. 10907 (or former 49 U.S.C. 10910);

(ii) The feeder line application involves any portion of the rail line involved in the abandonment or discontinuance application;

(iii) The feeder line application was filed prior to the date the abandonment or discontinuance application was filed; and

(iv) The feeder line application is pending before the Board.

(b) *Employee or employee representative participation.* Employees or their representatives may file protests or comments to an application. However, because the Board will impose employee protective conditions under 49 U.S.C. 10903(b)(2) if an application is granted, employees and their representatives need not file comments or protests seeking this protection.

(c) *Filing and service of written comments, protests, along with evidence and argument, and replies.* (1) Written comments and protests, as well as public use and trail use requests, shall be filed with the Board (the Secretary, Surface Transportation Board, Washington, DC 20423) within 45 days of the filing with the Board of an abandonment or discontinuance application.

(2) An original and 10 copies of each written comment or protest shall be filed with the Board.

(3) A copy of each written comment or protest shall be served on applicant or its representative at the time of filing with the Board. If the applicant carrier is in bankruptcy, each comment or protest shall also be filed on the Bankruptcy Court. Each filing shall contain a certificate of service.

(4) Replies or rebuttal to written comments and protests shall be filed and served by applicants no later than 60 days after the filing of the application. An original and 10 copies of such replies shall be filed with the Board.

(d) *Time limits.* (1) Pleadings, requests or other papers or documents (including any comments or protests and any appeal from a Board decision) required or permitted to be filed under this part must be received for filing at the Board's Offices at Washington, DC within the time limits, if any, for such filing. The date of receipt at the Board and not the date of deposit in the mail is determinative, provided, however, that if such document is mailed by certified, registered, or express mail, postmarked at least 3 days prior to the due date, it will be accepted as timely filed.

(2) In computing any time period prescribed or allowed by this part, the day of the act, event, or default after which the designated period of time begins to run is not to be included.

(3) Any filing under this part which falls due on a Saturday, Sunday, or a legal holiday in the District of Columbia, may be filed at the Board by the end of the next day which is neither a Saturday, Sunday, nor a holiday, except as indicated in paragraph (d)(4) of this section. A half holiday shall not be considered as a holiday.

(4) Offers of financial assistance made pursuant to § 1152.27(c) must be filed on or before their statutory or regulatory due date as computed in paragraph (d)(2) of this section, regardless of whether that date is a Saturday, Sunday, or a legal holiday in the District of Columbia.

(5) The Board will reject any pleading filed after its due date unless good cause is shown why the pleading is filed late.

(6) *Oral hearings.* (i) Any oral hearing request is due 10 days after the filing of the application. The Board, through the Director of the Office of Proceedings, will issue a decision on any oral hearing request within 15 days after the filing of the application. If the Board decides to hold an oral hearing, the oral hearing shall be for the primary purpose of cross examination of witnesses filing verified statements in the proceeding. Any direct testimony, other than applicant's rebuttal evidence, shall be received at the discretion of the hearing officer.

(ii) In addition to that contained in the application, the submission of written evidence prior to the commencement of the hearing shall be established by the Board.

(iii) Post hearing legal briefs shall be due 10 days after the close of the oral hearing, or at an earlier date if established at the hearing by the hearing officer.

(e) *Appellate procedures*—(1) *Scope of rule.* Except as specifically indicated below, these appellate procedures are to be followed in abandonment and discontinuance proceedings in lieu of the general procedures at 49 CFR 1115. Appeals of initial decisions of the Director of the Office of Proceedings determining:

(i) Whether offers of financial assistance satisfy the standard of 49 U.S.C. 10904(d) for purposes of instituting negotiations or, in exemption proceedings, for purposes of partial revocation and instituting negotiations;

(ii) Whether partially to revoke or to reopen abandonment exemptions authorized, respectively, under 49 U.S.C. 10502 and 49 CFR part 1152 subpart F for the purpose of imposing public use conditions under the criteria in 49 CFR 1152.28 and/or conditions limiting salvage of the rail properties for environmental and historic preservation purposes; and

(iii) The applicability and administration of the Trails Act [16 U.S.C. 1247(d)] in abandonment proceedings under 49 U.S.C. 10903 (and abandonment exemption proceedings), issued pursuant to delegations of authority at 49 CFR 1011.8(c) (4) and (5), will be acted on by the entire Board as set forth at 49 CFR 1011.2(a)(7). An original and 10 copies of all appeals, and replies to appeals, under this section must be filed with the Board.

(2) *Appeals criteria.* Appeals to the Board's decision in abandonment or discontinuance proceedings will not be entertained. Those decisions are administratively final upon the date they are served.

(i) Parties seeking further administrative action may file a petition to reopen the proceeding under paragraph

(e)(4) of this section. If an abandonment or discontinuance is granted and a party wishes the Board to have the opportunity to consider a petition to reopen before the abandonment or discontinuance authorization becomes effective, it must file its petition within 15 days after the administratively final decision is served together with a request for a stay of effectiveness under paragraph (e)(7) of this section. If such a petition to reopen and stay request is received within that 15-day period, any replies to the petition to reopen must be filed no later than 25 days after the date the decision is served, and any reply to the stay request must reach the Board no later than 5 days after the stay request is filed.

(ii) The Board will grant a petition to reopen only upon a showing that the action would be affected materially because of new evidence, changed circumstances, or material error.

(3) *Form.* A petition to reopen and any reply shall not exceed 30 pages in length, including the index of subject matter, argument, and appendices or other attachments.

(4) *Petitions to reopen administratively final actions.* A person may file a petition to reopen any administratively final action of the Board. A petition to reopen shall state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances. An original and 10 copies of such petitions must be filed with the Board.

(5) *Judicial review.* (i) Parties may seek judicial review of a Board action in an abandonment or discontinuance proceeding on the day the action of the Board becomes final.

(ii) If a petition seeking reopening is filed under this section, before or after a petition seeking judicial review is filed with the courts, the Board will act upon the petition after advising the court of its pendency unless action might interfere with the court's jurisdiction.

(6) *Petitions to vacate.* In the event of procedural defects (such as the loss of a properly filed protest, the failure of the applicant to afford the public the requisite notice of its proposed abandonment, etc.), the Board will entertain petitions to vacate the abandonment or discontinuance authorization. An original and 10 copies of these petitions to vacate must be filed with the Board.

(7) *Petitions to stay.* (i) The filing of a petition to reopen shall not stay the effect of a prior action. An original and 10 copies of any petitions to stay must be filed with the Board.

(ii) A petition to reopen an administratively final action may be accompanied by a petition for a stay of the effectiveness of the abandonment or discontinuance. As provided in paragraph (e)(2) of this section, a petition to reopen must be accompanied by a stay request if the party wishes the Board to have the opportunity to consider the petition to reopen before the abandonment or discontinuance authorization becomes final.

(iii) A party may petition for a stay of the effectiveness of abandonment or discontinuance authorization pending a request for judicial review. The reasons for the desired relief shall be stated in the petition, and the petition shall be filed not less than 15 days prior to the effective date of the abandonment authorization. No reply need be filed. If a party elects to file a reply, the reply must reach the Board no later than 5 days after the petition is filed.

[61 FR 67883, Dec. 24, 1996, as amended at 62 FR 34669, June 27, 1997]

§ 1152.26 Board determination under 49 U.S.C. 10903.

(a) The following schedule shall govern the process for Board consideration and decisions in abandonment and discontinuance application proceedings from the time the application is filed until the time of the Board's decision on the merits:

Day 0—Application filed, including applicant's case in chief.

Day 10—Due date for oral hearing requests.

Day 15—Due date for Board decision on oral hearing requests.

Day 20—Due date for Notice of Application to be published in the FEDERAL REGISTER.

Day 45—Due date for protests and comments, including opposition case in chief, and for public use and trail use requests.

Day 60—Due date for applicant's reply to opposition case and for applicant's response to trail use requests.

Day 110—Due date for service of decision on the merits.

Day 120—Due date for offers of financial assistance, except that if an application has been granted by decision issued sooner than Day 110, the offer of financial assistance shall be due 10 days after service of the decision granting the application.

(b) If an application for abandonment or discontinuance is filed by a bankrupt railroad, the Board shall base its decision (Report to the Bankruptcy Court) on the application and any responses to the application that are filed. In each such instance, the Board shall establish a reasonable period of time for filing responses to the application so that public input can be included in the Board's decision (Report) and so that the Board will be able to meet a deadline imposed or requested by the Bankruptcy Court. Because Board action on abandonment applications by bankrupt railroads is advisory only, no environmental filings or analysis is necessary. See 49 CFR 1105.5(c).

[61 FR 67883, Dec. 24, 1996, as amended at 62 FR 34670, June 27, 1997]

§ 1152.27 Financial assistance procedures.

(a) *Provision of information.* An applicant must provide promptly upon request to a party considering an offer of financial assistance to continue existing rail service, and concurrently to the Board, the following:

(1)(i) *In an application or petition for exemption proceeding,* an estimate of the annual subsidy and minimum purchase price required to keep the line or a portion of the line in operation;

(ii) *In a class exemption proceeding,* either an estimate of the annual subsidy or the minimum purchase price, depending upon the type of financial assistance indicated in the potential offeror's formal expression of intent submitted under paragraph (c)(2)(i) of this section;

(2) Its most recent reports on the physical condition of the involved line; and

(3) Traffic, revenue, and other data necessary to determine the amount of annual financial assistance that would be required to continue rail transportation over that part of the railroad line. In an exemption proceeding, the data to be provided must at a minimum include the carrier's estimate of the net liquidation value of the line, with supporting data reflecting available real estate appraisals, assessments of the quality and quantity of track materials in a line, and removal cost estimates (including the cost of transporting removed materials to point of sale or point of storage for relay use), and, if an offer of subsidy is contemplated, an estimate of the cost of rehabilitating the line to Federal Railroad Administration class 1 Safety Standards (49 CFR part 213).

(b) *Federal Register notice*—(1) *Abandonment and discontinuance applications.* The FEDERAL REGISTER publication, which gives notice of the filing of the application 20 days after the application is filed, will serve as notice to persons intending to offer financial assistance to assure continued rail service under 49 U.S.C. 10904 and these regulations as they relate to abandonment and discontinuance applications. Offers of financial assistance will be due 120 days after the application is filed or 10 days after a decision granting the application is served, whichever occurs sooner.

(2) *Exemption proceedings.* (i) If a petition for individual exemption from the prior approval requirements of 49 U.S.C. 10903 is filed with the Board for abandonment or discontinuance of a line of railroad, the Board will publish notice of the petition in the FEDERAL REGISTER within 20 days of the filing of the petition. The FEDERAL REGISTER publication will serve as notice to persons with a potential interest in providing financial assistance to assure continued rail service on the line under 49 U.S.C. 10904 and these regulations as they relate to exempt abandonments and discontinuances. Offers of financial assistance will be due 120 days after the filing of the petition for exemption or 10 days after service of a Board decision granting the exemption, whichever occurs sooner.

(ii) If a notice of exemption is filed under the class exemption, the Board will publish notice of the exemption in the FEDERAL REGISTER within 20 days of filing. The FEDERAL REGISTER publication will serve as notice to persons with a potential interest in providing financial assistance to assure continued rail service on the line under 49

U.S.C. 10904 and these regulations as they relate to exempt abandonments and discontinuances. Offers of financial assistance will be due no later than 30 days after the date of the FEDERAL REGISTER publication giving notice of the exemption.

(c) *Submission of financial assistance offer*—(1) *Abandonment and discontinuance applications and petitions for exemption*—(i) *Service and filing.* An offeror must serve its offer of assistance on the carrier owning and operating the line and all parties to the abandonment or discontinuance application or exemption proceeding. The offer must be filed concurrently with the Secretary, Surface Transportation Board, Washington, DC 20423.

(A) An offer may be filed and served at any time after the filing of the abandonment or discontinuance application or petition for exemption. Once a decision is served granting an application or petition for exemption, however, the Board must be notified that an offer has previously been submitted.

(B) An offer, or notification of a previously filed offer, must be filed and served no later than 10 days after service of the Board decision granting the application or petition for exemption. This filing and service is subject to the requirements of 49 CFR 1152.25 (d)(1), (d)(2), and (d)(4).

(C) If, after a *bona fide* request, applicant or petitioner has failed to provide a potential offeror promptly with the information required under paragraph (a) of this section and if that information is not contained in the application or petition, the Board will entertain petitions to toll the 10-day period for submitting offers of financial assistance under paragraph (c)(1) of this section. Petitions must be filed with the Board within 5 days after service of the decision granting the application or petition for exemption. Petitions should include copies of the prior written request for information or an accurate outline of the specific information that was orally requested. Replies to these petitions must be filed within 10 days after service of the decision granting the application or petition for exemption. These petitions and replies must be filed on or before their actual due date under 49 CFR 1152.25(d)(4). The Board will issue a decision on petitions within 15 days after service of the decision granting the application or petition for exemption.

(ii) *Contents of offer.* The offeror shall set forth its offer in detail. The offer must:

(A) Identify the line, or the portion of the line, in question;

(B) Demonstrate that the offeror is financially responsible; that is, that it has or within a reasonable time will have the financial resources to fulfill proposed contractual obligations; governmental entities will be presumed to be financially responsible; and

(C) Explain the disparity between the offeror's purchase price or subsidy if it is less than the carrier's estimate under paragraph (a)(1) of this section, and explain how the offer of subsidy or purchase is calculated.

(2) *Class exemption proceedings*—(i) *Expression of intent to file offer.* Persons with a potential interest in providing financial assistance must, no later than 10 days after the FEDERAL REGISTER publication described in paragraph (b)(2)(ii) of this section, submit to the carrier and the Board a formal expression of their intent to file an offer of financial assistance, indicating the type of financial assistance they wish to provide (i.e., subsidy or purchase). Such submissions are subject to the filing requirements of § 1152.25(d)(1) through (d)(3). Submission of a formal expression of intent under this subsection will automatically stay the effective date of the notice of exemption under the class exemption for 40 days (normally, this will be 10 days beyond the date stated in the FEDERAL REGISTER publication).

(ii) *Service and filing.* An offeror must serve its offer of assistance on the carrier that instituted the exempt filing as well as all other parties to the proceeding. The offer must be filed concurrently with the Secretary, Surface Transportation Board, Washington, DC 20423.

(A) An offer may be filed and served at any time after the filing of the notice of exemption. Once a notice of exemption is published in the FEDERAL REGISTER, however, the Board must be notified that an offer has previously been submitted.

(B) An offer, or notification of a previously filed offer, must be filed and served no later than 30 days after the FEDERAL REGISTER publication described in paragraph (b)(2)(ii) of this section. This filing and service is subject to the requirements of 49 CFR 1152.25 (d)(1), (d)(2), and (d)(4).

(C) If, after a *bona fide* request, applicant has failed to provide a potential offeror promptly with the information required under paragraph (a) of this section and if that information is not contained in the notice of exemption, the Board will entertain petitions to toll the 30-day period for submitting offers of financial assistance under paragraph (c)(2) of this section. Petitions must be filed with the Board within 25 days after publication in the FEDERAL REGISTER (described in paragraph (b)(2)(ii) of this section). Petitions should include copies of the prior written request for information or an accurate outline of the specific information that was orally requested. Replies to these petitions must be filed within 30 days after the publication. These petitions and replies must be filed on or before their actual due date under 49 CFR 1152.25(d)(4). The Board will issue a decision on petitions to toll the offer period within 35 days after publication.

(D) Upon receipt of a formal expression of intent to file an offer under paragraph (c)(2)(i) of this section, the rail carrier applicant may advise the Board and the potential offeror that additional time is needed to develop the information required under paragraph (a) of this section. Applicant shall expressly indicate the amount of time it considers necessary (not to exceed 60 days) to develop and submit the required information to the potential offeror. For the duration of the time period so indicated by the applicant, the 30-day period for submitting offers of financial assistance under paragraph (c)(2) of this section shall be tolled without formal Board action.

(iii) *Contents of offer.* The offeror shall set forth its offer in detail. The offer must meet the requirements of paragraph (c)(1)(ii) of this section.

(d) *Access to documents.* Upon receipt by the carrier of a written comment under § 1152.25 or a formal expression of intent under paragraph (c)(2)(i) of this section indicating an intent to offer financial assistance, or upon receipt by the carrier of an offer of financial assistance, whichever occurs earlier, the carrier must make available to that party or offeror the records, accounts, appraisals, working papers, and other documents used in preparing Exhibit 1 (§ 1152.36) or, if an exemption proceeding, those documents that would have been used in preparing Exhibit 1 had an abandonment or discontinuance application been filed, or other records, reports, and data in the possession of the carrier seeking the exemption that provide comparable data. These documents shall be made available during regular business hours at a time and place mutually agreeable to the parties.

(e) *Review of offers*—(1) *Abandonment and discontinuance applications.* The Board will review each offer submitted to determine if a financially responsible person has offered assistance. If that criterion is met, the Board will issue a decision postponing the effective date of the authorization for abandonment or discontinuance. This decision will be issued within 15 days of the service of the decision granting the application (or within 5 days after the offer is filed if the time for filing has been tolled under paragraph (c)(1)(i)(C) of this section, or within 5 days after expiration of the 120 day (4 month) period described in 49 U.S.C. 10904, if that occurs first). Under the delegation of authority at § 1011.8, the Director of the Office of Proceedings will make the initial determination whether offers of financial assistance satisfy the standards of 49 U.S.C. 10904(d) for purposes of instituting negotiations. Appeals of initial decisions determining whether offers of financial assistance satisfy the standards of 49 U.S.C. 10904(d) for purposes of instituting negotiations will be acted upon by the entire Board pursuant to 49 CFR 1011.2(a)(7).

(2) *Exemption proceedings.* The Board will review each offer submitted to determine if a financially responsible person has offered assistance. If that criterion is met, the Board will postpone the effective date either of the decision granting a petition for individual exemption or the notice of exemption under the class exemption and

partially revoke the exemption or (in the case of a class exemption) the notice of exemption to the extent it applies to 49 U.S.C. 10904. The decision to postpone and partially revoke will be issued within 15 days of the service date of a decision granting a petition for exemption, or within 35 days of the FEDERAL REGISTER publication described in paragraph (b)(2)(ii) of this section (or within 5 days after the offer is filed if the time for filing has been tolled under paragraph (c)(1)(i)(C) or (c)(2)(ii) (C) or (D) of this section). Under the delegation of authority at § 1011.8, the Director of the Office of Proceedings will make the initial determination whether offers of financial assistance satisfy the standards of 49 U.S.C. 10904(d) for purposes of partial revocation and institution of negotiations. Appeals of initial decisions determining whether offers of financial assistance satisfy the standards of 49 U.S.C. 10904(d) for purposes of partial revocation and institution of negotiations will be acted upon by the entire Board pursuant to 49 CFR 1011.2(a)(7).

(f) *Agreement on financial assistance.* (1) If the carrier and a person offering financial assistance enter into a subsidy agreement designed to provide for continued rail service, the Board will postpone the effective date of the abandonment or discontinuance. If a decision granting a petition for individual exemption, or a notice of exemption, has been issued, the Board will postpone the effective date of the decision or notice of exemption. The postponement will be for as long as the subsidy agreement is in effect.

(2) If the carrier and a person offering to purchase a line enter into a purchase agreement which will result in continued rail service, the Board will approve the transaction and dismiss the application for abandonment or discontinuance, or the petition for exemption or notice of exemption. Board approval is not required under 49 U.S.C. 10901, 10902, or 11323 for the parties to consummate the transaction or for the purchaser to institute service and operate as a railroad subject to 49 U.S.C. 10501(a).

(g) *Failure to reach agreement on financial assistance.* (1) If the carrier and a financially responsible person fail to agree on the amount or terms of subsidy or purchase, either party may request the Board to establish the conditions and amount of compensation. This request must be filed with the Board within 30 days after the offer is made and served concurrently by overnight mail on all parties to the proceeding. The request must be accompanied by the appropriate fee, codified at 49 CFR 1002.2(f)(26). Replies will be due 5 days later.

(2) If no agreement is reached within 30 days after the offer of purchase or subsidy is made, and no request is made to the Board to set the conditions and amount of compensation under paragraph (g)(1) of this section, the Board will serve a decision vacating the prior decision, which postponed the effective date of the decision granting the application, the decision granting the exemption, or the notice of exemption and, which, if applicable, partially revoked either the decision granting the exemption or (in the case of a class exemption) the notice of exemption. The Board will issue the decision to vacate within 10 days of the due date for requesting the Board to set the conditions and amount of compensation, and the Board will make the decision to vacate effective on its date of service.

(h) *Request to establish conditions and compensation for financial assistance.* (1) If the Board is requested to establish conditions and compensation for financial assistance under paragraph (g)(1) of this section, the Board will issue a decision within 30 days after the request is due.

(2) If the applicant receives multiple offers of financial assistance, requests to establish conditions and compensation will not be permitted before the applicant selects the offeror with whom it wishes to transact business. (See paragraph (l)(1) of this section.)

(3) A party requesting the Board to establish conditions and compensation for financial assistance must, within the time period set forth in paragraph (h)(4) of this section, provide its case in chief, including reasons why its estimates are correct and the other negotiating party's estimates are incorrect, points of agreement and points of disagreement between the negotiating

parties, and evidence substantiating these allegations. The offeror has the burden of proof as to all issues in dispute.

(4) The offeror must submit all evidence and information supporting the terms it seeks within 30 days after the offer is made. The carrier's reply to this evidence and support for the terms it seeks are due within 35 days after the offer is made. No rebuttal evidence will be permitted and evidence and information submitted after these dates will be rejected.

(5) If requested, the Board will determine the amount and terms of subsidy based on the avoidable cost of providing continued rail transportation, plus a reasonable return on the value of the line. Under 49 U.S.C. 10904(f)(4)(B), no subsidy arrangement approved under section 10904 shall remain in effect for more than one year unless mutually agreed by the parties.

(6) If requested, the Board will determine the price and other terms of sale. The Board will not set a price below the fair market value of the line (including, unless otherwise agreed upon by the parties, all facilities on the line or portion necessary to provide effective transportation services). Fair market value equals constitutional minimum value which is the greater of the net liquidation value of the line or the going concern value of the line. The constitutional minimum value is computed without regard to labor protection costs.

(7) Within 10 days of the service date of the Board's decision, the offeror must accept or reject the Board's terms and conditions with a written notification to the Board and all parties to the proceeding. If the offeror accepts the terms and conditions set by the Board, the Board's decision is binding on both parties. If the offeror withdraws its offer or does not accept the terms and conditions set by the Board with a timely written notification, the Board will serve, within 20 days after the service date of the Board decision setting the terms and conditions, a decision vacating the prior decision, which postponed the effective date of either the decision granting the application or exemption or the notice of exemption, and which, if applicable, partially revoked the exemption or (in the case of a class exemption) the notice of exemption (unless other offers are being considered under paragraph (l) of this section). The decision to vacate will be effective on its date of service.

(i) *Substitution of purchasers and disposition after sale.* (1) Prior to the consummation of a purchase under this section, an offeror may substitute its corporate affiliate as the purchaser under an agreement, provided the Board has determined either:

(i) The original offeror has guaranteed the financial responsibility of its affiliate; or

(ii) The affiliate has demonstrated financial responsibility in its own right.

(2) Except as provided in paragraph (i)(3) of this section, a purchaser under this section may not:

(i) Transfer the line or discontinue service over the line prior to the end of the second year after consummation of the original sale under these provisions; or

(ii) Transfer the line, except to the carrier from whom the line was purchased, prior to the end of the fifth year after consummation.

(3) Paragraph (i)(2) of this section does not preclude a purchaser under this section from transferring the line to a corporate affiliate following the consummation of the original sale. Prior Board approval of the affiliate's acquisition and operation, however, is required under 49 U.S.C. 10901, 10902, or 11323. A corporate affiliate acquiring a line under this section is prohibited from discontinuing service over the line or transferring the line to a party that is not a corporate affiliate during the time periods prescribed in paragraph (i)(2) of this section.

(j) *Discontinuance of subsidy.* A subsidizer may discontinue a subsidy under this section by giving 60 days notice of the discontinuance to the applicant and all other parties to the proceeding. Unless another financially responsible party enters into a subsidy agreement as beneficial to the carrier as the discontinued subsidy agreement in a situation where the 1-year time limit of 49 U.S.C. 10904(f)(4)(B) has not yet run, the carrier may by filing a request with the Board and serving the

request on all parties to the abandonment or exemption proceeding obtain a decision vacating the decision postponing the effective date of either the decision granting the application, or petition for individual exemption, or the notice of exemption. The Board will issue a decision to vacate within 10 days after the filing and service of the request. This decision to vacate will be effective on its service date.

(k) *Default on agreement.* If any party defaults on its obligations under a financial assistance agreement, any other party to the agreement may promptly inform the Board of that default. Upon notification, the Board will take appropriate action.

(l) *Multiple offers of financial assistance.* (1) If an applicant receives more than one offer to purchase or subsidize the line from offerors found to be financially responsible, the applicant must select the offeror from those with whom it wishes to transact business. In abandonment and discontinuance application and petition for exemption proceedings within 25 days after service of the decision granting the application or petition for exemption, and in class exemption proceedings within 45 days after the FEDERAL REGISTER publication described in paragraph (b)(2)(ii) of this section, the railroad must:

(i) File a written notification of its selection with the Board; and

(ii) Serve a copy of the notification on all parties to the proceeding.

(2)(i) *Abandonment and discontinuance applications and petitions for exemption.* If the applicant has received multiple offers of financial assistance from persons found to be financially responsible and has selected the offeror with whom it wishes to transact business, the negotiating parties shall complete the sale or subsidy agreement or request the Board to establish the conditions and amount of compensation within 40 days after the service date of the decision granting the application or petition for exemption. A request to the Board to set terms and conditions must be served concurrently on all parties to the proceeding. If no agreement on subsidy or sale is reached within the 40-day period and the Board has not been requested to establish the conditions and amount of compensation, any other financially responsible offeror may request the Board to establish the conditions and amount of compensation. This request must be filed at the Board within 50 days of the service date of the decision granting the application or petition for exemption and served concurrently on all parties to the proceeding. If no other request is filed, the Board will issue a decision authorizing abandonment or discontinuance within 60 days of the service date of the decision granting the application or petition for exemption. This decision will be effective on the date of service.

(ii) *Class exemption proceedings.* If the carrier seeking the exemption has received multiple offers of financial assistance from persons found to be financially responsible and has selected the offeror with whom it wishes to transact business, the negotiating parties shall complete the sale or subsidy agreement or request the Board to establish the conditions and amount of compensation within 60 days after the FEDERAL REGISTER publication described in paragraph (b)(2)(ii) of this section. A request to the Board to set terms and conditions must be served concurrently on all parties to the proceeding. If no agreement on subsidy or sale is reached within the 60-day period and the Board has not been requested to establish the conditions and amount of compensation, any other financially responsible offeror may request the Board to establish the conditions and amount of compensation. This request must be filed at the Board within 70 days of the FEDERAL REGISTER publication described in paragraph (b)(2)(ii) of this section and served concurrently on all parties to the proceeding. If no other request is filed, the Board will issue a decision vacating the decision postponing the effective date of the notice of exemption within 80 days of the FEDERAL REGISTER publication described in paragraph (b)(2)(ii) of this section. The decision to vacate will be effective on the date of service.

(3) If the Board has established the conditions and amount of compensation, and the original offer is withdrawn under paragraph (h)(7) of this section, any other offeror found to be

financially responsible may accept the Board's decision within 20 days after the service date of the Board's decision setting terms and conditions. If the decision is accepted by another such offeror, the Board will require the applicant to accept the terms incorporated in the Board's decision.

(m) *Additional time for filing.* Notwithstanding the deadlines previously set forth in part 1152 for filing an offer of financial assistance, parties that can show that they would be materially prejudiced by having less than the full 4 months for filing an offer of financial assistance provided in 49 U.S.C. 10904(c) for application proceedings may seek relief under 49 CFR part 1117.

(n) *Special provisions for summary discontinuance and abandonment of lines not part of the Final System Plan.* (1) Board authorization is not needed for the cessation of service on a line of railroad formerly in reorganization that was not included in the Final System Plan (Plan) under the Regional Rail Reorganization Act of 1973, 45 U.S.C. 701 *et seq.*, as amended by the Railroad Revitalization and Regulatory Reform Act of 1976, if the line has been continuously subsidized since the inception of the Plan. To provide an opportunity for rail service continuation through offers of financial assistance, however, the owner of the line must give not less than 60 days' notice of a discontinuance, and beginning 120 days after discontinuance, not less than 30 days' notice of abandonment. Designated operators need only comply with the notice requirements of § 1150.11 of this title. In instances of discontinuance by a designated operator, the line owner is not obligated to operate the line. Notice is to be sent by the line owner to the Board, the governor and transportation agencies and the government of each political subdivision of each state in which such rail properties are located and to each shipper who has used the rail service during the previous 12 months. The Board will generally apply the OFA procedures in this section (49 CFR 1152.27) for class exemptions to summary abandonment and discontinuance notices (except that the Board will not postpone the effective date of a summary discontinuance). For example, notice of summary abandonment or discontinuance will be published by the Board in the FEDERAL REGISTER within 20 days of filing. Paragraph (b)(2)(ii) of this section. Expressions of intent to file an offer must be filed no later than 10 days after the FEDERAL REGISTER publication. Paragraph (c)(2)(i) of this section. An offer must be filed within 30 days of the FEDERAL REGISTER publication. Paragraphs (b)(2)(ii) and (c)(2)(ii)(B) of this section. The Board will review offers to determine if a financially responsible person has offered assistance. If this criterion is met, the Board will postpone the effective date of the summary abandonment (but not the discontinuance) within 35 days of the FEDERAL REGISTER publication. Paragraph (e)(2) of this section. If the carrier and financially responsible person fail to agree on the amount or terms of subsidy or purchase, either party may request the Board to establish the conditions and amount of the compensation. This request must be filed within 30 days after the offer of purchase or subsidy is made, and the Board will issue a decision within 30 days after the request is due. Paragraphs (g)(1) and (h)(1) of this section.

(2) Where a designated operator is being used, it shall be paid a reasonable management fee. If the parties cannot agree on this fee, it shall be four and one-half percent of the total annual revenues attributable to the branch.

[61 FR 67883, Dec. 24, 1996, as amended at 63 FR 28290, May 22, 1998]

§ 1152.28 Public use procedures.

(a)(1) If the Board finds that the present or future public convenience and necessity require or permit abandonment or discontinuance, the Board will determine if the involved rail properties are appropriate for use for other public purposes.

(2) A request for a public use condition under 49 U.S.C. 10905 must be in writing and set forth:

(i) The condition sought;

(ii) The public importance of the condition;

(iii) The period of time for which the condition would be effective (up to the statutory maximum of 180 days); and

(iv) Justification for the imposition of the time period. A copy of the request shall be mailed to the applicant.

(3) For applications filed under part 1152, subpart C, a request for a public use condition must be filed not more than 45 days after the application is filed. A decision on the public use request will be issued by the Board or the Director of the Office of Proceedings prior to the effective date of the abandonment. For abandonment exemptions under part 1152, subpart F or exemptions granted on the basis of an individual petition for exemption filed under 49 U.S.C. 10502, a request for a public use condition must be filed not more than 20 days from the date of publication of the notice of exemption in the FEDERAL REGISTER in the case of class exemptions under subpart F of this part, or not more than 20 days from the date of publication of notice of the filing of the petition for individual exemption in the FEDERAL REGISTER.

(b) If the Board finds that the rail properties are appropriate for use for other public purposes, the railroad may dispose of the rail properties only under the conditions described in the Board's decision. The conditions imposed by the Board may include a prohibition against the disposal of the rail assets for a period of not more than 180 days from the effective date of the decision authorizing the abandonment or discontinuance, unless the properties have first been offered, on reasonable terms, for sale for public purposes. This period will run concurrently with any other postponements. Jurisdiction to impose such conditions expires after 180 days from the effective date of the decision authorizing the abandonment or discontinuance.

§ 1152.29 Prospective use of rights-of-way for interim trail use and rail banking.

(a) If any state, political subdivision, or qualified private organization is interested in acquiring or using a right-of-way of a rail line proposed to be abandoned for interim trail use and rail banking pursuant to 16 U.S.C. 1247(d), it must file a comment or otherwise include a request in its filing (in a regulated abandonment proceeding) or a petition (in an exemption proceeding) indicating that it would like to do so. The comment/request or petition must include:

(1) A map depicting, and an accurate description of, the right-of-way, or portion thereof (including mileposts), proposed to be acquired or used;

(2) A statement indicating the user's willingness to assume full responsibility: for managing the right-of-way; for any legal liability arising out of the use of the right-of-way (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability); and for the payment of all taxes assessed against the right-of-way; and

(3) An acknowledgment that interim trail use is subject to the user's continuing to meet its responsibilities described in paragraph (a)(2) of this section, and subject to possible future reconstruction and reactivation of the right-of-way for rail service. The statement must be in the following form:

Statement of Willingness To Assume Financial Responsibility

In order to establish interim trail use and rail banking under 16 U.S.C. 1247(d) and 49 CFR 1152.29, _____ (Interim Trail User) is willing to assume full responsibility for management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against the right-of-way owned by _____ (Railroad) and operated by _____ (Railroad). The property, known as _____ (Name of Branch Line), extends from railroad milepost _____ near _____ (Station Name), to railroad milepost _____, near _____ (Station name), a distance of _____ miles in [County(ies), (State(s)]. The right-of-way is part of a line of railroad proposed for abandonment in Docket No. STB AB-_____ (Sub-No. _____).

A map of the property depicting the right-of-way is attached.

_____ (Interim Trail User) acknowledges that use of the right-of-way is subject to the user's continuing to meet its responsibilities described above and subject to possible future reconstruction and reactivation of the right-of-way for rail service. A copy of this statement is being served on the railroad(s) on the same date it is being served on the Board.

(b)(1) In abandonment application proceedings under 49 U.S.C. 10903, interim trail use statements are due within the 45-day protest and comment period following the date the abandonment application is filed. See § 1152.25(c). The applicant carrier's response notifying the Board whether and with whom it intends to negotiate a trail use agreement is due within 15 days after the close of the protest and comment period (i.e., 60 days after the abandonment application is filed).

(i) In every proceeding where a Trails Act request is made, the Board will determine whether the Trails Act is applicable.

(ii) If the Trails Act is not applicable because of failure to comply with § 1152.29(a), or is applicable but the carrier either does not intend to negotiate an agreement, or does not timely notify the Board of its intention to negotiate, a decision on the merits will be issued and no Certificate of Interim Trail Use or Abandonment (CITU) will be issued. If the carrier is willing to negotiate an agreement, and the public convenience and necessity permit abandonment, the Board will issue a CITU.

(2) In exemption proceedings, a petition containing an interim trail use statement is due within 10 days after the date the notice of exemption is published in the FEDERAL REGISTER in the case of a class exemption and within 20 days after publication in the FEDERAL REGISTER of the notice of filing of a petition for exemption in the case of a petition for exemption. When an interim trail use comment(s) or petition(s) is filed in an exemption proceeding, the railroad's reply to the Board (indicating whether and with whom it intends to negotiate an agreement) is due within 10 days after the date a petition requesting interim trail use is filed.

(3) Late-filed trail use statements must be supported by a statement showing good cause for late filing.

(c) *Regular and NERSA abandonment proceedings.* (1) If continued rail service does not occur pursuant to 49 U.S.C. 10904 and § 1152.27, and a railroad agrees to negotiate an interim trail use/rail banking agreement, then the Board will issue a CITU to the railroad and to the interim trail user for that portion of the right-of-way to be covered by the agreement. The CITU will: Permit the railroad to discontinue service, cancel any applicable tariffs, and salvage track and material consistent with interim trail use and rail banking, as long as it is consistent with any other Board order, 30 days after the date it is issued (10 days after issuance in NERSA proceedings); and permit the railroad to fully abandon the line if no trail use agreement is reached 180 days after it is issued, subject to appropriate conditions, including labor protection and environmental matters.

(2) The CITU will indicate that any interim trail use is subject to future restoration of rail service, and subject to the user continuing to meet the financial obligations for the right-of-way. The CITU will also provide that, if the user intends to terminate trail use, it must send the Board a copy of the CITU and request that it be vacated on a specified date. The Board will reopen the abandonment proceeding, vacate the CITU, and issue a decision permitting immediate abandonment for the involved portion of the right-of-way. Copies of the decision will be sent to:

(i) The abandonment applicant;

(ii) The owner of the right-of-way; and

(iii) The current trail user.

(3) If an application to construct and operate a rail line over the right-of-way is authorized under 49 U.S.C. 10901 and 49 CFR part 1150, or exempted under 49 U.S.C. 10502, then the CITU will be vacated accordingly.

(d) *Exempt abandonment proceedings.* (1) If continued rail service does not occur under 49 U.S.C. 10904 and § 1152.27 and a railroad agrees to negotiate an interim trail use/rail banking agreement, then the Board will issue a Notice of Interim Trail Use or Abandonment (NITU) to the railroad and to the interim trail user for the portion of the right-of-way to be covered by the agreement. The NITU will: permit the railroad to discontinue service, cancel any applicable tariffs, and salvage track and materials, consistent with interim trail use and rail banking, as long as it is consistent with any other Board order, 30 days after the date it is

issued; and permit the railroad to fully abandon the line if no agreement is reached 180 days after it is issued, subject to appropriate conditions, including labor protection and environmental matters.

(2) The NITU will indicate that interim trail use is subject to future restoration of rail service, and subject to the user continuing to meet the financial obligations for the right-of-way. The NITU will also provide that, if the user intends to terminate trail use, it must send the Board a copy of the NITU and request that it be vacated on a specific date. The Board will reopen the exemption proceeding, vacate the NITU, and issue a decision reinstating the exemption for that portion of the right-of-way. Copies of the decision will be sent to:

(i) The abandonment exemption applicant;

(ii) The owner of the right-of-way; and

(iii) The current trail user.

(3) If an application to construct and operate a rail line over the right-of-way is authorized under 49 U.S.C. 10901 and 49 CFR part 1150, or exempted under 49 U.S.C. 10502, then the NITU will be vacated accordingly.

(e)(1) Where late-filed trail use statements are accepted, the Director (or designee) will telephone the railroad to determine whether abandonment has been consummated and, if not, whether the railroad is willing to negotiate an interim trail use agreement. The railroad shall confirm, in writing, its response, within 5 days. If abandonment has been consummated, the trail use request will be dismissed. If abandonment has not been consummated but the railroad refuses to negotiate, then trail use will be denied. If abandonment has not been consummated and the railroad is willing to negotiate, the abandonment proceeding will be reopened, the abandonment decision granting an application, petition for exemption or notice of exemption will be vacated, and an appropriate CITU or NITU will be issued. The effective date of the CITU or NITU will be the same date as the vacated decision or notice.

(2) A railroad that receives authority from the Board to abandon a line (in a regulated abandonment proceeding under 49 U.S.C. 10903, or by individual or class exemption issued under 49 U.S.C. 10502) shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line (e.g., discontinued operations, salvaged the track, canceled tariffs, and intends that the property be removed from the interstate rail network). The notice shall provide the name of the STB proceeding and its docket number, a brief description of the line, and a statement that the railroad has consummated, or fully exercised, the abandonment authority on a certain date. The notice shall be filed within 1 year of the service date of the decision permitting the abandonment (assuming that the railroad intends to consummate the abandonment). Notices will be deemed conclusive on the point of consummation if there are no legal or regulatory barriers to consummation (such as outstanding conditions, including Trails Act conditions). If, after 1 year from the date of service of a decision permitting abandonment, consummation has not been effected by the railroad's filing of a notice of consummation, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. In that event, a new proceeding would have to be instituted if the railroad wants to abandon the line. Copies of the railroad's notice of consummation shall be filed with the Secretary of the Board. In addition, the notice of consummation shall be sent to the State Public Service Commission (or equivalent agency) of every state through which the line passes. If, however, any legal or regulatory barrier to consummation exists at the end of the 1-year time period, the notice of consummation must be filed not later than 60 days after satisfaction, expiration or removal of the legal or regulatory barrier. For good cause shown, a railroad may file a request for an extension of time to file a notice so long as it does so sufficiently in advance of the expiration of the deadline for notifying the Board of consummation to allow for timely processing.

(f)(1) When a trail user intends to terminate trail use and another person intends to become a trail user by assuming financial responsibility for the right-of-way, then the existing and future trail users shall file, jointly:

(i) A copy of the extant CITU or NITU; and

(ii) A Statement of Willingness to Assume Financial Responsibility by the new trail user.

(2) The parties shall indicate the date on which responsibility for the right-of-way is to transfer to the new trail user. The Board will reopen the abandonment or exemption proceeding, vacate the existing NITU or CITU; and issue an appropriate replacement NITU or CITU to the new trail user.

(g) In proceedings where a timely trail use statement is filed, but due to either the railroad's indication of its unwillingness to negotiate interim trail use agreement, or its failure to timely notify the Board of its willingness to negotiate, a decision authorizing abandonment or an exemption notice or decision is issued instead of a CITU or NITU, and subsequently the railroad and trail use proponent nevertheless determine to negotiate an interim trail use agreement under the Trails Act, then the railroad and trail use proponent must file a joint pleading requesting that an appropriate CITU or NITU be issued. If the abandonment has not been consummated, the Board will reopen the proceeding, vacate the outstanding decision or notice (or portion thereof), and issue an appropriate CITU or NITU that will permit the parties to negotiate for a period agreed to by the parties in their joint filing, but not to exceed 180 days, at the end of which, the CITU or NITU will convert into a decision or notice permitting abandonment.

[61 FR 67883, Dec. 24, 1996, as amended at 62 FR 34670, June 27, 1997; 64 FR 53268, Oct. 1, 1999]

Subpart D—Standards for Determining Costs, Revenues, and Return on Value

§ 1152.30 General.

(a) *Contents of subpart.* (1) 49 U.S.C. 10904 directs the Board to determine the extent to which the avoidable costs of providing rail service plus a reasonable return on the value of the line exceed the revenues attributable to the line. This subpart contains the methodology for such determinations and the standards necessary for application of those terms in the context of a particular proceeding. Such data will be used in reaching the Board's findings on the merits of an abandonment or discontinuance proceeding and in making the necessary financial assistance determinations.

(2) This subpart also sets forth a method by which the carrier may establish its Forecast Year estimates and Estimated Subsidy Payment to be included in its application (§ 1152.22(d) of this part). Furthermore, an offeror of financial assistance may use this method to formulate a subsidy offer and/or Proposed Subsidy Payment under 49 U.S.C. 10904 and § 1152.27 of subpart C of this part.

(b) *Data collection.* The owning or operating carrier shall establish a system to collect at branch level the data necessary to compute the base year data and the final subsidy payment. The collection and compilation of such data shall be in accordance with the Branch Line Accounting System (49 CFR part 1201).

(c) *Final payment of financial assistance.* (1) When a financial assistance agreement is concluded, the final payment will be adjusted to reflect the actual revenues derived, avoidable costs incurred, and value of the properties used in the subsidy year.

(2) Where an adjustment results in an increase in the Estimated Subsidy Payment upon which the financial assistance agreement is based, the amount of such increase is limited to 15 percent of the estimated payment. However, if the railroad notifies the subsidizer that the estimate will be exceeded by more than 15 percent in one of the Financial Status Reports (§ 1152.37) issued during the first 10 months of the subsidy year or the increase results from an expense preapproved by the subsidizer, the adjusted amount shall be included in the final payment.

§ 1152.31 Revenue and income attributable to branch lines.

The revenue attributable to the rail properties is the total of the revenues assigned to the branch in accordance with this section, plus any subsidy payments that would cease upon discontinuance of service on the branch, for the subsidy year. The revenues assigned shall be derived from the following accounts:

(a) *Account 101—Freight.* The revenue assigned under this account shall be the actual revenues, including transit revenues, accruing to the railroad, derived from waybills and other source documents, for all traffic that:

(1) Originates and terminates on the branch;

(2) Originates or terminates on the branch and is handled off the branch on the system but not on another carrier; and

(3) Originates or terminates on the branch and is handled on another carrier. All traffic that is received or forwarded through interchange at a point on the branch, including ferry operations, shall be considered as originating or terminating on the branch. The revenues of all other bridge or overhead traffic that will not be retained by the carrier shall be attributed to the branch on the ratio of miles moved on the branch to miles moved on the system, provided, however, that the parties may agree on a mutually acceptable usage charge for bridge traffic in lieu of the mileage apportionment.

(b) *Account 104—Switching; Account 105—Water transfers; Account 106—Demurrage; Account 110—Incidental; Account 121—Joint Facility-Credit; Account 122—Joint Facility-Debt; Account 506—Revenues from Properties Used in Other Than Carrier Operations; Account 510—Miscellaneous Rent Income; Account 519—Miscellaneous Income.* The revenues assigned under these accounts shall be the actual revenues accruing to the railroad that are directly attributable to the branch.

(c) *Chart for revenue accounts.*

Revenue account title	Account No.
Freight	101
Switching	104
Water transfers	105
Demurrage	106
Incidental	110
Joint facility-credit	121
Joint facility-debt	122
Revenues from property used in other than carrier operations, less expenses.	506, 534
Miscellaneous rent income	510
Miscellaneous income	519

§ 1152.32 Calculation of avoidable costs.

This section defines: Which cost elements are eligible for inclusion in the calculation of avoidable costs; the conditions under which certain cost elements become eligible for inclusion; and the basis of apportioning those cost elements which are not assigned to the branch on an actual expense basis. The avoidable costs of providing freight service on a branch shall be the total of the costs assigned to the branch in accordance with this section. The avoidable costs of providing freight service on a branch shall be just and reasonable, and shall not exceed those necessary for an honest and efficient operation. Those expenses apportioned under this section shall be derived from the latest Form R–1 Annual Report for Class I railroads filed with the Board prior to the conclusion of the subsidy year, and company records for all non-Class I railroads, and assigned to the branch according to the procedures set forth in § 1152.33 of these regulations. When the term ''Actual'' is specified as the basis for assigning an expense, it shall mean that the only costs which can be assigned to the account are those costs which are incurred solely as a result of the continuation of rail freight service on the branch. The accounts in the following charts, which list only the ''freight-only'' account numbers, shall include the portion of common expenses that have been apportioned to freight service.

Operating expense group and accounts	Account No.	Basis of assignment to on-branch costs
(a) Maintenance of way and structures:		
(1) Administration: Track:		
Salaries and wages	11–13–02	Actual.

Operating expense group and accounts	Account No.	Basis of assignment to on-branch costs
Materials	21–13–02	Do.
Purchased services	41–13–02	Do.
Other expenses	61–13–02	Do.
Bridges and buildings		
Salaries and wages	11–13–03	Do.
Materials	21–13–03	Do.
Purchased services	41–13–03	Do.
Other expenses	61–13–03	Do.
Signals		
Salaries and wages	11–13–04	Do.
Materials	21–13–04	Do.
Purchased services	41–13–04	Do.
Other expenses	61–13–04	Do.
Communications		
Salaries and wages	11–13–05	Do.
Materials	21–13–05	Do.
Purchased services	41–13–05	Do.
Other expenses	61–13–05	Do.
Other		
Salaries and wages	11–13–06	Do.
Materials	21–13–06	Do.
Purchased services	41–13–06	Do.
Other expenses	61–13–06	Do.
(2) Repair maintenance and other roadway—running:		
Salaries and wages	11–11–10	Do.
Materials	21–11–10	Do.
Repairs by others—DR	39–11–10	Do.
Repairs for others—CR	40–11–10	Do.
Purchased services	41–11–10	Do.
Other expenses	61–11–10	Do.
Roadway—switching		
Salaries and wages	11–12–10	Do.
Materials	21–12–10	Do.
Repairs by others—DR	39–12–10	Do.
Repairs for others—CR	40–12–10	Do.
Purchased services	41–12–10	Do.
Other expenses	61–12–10	Do.
Tunnels and subways—running		
Salaries and wages	11–11–11	Do.
Materials	21–11–11	Do.
Repairs by others—DR	39–11–11	Do.
Repairs for others—CR	40–11–11	Do.
Purchased services	41–11–11	Do.
Other expenses	61–11–11	Do.
Tunnels and subways—switching		
Salaries and wages	11–12–11	Do.
Materials	21–12–11	Do.
Repairs by others—DR	39–12–11	Do.
Repairs for others—CR	40–12–11	Do.
Purchased services	41–12–11	Do.
Other expenses	61–12–11	Do.
Bridges and culverts—running		
Salaries and wages	11–11–12	Do.
Materials	21–11–12	Do.
Repairs by others—DR	39–11–12	Do.
Repairs for others—CR	40–11–12	Do.
Purchased services	41–11–12	Do.
Other expenses	61–11–12	Do.
Bridges and culverts—switching		
Salaries and wages	11–12–12	Do.
Materials	21–12–12	Do.
Repairs by others—DR	39–12–12	Do.
Repairs for others—CR	40–12–12	Do.
Purchased services	41–12–12	Do.
Other expenses	61–12–12	Do.
Ties—running—material	21–11–13	Do.
Ties—switching—material	21–12–13	Do.
Rails—running—material	21–11–14	Do.
Rails—switching—material	21–12–14	Do.
Other track material—running—material	21–11–15	Do.
Other track material—switching—material	21–12–15	Do.
Ballast—running—material	21–11–16	Do.
Ballast—switching—material	21–12–16	Do.

Operating expense group and accounts	Account No.	Basis of assignment to on-branch costs
Track laying and surfacing—running		
Salaries and wages	11–11–17	Do.
Materials	21–11–17	Do.
Repairs by others—DR	39–11–17	Do.
Repairs for others—CR	40–11–17	Do.
Purchased services	41–11–17	Do.
Other expenses	61–11–17	Do.
Track laying and surfacing—switching		
Salaries and wages	11–12–17	Do.
Materials	21–12–17	Do.
Repairs by others—DR	39–12–17	Do.
Repairs for others—CR	40–12–17	Do.
Purchased services	41–12–17	Do.
Other expenses	61–12–17	Do.
Road property damaged—running		
Salaries and wages	11–11–48	Do.
Materials	21–11–48	Do.
Repairs by others—DR	39–11–48	Do.
Repairs for others—CR	40–11–48	Do.
Purchased services	41–11–48	Do.
Other expenses	61–11–48	Do.
Road property damaged—switching		
Salaries and wages	11–12–48	Do.
Materials	21–12–48	Do.
Repairs by others—DR	39–12–48	Do.
Repairs for others—CR	40–12–48	Do.
Purchased services	41–12–48	Do.
Other Expenses	61–12–48	Do.
Road property damaged—other		
Salaries and wages	1–13–48	Do.
Materials	21–13–48	Do.
Repairs by others—DR	39–13–48	Do.
Repairs for others—CR	40–13–48	Do.
Purchased services	41–13–48	Do.
Other expenses	61–13–48	Do.
Signals and interlockers—running		
Salaries and wages	11–11–19	Do.
Materials	21–11–19	Do.
Repairs by others—DR	39–11–19	Do.
Repairs for others—CR	40–11–19	Do.
Purchased services	41–11–19	Do.
Other expenses	61–11–19	Do.
Signals and interlockers—switching		
Salaries and wages	11–12–19	Do.
Materials	21–12–19	Do.
Repairs by others—DR	39–12–19	Do.
Repairs for others—CR	40–12–19	Do.
Purchased services	41–12–19	Do.
Other expenses	61–12–19	Do.
Communications systems		
Salaries and wages	11–13–20	Do.
Materials	21–13–20	Do.
Repairs by others—DR	39–13–20	Do.
Repairs for others—CR	40–13–20	Do.
Purchased services	41–13–20	Do.
Other expenses	61–13–20	Do.
Electric power systems		
Salaries and wages	11–13–21	Do.
Materials	21–13–21	Do.
Repairs by others—DR	39–13–21	Do.
Repairs for others—CR	40–13–21	Do.
Purchased services	41–13–21	Do.
Other expenses	61–13–21	Do.
Highway grade crossings—running		
Salaries and wages	11–11–22	Do.
Materials	21–11–22	Do.
Repairs by others—DR	39–11–22	Do.
Repairs for others—CR	40–11–22	Do.
Purchased services	41–11–22	Do.
Other expenses	61–11–22	Do.
Highway grade crossings—switching		
Salaries and wages	11–12–22	Do.
Materials	21–12–22	Do.
Repairs by others—DR	39–12–22	Do.

Operating expense group and accounts	Account No.	Basis of assignment to on-branch costs
Repairs for others—CR	40–12–22	Do.
Purchased services	41–12–22	Do.
Other expenses	61–12–22	Do.
Station and office buildings		
Salaries and wages	11–13–23	Do.
Materials	21–13–23	Do.
Repairs by others—DR	39–13–23	Do.
Repairs for others—CR	40–13–23	Do.
Purchased services	41–13–23	Do.
Other expenses	61–13–23	Do.
Station buildings—locomotives		
Salaries and wages	11–13–24	Do.
Materials	21–13–24	Do.
Repairs by others—DR	39–13–24	Do.
Repairs for others—CR	40–13–24	Do.
Purchased services	41–13–24	Do.
Other expenses	61–13–24	Do.
Shop buildings—freight cars		
Salaries and wages	11–13–25	Do.
Materials	21–13–25	Do.
Repairs by others—DR	39–13–25	Do.
Repairs for others—CR	40–13–25	Do.
Purchased services	41–13–25	Do.
Other expenses	61–13–25	Do.
Shop buildings—other equipment		
Salaries and wages	11–13–26	Do.
Materials	21–13–26	Do.
Repairs by others—DR	39–13–26	Do.
Repairs for others—CR	40–13–26	Do.
Purchased services	41–13–26	Do.
Other expenses	61–13–26	Do.
Locomotive servicing facilities		
Salaries and wages	11–13–27	Do.
Materials	21–13–27	Do.
Repairs by others—DR	39–13–27	Do.
Repairs for others—CR	40–13–27	Do.
Purchased services	41–13–27	Do.
Other expenses	61–13–27	Do.
Miscellaneous buildings and structures		
Salaries and wages	11–13–28	Do.
Materials	21–13–28	Do.
Repairs by others—DR	39–13–28	Do.
Repairs for others—CR	40–13–28	Do.
Purchased services	41–13–28	Do.
Other expenses	61–13–28	Do.
Coal terminals		
Salaries and wages	11–13–29	Do.
Materials	21–13–29	Do.
Repairs by others—DR	39–13–29	Do.
Repairs for others—CR	40–13–29	Do.
Purchased services	41–13–29	Do.
Other expenses	61–13–29	Do.
Ore terminals		
Salaries and wages	11–13–30	Do.
Materials	21–13–30	Do.
Repairs by others—DR	39–13–30	Do.
Repairs for others—CR	40–13–30	Do.
Purchased services	41–13–30	Do.
Other expenses	61–13–30	Do.
TOFC/COFC terminals		
Salaries and wages	11–13–31	Do.
Materials	21–13–31	Do.
Repairs by others—DR	39–13–31	Do.
Repairs for others—CR	40–13–31	Do.
Purchased services	41–13–21	Do.
Other expenses	61–13–31	Do.
Other marine terminals		
Salaries and wages	11–13–32	Do.
Materials	21–13–32	Do.
Repairs by others—DR	39–13–32	Do.
Repairs for others—CR	40–13–32	Do.
Purchased services	41–13–32	Do.
Other expenses	61–13–32	Do.

Operating expense group and accounts	Account No.	Basis of assignment to on-branch costs
Motor vehicle loading and distribution facilities		
Salaries and wages	11–13–33	Do.
Materials	21–13–33	Do.
Repairs by others—DR	39–13–33	Do.
Repairs for others—CR	40–13–33	Do.
Purchased services	41–13–33	Do.
Other expenses	61–13–33	Do.
Facilities for other specialized service operations		
Salaries and wages	11–13–35	Do.
Materials	21–13–35	Do.
Repairs by others—DR	39–13–35	Do.
Repairs for others—CR	40–13–35	Do.
Purchased services	41–13–35	Do.
Other expenses	61–13–35	Do.
Roadway machines		
Salaries and wages	11–13–36	Daily repair costs per GMA, for each type of machine used on the branch line sec. 1152.33(a)(1).
Materials	21–13–36	Do.
Repairs by others—DR	39–13–36	Do.
Repairs for others—CR	40–13–36	Do.
Purchased services	41–13–36	Do.
Other expenses	61–13–36	Do.
Small tools and supplies		
Other expenses	11–13–37	Assign supplies on the daily costs per GMA, for each type of machine used on the branch; small tool assign to maintenance of way 11- 11/12–10 through 17, and 48, sec. 1152.33(a)(2).
Materials	21–13–37	Do.
Repairs by others—DR	39–13–37	Do.
Repairs for others—CR	40–13–37	Do.
Purchased services	41–13–37	Do.
Other expenses	61–13–37	Do.
Snow removal		
Salaries and wages	11–13–38	Actual.
Materials	21–13–38	Do.
Repairs by others—DR	39–13–38	Do.
Repairs for others—CR	40–13–38	Do.
Purchased Services	41–13–38	Do.
Other expenses	61–13–38	Do.
Fringe benefits—running	12–11–00	11–11–XX, sec. 1152.33(a)(3)(i).
Fringe benefits—switching	12–12–00	11–12–XX, sec. 1152.33(a)(3)(ii).
Fringe benefits—other	12–13–00	11–13–XX, sec. 1152.33(a)(3)(iii).
Casualties and insurance—running		
Other casualties	52–11–00	Actual.
Insurance	53–11–00	Do.
Casualties and insurance—switching		
Other casualties	52–12–00	Do.
Insurance	53–12–00	Do.
Lease rentals—debit—running	31–11–00	Do.
Lease rentals—debit—switching	31–12–00	Do.
Lease rentals—debit—other	31–13–00	Do.
Lease rentals—credit—running	32–11–00	Do.
Lease rentals—credit—switching	32–12–00	Do.
Lease rentals—credit—other	32–13–00	Do.
Joint facility rent—debit—running	33–11–00	Do.
Joint facility rent—debit—switching	33–12–00	Do.
Casualties and insurance—other		
Other casualties	52–13–00	Do.
Insurance	53–13–00	Do.
Joint facility—debit—other	33–13–00	Do.
Joint facility rent—credit—running	34–11–00	Do.
Joint facility rent—credit—switching	34–12–00	Do.
Joint facility rent—credit—other	34–13–00	Do.
Other rents—debit—running	35–11–00	Do.
Other rents—debit—switching	35–12–00	Do.
Other rents—debit—other	35–13–00	Do.
Other rents—credit—running	36–11–00	Do.
Other rents—credit—switching	36–12–00	Do.
Other rents—credit—other	36–13–00	Do.
Depreciation—running	62–11–00	Do.
Depreciation—switching	62–12–00	Do.
Depreciation—other	62–13–00	Do.

Operating expense group and accounts	Account No.	Basis of assignment to on-branch costs
Joint facility—debit—running	37–11–00	Do.
Joint facility—debit—switching	37–12–00	Do.
Joint facility—debit—other	37–13–00	Do.
Joint facility—credit—running	38–11–00	Do.
Joint facility—credit—switching	38–12–00	Do.
Joint facility—credit—other	38–13–00	Do.
Dismantling retired road property—running		
Salaries and wages	11–11–39	Do.
Materials	21–11–39	Do.
Purchased services	41–11–39	Do.
Other expenses	61–11–39	Do.
Dismantling retired road property—switching		
Salaries and wages	11–12–39	Do.
Materials	21–12–39	Do.
Purchased services	41–12–39	Do.
Other expenses	61–12–39	Do.
Dismantling retired road property—other		
Salaries and wages	11–13–39	Do.
Materials	21–13–39	Do.
Purchased services	41–13–39	Do.
Other expenses	61–13–39	Do.
Other—running		
Salaries and wages	11–11–99	Do.
Materials	21–11–99	Do.
Purchased services	41–11–99	Do.
Other expenses	61–11–99	Do.
Other—switching		
Salaries and wages	11–12–99	Do.
Materials	21–12–99	Do.
Purchased Services	41–12–99	Do.
Other Expenses	61–12–99	Do.
Other—other		
Salaries and wages	11–13–99	Do.
Materials	21–13–99	Do.
Purchased services	41–13–99	Do.
Other expenses	61–13–99	Do.
(b) Maintenance of equipment:		
(1) Locomotives: Administration		
Salaries and wages	11–21–01	Do.
Materials	21–21–01	Do.
Purchased services	41–21–01	Do.
Other expenses	61–21–01	Do.
Repairs and maintenance		
Salaries and wages	11–21–41	Road diesel and road electric locomotive gross ton miles. Yard diesel and yard electric locomotive unit hours, § 1152.33(b)(1).
Materials	21–21–41	Do.
Repairs by others—DR	39–21–41	Do.
Repairs for others—CR	40–21–41	Do.
Purchased services	41–21–41	Do.
Other expenses	61–21–41	Do.
Machinery repair		
Salaries and wages	11–21–40	Actual.
Materials	21–21–40	Do.
Repairs by others—DR	39–21–40	Do.
Repairs for others—CR	40–21–40	Do.
Purchased services	41–21–40	Do.
Other expenses	61–21–40	Do.
Equipment damaged		
Salaries and wages	11–21–48	Do.
Materials	21–21–48	Do.
Repairs by others—DR	39–21–48	Do.
Repairs for others—CR	40–21–48	Do.
Purchased services	41–21–48	Do.
Other expenses	61–21–48	Do.
Equipment damaged		
Fringe benefits	12–21–00	11–21–XX, sec. 1152.33(b)(3)(i).
Other casualties and insurance		
Other casualties	52–21–00	Actual.
Insurance	53–21–00	Do.
Lease rentals—debit	31–21–00	Do.
Lease rentals—credit	32–21–00	Do.

Operating expense group and accounts	Account No.	Basis of assignment to on-branch costs
Joint facility rent—debit	33–21–00	Do.
Joint facility rent—credit	34–21–00	Do.
Other rents—debit	35–21–00	Do.
Other rents—credit	36–21–00	Do.
Joint facility—debit	37–21–00	Do.
Joint facility—credit	38–21–00	Do.
Depreciation	62–21–00	All locomotives, locomotive unit hours, sec. 1152.33(b)(2).
Dismantling retired property		
Salaries and wages	11–21–39	Actual.
Materials	21–21–39	Do.
Purchased services	41–21–39	Do.
Other expenses	61–21–39	Do.
Other		
Salaries and wages	11–21–99	Do.
Materials	21–21–99	Do.
Purchased services	41–21–99	Do.
Other expenses	61–21–99	Do.
(2) Freight cars: Administration:		
Salaries and wages	11–22–01	Do.
Materials	21–22–01	Do.
Purchased services	41–22–01	Do.
Other expenses	61–22–01	Do.
Machinery repair		
Salaries and wages	11–22–40	Do.
Materials	21–22–40	Do.
Repairs by others—DR	39–22–40	Do.
Repairs for others—CR	40–22–40	Do.
Purchased services	41–22–40	Do.
Other expenses	61–22–40	Do.
Equipment damage		
Salaries and wages	11–22–48	Do.
Materials	21–22–48	Do.
Repairs by others—DR	39–22–48	Do.
Repairs for others—CR	40–22–48	Do.
Purchased services	41–22–48	Do.
Other expenses	61–22–48	Do.
Fringe benefits	12–22–00	11–22–XX, sec. 1152.33–(b)(3)(iii).
Other casualties and insurance		
Other casualties	52–22–00	Actual.
Insurance	53–22–00	Do.
Joint facility rent—DR	33–22–00	Do.
Joint facility rent—CR	34–22–00	Do.
Joint facility—DR	37–22–00	Do.
Joint facility—CR	38–22–00	Do.
Dismantling retired property		
Salaries and wages	11–22–39	Do.
Materials	21–22–39	Do.
Purchased services	41–22–39	Do.
Other expenses	61–22–39	Do.
Other		
Salaries and wages	11–22–99	Do.
Materials	21–22–99	Do.
Purchased services	41–22–99	Do.
Other expenses	61–22–99	Do.
Freight car costs per day and per mile:		
Repair and maintenance		
Salaries and wages	11–22–42	These accounts are used to develop the cost per car day and per car mile for each type of car, sec. 1152.32(g).
Materials	21–22–42	Do.
Repairs by others—DR	39–22–42	Do.
Repairs for others—CR	40–22–42	Do.
Purchased services	41–22–42	Do.
Other expenses	61–22–42	Do.
Lease rentals—DR	31–22–00	
Lease rentals—CR	32–22–00	
Depreciation	62–22–00	
Other rents—DR	35–22–00	
Other rents—CR	36–22–00	
(3) Other equipment: Administration		
Salaries and wages	11–23–01	Actual.
Materials	21–23–01	Do.
Purchased services	41–23–01	Do.

Operating expense group and accounts	Account No.	Basis of assignment to on-branch costs
Other expenses	61–23–01	Do.
Repair and maintenance: Trucks, trailers and containers—revenue service		
Salaries and wages	11–23–43	Do.
Materials	21–23–43	Do.
Repairs by others—DR	39–23–43	Do.
Repairs for others—CR	40–23–43	Do.
Purchased services	41–23–43	Do.
Other expenses	61–23–43	Do.
Floating equipment—revenue service		
Salaries and wages	11–23–44	Do.
Materials	21–23–44	Do.
Repairs by others—DR	39–23–44	Do.
Repairs for others—CR	40–23–44	Do.
Purchased services	41–23–44	Do.
Other expenses	61–23–44	Do.
Computer and data processing		
Salaries and wages	11–23–46	Do.
Materials	21–23–46	Do.
Repairs by others—DR	39–23–46	Do.
Repairs for others—CR	40–23–46	Do.
Purchased services	41–23–46	Do.
Other expenses	61–23–46	Do.
Machinery		
Salaries and wages	11–23–40	Do.
Materials	21–23–40	Do.
Repairs by others—DR	39–23–40	Do.
Repairs for others—CR	40–23–40	Do.
Purchased services	41–23–40	Do.
Other expenses	61–23–40	Do.
Work and other non revenue equipment		
Salaries and wages	11–23–47	Do.
Materials	21–23–47	Do.
Repairs by others—DR	39–23–47	Do.
Repairs for others—CR	40–23–47	Do.
Purchased services	41–23–47	Do.
Other expenses	61–23–47	Do.
Equipment damaged		
Salaries and wages	11–23–48	Do.
Materials	21–23–48	Do.
Repairs by others—DR	39–23–48	Do.
Repairs for others—CR	40–23–38	Do.
Purchased services	41–23–48	Do.
Other expenses	61–23–48	Do.
Equipment damaged		
Fringe benefits	12–23–00	11–23–XX, sec. 1152.33(b)(3)(ii).
Other casualties and insurance		
Other casualties	52–23–00	Actual.
Insurance	53–23–00	Do.
Lease rentals—DR	31–23–00	Do.
Lease rentals—CR	32–23–00	Do.
Joint facility rent—DR	33–23–00	Do.
Joint facility rent—CR	34–23–00	Do.
Other rents—DR	35–23–00	Do.
Other rents—CR	36–23–00	Do.
Depreciation	62–23–00	Do.
Joint facility—DR	37–23–00	Do.
Joint facility—CR	38–23–00	Do.
Dismantling retired property		
Salaries and wages	11–23–39	Do.
Materials	21–23–39	Do.
Purchased services	41–23–39	Do.
Other expenses	61–23–39	Do.
Other		
Salaries and wages	11–23–99	Do.
Materials	21–23–99	Do.
Purchased services	41–23–99	Do.
Other expenses	61–23–99	Do.
(c) Transportation:		
(1) Train operations: Administration:		
Salaries and wages	11–31–01	Do.
Materials	21–31–01	Do.
Purchased services	41–31–01	Do.
Other expenses	61–31–01	Do.

Operating expense group and accounts	Account No.	Basis of assignment to on-branch costs
Engine crews		
Salaries and wages	11–31–56	Do.
Materials	21–31–56	Train hours, sec. 1152.33(c)(1)(i).
Purchased services	41–31–56	Actual.
Other expenses	61–31–56	Do.
Train crews		
Salaries and wages	11–31–57	Do.
Materials	21–31–57	Train hours, sec. 1152.33(c)(1)(i).
Purchased services	41–31–57	Actual.
Other expenses	61–31–57	Do.
Dispatching trains		
Salaries and wages	11–31–58	Do.
Materials	21–31–58	Do.
Purchased services	41–31–58	Do.
Other expenses	61–31–58	Do.
Operating signals and interlockers		
Salaries and wages	11–31–59	Do.
Materials	21–31–59	Do.
Purchased services	41–31–59	Do.
Other expenses	61–31–59	Do.
Operating drawbridges		
Salaries and wages	11–31–60	Do.
Materials	21–31–60	Do.
Purchased services	41–31–60	Do.
Other expenses	61–31–60	Do.
Highway crossing protection		
Salaries and wages	11–31–61	Do.
Materials	21–31–61	Do.
Purchased services	41–31–61	Do.
Other expenses	61–31–61	Do.
Train and inspection and lubrication		
Salaries and wages	11–31–62	Train hours, Sec. 1152.33(c)(1)(i).
Materials	21–31–62	Do.
Purchased services	41–31–62	Actual.
Other expenses	61–31–62	Do.
Locomotive fuel		
Salaries and wages	11–31–67	Diesel locomotive unit hours, Sec. 1152.33(c)(1)(ii).
Materials	21–31–67	Do.
Purchased services	41–31–67	Do.
Other expenses	61–31–67	Do.
Electric power purchased or produced for motive power		
Salaries and wages	11–31–68	Electric locomotive unit hours, sec. 1152.33(c)(1)(iii).
Materials	21–31–68	Do.
Purchased services	41–31–68	Do.
Other expenses	61–31–68	Do.
Servicing locomotives		
Salaries and wages	11–31–69	Locomotive unit miles, sec. 1152.33(c)(1)(iv).
Materials	21–31–69	Do.
Purchased services	41–31–69	Do.
Other expenses	61–31–69	Do.
Freight lost or damaged—solely related	51–31–00	Actual.
Clearing wrecks		
Salaries and wages	11–31–63	Do.
Materials	21–31–63	Do.
Purchased services	41–31–63	Do.
Other expenses	61–31–63	Do.
Fringe benefits	12–31–00	11–31–XX, sec. 1152.33 (c)(4)(i).
Other casualties and insurance		
Other casualties	52–31–00	Actual.
Insurance	53–31–00	Do.
Joint facility—DR	37–31–00	Do.
Joint facility—CR	38–31–00	Do.
Other		
Salaries and wages	11–31–99	Do.
Materials	21–31–99	Do.
Purchased services	41–31–99	Do.
Other expenses	61–31–99	Do.
(2) Yard operations: Administration:		
Salaries and wages	11–32–01	Do.
Materials	21–32–01	Do.
Purchased services	41–32–01	Do.
Other expenses	61–32–01	Do.
Switch crews		
Salaries and wages	11–32–64	Do.

Operating expense group and accounts	Account No.	Basis of assignment to on-branch costs
Materials	21–32–64	Locomotive unit hours, sec. 1152.33(c)(2)(i)
Purchased services	41–32–64	Actual.
Other expenses	61–32–64	Do.
Controlling operations		
Salaries and wages	11–32–65	Do.
Materials	21–32–65	Do.
Purchased services	41–32–65	Do.
Other expenses	61–32–65	Do.
Yard and terminal clerical		
Salaries and wages	11–32–66	Do.
Materials	21–32–66	Do.
Purchased services	41–32–66	Do.
Other expenses	61–32–66	Do.
Operating switches, signals, retarders and humps		
Salaries and wages	11–32–59	Do.
Materials	21–32–59	Do.
Purchased services	41–32–59	Do.
Other expenses	61–32–59	Do.
Locomotive fuel		
Salaries and wages	11–32–67	Dieselloco motive unit hours, sec. 1152.33(c)(2)(ii)
Materials	21–32–67	Do.
Purchased services	41–32–67	Do.
Other expenses	61–32–67	Do.
Electric power purchased or produced for motive power		
Salaries and wages	11–32–68	Electric locomotive unit hours, sec. 1152.33(c)(2)(iii).
Materials	21–32–68	Do.
Purchased services	41–32–68	Do.
Other expenses	61–32–68	Do.
Servicing locomotives		
Salaries and wages	11–32–69	Locomotive unit hours, sec. 1152.33(c)(2)(i).
Materials	21–32–69	Do.
Purchased services	41–32–69	Do.
Other expenses	61–32–69	Do.
Freight lost or damaged—solely related	51–32–00	Actual.
Clearing wrecks		
Salaries and wages	11–32–63	Do.
Materials	21–32–63	Do.
Purchased services	41–32–63	Do.
Other expenses	61–32–63	Do.
Fringe benefits	12–32–00	11–32–XX, sec. 1152.33(c)(4)(ii).
Other casualties and insurance		
Other casualties	52–32–00	Actual.
Insurance	53–32–00	Do.
Joint facility—DR	37–32–00	Do.
Joint facility—CR	38–32–00	Do.
Other		
Salaries and wages	11–32–99	Do.
Materials	21–32–99	Do.
Purchased services	41–32–99	Do.
Other expenses	61–32–99	Do.
(3) Train and yard operations common:		
Cleaning car interiors		
Salaries and wages	11–33–70	Do.
Materials	21–33–70	Do.
Purchased services	41–33–70	Do.
Adjusting and transferring loads		
Salaries and wages	11–33–71	Do.
Materials	21–33–71	Do.
Purchased services	41–33–71	Do.
Carloading devices and grain doors		
Salaries and wages	11–33–72	Do.
Materials	21–33–72	Do.
Purchased services	41–33–72	Do.
Freight lost or damaged—all other	51–33–00	Do.
Fringe benefits	12–33–00	11–33–XX, sec. 1152.33(c)(4)(iii).
(4) Specialized service operations: Administration:		
Salaries and wages	11–34–01	Actual.
Materials	21–34–01	Do.
Purchased services	41–34–01	Do.
Other expenses	61–34–01	Do.
Pick-up and delivery, marine line haul, and rail substitute service		
Salaries and wages	11–34–73	Do.

Operating expense group and accounts	Account No.	Basis of assignment to on-branch costs
Materials	21–34–73	Do.
Purchased services	41–34–73	Do.
Other expenses	61–34–73	Do.
Loading and unloading and local marine		
Salaries and wages	11–34–74	Do.
Materials	21–34–74	Do.
Purchased services	41–34–74	Do.
Other expenses	61–34–74	Do.
Protective services		
Salaries and wages	11–34–75	Do.
Materials	21–34–75	Do.
Purchased services	41–34–75	Do.
Other expenses	61–34–75	Do.
Freight lost or damaged—Solely related	51–34–00	Do.
Fringe benefits	12–34–00	11–34–XX, sec. 1152.33(c)(4)(iv).
Casualties and insurance		
Other casualties	52–34–00	Actual.
Insurance	53–34–00	Do.
Joint facility—DR	37–34–00	Do.
Joint facility—CR	38–34–00	Do.
Other		
Salaries and wages	11–34–99	Do.
Materials	21–34–99	Do.
Purchased services	41–34–99	Do.
Other expenses	61–34–99	Do.
(5) Administrative support operations: Administration :		
Salaries and wages	11–35–01	Do.
Materials	21–35–01	Do.
Purchased services	41–35–01	Do.
Other expenses	61–35–01	Do.
Employees performing clerical and accounting functions		
Salaries and wages	11–35–76	Do.
Materials	21–35–76	Do.
Purchased services	41–35–76	Do.
Other expenses	61–35–76	Do.
Communication systems operation		
Salaries and wages	11–35–77	Do.
Materials	21–35–77	Do.
Purchased services	41–35–77	Do.
Other expenses	61–35–77	Do.
Loss and damage claims processing		
Salaries and wages	11–35–78	Number of claims, sec. 1152.33(c)(3)(i).
Materials	21–35–78	Do.
Purchased services	41–35–78	Do.
Other expenses	61–35–78	Do.
Fringe benefits	12–35–00	11–35–XX. sec. 1152.33(c)(4)(v).
Joint facility—DR	37–35–00	Actual.
Joint facility—CR	38–35–00	Do.
Casualties and insurance.		
Other casualties	52–35–00	Do.
Insurance	53–35–00	Do.
Other		
Salaries and wages	11–35–99	Do.
Materials	21–35–99	Do.
Purchased services	41–35–99	Do.
Other expenses	61–35–99	Do.
(d) General Administrative Officers—general administration:		
Salaries and wages	11–61–01	Do.
Materials	21–61–01	Do.
Purchased services	41–61–01	Do.
Other expenses	61–61–01	Do.
Accounting, auditing and finance		
Salaries and wages	11–61–86	Do.
Materials	21–61–86	Do.
Purchased services	41–61–86	Do.
Other expenses	61–61–86	Do.
Management services and data processing		
Salaries and wages	11–61–87	Do.
Materials	21–61–87	Do.
Purchased services	41–61–87	Do.

Operating expense group and accounts	Account No.	Basis of assignment to on-branch costs
Other expenses	61–61–87	Do.
Marketing:		
Salaries and wages	11–61–88	Do.
Materials	21–61–88	Do.
Purchased services	41–61–88	Do.
Other expenses	61–61–88	Do.
Sales		
Salaries and wages	11–61–89	Do.
Materials	21–61–89	Do.
Purchased services	41–61–89	Do.
Other expenses	61–61–89	Do.
Industrial development		
Salaries and wages	11–61–90	Do.
Materials	21–61–90	Do.
Purchased services	41–61–90	Do.
Other expenses	61–61–90	Do.
Personnel and labor relations		
Salaries and wages	11–61–91	Do.
Materials	21–61–91	Do.
Purchased services	41–61–91	Do.
Other expenses	61–61–91	Do.
Legal and secretarial		
Salaries and wages	11–61–92	Do.
Materials	21–61–92	Do.
Purchased services	41–61–92	Do.
Other expenses	61–61–92	Do.
Public relations and advertising		
Salaries and wages	11–61–93	Do.
Materials	21–61–93	Do.
Purchased services	41–61–93	Do.
Other expenses	61–61–93	Do.
Research and development		
Salaries and wages	11–61–94	Do.
Materials	21–61–94	Do.
Purchased services	41–61–94	Do.
Other expenses	61–61–94	Do.
Fringe benefits	12–61–00	11–61–XX, sec. 1152.33(d)(1).
Casualties and insurance		
Other casualties	52–61–00	Actual
Insurance	53–61–00	Do.
Writedown of uncollectible accounts	63–61–00	Do.
Other taxes except on corporate income or payroll	65–61–00	Do.
Joint facility—DR	37–61–00	Do.
Joint facility—CR	38–61–00	Do.
Other		
Salaries and wages	11–61–99	Do.
Materials	21–61–99	Do.
Purchased services	41–61–99	Do.
Other expenses	61–61–99	Do.

(e) *Deadheading, taxi, and hotel costs.* The costs assigned under this subsection shall be the actual costs incurred as a result of providing service to the branch line for deadheading, taxi, and hotel costs. The amounts included under this subsection shall not be included under other subsections of these regulations.

(f) *Overhead movement costs.* The costs assigned under this subsection shall be the actual costs incurred in moving over any other rail line solely to reach and provide service to the branch. The amounts shown under this subsection shall not be included under other subsections of these regulations.

(g) *Freight car costs.* For Class I railroads, the on-segment costs for time-mileage freight cars shall be calculated on the basis of the carrier's average cost per day and per mile. Those freight cars that are rented on a straight mileage basis are to be costed on the carrier's average cost per mile for each type of car rented on this basis. No costs are to be included in the calculation for private line (shipper owned) or other cars for which the railroad does not make payments. The cost

per day and per mile shall be calculated separately for each type of car specified in Ex Parte No. 334, *Car Service Compensation—Basic Per Diem Charges,* 362 I.C.C. 884 (1980). The freight car costs shall be separated between ''return on value-freight cars'' and ''freight car costs other than return on freight cars''. The costs assigned to a line under this subsection are to be derived from the accounts listed below.

Operating expense group—Repair and maintenance	Account No.
Salaries and wages	11–22–42
Materials	21–22–42
Repairs by others—DR	39–22–42
Repairs for others—CR	40–22–42
Purchased services	41–22–42
Other expenses	61–22–42
Lease rentals—DR	31–22–00
Lease rentals—CR	32–22–00
Depreciation	
Other rents—DR	35–22–00
Other rents—CR	36–22–00

The system total of the repair and maintenance accounts, all accounts designated XX-XX-42, and depreciation shall be divided into time-related costs and mileage-related costs on the basis of 50 percent time and 50 percent mileage for repairs, and 60 percent time and 40 percent mileage for depreciation. Freight car costs shall not include depreciation as determined in Account No. 62–22–00. Freight car depreciation shall be calculated in the manner set forth in paragraph (g)(3)(i) of this section. The system total receipts and payments for the hire of time-mileage cars, and the basic data used in the development of the car-day and car-mile factors, shall be taken from the carrier's latest Form R–1 and company records. The specific steps to complete the calculation are as follows:

(1) The total system car days by car type shall be calculated by:

(i) Averaging the carrier's freight car ownership at the beginning and end of the year (Form R–1, schedule 710, columns (b) and (k);

(ii) Multiplying the average by the standard active number of car days (346) as developed in ICC Docket No. 31358;

(iii) Subtracting car days on foreign lines (source: Company records); and

(iv) Adding the foreign car days on home line (source: Company records). This procedure shall be followed for each car type specified in Ex Parte No. 334, *supra.*

(2) The total railroad car miles shall be calculated by adding the loaded car miles for the railroad owned and leased cars (R–1, Schedule 755) to empty car miles for the railroad owned or leased cars (R–1, Schedule 755). The total car miles, loaded and empty, shall be calculated for each car type specified in Ex Parte No. 334, *supra.*

(3) The cost per car day shall be calculated for each type of time-mileage car by adding 50 percent of total freight car repair costs for each type (Form R–1, schedule 415, column (b)), and 60 percent of the depreciation shall be developed as follows:

(i) The current value for each type of car shall be calculated by first arriving at the current cost per car using the most recent purchase of this type by the railroad indexed to the midpoint of the year or a price quote from the manufacturer. This unit price shall be applied to the average number of this type of car owned by the carrier during the year. The current value developed for each car type is then multiplied by the composite depreciation rate for that type of car as shown in the latest annual report filed with the Board or company records.

(ii) Add 100 percent of the return on investment. Return on investment shall be determined by multiplying the current value of each type of car, developed in paragraph (g)(3)(i) of this section, by 1 minus the ratio of accumulated depreciation to the total original cost investment. This will determine the net current value for each type of car. The net current value for each type of car shall then be multiplied by the nominal rate of return calculated in § 1152.34(d) to obtain nominal return on investment for each type of car. The total return on investment shall then be calculated by deducting the projected holding gain (loss) for the forecast and/or subsidy year from the nominal return on investment for each type of car. In any instance where the holding gain is not specifically determined for freight cars, the Gross Domestic Product deflator calculated by the U.S. Department of Commerce shall be used. The total return on investment for each type of car shall

then be divided by total car-days for each car-type developed in paragraph (g)(1) of this section.

(iii) To the amounts for repairs and depreciation, add the time portion of the railroad's payment for hire of time-mileage freight cars (Form R–1, schedule 414, column (g)), and subtract the time portion of the railroad's receipts for hire of time mileage freight cars (Form R–1, schedule 414, column (d)). The total of these costs is divided by the total car days for each type developed in paragraph (g)(1) of this section.

(4) The cost per mile shall be calculated for each type of time-mileage car as follows. First, add:

(i) 50 percent of the total freight train car repair cost for each car type (Form R–1, schedule 415, column (b));

(ii) 40 percent of the total depreciation costs for each car type developed in paragraph (g)(3)(i) of this section; and

(iii) The mileage portion of the carrier's payments for the hire of time-mileage freight cars (Form R–1, schedule 414, column (f)).

Second, subtract the mileage portion of the carrier's receipts for hire of time-mileage freight cars (Form R–1, schedule 414, column (c)). Finally, divide the result by the total car-miles for each car-type developed in paragraph (g)(2) of this section.

(5) The costs per car day and per car mile developed in paragraphs (g) (3) and (4) of this section shall be applied to the total car days and total car miles for each car type accumulated on the line segment for all traffic originated and/or terminated on the segment plus those freight cars that bridge the line segment which are attributed to time-mileage freight train cars. The on-segment costs for freight cars rented on a straight mileage basis shall be the railroad's total payments for mileage cars (Form R–1, schedule 414, column (e)) for each car type divided by the total miles on which the charges were based.

(6) For Class II and III railroads, the on-segment costs for time-mileage and straight mileage freight cars shall be calculated in the same manner prescribed for Class I railroads, using the latest data available.

(h) *Return on investment—locomotive* (*line*). The return on investment shall be calculated for each type of classification of locomotive that is actually used to provide service to the line segment. The return for the locomotive(s) used shall be calculated in accordance with the following procedure:

(1) The current replacement cost for each type of locomotive used to serve the line segment shall be based on the most recent purchase of that particular type and size locomotive by the carrier, indexed to the midpoint of the forecast and/or subsidy year, or on an amount quoted by the manufacturer. The amount must be substantiated. This unit cost shall be multiplied by 1 minus the ratio of total accumulated depreciation to original total cost of that type of equipment owned by applicant-carrier, as shown by company records.

(2) The current nominal cost of capital shall be used in the calculation of return on investment for locomotives and shall be calculated as provided in § 1152.34(d).

(3) The return on investment for each category or type of locomotive shall be the nominal return less the holding gain (loss). The nominal return is calculated by multiplying the replacement cost determined in paragraph (h)(1) of this section by the nominal rate of return determined in paragraph (h)(2) of this section. The holding gain (loss) shall be the gain (loss) projected to occur during the forecast and/or subsidy year. In any instance where the holding gain is not specifically determined for locomotives, the Gross Domestic Product deflator calculated by the U.S. Department of Commerce shall be used.

(4) The return on investment for each type of locomotive shall be assigned to the line segment on a ratio of the locomotive unit hours on the segment to average locomotive unit hours per unit for each type of locomotive in the system. This ratio will be developed as follows:

(i) The carrier shall keep and maintain records of the number of hours that each type of locomotive incurred in serving the segment during the subsidy period.

(ii) The railroad shall develop the system average locomotive unit hours per unit for each of the following types of locomotives; yard diesel; yard-other; road diesel; and road-other.

(iii) The ratio applied to the return on investment is calculated by dividing the hours that each type or class of locomotive is used to serve the segment, as developed in paragraph (h)(4)(i) of this section, by the system average locomotive unit hours per unit for the applicable type developed in paragraph (h)(4)(ii) of this section.

(5) The cost assigned to the segment for each type of locomotive shall be calculated by multiplying the annual return on investment developed in paragraph (h)(3) of this section by the ratio(s) developed in paragraph (h)(4) of this section.

(i) *Revenue taxes.* The amount of revenue taxes shall be computed based on the amounts directly paid in those states that subject the railroad to a revenue tax.

(j) *Property taxes* (*Line*). (1) The assigned costs under this subsection shall be the net systemwide property tax savings resulting from the abandonment, calculated as set out below, if the applicant-carrier intends subsequently to sell or otherwise dispose of the abandoned properties. If the applicant-carrier expresses an intent to dispose of the properties, it will be presumed that the properties will ultimately be sold or otherwise disposed of after abandonment. Protestants may rebut this presumption by showing that it would be financially beneficial to retain ownership of the property for investment purposes.

(2) In states where a true *ad valorem* tax is levied on real property (such as track, land, buildings, and other facilities), applicant must affirm that the ad valorem method applies and must substantiate the amount of property taxes levied against the property on the line segment.

(3) In states where the *ad valorem* method is not employed, applicant must describe the applicable property tax methodology if it is claiming the local property tax as an avoidable cost of operations. Additionally, it must substantiate with evidence and computations the actual statewide tax savings attributable to the abandonment.

(4) Any property tax properly substantiated under paragraphs (f)(2) or (3) of this section shall be presumed to represent systemwide savings to the carrier. Protestants may rebut this presumption by presenting evidence:

(i) That property taxes in those states where the carrier operates that are not involved in the abandonment will increase significantly because of reassessments attributable to the abandonment; or

(ii) That a significantly higher property tax will be levied against a retained portion of the abandoned property. If applicant does not refute protestant's evidence, it may claim avoidable property taxes only if, and to the extent, it proves systemwide property tax savings.

(5) In states where real property taxes are assessed and levied against the owner of the property but the tax on rolling stock is assessed to the railroad operating the service on the basis of a formula of a statewide valuation of property, the tax on rolling stock attributable to each line segment shall be determined as follows:

(i) Using ratio of the cost of equipment (as used in the formula) to the total of all property costs (as used in formula);

(ii) Apply that ratio to the total state assessment to determine the portion of the assessment attributable to rolling stock;

(iii) Allocate the rolling stock assessment thus determined to each line segment on the basis of car and locomotive unit miles on the segment to total car and locomotive unit miles in the state; and

(iv) Apply the appropriate tax rate or rates to the allocated assessment thus determined.

(k) *Administrative costs.* The costs assigned under this account shall be the actual costs directly attributable to the administration of the subsidy program or at the option of the carrier, one percent of the total annual revenues attributed to the branch shall be allowable to cover all costs of administering the subsidy program. Either method may be used, but not both.

(l) *Casualty reserve account.* The costs assigned under this account shall be any payments mutually agreed to by the person offering the subsidy and the railroad for the purpose of holding the subsidizer harmless from any liability under those accounts that are used to record any costs incurred by the railroad as a result of an accident.

(m) *Rehabilitation.* (1) For abandonment purposes the applicant carrier shall project the amounts necessary to permit efficient operations over the line segment. The carrier shall indicate the level of FRA class safety standard to be attained with the amount of expenditure. See 49 CFR part 213. Applicant, in making its projection of rehabilitation costs, shall give consideration to:

(i) The cost to attain the lowest operationally feasible track level;

(ii) The cost to attain the rehabilitation level resulting in the lowest operating and rehabilitation expenditures; or

(iii) The cost to attain the rehabilitation level resulting in the lowest loss, or highest profit, from operations.

(2) For subsidy purposes rehabilitation costs shall not be included unless:

(i) The track fails to meet minimum Federal Railroad Administrative class 1 safety standards (49 CFR part 213), in which case the railroad will furnish, with the abandonment application, a detailed estimate of the costs to rehabilitate the track to the minimum level; or

(ii) The potential subsidizer requests a level of service which requires expenditures for rehabilitation.

(n) *Off-branch costs.* The off-branch costs developed in this section shall be separated between ''off-branch costs other than return on freight cars'' and ''return on value-freight cars''. The off-branch costs shall be developed in the following manner:

(1) Terminal costs, line-haul costs, interchange costs, and modified terminal costs shall be considered as the off-branch avoidable costs of providing service over the remainder of the railroad's system. These costs shall be computed by applying the variable unit costs to the service units attributed to the branch line's traffic for the time periods specified in §1152.22(d) of this part.

(2) The procedure for determining the off-branch costs shall be based upon the URCS cost formula. This formula shall be applied to the latest Annual Report Form R–1 filed by the railroad, with two exceptions. First, the amount used in the formula for freight car depreciation shall be calculated using the procedure discussed in paragraph (g)(3)(iii) of this section applied to the average total car fleet of the railroad. Second, the return on investment in freight cars shall be computed using the procedure set forth in paragraph (g)(3)(ii) of this section. In addition, the application of URCS shall include the use of the nominal cost of capital for all return on investment determinations.

(3) *The Class I Procedure:* A Class I railroad shall calculate its off-branch costs using the Class I procedure as set forth below in this paragraph.

(i) The unit costs developed by applying URCS in the manner specified in paragraph (n)(2) of this section shall be applied to the service characteristics of each movement of traffic that is attributed to the branch line. This application shall result in the total off-branch cost associated with this traffic for normal terminal handlings, line-haul mileage, and interchange events.

(ii) The modified terminal cost per carload shall be calculated separately for each type of freight car and applied to each car that is attributed to the branch line. The modified terminal cost shall consist of clerical costs, two days of freight car cost, and an inter-intra train switching cost (locomotive engine minute cost only). The clerical cost and inter-intra train switching cost shall be calculated from unit costs developed within the individual URCS application.

(A) The unit costs for the clerical cost per carload calculation are located in URCS Worktable E1, Part 1: Line 106, columns 1, 2, and 3; line 107, column 1; line 108, column 1; line 109, column 1; and line 110, column 1.

(B) The inter-intra train switching cost shall be calculated by multiplying the total switch engine minute cost from URCS Worktable E1, Part 1, line 111, columns 1, 2, and 3 by the total

minutes specified in the next sentence. The total minutes specified in this sentence shall equal the sum of:

(*1*) The minutes per switch event from Worktable E2, Part 1, line 118, column 29; and

(*2*) The product of the minutes per switch event from Worktable E2, Part 1, line 118, column 29 and the ratio of loaded to total car miles for the particular type of freight car being costed.

(C) The freight car cost shall be the car ownership costs per car day for 2 days developed in accordance with the procedures set forth in paragraph (g)(3) of this section for the type of freight car being costed.

(iii) For a Class I railroad, the total costs calculated using the procedures set forth in paragraphs (n)(3)(i) and (n)(3)(ii) of this section shall constitute the off-branch costs attributable to the branch line's traffic.

(4) A Class II or Class III railroad shall calculate its off-branch costs using any one of three different procedures. *The Class I Procedure:* A Class II or Class III railroad may calculate its off-branch costs using the Class I procedure set forth in paragraph (n)(3) of this section, if the necessary data are available from the railroad's own records. If the data necessary to complete the Class I procedure set forth in paragraph (n)(3) of this section are not available from the railroad's own records, the Class II or Class III railroad shall calculate its off-branch costs using either one of the following procedures based on the latest regional URCS data and the railroad's own records. *The Class II/III Simplified Costing Procedure:* A Class II or Class III railroad may calculate its off-branch costs using the Class I procedure set forth in paragraph (n)(3) of this section, with regional URCS data of the Class I railroads used in lieu of individual URCS data of the Class II or Class III railroad. Costs developed through the use of the Class II/III simplified costing procedure shall enjoy a rebuttable presumption of correctness. *The Class II/III Standard Costing Procedure:* A Class II or Class III railroad may calculate its off-branch costs using the Class II/III standard costing procedure set forth in paragraphs (n)(4)(i) through (n)(4)(xiv) of this section. Costs developed through the use of the Class II/III standard costing procedure shall be given preference over costs developed through the use of the Class II/III simplified costing procedure. The Class II/III standard costing procedure is set forth in paragraphs (n)(4)(i) through (n)(4)(xiv) of this section.

(i) The Class II or Class III railroad shall first determine which URCS regional application will be used based on its geographical location. The railroad's total estimated system variable expenses are calculated by multiplying its total operating expenses by the ratio of variable expenses to total expenses; this ratio is located in Worktable D8, Part 6, line 615, column 1 of the URCS printout for the appropriate region. If a railroad has passenger and freight service, the freight portion of the total estimated system variable expenses shall be calculated by multiplying the total estimated system variable expenses, calculated as above, by the ratio of freight related operating expenses to total railway operating expenses.

(ii) The total number of revenue carload terminal handlings, as determined from the railroad's records, shall be calculated as the sum of:

(A) Originated and terminated (local) revenue carloads multiplied by 2; plus

(B) Interchanged and either originated or terminated (interline) revenue carloads.

(iii) The total number of revenue carload interchange handlings, as determined from the railroad's records, shall be calculated as the sum of:

(A) Bridge (interchange to interchange) revenue carloads multiplied by 2; plus

(B) Revenue carloads that are interchanged and either originated or terminated (interline).

(iv) The system average shipment weight per car, as determined from the railroad's records, shall be calculated by dividing:

(A) Ton-miles-revenue freight by

(B) Loaded freight car miles.

(v) The system average loaded car miles per car, as determined from the railroad's records, shall be calculated by dividing:

(A) Revenue ton-miles by

(B) Revenue tons.

(vi) The railroad shall complete a URCS Phase III ''Movement Costing Program'' based on the application of URCS data for the appropriate region. The following data shall be inputs to the Phase III program application.

(A) The carrier code, either ''REG 4'' or ''REG 7'', shall correspond to the appropriate region.

(B) The type of shipment shall be designated as ''OD'' in order for the movement to be costed as an interline movement.

(C) The distance shall be the system average loaded car miles per car as developed in paragraph (n)(4)(v) of this section.

(D) The type of freight car shall be identified as a Box, General Service Equipped, which has an input user code of ''3''. If all of the traffic on the branch line is transported in a single type of car, and it is not a Box, General Service Equipped, the code for that type of car may be substituted.

(E) The number of freight cars shall be ''1''.

(F) The car ownership factor shall be designated as ''R'' for railroad owned cars unless all of the branch line traffic is moved in privately owned cars, in which case the code ''P'' for privately owned cars would be the input.

(G) The program requires a loss and damage input. The code ''48'', representing the average of all commodities, shall be used.

(H) The input for shipment weight shall be the system average shipment weight per car developed in paragraph (n)(4)(iv) of this section.

(I) The input for type of movement shall be ''1'', representing an individual car movement.

(vii) The ratios employed to separate the total estimated system variable expenses, as determined in paragraph (n)(4)(i) of this section, among terminal, interchange, and line-haul operations shall be based on the procedures outlined in this paragraph (n)(4)(vii). This separation shall reflect the variable costs resulting from the application of the URCS Phase III program based on the input factors specified in paragraph (n)(4)(vi) of this section. The ratios shall be calculated in the following manner:

(A) The terminal expenses calculated by the application of the Phase III program shall consist of the following:

(*1*) ''Carload and Clerical Costs'' shall be calculated as the sum of lines 256, 258, 260, 262, 264, 266, and 268.

(*2*) Switching expenses based on ''Total SEM-Industry'' shall be calculated by multiplying:

(*i*) The sum of lines 315, 317, and 319, by

(*ii*) Line 311.

(*3*) Car mile yard cost ''CM(Y)-Industry'' shall be calculated by multiplying:

(*i*) The sum of lines 426, 428, and 430, by

(*ii*) Line 422.

(*4*) Car day yard cost ''CD(Y)-Industry'' and ''CD(Y)-L&UL'' shall be calculated by multiplying:

(*i*) The sum of lines 452, 454, and 456, by

(*ii*) The sum of lines 446 and 450.

(*5*) The expenses for accessorial services for railroad owned cars shall be calculated as the sum of:

(*i*) The product of line 422 and the sum of lines 464, 466, and 468; plus

(*ii*) The product of the sum of lines 446 and 450 and the sum of lines 476, 478, and 480.

(B) The interchange expenses calculated by the application of the Phase III program shall consist of the following:

(*1*) Switching expenses based on ''Total SEM-Interchange'' shall be calculated by multiplying

(*i*) The sum of lines 315, 317, and 319, by

(*ii*) Line 312.

(*2*) Car mile cost in interchange ''CM(Y)-Interchange'' shall be calculated by multiplying:

(*i*) The sum of lines 426, 428, and 430, by

(*ii*) Line 423.

(*3*) Car day cost in interchange ''CD(Y)-Interchange (L&E)'' shall be calculated by multiplying:

(*i*) The sum of lines 452, 454, and 456, by

(*ii*) Line 447.

(*4*) The expenses for accessorial services for railroad owned cars shall be calculated as the sum of:

(*i*) The product of line 423 and the sum of lines 464, 466, and 468; plus.

(*ii*) The product of line 447 and the sum of lines 476, 478, and 480.

(C) The line-haul expenses resulting from the application of the Phase III program shall be calculated by subtracting the sum of:

(*1*) The terminal expenses as determined in paragraph (n)(4)(vii)(A) of this section, and

(*2*) The interchange expenses as determined in paragraph (n)(4)(vii)(B) of this section, from

(*3*) The total variable cost excluding loss and damage as calculated in the Phase III program at line 696.

(D) The ratio for terminal expenses shall be calculated by dividing the terminal expenses as determined in paragraph (n)(4)(vii)(A) of this section by the total variable cost excluding loss and damage as calculated in the Phase III program at line 696.

(E) The ratio for interchange expenses shall be calculated by dividing the interchange expenses as determined in paragraph (n)(4)(vii)(B) of this section by the total variable cost excluding loss and damage as calculated in the Phase III program at line 696.

(F) The ratio for line-haul expenses shall be calculated by dividing the line-haul expenses as determined in paragraph (n)(4)(vii)(C) of this section by the total variable cost excluding loss and damage as calculated in the Phase III program at line 696.

(viii) The railroad's total estimated system variable expenses shall be separated as follows:

(A) The total terminal variable expenses shall be calculated by multiplying the total estimated system variable expenses as determined in paragraph (n)(4)(i) of this section by the ratio for terminal expenses as determined in paragraph (n)(4)(vii)(D) of this section.

(B) The total interchange variable expenses shall be calculated by multiplying the total estimated system variable expenses as determined in paragraph (n)(4)(i) of this section by the ratio for interchange expenses as determined in paragraph (n)(4)(vii)(E) of this section.

(C) The total line-haul variable expenses shall be calculated by multiplying the total estimated system variable expenses as determined in paragraph (n)(4)(i) of this section by the ratio for line-haul expenses as determined in paragraph (n)(4)(vii)(F) of this section.

(ix) The railroad's unit costs shall be determined for terminal, interchange, and line-haul operations as follows:

(A) The terminal cost per carload shall be calculated by dividing the total terminal variable expenses as determined in paragraph (n)(4)(viii)(A) of this section by the total number of revenue carload terminal handlings as determined in paragraph (n)(4)(ii) of this section.

(B) The interchange cost per carload shall be calculated by dividing the total interchange variable expenses as determined in paragraph (n)(4)(viii)(B) of this section by the total number of revenue carload interchange handlings as determined in paragraph (n)(4)(iii) of this section.

(C) The line-haul cost per car mile shall be calculated by dividing the total line-haul variable expenses as determined in paragraph (n)(4)(viii)(C) of this section by the total system freight car miles, loaded and empty, as determined from the railroad's records.

(x) The modified terminal cost per carload is a composite of costs developed in the Phase III program and costs determined in accordance with paragraph (g) of this section and this paragraph. The modified terminal cost per carload shall be calculated for each type of car as follows:

(A) The station clerical cost per carload shall be developed in the following manner:

(*1*) The station clerical expense ratio shall be calculated by dividing the total clerical cost (the sum of lines 256, 258, 260, 262, 264, 266, and 268) by the terminal expenses as determined in paragraph (n)(4)(vii)(A) of this section.

(*2*) The station clerical cost per carload shall be calculated by multiplying the terminal cost per carload as determined in paragraph (n)(4)(ix)(A) of this section by the station clerical expense ratio.

(B) The interchange switching cost per carload shall be developed in the following manner:

(*1*) The total interchange switching expense shall be calculated by multiplying the sum of lines 315, 317, and 319 by line 312.

(*2*) The interchange switching ratio shall be calculated by dividing the total interchange switching expense by the interchange expenses as determined in paragraph (n)(4)(vii)(B) of this section.

(*3*) The interchange switching cost per carload shall be calculated by multiplying the interchange cost per carload as determined in paragraph (n)(4)(ix)(B) of this section by the interchange switching ratio.

(C) The freight car cost element shall be the freight car cost per car day for 2 days as developed for each car type in paragraph (g)(3) of this section.

(D) The modified terminal cost per carload shall be the total of the costs developed in paragraphs (n)(4)(x)(A), (n)(4)(x)(B), and (n)(4)(x)(C) of this section.

(xi) The terminal costs shall be calculated by multiplying the terminal cost per carload as determined in paragraph (n)(4)(ix)(A) of this section by the number of carloads that both:

(A) Originated or terminated on the branch, and

(B) Are local to the railroad serving the branch.

(xii) The interchange costs shall be calculated by multiplying the interchange cost per carload as determined in paragraph (n)(4)(ix)(B) of this section by the number of carloads that both:

(A) Originated or terminated on the branch; and

(B) Are received in or forwarded through interchange with other railroads.

(xiii) The line-haul costs shall be calculated by multiplying the line-haul cost per car mile as determined in paragraph (n)(4)(ix)(C) of this section by the total loaded and empty car miles generated on the railroad's system off the branch by cars that originated or terminated on the branch.

(xiv) The modified terminal costs shall be calculated by multiplying the modified terminal cost per carload as determined in paragraph (n)(4)(x)(D) of this section by the number of carloads that originated or terminated on the branch.

(o) *Locomotive depreciation*. The depreciation cost for locomotives used on the line shall be calculated using the following procedure:

(1) The current replacement cost for each type of locomotive used to serve the line will be based on the most recent purchase of that particular type and size locomotive by the carrier indexed to the midpoint of the year or on an amount quoted by the manufacturer.

(2) The depreciation rate that will be applied to the replacement cost shall be the carrier's component rate for each type of locomotive as reported in the latest Annual Report Form R–1 submitted to the Board or from the company records. Carriers using depreciation rates based on company records must explain why composite rates are inappropriate; provide a detailed explanation of the methodology used to compute the alternate depreciation rate; and demonstrate that these rates have been used consistently.

(3) The annual depreciation cost for each type of locomotive shall be calculated by multiplying the replacement cost(s) developed in paragraph (o)(1) of this section by the rate from paragraph (o)(2) of this section.

(4) The depreciation expense for each type of locomotive shall be assigned to the line on the ratio of the hours incurred serving the line to the average system locomotive unit hours in service by each of the following categories of locomotives: yard-diesel; yard-other; road-diesel; and road-other. The ratio for each type of locomotive used to serve the line shall be the same as that developed in paragraph (h)(4) of this section.

(5) The depreciation shall be calculated by multiplying the annual depreciation expense for each type of locomotive developed in paragraph (o)(3) of this section by the ratio(s) developed in paragraph (o)(4) of this section.

(p) *Opportunity costs*. Applicant-carrier may, at its discretion, present evidence of its opportunity costs, if the assets engaged in the line proposed to be abandoned could be used more profitably in some other capacity.

Opportunity costs may be calculated in accordance with the methodology established in § 1152.34 of this part, or by using any other reasonable, fully explained method. Opportunity costs are not included as costs on Exhibit 1 described at § 1152.36. These costs should be submitted as a separate exhibit to the application.

(q) *Labor costs.* (1) The salaries, wages and fringe benefits of personnel exclusively assigned to the line segment shall be deemed attributable costs of the segment. The salaries, wages, and fringe benefits of personnel not exclusively assigned to the line segment shall be deemed attributable costs of the segment to the extent they are shown to be apportionable to the segment to be abandoned.

(2) These costs shall be deemed attributable notwithstanding any obligation of applicant to provide employee protection for employees after the abandonment.

§ 1152.33 Apportionment rules for the assignment of expenses to on-branch costs.

The accounts specified under § 1152.32 (a), (b), (c), and (d) as having an assignment basis other than ''Actual'' shall be apportioned according to the rules contained in this section.

(a) *Maintenance of way and structures*—(1) *Roadway machines.* All accounts designated XX–13–36 shall be assigned to the branch on the basis of the average repair costs, for each type of machine, included in the daily rental fees charged by the operating railroad or as published by the General Manager's Association of Chicago (GMA), based on the actual number of days each type of machine is used on the branch.

(2) *Small tools and supplies.* All accounts designated XX–13–37 shall be assigned to the branch as follows:

(i) The costs of supplies, consumed in the operation of roadway machines, shall be assigned to the branch on the basis of the average costs of supplies per day, included in the daily rental fees charged by the operating railroad or as published by the GMA, multiplied by the actual number of days that the machine is used on the branch;

(ii) The costs of small tools shall be assigned to the branch on the basis of the ratio that the branch amounts in Accounts 11–11–10 through 11–11–17 and 11–11–48, plus 11–12–10 through 11–12–17 and 11–12–48, bear to the railroad's system total for the same accounts.

(3) *Fringe benefits.* Fringe benefits shall be assigned to the branch separated between running, switching and other, on the ratio that the total branch salary and wages bear to the total system salaries and wages for each activity as follows:

(i) *Fringe benefits—Running, Account 12–11–00,* total of all 11–11–XX accounts branch to system;

(ii) *Fringe benefits—Switching, Account 12–12–00,* total of all 11–12–XX accounts branch to system; and

(iii) *Fringe benefits—Other, Account 12–13–00,* total of all 11–13–XX accounts branch to system.

(b) *Maintenance of equipment*—(1) *Locomotive repairs and maintenance.* All accounts designated XX–21–41 shall be separated between yard and road with a further separation between diesel and other (electric). The costs for these accounts for yard locomotives shall be assigned to the branch separately for diesel and electric locomotives on the basis of the ratio of branch diesel and electric yard locomotive unit-hours to the total system diesel and electric yard locomotive unit-hours. The costs for these accounts for road locomotives shall be assigned to the branch separately for diesel and electric locomotives on the basis of the ratio of branch diesel and electric locomotive gross ton-miles in road service to the total system diesel and electric locomotive gross ton-miles in road service. The costs assigned under these accounts for specialized equipment devoted exclusively to branch line service shall be the actual costs for the specific equipment used.

(2) *Locomotive depreciation.* Locomotive depreciation shall be calculated and assigned in accordance with the procedures set forth in § 1152.32(o).

(3) *Fringe Benefits.* Fringe benefits for locomotives and other equipment shall be assigned to the branch on the ratio that the total branch salary and wages bear to the system total salaries and

wages for each type of equipment as follows:

(i) *Locomotives—Account 12–21–00,* total of all 11–21–XX accounts branch to system.

(ii) *Other Equipment—Account 12–23–00,* total of all 11–23–XX accounts branch to system.

(iii) Fringe benefits for freight cars shall be calculated by first estimating the total in Account 11–22–42, Freight car repairs—salaries and wages, that is included in the total on branch costs for freight cars as determined from the car-day and car-mile cost calculations in §1152.32(g) of these regulations. To this amount is added the branch totals in the balance of all 11–22–XX accounts. The ratio of this total branch account to the system total for all 11–22–XX accounts is applied to Account 12–22–00, Fringe Benefits—Freight Cars.

(c) *Transportation*—(1) *Train operations*—(i) *Engine Crews-Materials. Account 21–31–56; Train Crews-Materials, Account 21–31–57; Train Inspection and Lubrication-Salaries and Wages, Account 11–31–62; and Train Inspection and Lubrication-Materials, Account 21–31–62.* If the branch is served by a local/way or through train, the costs in these accounts shall be assigned to the branch on the weighted ratio of the loaded freight train cars on the branch to the total system loaded freight train cars, and the loaded and empty car-miles on the branch to the total system loaded and empty car-miles. This shall be calculated as follows:

(A) To determine the car-mile portion of these accounts:

(*1*) Multiply the total amounts in these accounts (from the R–1 Annual Report, Schedule 410) by 69 percent, which is the ratio of train-mile and running expenses;

(*2*) Divide the amount in paragraph (c)(1)(i)(A)(*1*) of this section by the total system loaded and empty car-miles; and

(*3*) Multiply the car-mile unit cost factor from paragraph (c)(1)(i)(A)(*2*) of this section by the on-branch car-miles (loaded and empty).

(B) To determine the carload portion of these accounts:

(*1*) Multiply the total amounts in these accounts by 31 percent, which is the ratio of terminal expenses;

(*2*) Divide the amount in paragraph (c)(1)(i)(B)(1) of this section by the total system carloads; and

(*3*) Multiply the carload unit cost factor from paragraph (c)(1)(i)(B)(*2*) of this section by the on-branch carloads.

(C) To determine the total costs assignable to the branch for these accounts, add the amounts developed in paragraphs (c)(1)(i)(A)(*3*) and (c)(1)(i)(B)(*3*) of this section.

(ii) All accounts designated xx–31–67 shall be assigned to the branch in accordance with the following procedure. The dollar amounts used in the determination of locomotive fuel costs shall be based on data contained in the most recent publication issued by the General Managers Association (GMA) relating to the rental of locomotives. The total number of locomotive unit hours incurred by the locomotive(s) shall then be categorized according to the applicable GMA horsepower classification group. The fuel cost is derived from the Repairs and Supplies Expenses element of the locomotive rental rates published by the GMA. The fuel cost per locomotive unit hour shall be determined for each GMA horsepower classification group by multiplying the latest GMA fuel cost percentage by the Repairs and Supplies Expense per hour included in each group. The fuel cost update ratio is determined by using the indices for fuel from the Association of American Railroad's (AAR's) Railroad Cost Recovery Index (RCR). The indices shall be taken from the district to which the railroad is assigned by the Board. The index for the current period is divided by the index of the period representative of the GMA publication to develop the fuel update ratio. The fuel cost per locomotive unit hour developed for each GMA horsepower group shall be multiplied by the fuel update ratio to determine the fuel cost per locomotive hour for each horsepower group. The updated fuel cost per locomotive unit hour for each applicable GMA group shall be multiplied by the number of locomotive unit hours incurred in serving the branch by locomotives of that GMA horsepower classification group. The total cost developed under this

procedure for each horsepower classification shall be the locomotive fuel cost assignable to the branch line.

(iii) *Electric power purchased or produced for motive power*—All accounts designated XX–31–68 shall be assigned to the branch on the ratio of road electric locomotive unit hours on the branch to the total system road electric locomotive unit hours.

(iv) *Servicing locomotives*—All accounts designated XX–31–69 shall be assigned to the branch on the ratio of road locomotive unit miles on the branch to the total system road locomotive unit miles.

(2) *Yard operations*—(i) *Switch Crews—Materials, Account 21–32–64, and Servicing Locomotives,* all accounts designated XX–32–69. The costs for these accounts shall be assigned to the branch on the ratio of yard locomotive unit hours on the branch to the system total yard locomotive unit hours.

(ii) *Locomotive fuel*—All accounts designated XX–32–67 shall be assigned to the branch on the ratio of yard diesel locomotive unit hours on the branch to the total system yard diesel locomotive unit hours.

(iii) *Electric power purchased or produced for motive power*—All accounts designated XX–32–68 shall be assigned to the branch on the ratio of yard electric locomotive unit hours on the branch to the total system yard electric locomotive unit hours.

(3) *Administrative support operations*—(i) *Loss and damage claims processing*—All accounts designated XX–35–78 shall be assigned to the branch on the ratio of the number of claims processed for loss or damage occurring on the branch to the total number of claims processed by the railroad.

(ii) [Reserved]

(4) *Transportation fringe benefits.* Fringe benefits shall be assigned to the branch separated between train operations, yard operations, train and yard operations common, specialized service operations, and administrative support operations. The costs for each activity shall be assigned to the branch on the ratio that the total branch salary and wages bear to the total system salary and wages for each activity shown below.

(i) *Train Operations, Account 12–31–00,* total of all 11–31–XX accounts branch to system.

(ii) *Yard Operations, Account 12–32–00,* total of all 11–32–XX accounts branch to system.

(iii) *Train and Yard Operations Common, Account 12–33–00,* total of all 11–33–XX accounts branch to system.

(iv) *Specialized Service Operations, Account 12–34–00,* total of all 11–34–XX accounts branch to system.

(v) *Administrative Support, Account 12–35–00,* total of all 11–35–XX accounts branch to system.

(d) *General administrative.* (1) *Fringe Benefits, Account 12–61–00,* shall be assigned to the branch on the ratio that the total branch salary and wages in all 11–61–XX accounts bear to the system total salary and wages in all 11–61–XX accounts.

(2) [Reserved]

§ 1152.34 Return on investment.

Return on investment for road property shall be computed according to the procedures set forth in this section.

(a)–(b) [Reserved]

(c) *Return on investment—road properties.* Return on investment—road properties shall be computed according to the following procedures:

(1) The investment base to which the nominal return element shall apply shall be the sum of:

(i) The allowable working capital computed at 15 days on-branch cash avoidable costs (on branch avoidable costs less depreciation).

(ii) The amount of current income tax benefits resulting from abandonment of the line which would have been applicable to the period of the subsidy agreement. (Conversely, if the railroad would incur an income tax liability from abandonment, the liability should be deducted from the investment base.) This information is to be furnished by the railroad and subject to audit by the person offering the subsidy.

(iii) The net liquidation value for the highest and best use for non-rail purposes of the rail properties on the line to be subsidized which are used and required for performance of the services requested by the persons offering the subsidy. This value shall be determined by computing the current appraised

market value of such properties for other than rail transportation purposes, less all costs of dismantling and disposition of improvements necessary to make the remaining properties available for their highest and best use and complying with applicable zoning, land use, and environmental regulations. If rehabilitation has been performed along the line during a subsidy year and rehabilitation expenses have been paid by the subsidizer under 49 CFR 1152.32(m)(2), the investment base shall exclude the increment to the net liquidation value of the line caused by the rehabilitation project. For these purposes:

(A) In calculating the net liquidation values for the Forecast Year, no asset on the line shall be excluded from the determination of net liquidation value because it contributes negatively to that value, i.e., the removal costs exceed the market value after removal. All such assets shall be included in the net liquidation value determination if the carrier is required by law to remove them or if the carrier intends to remove them, even if it is not required to do so. The parties shall fully support and explain the exclusion for net liquidation purposes of all assets having a negative salvage value.

(*1*) In calculating the net liquidation value of railroad properties for the purpose of determining the operating subsidy under an offer of financial assistance, any asset with a negative salvage value shall be included at a value of zero (0).

(*2*) Determination of the net liquidation value of rail properties for the purpose of purchasing the rail properties under an offer of financial assistance shall include any asset with a negative salvage value at a value of zero (0).

(B) All adjustments to the appraised fair market value of right-of-way land, including a downward adjustment to reflect an imputed real estate Board or selling expense, shall be fully supported and explained.

(C) Parties shall fully support and explain their use of unadjusted across-the-fence (ATF) values as a surrogate for the value of railroad right-of-way land, given that the physical and economic characteristics (grading and elevation) usually are different from those of surrounding parcels. All adjustments to ATF values to arrive at the right-of-way values shall also be supported and explained.

(2) [Reserved]

(d) *Reasonable return.* A rail carrier shall furnish to the Board, and to any financially responsible person considering making an offer of a rail service continuation payment, a substantiated statement showing its current nominal cost of capital. The railroad's nominal cost of capital shall be the current before tax cost of capital, weighted to the capital structure, and adjusted for the effects of the combined statutory Federal and state income tax rates. This rate of return expressed as a percent, shall be calculated as follows:

(1) The railroad shall determine its permanent capital structure ratio for debt and equity capital such that the two numbers total 100 percent. This capital structure will be the actual capital structure of the railroad. If this calculation is not possible or also not representative because the railroad is part of a conglomerate, the debt-equity ratio from the Board's latest Determination of Adequate Railroad Revenues will be used. However, if the debt-equity ratio for the railroad industry is used then the industry average equity and debt rate from the Board's latest revenue adequacy finding must also be used in paragraphs (d)(2) and (d)(3) of this section.

(2) The current nominal cost of debt shall be determined by taking the average of all debt instruments (including bonds, equipment trust certificates, financial lease arrangements, et cetera) issued by the carrier in the most recent 12-month period. The debt cost calculated by this procedure is a before-tax rate and is not adjusted for inflation or income taxes.

(3) The current nominal after tax cost of equity shall be an amount equal to that which a prudent investor would expect to earn through investment in the market place. The current after tax nominal cost of equity is divided by 1 minus the combined statutory Federal and state income tax rates. This will develop the nominal cost of equity on a before tax basis.

(4) The current nominal before-tax cost of debt is multiplied by the current percentage of debt to total capital to obtain a weighted before-tax nominal cost of current debt.

(5) The current nominal before-tax cost of equity is multiplied by the current percentage of equity to total capital to obtain a weighted nominal before-tax cost of current equity.

(6) The results of paragraphs (d)(4) and (d)(5) of this section are added together to determine the current nominal cost of capital.

(e) *Holding gain (loss)-road properties.* The railroad shall determine the holding gain (loss) that is projected to occur during the forecast and/or subsidy year. In any instance where the holding gain is not specifically determined for road properties, the Gross Domestic Product deflator calculated by the U.S. Department of Commerce shall be used.

§ 1152.35 [Reserved]

§ 1152.36 Submission of revenue and cost data.

The following information shall be submitted by applicant as Exhibit 1 to an abandonment or discontinuance application (§ 1152.22(d)) and shall be developed in accordance with the methodology established in §§ 1152.31 through 1152.35, as applicable. Such information, form and methodology shall also be used by an offeror of financial assistance to formulate a Proposed Subsidy Payment (§ 1152.27).

	Base year operations	Forecast year operations	Projected subsidy year operations
Revenues attributable for:			
1. Freight originated and/or terminated on branch			
2. Bridge traffic			
3. All other revenue and income			
4. Total revenues attributable (lines 1 through 3)			
Avoidable costs for:			
5. On-branch costs (lines 5a through 5k)			
a. Maintenance of way and structures			
b. Maintenance of equipment			
c. Transportation			
d. General administrative			
e. Deadheading, taxi, and hotel			
f. Overhead movement			
g. Freight car costs (other than return on freight cars)			
h. Return on value-locomotives			
i. Return on value-freight cars			
j. Revenue taxes			
k. Property taxes			
6. Off-branch costs			
a. Off-branch costs (other than return on freight cars)			
b. Return on value-freight cars			
7. Total avoidable costs (line 5 plus line 6)			
Subsidization costs for:			
8. Rehabilitation [1]			
9. Administration costs (subsidy year only) [2]			
10. Casualty reserve account [2]			
11. Total subsidization costs (lines 8 through 10)			
Return on value:			
12. Valuation of property (lines 12a through 12c)			
a. Working capital	XXXX.		
b. Income tax consequences	XXXX.		
c. Net liquidation value	XXXX.		
13. Nominal rate of return	XXXX.		
14. Nominal return on value (line 12 times line 13) [3]	XXXX.		
15. Holding gain (loss)	XXXX.		
16. Total return on value (line 14 minus 15) [3]	XXXX.		
17. Avoidable loss from operations (line 4 minus line 7)			
18. Estimated forecast year loss from operations (line 4 minus lines 7 and 16)			
19. Estimated subsidy (line 4 minus lines 7, 11 and 16)			

[1] This projection shall be computed in accordance with § 1152.32(m).
[2] Omit in applications pursuant to §§ 1152.22 and 1152.23.
[3] If the amount in line 12c is a negative for the ''Forecast Year operations'' insert ''0'' in this line.

§ 1152.37 Financial status reports.

Within 30 days after the end of each quarter of the subsidy year, each carrier which is party to the financial assistance agreement shall submit to the subsidizer a Financial Status Report for each line operated under subsidy. Such Financial Status Report shall be in the form prescribed below. Significant deviations from the negotiated estimates must be explained. All data shall be developed in accordance with the methodology set forth in §§ 1152.31 through 1152.35. In the quarterly reports, the actual data for the year to date and a projection to the end of the subsidy year shall be shown for each item.

	Actual	Projected
Revenues for:		
1. Freight originated and/or terminated on branch		
2. Bridge traffic		
3. All other revenue and income		
4. Total revenues (lines 1 through 3)		
Avoidable costs for:		
5. On-branch costs (lines 5a through 5j)		
a. Maintenance of way and structures		
b. Maintenance of equipment		
c. Transportation		
d. General administrative		
e. Deadheading, taxi, and hotel		
f. Overhead movement		
g. Freight car costs		
h. Return on investment—locomotives		
i. Revenue taxes		
j. Property taxes		
6. Off-branch costs		
7. Total avoidable costs (line 5 plus line 6)		
Subsidization costs for:		
8. Rehabilitation		
9. Administrative costs		
10. Casualty		
11. Total subsidization costs (lines 8 through 10)		
Return on value:		
12. Valuation of property (lines 12a through 12c)		
a. Working capital		
b. Income tax consequences		
c. Net liquidation value		
13. Rate of return		
14. Total return on value (line 12 times line 13)		
Subsidy payment:		
15. Subsidy payment (line 4 minus lines 7, 11, and 14)		

Subpart E [Reserved]

Subpart F—Exempt Abandonments and Discontinuances of Service and Trackage Rights

§ 1152.50 Exempt abandonments and discontinuances of service and trackage rights.

(a)(1) A proposed abandonment or discontinuance of service or trackage rights over a railroad line is exempt from the provisions of 49 U.S.C. 10903 if the criteria in this section are satisfied.

(2) Whenever the Board determines a proposed abandonment to be exempt from the requirements of 49 U.S.C. 10903, whether under this section or on the basis of the merits of an individual petition, the provisions of §§ 1152.27, 1152.28, and 1152.29 as they relate to exemption proceedings shall be applicable.

(b) An abandonment or discontinuance of service or trackage rights is exempt if the carrier certifies that no local traffic has moved over the line for at least 2 years and any overhead traffic on the line can be rerouted over other lines and that no formal complaint filed by a user of rail service on the line (or a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Board or

any U.S. District Court or has been decided in favor of the complainant within the 2-year period. The complaint must allege (if pending), or prove (if decided) that the carrier has imposed an illegal embargo or other unlawful impediment to service.

(c) The Board has found:

(1) That its prior review and approval of these abandonments and discontinuances is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and

(2) That these transactions are of limited scope and continued regulation is unnecessary to protect shippers from abuse of market power. 49 U.S.C. 10502. A notice must be filed to use this class exemption. The procedures are set out in §1152.50(d). This class exemption does not relieve a carrier of its statutory obligation to protect the interests of employees. 49 U.S.C. 10502(g) and 10903(b)(2). This also does not preclude a carrier from seeking an exemption of a specific abandonment or discontinuance that does not fall within this class.

(d) *Notice of exemption*. (1) At least 10 days prior to filing a notice of exemption with the Board, the railroad seeking the exemption must notify in writing:

(i) The Public Service Commission (or equivalent agency) in the state(s) where the line will be abandoned or the service or trackage rights discontinued;

(ii) Department of Defense (Military Traffic Management Command, Transportation Engineering Agency, Railroads for National Defense Program);

(iii) The National Park Service, Recreation Resources Assistance Division; and

(iv) The U.S. Department of Agriculture, Chief of the Forest Service.

The notice shall name the railroad, describe the line involved, including United States Postal Service ZIP Codes, indicate that the exemption procedure is being used, and include the approximate date that the notice of exemption will be filed with the Board. The notice shall include the following statement ''Based on information in our possession, the line (does) (does not) contain federally granted rights-of-way. Any documentation in the railroad's possession will be made available promptly to those requesting it.''

(2) The railroad must file a verified notice using its appropriate abandonment docket number and subnumber (followed by the letter ''X'') with the Board at least 50 days before the abandonment or discontinuance is to be consummated. The notice shall include the proposed consummation date, the certification required in §1152.50(b), the information required in §§1152.22(a) (1) through (4), (7) and (8), and (e)(4), the level of labor protection, and a certificate that the notice requirements of §§1152.50(d)(1) and 1105.11 have been complied with.

(3) The Board, through the Director of the Office of Proceedings, shall publish a notice in the FEDERAL REGISTER within 20 days after the filing of the notice of exemption. The notice shall include a statement to alert the public that following any abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use. Petitions to stay the effective date of the notice on other than environmental or historic preservation grounds must be filed within 10 days of the publication. Petitions to stay the effective date of the notice on environmental or historic preservation grounds may be filed at any time but must be filed sufficiently in advance of the effective date in order to allow the Board to consider and act on the petition before the notice becomes effective. Petitions for reconsideration, comments regarding environmental, energy and historic preservation matters, and requests for public use conditions under 49 U.S.C. 10905 and 49 CFR 1152.28(a)(2) must be filed within 20 days after publication. Requests for a trail use condition under 16 U.S.C. 1247(d) and 49 CFR 1152.29 must be filed within 10 days after publication. The exemption will be effective 30 days after publication, unless stayed. If the notice of exemption contains false or misleading information, the use of the exemption is void *ab initio* and the Board shall summarily reject the exemption notice.

(4) In out-of-service rail line exemption proceedings under 49 CFR 1152.50, the Board, on its own motion, will stay the effective date of individual notices

of exemption when an informed decision on pending environmental and historic preservation issues cannot be made prior to the date that the exemption authority would otherwise become effective.

(5) A notice or decision to all parties will be issued if use of the exemption is made subject to environmental, energy, historic preservation, public use and/or interim trail use and rail banking conditions.

(6) To address whether the standard labor protective conditions set forth in *Oregon Short Line R. Co.—Abandonment—Goshen,* 360 I.C.C. 91 (1979), adequately protect affected employees, a petition for partial revocation of the exemption under 49 U.S.C. 10502(d) must be filed.

(e) *Consummation notice.* As provided in §1152.29(e)(2), rail carriers that receive authority to abandon a line under §1152.50 must file with the Board a notice that abandonment has been consummated.

[61 FR 67883, Dec. 24, 1996, as amended at 62 FR 34670, June 27, 1997]

Subpart G—Special Rules Applicable to Petitions for Abandonments or Discontinuances of Service or Trackage Rights Filed Under the 49 U.S.C. 10502 Exemption Procedure

§1152.60 Special rules.

(a) This section contains special rules applicable to any proceeding instituted under the 49 U.S.C. 10502 exemption procedure for either the abandonment of a rail line or the discontinuance of service or trackage rights over a rail line. General rules applicable to any proceeding filed under the 49 U.S.C. 10502 exemption procedure may be found at 49 CFR part 1121, but the rules in part 1152 control in case of any conflict with the general exemption rules. In the case of petitions for exemption for abandonment, notice of the filing of the petition will be published by the Board, through the Director of the Office of Proceedings, in the FEDERAL REGISTER 20 days after the petition is filed. There will be no further FEDERAL REGISTER publication later if and when a petition is granted.

(b) Any petition filed under the 49 U.S.C. 10502 exemption procedure for either the abandonment of a rail line or the discontinuance of service or trackage rights over a rail line must be accompanied by a map that meets the requirements of §1152.22(a)(4) of this part.

(c) A petitioner for an abandonment exemption shall submit, with its petition, a draft FEDERAL REGISTER notice of its petition according to the form prescribed below:

Draft FEDERAL REGISTER Notice. The petitioner shall submit a draft notice of its petition to be published by the Board within 20 days of the petition's filing with the Board. The petitioner must submit a copy of the draft notice as data contained on a computer diskette compatible with the Board's current word processing capabilities. The draft notice shall be in the form set forth below:

STB No. AB–_____ (Sub-No._____)

Notice of Petition for Exemption To Abandon or To Discontinue Service

On (insert date petition was filed with the Board) (name of petitioner) filed with the Surface Transportation Board, Washington, D.C. 20423, a petition for exemption for the abandonment of (the discontinuance of service on) a line of railroad known as_____, extending from railroad milepost near (station name) to (the end of line or rail milepost) near (station name), which traverses through _____ (ZIP Codes) United States Postal Service ZIP Codes, a distance of _____ miles, in [County(ies), State(s)]. The line for which the abandonment (or discontinuance) exemption request was filed includes the stations of (list all stations on the line in order of milepost number, indicating milepost location).

The line (does) (does not) contain federally granted rights-of-way. Any documentation in the railroad's possession will be made available promptly to those requesting it.

The interest of railroad employees will be protected by (specify the appropriate conditions).

Any offer of financial assistance will be due no later than 10 days after service of a decision granting the petition for exemption.

All interested persons should be aware that following abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use.

Any request for a public use condition and any request for trail use/rail banking will be due no later than 20 days after notice of the filing of the petition for exemption is published in the FEDERAL REGISTER.

Persons seeking further information concerning abandonment procedures may contact the Surface Transportation Board or refer to the full abandonment or discontinuance regulations at 49 CFR part 1152. Questions concerning environmental issues may be directed to the Board's Section of Environmental Analysis.

An environmental assessment (EA) (or environmental impact statement (EIS), if necessary) prepared by the Section of Environmental Analysis will be served upon all parties of record and upon any agencies or other persons who commented during its preparation. Any other persons who would like to obtain a copy of the EA (or EIS) may contact the Section of Environmental Analysis. EAs in these abandonment proceedings normally will be made available within 60 days of the filing of the petition. The deadline for submission of comments on the EA will generally be within 30 days of its service.

(d) A petitioner for an abandonment exemption must serve a copy of the petition on the persons receiving notices of exemption under §1152.50(d). The petition must include the following statement: ''Based on information in our possession, the line (does) (does not) contain federally granted right-of-way. Any documentation in petitioner's possession will be made available promptly to those requesting it.''

(e) As Provided in §1152.29(e)(2), rail carriers that receive authority to abandon a line by individual exemption under 49 U.S.C. 10502 must file with the Board a notice that abandonment has been consummated.

[61 FR 67883, Dec. 24, 1996, as amended at 62 FR 34670, June 27, 1997]

PARTS 1155–1176 [RESERVED]

Parts 1177–1199—Finance Procedures

Parts 1177–1179—Securities, Security Interests and Financial Structures

PART 1177—RECORDATION OF DOCUMENTS

Sec.

1177.1 Definitions and classifications of documents.
1177.2 To whom documents should be submitted for recordation.
1177.3 Requirements for submission.
1177.4 Sample forms.
1177.5 Administrative procedure.

AUTHORITY: 49 U.S.C. 721, 11301.

SOURCE: 46 FR 54946, Nov. 5, 1981, unless otherwise noted. Redesignated at 47 FR 49592, Nov. 1, 1982.

§1177.1 Definitions and classifications of documents.

(a) A ''primary document'' is a mortgage (excluding those under the Ship Mortgage Act of 1920, as amended—46 U.S.C. et seq.), lease, equipment trust agreement, conditional sales agreement, assignment of a lease or leases which have not previously been filed, or other instrument evidencing the mortgage, lease, conditional sale, or bailment of one or more vessels operated subject to Surface Transportation Board jurisdiction, railroad cars, locomotives, or other rolling stock for a use related to interstate commerce.

(b) A ''secondary document'' is any assignment of rights or interest, supplement, or amendment to any primary or other secondary document. These include releases, discharges, or satisfactions, either total or partial.

§1177.2 To whom documents should be submitted for recordation.

Documents to be recorded shall be submitted in person or by mail addressed to the Secretary, Surface Transportation Board, Washington, DC 20423. All documents submitted by mail should clearly state ''Documents for Recordation'' on the envelope.

§1177.3 Requirements for submission.

In order to be accepted for recordation, an original of any primary or secondary document must:

(a) Be in writing and executed by the parties to the document, and acknowledged or verified either in a form:

(1) Authorized by the law of the state, territory, district or possession where executed for the acknowledgement or verification of deeds of land; or

(2) Substantially as follows:

INDIVIDUAL FORM OF ACKNOWLEDGEMENT

I, (name of signor), certify that I am the person described in and who executed the foregoing instrument and that I acknowledge that I executed the same as my free act and deed. I further declare (certify, verify or state) under penalty of perjury (''under the

laws of the United States of America'' if executed outside the United States) that the foregoing is true and correct. Executed on (date).

Signature.

or;

CORPORATE FORM OF ACKNOWLEDGEMENT

I, (name of signor), certify that I am (title of office) of (name of corporation), that the seal affixed to the foregoing instrument is the corporate seal of said corporation, that the instrument was signed and sealed on behalf of the corporation by authority of its Board of Directors, and that I acknowledge that the execution of the foregoing instrument was the free act and deed of the corporation. I further declare (certify, verify or state) under penalty of perjury (''under the laws of the United States of America'' if executed outside the United States of America) that the foregoing is true and correct. Executed on (date).

Signature.

or;

(3) Substantially as follows:

INDIVIDUAL FORM OF ACKNOWLEDGEMENT

State of _____

County of _____, ss:

On this _____ day of _____, 19___, before me, personally appeared (name of signor), to me known to be the person described in and who executed the foregoing instrument and (s)he acknowledged that (s)he executed the same as his/her free act and deed.
(SEAL)

_____

Signature of Notary Public

My Commission expires _____

Corporate Form of Acknowledgement

State of _____ _____
County of _____, ss: _____

On this _____ day of _____, 19___ before me personally appeared (name of signor), to me personally known, who being by me duly sworn, says that (s)he is the (title of office) of (name of corporation), that the seal affixed to the foregoing instrument is the corporate seal of said corporation, that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors, and (s)he acknowledged that the execution of the foregoing instrument was the free act and deed of said corporation.
(SEAL)

_____

Signature of Notary Public
My Commission expires _____

(b) Be accompanied by at least one fully executed and acknowledged or verified counterpart, or if no counterpart has been executed and acknowledged by the parties, one certified true copy. A certified true copy of an original document is a complete and identical copy in all respects to the original attached with:

(1) A certificate executed by a notary public, stating that he or she has compared the copy with the original and has found the copy to be complete and identical in all respects to the original document; or

(2) A certification of the filer stating that he or she has compared the copy with the original and found the copy to be complete and identical in all respects to the original document and that he or she declares under penalty of perjury (''under the laws of the United States of America'' if executed outside the United States) that the foregoing is true and correct; or

(3) There may be attached to the copy, affidavits, wherein the affidavit states that he or she has compared the copy with the original document and found the copy to be complete and identical in all respects to the original documents.

(c) Be accompanied by the fee set forth in 49 CFR 1002.2(f)(83). However, assignments which are executed prior to the filing of the primary document and which are submitted concurrently will be treated along with the primary document as one for fee purposes and will be assessed only one fee. A lease and agreement (Philadelphia Plan) shall be similarly treated.

(d) Be accompanied by a letter of transmittal requesting the recording of the document. For a sample of a letter, see §1177.4 Documents submitted concurrently under the same recordation number may be included in a single transmittal letter. Otherwise, each document must have its own letter of transmittal. The letter should be addressed to the Secretary and include the following information:

(1) *Type of Agreement.* (equipment trust, mortgage, assignment, etc.).

(2) *Whether document is a primary document or a secondary document* (see

§ 1177.1). If the document is a secondary document, it must contain the recordation number of the primary document to which it is connected, unless it is being filed concurrently with a primary document to which a recordation number has not yet been assigned.

(3) *A request for cross-indexing.* If the document is an assignment, parties may request the listing of the assignment in the index under the name(s) of parties with continuing interest not involved in this particular assignment.

(4) *A description of the equipment covered in the document*—(i) *For railway equipment*—The type of equipment; whether locomotives, cars, or other rolling stock; with any A.A.R. mechanical designation; the number of each type; any identifying marks such as the name or initials of the lessee, mortgagee, or vendee, and the road or serial number, or if more than one for each type of equipment, the first and last inclusive numbers.

(ii) *For water carrier equipment*—Whether tow boats, barges or other vessels; type of equipment; description as contained in the United States Coast Guard certificate of enrollment; number of each type of equipment; and any identifying marks such as the name or initial of the lessee, mortgagee, or vendee.

(5) Parties to the agreement, as follows:

(i) Conditional sale-vendor, purchaser, guarantor.

(ii) Mortgage—mortgagor, mortgagee, guarantor.

(iii) Equipment Trust—vendor, trustee, lessor, lessee, guarantor of lease.

(iv) Lease—lessee, lessor, guarantor.

(v) Bailment—bailor, bailee, guarantor.

(vi) Other transactions—principal debtor, trustee, guarantor, and other parties.

(6) Parties to whom original document should be returned.

(7) The amount of the enclosed fee.

(8) A short summary (1 or 2 sentences) of the type of document and a very brief description of the equipment and identifying numbers. This summary will be entered into the index as an aid to researching the encumbrances to title. (For a sample of a summary, see § 1177.4).

(9) The letter must be signed by an executive officer of one of the parties having knowledge of the matters described in the letter, or their attorney or representative in fact.

NOTE: If the document is a mortgage or deed of trust which contains a ''hereafter acquired'' or similar clause, the following statement may be included in the letter of transmittal in lieu of the equipment description above:

''Included in the property covered by the aforesaid mortgage (or deed of trust) are (here identify generally the equipment such as ''barges, tow boats, or other vessels, railroad cars, locomotives and other rolling stock'') intended for use related to interstate commerce, or interests therein, owned by (name of mortgagor) at the date of said mortgage or thereafter acquired by it or its successors as owners of the water carriers or the lines of railway covered by the mortgage.''

When such a mortgage or deed of trust is filed, it is not necessary to refile the document whenever additional rolling stock is acquired in order to perfect the lien of the document upon the addition of vessels or rolling stock.

(Authority: 5 U.S.C. 553, 31 U.S.C. 9701; 49 U.S.C. 10321)

[46 FR 54946, Nov. 5, 1981. Redesignated at 47 FR 49592, Nov. 1, 1982 and amended at 52 FR 46484, Dec. 8, 1987; 56 FR 10520, Mar. 13, 1991; 56 FR 12423, Mar. 25, 1991; 64 FR 53268, Oct. 1, 1999]

§ 1177.4 Sample forms.

(a) Sample short summary for the Index.

(1) *Primary documents.* [Type of document] between [name and address of lessor, mortgagor, bailor, etc.] and [name and address of lessee, mortgagee, bailee, etc.] dated [date], and covering [briefly list amount and types of equipment].

(2) *Secondary documents.* (i) If an assignment—Assignment between [name and address of assignor] and [name and address of assignee] dated [date of assignment] and covering [list amount and types of equipment], and connected to [type of document primary document is] with Recordation No. [recordation number of the primary document if known, at time recorded].

(ii) Other secondary documents—[Type of document] to [type of primary

document] with Recordation No. [Recordation number of the primary document], dated [date of amendment, supplement, release, etc.] and covering [list amount and types of equipment].

(b) *Sample Letter of Transmittal.*

[Secretary's Name] *Secretary, Surface Transportation Board, Washington, D.C.*

Dear Secretary: I have enclosed an original and one copy/counterpart of the document(s) described below, to be recorded pursuant to Section 11301 of Title 49 of the U.S. Code.

This document is a [mortgage, lease, equipment trust, supplement, etc.], a [primary or secondary] document, dated [date].

(If a secondary document)—The primary document to which this is connected is recorded under Recordation No. ____.

(If an assignment)—We request that this assignment be cross-indexed.

The names and addresses of the parties to the documents are as follows:

Vendor, Lessor, Mortgagor, etc: [name and address]

Vendee, Lessee, Mortgagee, etc: [name and address].

A description of the equipment covered by the document follows:

[Type of equipment, amount of each, AAR designation if any, identifying marks, road or serial numbers, etc., as outlined in 1177.3(d)(4).]

A fee of _____ is enclosed. Please return the original and any extra copies not needed by the Board for recordation to [party to whom documents should be returned].

A short summary of the document to appear in the index follows: [a short summary as described in 1177.4(a).].

Very truly yours,

_____

[signature of an executive officer of one of the parties, their attorney, or representative in fact.]

[46 FR 54946, Nov. 5, 1981 as amended at 64 FR 53268, Oct. 1, 1999]

§ 1177.5 Administrative procedure.

(a) At the time of filing of a document with the Board for recordation, a consecutive number will be stamped upon the original document and upon the copies or the counterparts, with the date and hour of the filing. A notation acknowledging that the document has been filed pursuant to 49 U.S.C. 11303 will be made. The original document, along with the notation, will be returned to the party named in the transmittal letter and a copy or counterpart will be retained by the Board. For a secondary document, the number assigned will be the recordation number of the primary document plus the next available letter suffix.

(b) The Board will maintain an index for public use as required by 49 U.S.C 11303(b). There will be an index of parties to documents recorded at the Board in alphabetical order by the party's name. If requested by the letter of transmittal, this index will also be amended to reflect an assignment under the name of the party other than the assignor or assignee to the document. There will also be an index of documents by number, which will list secondary documents referenced to the primary ones. The indexes will contain the pertinent information furnished by the parties in the transmittal letter.

(c) The Board cannot judge the validity of documents, nor judge the status of encumbrances to property as reflected by documents recorded at the Board. The public is welcome to research the records or use an agent or attorney to do so, provided that Board rules concerning handling of the documents are respected.

(d) The public should note that filing documents with the Board is discretionary and encumbrances exist which are not on file with the Board.

PARTS 1178–1179 [RESERVED]

Parts 1180–1189—Combinations and Ownership

PART 1180—RAILROAD ACQUISITION, CONTROL, MERGER, CONSOLIDATION PROJECT, TRACKAGE RIGHTS, AND LEASE PROCEDURES

Subpart A—General Acquisition Procedures

Sec.
1180.0 Scope and purpose.
1180.1 General policy statement for merger or control of at least two Class I railroads.
1180.2 Types of transactions.
1180.3 Definitions.
1180.4 Procedures.
1180.5 [Reserved]
1180.6 Supporting information.
1180.7 Market analyses.

1180.8 Operational data.
1180.9 Financial information.
1180.10 Service assurance plans.
1180.11 Transnational and other informational requirements.

Subpart B—Transfer or Operation of Lines of Railroads in Reorganization

1180.20 Procedures.

AUTHORITY: 5 U.S.C. 553 and 559; 11 U.S.C. 1172; 49 U.S.C. 721, 10502, 11323–11325.

Subpart A—General Acquisition Procedures

SOURCE: 47 FR 9844, Mar. 8, 1982, unless otherwise noted. Redesignated at 47 FR 49592, Nov. 1, 1982.

§ 1180.0 Scope and purpose.

(a) *General.* The regulations in this subpart set out the information to be filed and the procedures to be followed in control, merger, acquisition, lease, trackage rights, and any other consolidation transaction involving more than one railroad that is initiated under 49 U.S.C. 11323. Section 1180.2 separates these transactions into four types: *Major, significant, minor,* and *exempt.* The informational requirements for these types of transactions differ. Before an application is filed, the designation of type of transaction may be clarified or certain of the information required may be waived upon petition to the Board. This procedure is explained in § 1180.4. The required contents of an application are set out in §§ 1180.6 (general information supporting the transaction), 1180.7 (competitive and market information), 1180.8 (operational information), 1180.9 (financial data), 1180.10 (service assurance plans), and 1180.11 (transnational and other informational requirements). A *major* application must contain the information required in §§ 1180.6(a), 1180.6(b), 1180.7(a), 1180.7(b), 1180.8(a), 1180.8(b), 1180.9, 1180.10, and 1180.11. A *significant* application must contain the information required in §§ 1180.6(a), 1180.6(c), 1180.7(a), 1180.7(c), and 1180.8(b). A *minor* application must contain the information required in §§ 1180.6(a) and 1180.8(c). Procedures (including time limits, filing requirements, participation requirements, and other matters) are contained in § 1180.4. All applications must comply with the Board's Rules of General Applicability, 49 CFR parts 1100 through 1129, unless otherwise specified. These regulations may be cited as the Railroad Consolidation Procedures.

(b) *Waiver.* We will waive application of the regulations contained in this subpart for a consolidation involving The Kansas City Southern Railway Company and another Class I railroad and instead will apply the regulations in this subpart A in effect before July 11, 2001 and contained in the 49 CFR, Parts 1000 to 1199, edition revised as of October 1, 2000, unless we are shown why such a waiver should not be allowed. Interested parties must file any objections to this waiver within 10 days after the applicants' prefiling notification (see 49 CFR § 1180.4(b)(1)).

[66 FR 32583, June 15, 2001]

§ 1180.1 General policy statement for merger or control of at least two Class I railroads.

(a) *General.* To meet the needs of the public and the national defense, the Surface Transportation Board (Board) seeks to ensure balanced and sustainable competition in the railroad industry. The Board recognizes that the railroad industry (including Class II and III carriers) is a network of competing and complementary components, which in turn is part of a broader transportation infrastructure that also embraces the nation's highways, waterways, ports, and airports. The Board welcomes private-sector initiatives that enhance the capabilities and the competitiveness of this transportation infrastructure. Although mergers of Class I railroads may advance our nation's economic growth and competitiveness through the provision of more efficient and responsive transportation, the Board does not favor consolidations that reduce the transportation alternatives available to shippers unless there are substantial and demonstrable public benefits to the transaction that cannot otherwise be achieved. Such public benefits include improved service, enhanced competition, and greater economic efficiency. The Board also will look with disfavor on consolidations under which the controlling entity does not assume full responsibility

for carrying out the controlled carrier's common carrier obligation to provide adequate service upon reasonable demand.

(b) *Consolidation criteria.* The Board's consideration of the merger or control of at least two Class I railroads is governed by the public interest criteria prescribed in 49 U.S.C. 11324 and the rail transportation policy set forth in 49 U.S.C. 10101. In determining the public interest, the Board must consider the various goals of effective competition, carrier safety and efficiency, adequate service for shippers, environmental safeguards, and fair working conditions for employees. The Board must ensure that any approved transaction would promote a competitive, efficient, and reliable national rail system.

(c) *Public interest considerations.* The Board believes that mergers serve the public interest only when substantial and demonstrable gains in important public benefits—such as improved service and safety, enhanced competition, and greater economic efficiency—outweigh any anticompetitive effects, potential service disruptions, or other merger-related harms. Although further consolidation of the few remaining Class I carriers could result in efficiency gains and improved service, the Board believes additional consolidation in the industry is also likely to result in a number of anticompetitive effects, such as loss of geographic competition, that are increasingly difficult to remedy directly or proportionately. Additional consolidations could also result in service disruptions during the system integration period. Accordingly, to assure a balance in favor of the public interest, merger applications should include provisions for enhanced competition, and, where both carriers are financially sound, the Board is prepared to use its conditioning authority as necessary under 49 U.S.C. 11324(c) to preserve and/or enhance competition. In addition, when evaluating the public interest, the Board will consider whether the benefits claimed by applicants could be realized by means other than the proposed consolidation. The Board believes that other private-sector initiatives, such as joint marketing agreements and interline partnerships, can produce many of the efficiencies of a merger while risking less potential harm to the public.

(1) *Potential benefits.* By eliminating transaction cost barriers between firms, increasing the productivity of investment, and enabling carriers to lower costs through economies of scale, scope, and density, mergers can generate important public benefits such as improved service, more competition, and greater economic efficiency. A merger can strengthen a carrier's finances and operations. To the extent that a merged carrier continues to operate in a competitive environment, its new efficiencies would be shared with shippers and consumers. Both the public and the consolidated carrier can benefit if the carrier is able to increase its marketing opportunities and provide better service. A merger transaction can also improve existing competition or provide new competitive opportunities, and such enhanced competition will be given substantial weight in our analysis. Applicants shall make a good faith effort to calculate the net public benefits their proposed merger would generate, and the Board will carefully evaluate such evidence. To ensure that applicants have no incentive to exaggerate these projected benefits to the public, the Board expects applicants to propose additional measures that the Board might take if the anticipated public benefits fail to materialize in a timely manner. In this regard, the Board recognizes, however, that applicants require the flexibility to adapt to changing marketplace or other circumstances and that it is inevitable that an approved merger may not necessarily be implemented in precisely the manner anticipated in the application. Applicants will be held accountable, however, if they do not act reasonably in light of changing circumstances to achieve promised merger benefits.

(2) *Potential harm.* The Board recognizes that consolidation can impose costs as well as benefits. It can reduce competition both directly and indirectly in particular markets, including product markets and geographic markets. Consolidation can also threaten essential services and the reliability of the rail network. In analyzing these

impacts we must consider, but are not limited by, the policies embodied in the antitrust laws.

(i) *Reduction of competition.* Although in specific markets railroads operate in a highly competitive environment with vigorous intermodal competition from motor and water carriers, mergers can deprive shippers of effective options. Intramodal competition can be reduced when two carriers serving the same origins or destinations merge. Competition arising from shippers' build-out, transloading, plant siting, and production shifting choices can be eliminated or reduced when two railroads serving overlapping areas merge. Competition in product and geographic markets can also be eliminated or reduced by mergers, including end-to-end mergers. Any railroad combination entails a risk that the merged carrier would acquire and exploit increased market power. Applicants shall propose remedies to mitigate and offset competitive harms. Applicants shall also explain how they would at a minimum preserve competitive and market options such as those involving the use of major existing gateways, build-outs or build-ins, and the opportunity to enter into contracts for one segment of a movement as a means of gaining the right separately to pursue rate relief for the remainder of the movement.

(ii) *Harm to essential services.* The Board must ensure that essential freight, passenger, and commuter rail services are preserved wherever feasible. An existing service is essential if there is sufficient public need for the service and adequate alternative transportation is not available. The Board's focus is on the ability of the nation's transportation infrastructure to continue to provide and support essential services. Mergers should strengthen, not undermine, the ability of the rail network to advance the nation's economic growth and competitiveness, both domestically and internationally. The Board will consider whether projected shifts in traffic patterns could undermine the ability of the various network links (including Class II and Class III rail carriers and ports) to sustain essential services.

(iii) *Transitional service problems.* Experience shows that significant service problems can arise during the transitional period when merging firms integrate their operations, even after applicants take extraordinary steps to avoid those disruptions. Because service disruptions harm the public, the Board, in its determination of the public interest, will weigh the likelihood of transitional service problems. In addition, under paragraph (h) of this section, the Board will require applicants to provide a detailed service assurance plan. Applicants also should explain how they would cooperate with other carriers in overcoming serious service disruptions on their lines during the transitional period and afterwards.

(iv) *Enhanced competition.* To offset harms that would not otherwise be mitigated, applicants should explain how the transaction and conditions they propose would enhance competition.

(d) *Conditions.* The Board has broad authority under 49 U.S.C. 11324(c) to impose conditions on consolidations, including requiring divestiture of parallel tracks or the granting of trackage rights and access to other facilities. The Board will condition the approval of Class I combinations to mitigate or offset harm to the public interest, and will carefully consider conditions proposed by applicants in this regard. The Board may impose conditions that are operationally feasible and produce net public benefits, but will not impose conditions that undermine or defeat beneficial transactions by creating unreasonable operating, financial, or other problems for the combined carrier. Conditions are generally not appropriate to compensate parties who may be disadvantaged by increased competition. The Board anticipates that mergers of Class I carriers would likely create some anticompetitive effects that would be difficult to mitigate through appropriate conditions, and that transitional service disruptions might temporarily negate any shipper benefits. To offset such potential harms and improve the prospect that their proposal would be found to be in the public interest, applicants should propose conditions that would not simply preserve but also enhance competition. The Board seeks to enhance competition in ways that

strengthen and sustain the rail network as a whole (including that portion of the network operated by Class II and III carriers).

(e) *Employee protection.* The Board is required to provide a fair arrangement for the protection of the rail employees of applicants who are affected by a consolidation. The Board supports early notice and consultation between management and the various unions, leading to negotiated implementing agreements, which the Board strongly favors. Otherwise, the Board respects the sanctity of collective bargaining agreements and will look with extreme disfavor on overrides of collective bargaining agreements except to the very limited extent necessary to carry out an approved transaction. The Board will review negotiated agreements to ensure fair and equitable treatment of all affected employees. Absent a negotiated agreement, the Board will provide for protection at the level mandated by law (49 U.S.C. 11326(a)), and if unusual circumstances are shown, more stringent protection will be provided to ensure that employees have a fair and equitable arrangement.

(f) *Environment and safety.* (1) The National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* (NEPA), requires the Board to take environmental considerations into account in railroad consolidation cases. To meet its responsibilities under NEPA and related environmental laws, the Board must consider significant potential beneficial and adverse environmental impacts in deciding whether to approve a transaction as proposed, deny the proposal, or approve it with conditions, including appropriate environmental mitigation conditions addressing concerns raised by the parties, including federal, state, and local government entities. The Board's Section of Environmental Analysis (SEA) ensures that the agency meets its responsibilities under NEPA and the implementing regulations at 49 CFR part 1105 by providing the Board with an independent environmental review of merger proposals. In preparing the necessary environmental documentation, SEA focuses on the potential environmental impacts resulting from merger-related changes in activity levels on existing rail lines and rail facilities. The Board generally will mitigate only those impacts that would result directly from an approved transaction, and will not require mitigation for existing conditions and existing railroad operations.

(2) During the environmental review process, railroad applicants have negotiated agreements with affected communities, including groups of communities and other entities such as state and local agencies. The Board encourages voluntary agreements of this nature because they can be extremely helpful and effective in addressing specific local and regional environmental and safety concerns, including the sharing of costs associated with mitigating merger-related environmental impacts. Generally, these privately negotiated solutions between an applicant railroad and some or all of the communities along particular rail corridors or other appropriate entities are more effective, and in some cases more far-reaching, than any environmental mitigation options the Board could impose unilaterally. Therefore, when such agreements are submitted to it, the Board generally will impose these negotiated agreements as conditions to approved mergers, and these agreements generally will substitute for specific local and site-specific environmental mitigation for a community that otherwise would be imposed. Moreover, to encourage and give effect to negotiated solutions whenever possible, the opportunity to negotiate agreements will remain available throughout the oversight process to replace local and site-specific environmental mitigation imposed by the agency. The Board will require compliance with the terms of all negotiated agreements submitted to it during oversight by imposing appropriate environmental conditions to replace the local and site-specific mitigation previously imposed.

(3) Applicants will be required to work with the Federal Railroad Administration, on a case-by-case basis, to formulate Safety Integration Plans (SIPs) to ensure that safe operations are maintained throughout the merger implementation process. As part of the environmental review process, applicants will be required to submit:

(i) A SIP and

(ii) Evidence about potentially blocked grade crossings as a result of merger-related traffic increases or operational changes.

(g) *Oversight.* As a condition to its approval of any major transaction, the Board will establish a formal oversight process. For at least the first 5 years following approval, applicants will be required to present evidence to the Board, on no less than an annual basis, to show that the merger conditions imposed by the Board are working as intended, that the applicants are adhering to the various representations they made on the record during the course of their merger proceeding, that no unforeseen harms have arisen that would require the Board to alter existing merger conditions or impose new ones, and that the merger benefit projections accepted by the Board are being realized in a timely fashion. Parties will be given the opportunity to comment on applicants' submissions, and applicants will be given the opportunity to reply to the parties' comments. During the oversight period, the Board will retain jurisdiction to impose any additional conditions it determines are necessary to remedy or offset adverse consequences of the underlying transaction.

(h) *Service assurance and operational monitoring.* (1) The quality of service is of vital importance. Accordingly, applicants must file, with their initial application and operating plan, a Service Assurance Plan identifying the precise steps they would take to ensure adequate service and to provide for improved service. This plan must include the specific information set forth at § 1180.10 on how shippers, connecting railroads (including Class II and III carriers), and ports across the new system would be affected and benefitted by the proposed consolidation. As part of this plan, applicants will be required to provide service benchmarks, describe the extent to which they have entered into any arrangements with shippers and shipper groups to compensate for service failures, and establish contingency plans that would be available to mitigate any unanticipated service disruption.

(2) The Board will conduct significant post-approval operational monitoring to help ensure that service levels after a merger are reasonable and adequate.

(3) The Board also will require applicants to establish problem resolution teams and specific procedures for problem resolution to ensure that any unanticipated post-merger problems related to service or any other transportation matters, including claims, are promptly addressed. These teams should include representatives of all appropriate employee categories. Also, the Board envisions the establishment of a Service Council made up of shippers, railroads, passenger service representatives, ports, rail labor, and other interested parties to provide an ongoing forum for the discussion of implementation issues.

(4) *Loss and damage claims handling.* Shippers or shortlines who have freight claims under 49 CFR part 1005 during merger implementation shall file such claims, in writing or electronically, with the merged carrier. The claimant shall provide supporting documentation regarding the effect on the claimant, and the specific damages (in a determinable amount) incurred. Pursuant to 49 CFR part 1005, the merged carrier shall acknowledge each claim within 30 days and successively number each claim. Within 120 days of carrier receipt of the claim, the merged carrier shall respond to each claim by paying, declining, or offering a compromise settlement. The Board will take notice of these claims and their disposition as a matter of oversight. During each annual oversight period, the merged carrier shall report on claims received, their type, and their disposition for each quarterly period covered by oversight. While shippers and shortlines may also contract with the applicants for specific remedies with respect to claims, final adjudication of contract issues as well as unresolved claims will remain a matter for the courts.

(5) *Service failure claims.* Applicants must suggest a protocol for handling claims related to failure to provide reasonable service due to merger implementation problems. Commitments to submit all such claims to arbitration will be favored.

(6) *Alternative rail service.* Where shippers and connecting railroads require relief from extended periods of inadequate service, the procedures at 49 CFR parts 1146 and 1147 are available for the Board to review the documented service levels and to consider shipper proposals for alternative service relief when other avenues of relief have already been explored with the merged carrier in an effort to restore adequate service.

(i) *Cumulative impacts and crossover effects.* Because there are so few remaining Class I carriers and the railroad industry constitutes a network of competing and complementary components, the Board cannot evaluate the merits of a major transaction in isolation. The Board must also consider the cumulative impacts and crossover effects likely to occur as rival carriers react to the proposed combination. The Board expects applicants to explain how additional Class I mergers would affect the eventual structure of the industry and the public interest. Applicants should generally discuss the likely impact of such future mergers on the anticipated public benefits of their own merger proposal. Applicants will be expected to discuss whether and how the type or extent of any conditions imposed on their proposed merger would have to be altered, or any new conditions imposed, should we approve any future consolidation(s).

(j) *Inclusion of other carriers.* The Board will consider requiring inclusion of another carrier as a condition to approval only where there is no other reasonable alternative for providing essential services, the facilities fit operationally into the new system, and inclusion can be accomplished without endangering the operational or financial success of the new company.

(k) *Transnational and other informational issues.* (1) All applicants must submit ''full system'' competitive analyses and operating plans—incorporating any operations in Canada or Mexico—from which we can determine the competitive, service, employee, safety, and environmental impacts of the prospective operations within the United States, and explain how cooperation with the Federal Railroad Administration would be maintained to address potential impacts on operations within the United States of operations or events elsewhere on their systems. All applicants must further provide information concerning any restrictions or preferences under foreign or domestic law and policies that could affect their commercial decisions. Applicants must also address how any ownership restrictions might affect our public interest assessment.

(2) The Board will consult with relevant officials, as appropriate, to ensure that any conditions it imposes on an approved transaction are consistent with the North American Free Trade Agreement and other pertinent international agreements to which the United States is a party. In addition, the Board will cooperate with those Canadian and Mexican agencies charged with approval and oversight of a proposed transnational railroad combination.

(l) *National defense.* Rail mergers must not detract from the ability of the United States military to rely on rail transportation to meet the nation's defense needs. Applicants must discuss and assess the national defense ramifications of their proposed merger.

(m) *Public participation.* To ensure a fully developed record on the effects of a proposed railroad consolidation, the Board encourages public participation from federal, state, and local government departments and agencies; affected shippers, carriers, and rail labor; and other interested parties.

[66 FR 32583, June 15, 2001]

§ 1180.2 Types of transactions.

Transactions proposed under 49 U.S.C. 11323 involving more than one common carrier by railroad are of four types: *Major, significant, minor,* and *exempt.*

(a) A *major* transaction is a control or merger involving two or more class I railroads.

(b) A *significant* transaction is a transaction not involving the control or merger of two or more class I railroads that is of regional or national transportation significance as that phrase is used in 49 U.S.C. 11325(a)(2) and (c). A transaction not involving the control or merger of two or more

class I railroads is not significant if a determination can be made either:

(1) That the transaction clearly will not have any anticompetitive effects, or

(2) That any anticompetitive effects of the transaction will clearly be outweighed by the transaction's anticipated contribution to the public interest in meeting significant transportation needs.

A transaction not involving the control or merger of two or more class I railroads is significant if neither such determination can clearly be made.

(c) A *minor* transaction is one which involves more than one railroad and which is not a *major, significant,* or *exempt* transaction.

(d) A transaction is exempt if it is within one of the eight categories described in paragraphs (d)(1) through (8). The Board has found that its prior review and approval of these transactions is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and is of limited scope or unnecessary to protect shippers from market abuse. See 49 U.S.C. 10502. A notice must be filed to use one of these class exemptions. The procedures are set out in § 1180.4(g). These class exemptions do not relieve a carrier of its statutory obligation to protect the interests of employees. See 49 U.S.C. 10502(g) and 11326. The enumeration of the following categories of transactions as exempt does not preclude a carrier from seeking an exemption of specific transactions not falling into these categories.

(1) Acquisition of a line of railroad which would not constitute a major market extension where the Board has found that the public convenience and necessity permit abandonment.

(2) Acquisition or continuance in control of a nonconnecting carrier or one of its lines where (i) the railroads would not connect with each other or any railroads in their corporate family, (ii) the acquisition or continuance in control is not part of a series of anticipated transactions that would connect the railroads with each other or any railroad in their corporate family, and (iii) the transaction does not involve a class I carrier.

(3) Transactions within a corporate family that do not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with carriers outside the corporate family.

(4) Renewal of leases and any other matters where the Board has previously authorized the transaction, and only an extension in time is involved.

(5) Joint projects involving the relocation of a line of railroad which does not disrupt service to shippers.

(6) Reincorporation in a different State.

(7) Acquisition of trackage rights and renewal of trackage rights by a rail carrier over lines owned or operated by any other rail carrier or carriers that are: (i) based on written agreements, and (ii) not filed or sought in responsive applications in rail consolidation proceedings.

(8) Acquisition of temporary trackage rights by a rail carrier over lines owned or operated by any other rail carrier or carriers that are: (i) based on written agreements, (ii) not filed or sought in responsive applications in rail consolidation proceedings, (iii) for overhead operations only, and (iv) scheduled to expire on a specific date not to exceed 1 year from the effective date of the exemption. If the operations contemplated by the exemption will not be concluded within the 1-year period, the parties may, prior to expiration of the period, file a request for a renewal of the temporary rights for an additional period of up to 1 year, including the reason(s) therefor. Rail carriers acquiring temporary trackage rights need not seek authority from the Board to discontinue the trackage rights as of the expiration date specified under 49 CFR 1180.4(g)(2)(iii). All transactions under these rules will be subject to applicable statutory labor protective conditions.

[47 FR 9844, Mar. 8, 1982. Redesignated at 47 FR 49592, Nov. 1, 1982, and amended at 50 FR 15751, Apr. 22, 1985; 51 FR 24669, July 8, 1986; 58 FR 63104, Nov. 30, 1993; 62 FR 9716, Mar. 4, 1997; 68 FR 28140, May 23, 2003]

§ 1180.3 Definitions.

(a) *Applicant.* The term *applicant* means the parties initiating a transaction, but does not include a wholly

owned direct or indirect subsidiary of an applicant if that subsidiary is not a rail carrier. Parties who are considered applicants, but for whom the information normally required of an applicant need *not* be submitted, are:

(1) In *minor* trackage rights applications, the transferor and

(2) In responsive applications, a primary applicant.

(b) *Applicant carriers.* The term *applicant carriers* means: any applicant that is a rail carrier; any rail carrier operating in the United States, Canada, and/or Mexico in which an applicant holds a controlling interest; and all other rail carriers involved in the transaction. Because the service provided by these commonly controlled carriers can be an important competitive aspect of the transactions that we approve, applicant carriers are subject to the full range of our conditioning power. Carriers that are involved in an application only by virtue of an existing trackage rights agreement with applicants are not applicant carriers.

(c) *Major market extension.* A major market extension is a transaction which may significantly increase competition by extending service into a new market, expanding service in a currently served market when another carrier concurrently contracts its service to that market as part of the same transaction, or providing significantly more efficient and effective competitive service to a market presently being served. Criteria which can be used to determine if a railroad is proposing to provide a more competitive service to a currently served area include: (1) Creating a shorter route; (2) providing enhanced service capabilities (speed is not the only factor); (3) entering an interchange or market generating more than 5,000 cars per year or 5 percent of applicant's traffic; (4) filing the application as a condition of relief to a pending proceeding; and (5) permitting a carrier to become more competitive (extending its length of haul) See. *Burlington Northern, Inc.—Control & Merger—St. L.,* 354 I.C.C. 616, 617 (1978).

(d) *Petition for clarification.* A request that the Board clarify the applicability of any part of these regulations to a particular situation or explain the type of material needed to comply with these regulations.

(e) *Petition for waiver.* A request that the Board either dispense with material required by the regulations, or accept material in place of that required by these regulations.

(f) *Primary application.* A proposal for approval filed under 49 U.S.C. 11323 which begins a new proceeding and is not proposed either as a condition to or as an alternative to Board approval of another pending application.

(g) *Railroad.* Any common carrier by railroad as defined in 49 U.S.C. 10102(5)–(6).

(h) *Responsive applications.* Applications filed in response to a primary application are those seeking affirmative relief either as a condition to or in lieu of the approval of the primary application. Responsive applications include inconsistent applications, inclusion applications, and any other affirmative relief that requires an application, petition, notice, or any other filing to be submitted to the Board (such as trackage rights, purchases, constructions, operation, pooling, terminal operations, abandonments, and other types of proceedings not otherwise covered). For fees covering inconsistent applications or responsive applications not otherwise covered in the Board's fee schedule, see 49 CFR 1002.2(f) (38)–(41) and 1180.4(d)(4)(ii). The fees for all other responsive applications are set forth in 49 CFR 1002.2(f).

(i) *Transferee.* The transferee is:

(1) The acquiring corporation in a control proceeding,

(2) The surviving corporation in a merger,

(3) The resulting corporation in a consolidation,

(4) The leasee in a lease,

(5) The purchaser in an acquisition, and

(6) The grantee of trackage rights in a trackage rights proceeding.

(j) *Transferor.* The transferor is:

(1) The corporation acquired in a control proceeding,

(2) The merging corporation in a merger,

(3) All corporations to be consolidated in a consolidation,

(4) The lessor in a lease,

(5) The seller in an acquisition, and

(6) The grantor of trackage rights in a trackage rights proceeding.

[47 FR 9844, Mar. 8, 1982. Redesignated at 47 FR 49592, Nov. 1, 1982, as amended at 62 FR 9716, Mar. 4, 1997; 62 FR 28376, May 23, 1997; 66 FR 32586, June 15, 2001]

§ 1180.4 Procedures.

(a) *General.* (1) The original and 25 copies of all documents shall be filed in *major* proceedings. The original and 10 copies shall be filed in *significant* and *minor* proceedings.

(2) Each party to a proceeding shall choose a unique acronym of four letters or less for itself. It shall number each document filed in the proceeding consecutively, prefixed by its acronym.

(3) Any document filed with the Board (including applications, pleadings, etc.) shall be promptly furnished to interested persons on request, unless subject to a protective order. At any time, the Board may require the submission of additional copies of any document previously filed by any party to the proceeding.

(b) *Prefiling notification.* (1) Between 3 to 6 months prior to the proposed filing of an application in a *major* transaction, and 2 to 4 months prior to the proposed filing of an application in a *significant* transaction, applicant shall file a notice with the Board. The notice shall:

(i) Briefly describe the transaction,

(ii) Indicate the year to be used for the impact analysis,

(iii) Indicate the approximate filing date of the application, and

(iv) Indicate why the transaction is *major* or *significant*.

(2) The Board will publish a notice in the FEDERAL REGISTER within 30 days of receipt of the applicant's notice. The publication shall contain:

(i) A brief description of the transaction,

(ii) The year to be used for the impact analysis,

(iii) The approximate filing date,

(iv) A determination that the transaction is *major*, *significant*, or *minor*, and

(v) A statement of any additional information which must be filed with the application in order for the application to be considered complete.

(3) A prefiling notice may be amended to indicate a change in the anticipated filing date.

(4) *Prefiling notification.* When filing the notice of intent required by paragraph (b)(1) of this section, applicants also must file:

(i) *A proposed procedural schedule.* In any proceeding involving either a major transaction or a significant transaction, the Board will publish a FEDERAL REGISTER notice soliciting comments on the proposed procedural schedule, and will, after review of any comments filed in response, issue a procedural schedule governing the course of the proceeding.

(ii) *A proposed draft protective order.* The Board will issue, in each proceeding in which such an order is requested, an appropriate protective order.

(iii) *A statement of waybill availability for major transactions.* Applicants must indicate, as soon as practicable after the issuance of a protective order, that they will make their 100% traffic tapes available (subject to the terms of the protective order) to any interested party on written request. The applicants may require that, if the requesting party is itself a railroad, applicants will make their 100% traffic tapes available to that party only if it agrees, in its written request, to make its own 100% traffic tapes available to applicants (subject to the terms of the protective order) when it receives access to applicants' tapes.

(iv) Applicants may also propose the use of a voting trust at this stage, or at a later stage, if that becomes necessary. In each proceeding involving a major transaction, applicants contemplating the use of a voting trust must explain how the trust would insulate them from an unlawful control violation and why their proposed use of the trust, in the context of their impending control application, would be consistent with the public interest. Following a brief period of public comment and replies by applicants, the Board will issue a decision determining whether applicants may establish and use the trust.

(c) *Application.* (1) The fees for filing applications, petitions, or notices

under these procedures are set forth in 49 CFR 1002.2.

(2) Filing requirements.

(i) The original of all applications shall be signed in ink by the applicant, if an individual; by all partners, if a partnership; and if a corporation, association, or other similar form of organization, by its president, or such other executive officer having knowledge of the matters therein contained and duly designated for that purpose by the applicant. Applications shall be made under oath and shall contain an appropriate certification (if a corporation, by its secretary) showing that the affiant is duly authorized to verify and file the application. Any person controlling an applicant shall also sign the application.

(ii) The application shall be filed with Secretary, Surface Transportation Board, Washington, DC 20423.

(iii) Each copy of the application shall conform in all respects to the original and shall be complete in itself except that the signature in the copies may be stamped or typed and the notarial seal may be omitted. In like manner, where certified copies of documents are filed with the application, conformed copies thereof, showing certification in stamped or typewritten form, will be sufficient to accompany the additional copies of the application.

(iv) All applications required to be filed with the Board or served on designated persons shall include all exhibits, except as otherwise specifically noted. Information from other documents may be incorporated by reference in the application. However, the documents must have been filed with the Board within three years prior to filing of the application, the information must be up to date, and applicant must be prepared to supply copies of this information to interested persons on specific request.

(v) The applicant shall submit such additional information to support its application as the Board may require.

(vi) Applicant shall file concurrently all directly related applications, *e.g.*, those seeking authority to construct or abandon rail lines, obtain terminal operations, acquire trackage rights, etc.

(vii) The application shall contain a certificate of service indicating that all persons designated in §1180.4(c)(5) have been served with a copy of the application.

(3) In a *major* or *significant* transaction, and in all responsive applications, all of the direct testimony of applicants, in the form of verified statements, shall be filed and served with each application.

(4) The application and all exhibits shall be considered part of the evidentiary record upon acceptance. Any portion of an application and exhibits will remain subject to motions to strike. However, no motion need be made to have the application and exhibits admitted to the evidentiary record. If a *major* or *significant* transaction is designated for oral hearing the presiding Administrative Law Judge shall have discretion in extraordinary circumstances to allow for the presentation of oral or written direct testimony not previously submitted with the application.

(5) Service. The applicant shall serve a conformed copy of an application filed under these procedures by first-class mail upon:

(i) The Governor (or Executive Officer), Public Service Commission, and the Department of Transportation of each State in which any part of the properties of the applicant carriers involved in the proposed transaction is situated;

(ii) The Secretary of the United States Department of Transportation (Docket Clerk, Office of Chief Counsel, Federal Railroad Administration, Room 5101, 400 Seventh Street, SW., Washington, DC 20590).

(iii) The Attorney General of the United States;

(iv) The Federal Trade Commission; and

(v) In *major* or *significant* transactions, all persons requesting a copy after the prefiling notice is published in the FEDERAL REGISTER.

(6) Application format. (i) The application shall be in the same sequence as the information is requested in these procedures, and shall be numbered to correspond to the numbering in the procedures.

(ii) If any material required in the application would lend itself to being placed in an appendix, this should be done. The appendix and application shall be tabulated and cross-referenced in an index for ease in locating and referring to the information. The appendixes shall be in the same sequence as the information required by these procedures. If certain information required in the application is not applicable, provide an explanation. The application should be bound, and it may be bound in more than one volume. If an application is more than one volume, the cover of each volume should be in a different color. The pages in each volume shall begin with 1, and be sequentially numbered.

(iii) The Board's Office of the Secretary will provide informal opinions and interpretations, which are not binding on the Board, regarding the format of or information to be included in the application.

(iv) All filing, service, or other requirements of these procedures must be complied with when filing the application. Copies of the application filed with the Board shall be marked in red ''Railroad Consolidation Application'' on the transmittal envelope or package.

(v) The application shall conform to the typographical specifications of § 1104.2.

(vi) The information and data required of any applicant may be consolidated with the information and data required of the affiliated applicant carriers.

(7) Acceptance or rejection of an application.

(i) The Board shall accept a complete application no later than 30 days after the application is filed with the Board by publishing a notice in the FEDERAL REGISTER. A complete application contains all information for all applicant carriers required by these procedures, except as modified by advance waiver. The publication shall indicate the applicable time limits for processing the application. (These are the time limits of 49 U.S.C. 11325(b) for a *major* transaction, 49 U.S.C. 11325(c) for a *significant* transaction, and 49 U.S.C. 11325(d) for a *minor* transaction.)

(ii) The Board shall reject an incomplete application by serving a decision no later than 30 days after the application is filed with the Board. The decision shall explain specifically why the application was incomplete. A revised application may be submitted, incorporating portions of the prior application by reference. The resubmission or refiling of an application shall be considered a *de novo* filing for the purpose of computation of the time periods, provided that the resubmitted application is accepted as complete.

(8) The application must present a *prima facie* case. Applicants can fail to meet their burden of proof and thus not present a *prima facie* case either by (i) disclosing facts that, even if construed in their most favorable light, are insufficient to support a finding that the proposal is consistent with the public interest, or by (ii) disclosing facts that affirmatively demonstrate that the proposal is not in the public interest. See Ex Parte No. 282 (Sub-No. 3A), *Railroad Consolidation Procedures Expedited Processing*, 363 I.C.C. 767 (1980).

(d) *Responsive applications.* (1) No responsive applications shall be permitted to minor transactions.

(2) An inconsistent application will be classified as a major, significant, or minor transaction as provided in § 1180.2(a) through (c). The fee for an inconsistent application will be the fee for the type of transaction involved. See 49 CFR 1002.2(f)(38) through (41). The fee for any other type of responsive application is the fee for the particular type of proceeding set forth in 49 CFR 1002.2(f).

(3) Each responsive application filed and accepted for consideration will automatically be consolidated with the primary application for consideration.

(e) *Evidentiary proceeding.* (1) The Board may order an oral public hearing, a hearing by written submissions, or another kind of evidentiary proceeding. The determination will generally be made on the basis of the needs indicated by the written comments.

(2) The evidentiary proceeding will be completed:

(i) Within 1 year after the primary application is accepted for a *major* transaction;

(ii) Within 180 days for a *significant* transaction; and

(iii) Within 105 days for a *minor* transaction.

(3) A final decision on the primary application and on all consolidated cases will be issued:

(i) Within 90 days after the conclusion of the evidentiary proceeding for a *major* transaction;

(ii) Within 90 days for a *significant* transaction; and

(iii) Within 45 days for a *minor* transaction.

(4) The Secretary of Transportation may propose modifications to any transaction and shall have standing to appear before the Board in support of any such proposed modification.

(f) *Waiver or clarification.* (1) Upon petition of a prospective applicant, the Board may waive or clarify a portion of these procedures. A petition to waive all of the procedures will not be entertained.

(2) Except as otherwise provided in the procedural schedule adopted by the Board in any particular proceeding, petitions for waiver or clarification must be filed at least 45 days before the application is filed.

(3) No replies to a petition for waiver will be permitted, except where a proceeding involving the same parties and a related transaction is pending before us.[1] When a reply is permitted, the petition shall be served by first-class mail on all parties to the pending proceedings, with a reply due within 10 days of service. Replies to a petition for clarification shall be permitted within 10 days of the petition's filing.

(4) A waiver or clarification granted to any applicant in a proceeding shall apply to any other party to the proceeding unless otherwise indicated.

(5) All petitions for waiver or clarification must specify the sections for which waiver or clarification is sought and give the specific reasons why each waiver or clarification is necessary.

(g) *Notice of exemption.* (1) To qualify for an exemption under §1180.2(d), a railroad must file a verified notice of the transaction with the Board at least one week before the transaction is consummated indicating the proposed consummation date. Before a notice is filed, the railroad shall obtain a docket number from the Board's Office of the Secretary.

(i) The notice shall contain the information required in §1180.6(a)(1)(i)–(iii), (a)(5)–(6), and (a)(7)(ii), and indicate the level of labor protection to be imposed.

(ii) The Board shall publish a notice in the FEDERAL REGISTER within 30 days of the filing of the notice of exemption. The publication will indicate the labor protection required. If the notice of exemption contains false or misleading information which is brought to the Board's attention, the Board shall summarily revoke the exemption for that carrier and require divestiture.

(iii) Other exemptions that may be relevant to a proposal under this provision are codified at 49 CFR part 1150, subpart D, which governs transactions under 49 U.S.C. 10901.

(2)(i) To qualify for an exemption under §1180.2(d)(7) (acquisition or renewal of trackage rights agreements), in addition to the notice, the railroad must file a caption summary suitable for publication in the FEDERAL REGISTER. The caption summary must be in the following form:

SURFACE TRANSPORTATION BOARD

Notice of Exemption

Finance Docket No.

(1)—Trackage Rights—(2)

(2) (3) to grant (4) trackage rights to (1) between (5). The trackage rights will be effective on (6).

This notice is filed under §1180.2(d)(7). Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not stay the transaction.

Dated:

By the Board.

James H. Bayne,

Secretary.

The following key identifies the information symbolized in the summary.

(1) Name of the tenant railroad.

(2) Name of the landlord railroad.

(3) If an agreement has been entered use ''has agreed'', but if an agreement has been reached but not entered use ''will agree.''

(4) Indicate whether ''overhead'' or ''local'' trackage rights are involved.

(5) Describe the trackage rights.

(6) State the date the trackage rights agreement is proposed to be consummated.

[1] See *Itel Corp.—Control-Green Bay and W. R. Co.*, 354 I.C.C. 232, 233 (1978).

(ii) The Board will publish the caption summary in the FEDERAL REGISTER within 20 days of the date that it is filed with the Board. The filing of a petition to revoke under 49 U.S.C. 10502(d) does not stay the effectiveness of an exemption.

(iii) To qualify for an exemption under § 1180.2(d)(8) (acquisition of temporary trackage rights), in addition to the notice, the railroad must file a caption summary suitable for publication in the FEDERAL REGISTER. The caption summary must be in the following form:

SURFACE TRANSPORTATION BOARD

Notice of Exemption

STB Finance Docket No.

(1)—Temporary Trackage Rights—(2)

(2) (3) to grant overhead temporary trackage rights to (1) between (4). The temporary trackage rights will be effective on (5). The authorization will expire on (6).

This notice is filed under § 1180.2(d)(8). Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not stay the transaction.

Dated:
By the Board.
[Insert name]
Secretary.

The following key identifies the information symbolized in the summary.

(1) Name of the tenant railroad.

(2) Name of the landlord railroad.

(3) If an agreement has been entered use ''has agreed,'' but if an agreement has been reached but not entered use ''will agree.''

(4) Describe the temporary trackage rights.

(5) State the date the temporary trackage rights agreement is proposed to be consummated.

(6) State the date the authorization will expire (not to exceed 1 year from the date the trackage rights will become effective).

(iv) The Board will publish the caption summary in the FEDERAL REGISTER within 20 days of the date that it is filed with the Board. The filing of a petition to revoke under 49 U.S.C. 10502(d) does not stay the effectiveness of an exemption.

(3) Some transactions may be subject to environmental review pursuant to the Board's environmental rules at 49 CFR part 1105.

(h) *Official notice.* In connection with any application or request for relief under these procedures, the Board may take official notice of any or all of the following information. These data will be presumed valid unless discredited by any party. A party relying on information to be noticed officially shall list the information. Upon request, the party shall make the official notice material available. Any party is free to challenge the relevance or application of any such data, or the weight that should be accorded it.

(1) Annual STB Form R–1 Reports submitted by rail carriers.

(2) Quarterly Commodity Statistics submitted by rail carriers.

(3) STB Monthly Labor Statistics.

(4) Quarterly Financial Statements of Rail Carriers.

(5) All other reports submitted to the STB under oath.

(6) Annual 1-percent Waybill Sample.

(7) Federal Reserve Board Production Statistics.

(8) AAR compilations of bad order ratios, equipment ownership and repair statistics, and freight car order figures.

[47 FR 9844, Mar. 8, 1982. Redesignated at 47 FR 49592, Nov. 1, 1982 and amended at 49 FR 15088, Apr. 17, 1984; 50 FR 15751, Apr. 22, 1985; 51 FR 4928, Feb. 10, 1986; 51 FR 25207, July 11, 1986; 52 FR 46484, Dec. 8, 1987; 56 FR 36111, July 31, 1991; 56 FR 41806, Aug. 23, 1991; 58 FR 29362, May 20, 1993; 58 FR 63104, Nov. 30, 1993; 62 FR 9717, Mar. 4, 1997; 64 FR 53269, Oct. 1, 1999; 66 FR 32586, June 15, 2001; 68 FR 28140, May 23, 2003]

§ 1180.5 [Reserved]

§ 1180.6 Supporting information.

(a) All applications filed under 49 U.S.C. 11323 shall show in the title the names of the applicants and the nature of the proposed transaction. Beneath the title indicate the name, title, business address, and telephone number of the person(s) to whom correspondence with respect to the application should be addressed. The following information shall be included in all applications:

(1) A description of the proposed transaction, including appropriate references to any supporting exhibits and statements contained in the application and discussing the following:

(i) A brief summary of the proposed transaction, the name of applicants,

their business address, telephone number, and the name of the counsel to whom questions regarding the transaction can be addressed.

(ii) The proposed time schedule for consummation of the proposed transaction.

(iii) The purpose sought to be accomplished by the proposed transaction, e.g., operating economies, eliminating excess facilities, improving service, or improving the financial viability of the applicants.

(iv) The nature and amount of any new securities or other financial arrangements.

(2) A detailed discussion of the public interest justifications in support of the application, indicating how the proposed transaction is consistent with the public interest, with particular regard to the relevant statutory criteria, including

(i) The effect of the transaction on inter- and intramodal competition, including a description of the relevant markets (see § 1180.7). Include a discussion of whether, as a result of the transaction, there is likely to be any lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States.

(ii) The financial consideration involved in the proposed transaction, and any economies, to be effected in operations, and any increase in traffic, revenues, earnings available for fixed charges, and net earnings, expected to result from the consummation of the proposed transaction.

(iii) The effect of the increase, if any, of total fixed charges resulting from the proposed transaction.

(iv) The effect of the proposed transaction upon the adequacy of transportation service to the public, as measured by the continuation of essential transportation services by applicants and other carriers.

(v) The effect of the proposed transaction upon applicant carriers' employees (by class or craft), the geographic points where the impact will occur, the time frame of the impact (for at least 3 years after consolidation), and whether any employee protection agreements have been reached.

(vi) The effect of inclusion (or lack of inclusion) in the proposed transaction of other railroads in the territory, under 49 U.S.C. 11324.

(3) Any other supporting or descriptive statements applicants deem material.

(4) An opinion of applicants' counsel that the transaction meets the requirements of the law and will be legally authorized and valid, if approved by the Board. This should include specific references to any pertinent provisions of applicants' bylaws or charter or articles of incorporation.[2]

(5) A list of the State(s) in which any part of the property of each applicant carrier is situated.

(6) Map (exhibit 1). Submit a general or key map indicating clearly, in separate colors or otherwise, the line(s) of applicant carriers in their true relations to each other, short line connections, other rail lines in the territory, and the principal geographic points in the region traversed. If a geographically limited transaction is proposed, a map detailing the transaction should also be included. In addition to the map accompanying each application, 20 unbound copies of the map shall be filed with the Board.

(7) Explanation of the transaction.

(i) Describe the nature of the transaction (e.g., merger, control, purchase, trackage rights), the significant terms and conditions, and the consideration to be paid (monetary or otherwise).

(ii) Agreement (exhibit 2). Submit a copy of any contract or other written instrument entered into, or proposed to be entered into, pertaining to the proposed transaction.[3] In addition, parties to exempt trackage rights agreements and renewal of agreements described at § 1180.2(d)(7) must submit one copy of the executed agreement or renewal agreement with the notice of exemption, or within 10 days of the date that

[2] An opinion of counsel is not required in a control transaction for the party sought to be controlled, or in a responsive application for the party against whom relief is sought.

[3] A final signed contract or agreement need not be filed with a responsive application. However, a draft contract or agreement should be submitted containing the significant terms proposed.

the agreement is executed, whichever is later.

(iii) If a consolidation or merger is proposed, indicate: (A) The name of the company resulting from the consolidation or merger; (B) the State or territory under the laws of which the consolidated company is to be formed or the merged company is to file its certificate of amendment; (C) the capitalization proposed for the resulting company; and (D) the amount and character of capital stock and other securities to be issued.

(iv) Court order (exhibit 3). If a trustee, receiver, assignee, or personal representative of the real party in interest is an applicant, submit a certified copy of the order, if any, of the court having jurisdiction, authorizing the contemplated action.

(v) State whether the property involved in the proposed transaction includes all the property of the applicant carriers and, if not, describe what property is included in the proposed transaction.

(vi) Briefly describe the principal routes and termini of the lines involved, the principal points of interchange on the routes, and the amount of main-line mileage and branch line mileage involved.

(vii) State whether any governmental financial assistance is involved in the proposed transaction and, if so, the form, amount, source, and application of such financial assistance.

(8) Environmental data (exhibit 4). Submit information and data with respect to environmental matters prepared in accordance with 49 CFR part 1105. In major and significant transaction, applicants shall, as soon as possible, and no later than the filing of a notice of intent, consult with the Board's Section of Environmental Analysis for the proper format of the environmental report.

(b) In a *major* transaction, submit the following information:

(1) *Form 10–K (exhibit 6).* Submit: The most recent filing with the Securities and Exchange Commission (SEC) under 17 CFR 249.310 made within the year prior to the filing of the application by each applicant or by any entity that is in control of an applicant. These shall not be incorporated by reference, and shall be updated with any Form 10–K subsequently filed with the SEC during the pendency of the proceeding.

(2) *Form S–4 (exhibit 7).* Submit: The most recent filing with the SEC under 17 CFR 239.25 made within the year prior to the filing of the application by each applicant or by any entity that is in control of an applicant. These shall not be incorporated by reference, and shall be updated with any Form S–4 subsequently filed with the SEC during the pendency of the proceeding.

(3) *Change in control (exhibit 8).* If an applicant carrier submits an annual report Form R–1, indicate any change in ownership or control of that applicant carrier not indicated in its most recent Form R–1, and provide a list of the principal six officers of that applicant carrier and of any related applicant, and also of their majority-owned rail carrier subsidiaries. If any applicant carrier does not submit an annual report Form R–1, list all officers of that applicant carrier, and identify the person(s) or entity/entities in control of that applicant carrier and all owners of 10% or more of the equity of that applicant carrier.

(4) *Annual reports (exhibit 9).* Submit: The two most recent annual reports to stockholders by each applicant, or by any entity that is in control of an applicant, made within 2 years of the date of filing of the application. These shall not be incorporated by reference, and shall be updated with any annual or quarterly report to stockholders issued during the pendency of the proceeding.

(5) Issues (exhibit 10). Submit a discussion of any other issues relevant to the transaction.

(6) *Corporate chart (exhibit 11).* Submit a corporate chart indicating all relationships between applicant carriers and all affiliates and subsidiaries and also companies controlling applicant carriers directly, indirectly or through another entity (with each chart indicating the percentage ownership of every company on the chart by any other company on the chart). For each company: include a statement indicating whether that company is a noncarrier or a carrier; and identify every officer and/or director of that company who is also an officer and/or director of

any other company that is part of a different corporate family that includes a rail carrier. Such information may be referenced through notes to the chart.

(7) If applicant is not a carrier, indicate (i) the type of business in which it is engaged, (ii) the length of time so engaged, and (iii) its present and prospective activities which have or may have a relation to transportation subject to 49 U.S.C. Subtitle IV.

(8) *Intercorporate or financial relationships.* Indicate whether there are any direct or indirect intercorporate or financial relationships at the time the application is filed, not disclosed elsewhere in the application, through holding companies, ownership of securities, or otherwise, in which applicants or their affiliates own or control more than 5% of the stock of a non-affiliated carrier, including those relationships in which a group affiliated with applicants owns more than 5% of the stock of such a carrier. Indicate the nature and extent of any such relationships, and, if an applicant owns securities of a carrier subject to 49 U.S.C. Subtitle IV, provide the carrier's name, a description of securities, the par value of each class of securities held, and the applicant's percentage of total ownership. For purposes of this paragraph, ''affiliates'' has the same meaning as ''affiliated companies'' in Definition 5 of the Uniform System of Accounts (49 CFR part 1201, subpart A).

(9) *Employee impact exhibit.* The effect of the proposed transaction upon applicant carriers' employees (by class or craft), the geographic points where the impacts would occur, the time frame of the impacts (for at least 3 years after consolidation), and whether any employee protection agreements have been reached. This information (except with respect to employee protection agreements) may be set forth in the following format:

EFFECTS ON APPLICANT CARRIERS' EMPLOYEES

Current Location	.....
Jobs Classification	.....
Jobs Transferred to	.....
Jobs Abolished	.....
Jobs Created	.....
Year	.....

(10) *Conditions to mitigate and offset merger-related harms.* Applicants are expected to propose measures to mitigate and offset merger-related harms. These conditions should not simply preserve, but also enhance, competition.

(i) Applicants must explain how they would preserve competitive options for shippers and for Class II and III rail carriers. At a minimum, applicants must explain how they would preserve the use of major existing gateways, the potential for build-outs or build-ins, and the opportunity to enter into contracts for one segment of a movement as a means of gaining the right separately to pursue rate relief for the remainder of the movement.

(ii) Applicants should explain how the transaction and conditions they propose would enhance competition and improve service.

(11) *Calculating public benefits.* Applicants must enumerate and, where possible, quantify the net public benefits their merger would generate (if approved). In making this estimate, applicants should identify the benefits that would arise from service improvements, enhanced competition, cost savings, and other merger-related public interest benefits, and should discuss whether the particular benefits they are relying upon could be achieved short of merger. Applicants must also identify, discuss, and, where possible, quantify the likely negative effects approval would entail, such as losses of competition, potential for service disruption, and other merger-related harms. In addition, applicants must suggest additional measures that the Board might take if it approves the application and the anticipated public benefits identified by applicants fail to materialize in a timely manner.

(12) *Downstream merger applications.* (i) Applicants should anticipate whether additional Class I mergers are likely to be proposed in response to their own proposal and explain how, taken together, these mergers, if approved, could affect the eventual structure of the industry and the public interest.

(ii) Applicants are expected to discuss whether any conditions imposed on an approval of their proposed merger would have to be altered, or any new

conditions imposed, if the Board should approve additional future rail mergers.

(13) *Purpose of the proposed transaction*. The purpose sought to be accomplished by the proposed transaction, such as improving service, enhancing competition, strengthening the nation's transportation infrastructure, creating operating economies, and ensuring financial viability.

(c) In a *significant* transaction, submit the information specified in paragraphs (b)(3), (b)(5), (b)(6), (b)(7), and (b)(8) of this section.

[47 FR 9844, Mar. 8, 1982. Redesignated at 47 FR 49592, Nov. 1, 1982, and amended at 50 FR 15751, Apr. 22, 1985; 56 FR 41806, Aug. 3, 1991; 57 FR 28641, June 26, 1992; 58 FR 63104, Nov. 30, 1993; 62 FR 9717, Mar. 4, 1997; 64 FR 53269, Oct. 1, 1999; 66 FR 32587, June 15, 2001]

§ 1180.7 Market analyses.

(a) For *major* and *significant* transactions, applicants shall submit impact analyses (exhibit 12) describing the impacts of the proposed transaction—both adverse and beneficial—on inter- and intramodal competition with respect to freight surface transportation in the regions affected and on the provision of essential services by applicants and other carriers. An impact analysis should include underlying data, a study of the implications of those data, and a description of the resulting likely effects of the proposed transaction on the transportation alternatives that would be available to the shipping public. Each aspect of the analysis should specifically address significant impacts as they relate to the applicable statutory criteria (49 U.S.C. 11324(b) or (d)), essential services, and competition. Applicants must identify and address relevant markets and issues, and provide additional information as requested by the Board on markets and issues that warrant further study. Applicants (and any other party submitting analyses) must demonstrate both the relevance of the markets and issues analyzed and the validity of their methodology. All underlying assumptions must be clearly stated. Analyses should reflect the consolidated company's marketing plan and existing and potential competitive alternatives (inter- as well as intramodal). They can address: city pairs, interregional movements, movements through a point, or other factors; a particular commodity, group of commodities, or other commodity factor that would be significantly affected by the transaction; or other effects of the transaction (such as on a particular type of service offered).

(b) For *major* transactions, applicants shall submit ''full system'' impact analyses (incorporating any operations in Canada or Mexico) from which they must demonstrate the impacts of the transaction—both adverse and beneficial—on competition within regions of the United States and this nation as a whole (including inter- and intramodal competition, product competition, and geographic competition) and the provision of essential services (including freight, passenger, and commuter) by applicants and other network links (including Class II and Class III rail carriers and ports). Applicants' impact analyses must at least provide the following types of information:

(1) The anticipated effects of the transaction on traffic patterns, market concentrations, and/or transportation alternatives available to the shipping public. Consistent with § 1180.6(b)(10), these would incorporate a detailed examination of any competition-enhancing aspects of the transaction and of the specific measures proposed by applicants to preserve existing levels of competition and essential services;

(2) Actual and projected market shares of originated and terminated traffic by railroad for each major point on the combined system. Applicants may define points as individual stations or as larger areas (such as Bureau of Economic Analysis statistical areas or U.S. Department of Agriculture Crop Reporting Districts) as relevant and indicate the extent of switching access and availability of terminal belt railroads. Applicants should list points where the number of serving railroads would drop from two to one and from three to two, respectively, as a result of the proposed transaction (both before and after applying proposed remedies for competitive harm);

(3) Actual and projected market shares of revenues and traffic volumes for major interregional or corridor

flows by major commodity group. Origin/destination areas should be defined at relevant levels of aggregation for the commodity group in question. The data should be broken down by mode and (for the railroad portion) by single-line and interline routings (showing gateways used);

(4) For each major commodity group, an analysis of traffic flows indicating patterns of geographic competition or product competition across different railroad systems, showing actual and projected revenues and traffic volumes;

(5) Maps and other graphic displays where helpful in illustrating the analyses in this section;

(6) An explicit delineation of the projected impacts of the transaction on the ability of various network links (including Class II and Class III rail carriers and ports) to participate in the competitive process and to sustain essential services; and

(7) Supporting data for the analyses in this section, such as the basis for projections of changes in traffic patterns, including shipper surveys and econometric or other statistical analyses. If not made part of the application, applicants shall make these data available in a repository for inspection by other parties or otherwise supply these data on request, for example, electronically. Access to confidential information will be subject to protective order. For information drawn from publicly available published sources, detailed citations will suffice.

(8) If necessary, an explanation as to how the lack of reliable and consistent data has limited applicants' ability to satisfy any of the requirements in this paragraph (b).

(c) For *significant* transactions, specific regulations on impact analyses are not provided so that the parties will have the greatest leeway to develop the best evidence on the impacts of each individual transaction. As a general guideline, applicants shall provide supporting data that may (but need not) include: current and projected traffic flows; data underlying sales forecasts or marketing goals; interchange data; market share analysis; and/or shipper surveys. *It is important to note that these types of studies are neither limiting nor all-inclusive.* The parties must provide supporting data, but are free to choose the type(s) and format. If not made part of the application, applicants shall make these data available in a repository for inspection by other parties or otherwise supply these data on request, for example, electronically. Access to confidential information will be subject to protective order. For information drawn from publicly available published sources, detailed citations will suffice.

[66 FR 32588, June 15, 2001]

§ 1180.8 Operational data.

(a) Applications for *major* transactions must include a full-system operating plan—incorporating any prospective operations in Canada and Mexico—from which they must demonstrate how the proposed transaction would affect operations within regions of the United States and on a nationwide basis. As part of the environmental review process, applicants shall submit:

(1) A Safety Integration Plan, prepared in consultation with the Federal Railroad Administration, to ensure that safe operations would be maintained throughout the merger implementation process.

(2) Information on what measures they plan to take to address potentially blocked crossings as a result of merger-related changes in operations or increases in rail traffic.

(b) For *major* and *significant* transactions: Operating plan (exhibit 13). Submit a summary of the proposed operating plan changes, based on the impact analyses, that will result from the transaction, and their anticipated timing, allowing for any time required to complete rehabilitation, upgrading, yard construction, or other major operational changes following consummation of the proposed transaction. The plan should make clear the gains in service, operating efficiencies, and other benefits anticipated from the merger. The plan should include:

(1) The patterns of service on the properties, including the proposed principal routes, proposed consolidations of main-line operations, and the anticipated traffic density and general categories of traffic (including numbers of trains) on all main and secondary lines

in the system. Identify all yards expected to have an increase in activity greater than 20 percent. Changes in operations may be summarized in a *pro forma* density chart.

(2) If commuter or other passenger services are operated over the lines of applicant carriers, detail any impacts anticipated on such services, including delays which may be occasioned because a line is scheduled to handle increased traffic due to route consolidations.

(3) The anticipated equipment requirements of the proposed system, including locomotives, rolling stock by type, and maintenance-of-way equipment; plans for acquisition and retirement of equipment; projected improvements in equipment utilization and their relation to operating changes; and how these will lead to the financial and service benefits described in the summary.

(4) A description of the effect of any deferred maintenance or delayed capital improvements on any road or equipment properties involved, the schedule for eliminating such deferrals, details of general system rehabilitation including rehabilitation relating to the transaction (including proposed yard and terminal modifications), and how these activities will lead to the service improvements or operating economies anticipated from the transaction.

(5) Density charts (exhibit 14). Gross ton-mile traffic density charts shall be filed for applicant carriers containing a map geographically showing those lines handling 1 million gross ton-miles per mile road or more per year and respective densities, expressed in gross ton-miles per year, in each direction, in segments of such lines between major freight yards and terminals, including major intramodal and intermodal interchange points, using the corporate or political subdivision name of the points shown as well as the railroad station name. The mileage of each segment of line shall be provided, and should be shown on the chart. Data shown in the density chart shall be for the latest available full calendar year preceding the filing of the application. At applicants' option data may be shown on the density chart or an explanatory list.

(c) For *minor* transactions: Operating plan-minor (exhibit 15). Discuss any significant changes in patterns or types of service as reflected by the operating plan expected to be used after consummation of the transaction. Where relevant, submit information related to the following:

(1) Traffic level density on lines proposed for joint operations.

(2) Impacts on commuter or other passenger service operated over a line which is to be downgraded, eliminated, or operated on a consolidated basis.

(3) Operating economies, which include, but are not limited to, estimated savings.

(4) Any anticipated discontinuances or abandonments.

[47 FR 9844, Mar. 8, 1982. Redesignated at 47 FR 49592, Nov. 1, 1982, as amended at 66 FR 32589, June 15, 2001]

§ 1180.9 Financial information.

The following information shall be provided for *major* transactions, and for carriers shall conform to the Board's Uniform System of Accounts, 49 CFR part 1201:

(a) *Pro forma* balance sheet (exhibit 16). Where the transaction involves a proceeding other than a control, a *pro forma* balance sheet statement giving effect to the proposed transaction commencing for the first year of the Impact Analysis in exhibit 12. The data shall be presented in columnar form showing:

(1) In the *first* column, the balance sheet of transferee on a corporate entity basis,

(2) In the *second* column, a balance sheet of transferor, on a corporate entity basis,

(3) In the *third* column, *pro forma* adjustments and eliminations; and

(4) In the *fourth* column, transferee's balance sheet giving effect to consumation of the proposed transaction.[4]

[4] Where the purchase of a line or line segment is involved, a procedure utilizing three columns should be followed. The *first* column should show transferee's actual balance

Each adjustment and elimination shall be properly footnoted and fully explained. A *pro forma balance sheet shall be submitted for the number of years following consummation necessary to effect the operating plan*.

(b) *Pro forma* income statement (exhibit 17). Where the transaction involves a proceeding other than a control, submit a *pro forma* income statement showing transferee's estimate of revenues, expenses, and net income for at least each of the 3 years following consummation of the transaction.[5] The *pro forma* data shall be presented in columnar form, showing

(1) in the first column, transferee's actual income statement on a corporate entity basis for the year indicated in the impact analysis in exhibit 12;

(2) in the *second* column, a similar income statement for the transferor;

(3) in the *third* column, forecasted adjustments to the combined revenues, expenses, and net income to reflect increases or decreases anticipated under the unified operations, and

(4) in the fourth column, a compilation of the first three columns into a *pro forma* income statement.[6]

The adjustments are to be supported by a statement explaining the basis used in determining the estimated changes in revenues, expenses, and net income appearing in the *third* column. Additionally, if the major financial advantages to be derived from the proposed transaction will not occur within 3 years after consummation, then applicant shall furnish additional information to reflect the number of years within which the financial advantages will be realized. The basis for all such data furnished shall be fully explained and supported.

(c) Sources and application of funds (exhibit 18). Transferor's and transferee's statement of sources and application of funds for the current year, and a forecast[7] of sources and application of funds for each carrier (if a merger or consolidation, the surviving or resulting corporation) for the year following consummation of the proposed transaction, and the years necessary to effectuate the operating plan.[8] The form and content of these statements should be constructed in accordance with the schedule: ''Statement of Changes in Financial Position'' required in the most recently filed Annual Report R–1 for Class I railroads.

(d) Property encumbrance (exhibit 19). If any of the property covered by the application is encumbered and applicant has agreed to assume obligation or liability in respect thereof, submit:

(1) A description of the property encumbered.

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sheet on a corporate entity basis for the latest available 12-month period, the *second* column should show the adjustments necessitated by the purchase, and the *third* is a compilation of the first two columns into a *pro forma* balance sheet.

The transferor shall file a balance sheet similar to the one filed by the transferee, with the *second* column reflecting the adjustments resulting from the sale.

If the parent company (if any) of the transferee or transferor is affected, a similar balance sheet shall be filed for each.

All adjustments to these balance sheets shall be supported in footnotes to the appropriate balance sheet.

[5] If the operating plan requires more than 3 years to be put into effect, the *pro forma* income statement shall be prepared for as many years as necessary to implement fully the operating plan.

[6] Where the purchase of a line or line segment is involved, a procedure utilizing three columns should be followed. The *first* column should show transferee's actual income statement on a corporate entity basis for the latest available 12-month period, the *second* column should show the adjustment necessitated by the purchase, and the *third* column is a compilation of the first two columns into a *pro forma* income statement.

The transferor shall file an income statement similar to the one filed by the transferee, with the second column reflecting the adjustments resulting from the sale.

If the parent company (if any) of the transferor or transferee is affected, a similar statement shall be filed for each.

All adjustments to these income statements shall be supported in footnotes to the appropriate income statements.

[7] The forecast should reflect only changes anticipated to result from the proposed transaction. Forecasts are not required to reflect general economic conditions unrelated to the proposed transaction.

[8] The *pro forma* balance sheets (exhibit 16), *pro forma* income statements (exhibit 17), and sources and application of funds (exhibit 18) shall cover the same years.

(2) Amount of encumbrance and full description thereof, including maturity, interest rate, and other terms and conditions.

(3) Amount of encumbrance assumed or to be assumed by applicant.

(e) The Board will incorporate by reference the current balance sheets and income statements of Class I railroads which are on file with the Board. Class II and Class III railroads, and non-carrier entities shall submit balance sheets (exhibit 20) and income statements (exhibit 21) covering a period ending within 6 months before the application is filed.

[47 FR 9844, Mar. 8, 1982. Redesignated at 47 FR 49592, Nov. 1, 1982, and amended at 58 FR 63104, Nov. 30, 1993; 62 FR 9717, Mar. 4, 1997; 64 FR 53269, Oct. 1, 1999]

§ 1180.10 Service assurance plans.

For *major* transactions: Applicants must submit a Service Assurance Plan, which, in concert with the operating plan requirements, identifies the precise steps to be taken by applicants to ensure that projected service levels would be attainable and that key elements of the operating plan would improve service. The plan shall describe with reasonable precision how operating plan efficiencies would translate into present and future benefits for the shipping public. The plan must also describe any potential area of service degradation that might result due to operational changes and how instances of degraded service might be mitigated. Like the Operating Plan on which it is based, the Service Assurance Plan must be a full-system plan encompassing:

(a) *Integration of operations.* Based on the operating plan, and using appropriate benchmarks, applicants must develop a Service Assurance Plan describing how the proposed transaction would result in improved service levels and how and where service might be degraded. This description should be a precise route level review, but not a shipper-by-shipper review. Nonetheless, the plan should be sufficient for individual shippers to evaluate the projected improvements and changes, and respond to the potential areas of service degradation for their customary traffic routings. The plan should inform Class II and III railroads and other connecting railroads of the operational changes or changes in service terms that might affect their operations, including operations involving major gateways.

(b) *Coordination of freight and passenger operations.* If Amtrak or commuter services are operated over the lines of applicant carriers, applicants must describe definitively how they would continue to facilitate these operations so as to fulfill existing performance agreements for those services. Whether or not the passenger services are operated over lines of applicants or applicants' operations are on the lines of passenger agencies, applicants must establish operating protocols ensuring effective communications with Amtrak and/or regional rail passenger operators to minimize any potential transaction-related negative impacts.

(c) *Yard and terminal operations.* The operational fluidity of yards and terminals is key to the successful implementation of a transaction and effective service to shippers. Applicants must describe how the operations of principal classification yards and major terminals would be changed or revised and how these revisions would affect service to customers. As part of this analysis, applicants must furnish dwell time benchmarks for each facility described in this paragraph, and estimate what the expected dwell time would be after the revised operations are implemented. Also required will be a discussion of on-time performance for the principal yards and terminals in the same terms as required for dwell time.

(d) *Infrastructure improvements.* Applicants must identify potential infrastructure impediments (using volume/capacity line and terminal forecasts), formulate solutions to those impediments, and develop time frames for resolution. Applicants must also develop a capital improvement plan (to support the operating plan) for timely funding and completion of the improvements critical to transition of operations. They should also describe improvements related to future growth, and indicate the relationship of the improvements to service delivery.

(e) *Information technology systems.* Because the accurate and timely integration of applicants' information systems is vitally important to service, applicants must identify the process to be used for systems integration and training of involved personnel. This must include identification of the principal operations-related systems, operating areas affected, implementation schedules, the realtime operations data used to test the systems, and pre-implementation training requirements needed to achieve completion dates. If such systems will not be integrated and on line prior to implementation of the transaction, applicants must describe the interim systems to be used and the adequacy of those systems to ensure service delivery.

(f) *Customer service.* To achieve and maintain customer confidence in the transaction and to ensure the successful integration and consolidation of existing customer service functions, applicants must identify their plans for the staffing and training of personnel within or supporting the customer service centers. This discussion must include specific information on the planned steps to familiarize customers with any new processes and procedures that they may encounter in using the consolidated systems and/or changes in contact locations, telephone numbers, or communication mode.

(g) *Labor.* Applicants must furnish a plan for reaching necessary labor implementing agreements. Applicants must also provide evidence that sufficient qualified employees would be available at the proper locations to effect implementation.

(h) *Training.* Applicants must establish a plan for providing necessary training to employees involved with operations, train and engine service, operating rules, dispatching, payroll and timekeeping, field data entry, safety and hazardous material compliance, and contractor support functions (e.g., crew van service), as well as training for other employees in functions that would be affected by the acquisition.

(i) *Contingency plans for merger-related service disruptions.* To address potential disruptions of service that could occur, applicants must establish contingency plans. Those plans, based upon available resources and traffic flows and density, must identify potential areas of disruption and the risk of occurrence. Applicants must provide evidence that contingency plans would be in place to promptly restore adequate service levels. Applicants must also provide for the establishment of problem resolution teams and describe the specific procedures to be utilized for problem resolution.

(j) *Timetable.* Applicants must identify all major functional or system changes/consolidations that would occur and the time line for successful completion.

(k) *Benchmarking.* Specific benchmarking requirements may vary with the transaction. The minimum for benchmarking will be the 12 monthly periods immediately preceding the filing date of the notice of intent to file the application. Benchmarking is intended to provide an historic monthly baseline against which actual post-transaction levels of performance can be measured. Benchmarking data should be sufficiently detailed and encompassing to give a meaningful picture of operational performance for the newly merged system. Applicants will report in a matrix structure giving the historic monthly (benchmark) data and provide for the reporting of actual monthly data during the monitoring period. It is important that data reflect uniformly constructed measures of historic and post-transaction operations. Minimum benchmark data include:

(1) *Corridor performance benchmarking.* Benchmarks will consist of route level performance information including flow data for traffic moving on the applicants' systems. These data will encompass flows to and from major points. A major point could be a Bureau of Economic Analysis (BEA) statistical area, or it can be a railroad-created point based on an operational grouping of stations or interchanges, or it could be another similar construction. It will be necessary for applicants to define traffic points used to establish benchmarks for purposes of monitoring. A sufficient number of corridor flows must be reported so as to fully represent system flows, including interchanges with short lines and other

Class I's, and internal traffic of the respective applicants before the transaction. In addition to identifying traffic flows by areas, they also must be identified by commodity sector (for example, merchandise, intermodal, automotive, unit coal, unit grain etc.). Data for each flow must include: traffic volume in carloads (units), miles (area to area), and elapsed time in hours. Only loaded traffic need be included.

(2) *Yard and terminal benchmarking.*—(i) *Terminal dwell.* Terminal dwell for major yards will be calculated in hours for cars handled, not including run-through and bypass trains or maintenance of way and bad order cars.

(ii) *On time originations by major yard.* On time originations are based on the departure of scheduled trains originating at a particular yard.

(3) *System benchmarking.* (i) Cars on line.

(ii) Average train velocity, by train type.

(iii) Locomotive fleet size and applicable bad order ratios.

(iv) Passenger train performance for commuter and intercity passenger services.

[66 FR 32589, June 15, 2001]

§ 1180.11 Transnational and other informational requirements.

(a) For applicants whose systems include operations in Canada or Mexico, applicants must explain how cooperation with the Federal Railroad Administration would be maintained to address potential impacts on operations within the United States of operations or events elsewhere on their systems.

(b) All applicants must assess whether any restrictions or preferences under foreign or domestic law or policies could affect their commercial decisions, and discuss any ownership restrictions applicable to them.

[66 FR 32590, June 15, 2001]

Subpart B—Transfer or Operation of Lines of Railroads in Reorganization

§ 1180.20 Procedures.

(a) Transactions under 11 U.S.C. 1172, for the transfer or operation of lines of bankrupt railroads under a plan of reorganization are governed by the following procedures:

(1) If the buyer or operator is not a carrier, the Notice of Exemption procedures in subpart D of part 1150 of this title.

(2) If the buyer or operator is a carrier, either:

(i) The application procedures in subpart A of this part; or,

(ii) The procedures in part 1121 of this title for a petition to exempt the transaction from prior approval requirements of 49 U.S.C. 11323 *et seq.*

(b) The Board will establish or modify its existing procedures and deadlines as necessary in each proceeding to comply with appropriate orders of the Bankruptcy Court.

(c) Under 11 U.S.C. 1172(c)(1), the Board is required to provide affected employees with adequate protection. The Board will impose the minimum levels required by 49 U.S.C. 11326, unless a need is shown for greater levels of protection.

(d) All applications, notices, and petitions for exemption within the scope of § 1180.20(a) shall advise the Board that the proposed transaction involves the transfer or operation of lines in reorganization.

[57 FR 57112, Dec. 3, 1992; 57 FR 61585, Dec. 28, 1992, as amended at 62 FR 9717, Mar. 4, 1997]

PART 1182—PURCHASE, MERGER, AND CONTROL OF MOTOR PASSENGER CARRIERS

Sec.

1182.1 Applications covered by this part.
1182.2 Content of applications.
1182.3 Filing the application.
1182.4 Board review of the application.
1182.5 Comments.
1182.6 Processing an opposed application.
1182.7 Interim approval.
1182.8 Miscellaneous requirements.
1182.9 Notices of exemption.

AUTHORITY: 5 U.S.C. 559; 21 U.S.C. 853a; and 49 U.S.C. 13501, 13541(a), 13902(c), and 14303.

SOURCE: 63 FR 46397, Sept. 1, 1998, unless otherwise noted.

§ 1182.1 Applications covered by this part.

The rules in this part govern applications for authority under 49 U.S.C. 14303 to consolidate, merge, purchase,

lease, or contract to operate the properties or franchises of motor carriers of passengers or to acquire control of motor carriers of passengers. There is no application form for these proceedings. Applicants shall file a pleading containing the information described in 49 CFR 1182.2. *See* 49 CFR 1002.2(f) (2) and (5) for filing fees.

§ 1182.2 Content of applications.

(a) The application must contain the following information:

(1) Full name, address, and authorized signature of each of the parties to the transaction;

(2) Copies or descriptions of the pertinent operating authorities of all of the parties (NOTE: If an applicant is domiciled in Mexico or owned or controlled by persons of that country, copies of the actual operating authorities must be submitted.);

(3) A description of the proposed transaction;

(4) Identification of any motor passenger carriers affiliated with the parties, a brief description of their operations, and a summary of the intercorporate structure of the corporate family from top to bottom;

(5) A jurisdictional statement, under 49 U.S.C. 14303(g), that the 12-month aggregate gross operating revenues, including revenues of all motor carrier parties and all motor carriers controlling, controlled by, or under common control with any party from all transportation sources (whether interstate, intrastate, foreign, regulated, or unregulated) exceeded $2 million. (NOTE: The motor passenger carrier parties and their motor passenger carrier affiliates may select a consecutive 12-month period ending not more than 6 months before the date of the parties' agreement covering the transaction. They must, however, select the same 12-month period.)

(6) A statement indicating whether the transaction will or will not significantly affect the quality of the human environment and the conservation of energy resources;

(7) Information to demonstrate that the proposed transaction is consistent with the public interest, including particularly: the effect of the proposed transaction on the adequacy of transportation to the public; the total fixed charges (e.g., interest) that result from the proposed transaction; and the interest of carrier employees affected by the proposed transaction. *See* 49 U.S.C. 14303(b);

(8) Certification by applicant of the current U.S. Department of Transportation safety fitness rating of each motor passenger carrier involved in the transaction, whether that carrier is a party to the transaction or is affiliated with a party to the transaction;

(9) Certification by the party acquiring any operating rights through the transaction that it has sufficient insurance coverage under 49 U.S.C. 13906 (a) and (d) for the service it intends to provide;

(10) A statement indicating whether any party acquiring any operating rights through the transaction is either domiciled in Mexico or owned or controlled by persons of that country; and

(11) If the transaction involves the transfer of operating authority to an individual who will hold the authority in his or her name, that individual must complete the following certification:

> I, _____, certify under penalty of perjury under the laws of the United States, that I have not been convicted, after September 1, 1989, of any Federal or State offense involving the distribution or possession of a controlled substance, or that I have been so convicted, but I am not ineligible to receive Federal benefits, either by court order or operation of law, pursuant to 21 U.S.C. 853a.

(b) The application shall contain applicants' entire case in support of the proposed transaction, unless the Board finds, on its own motion or that of a party to the proceeding, that additional evidentiary submissions are required to resolve the issues in a particular case.

(c) Any statements submitted on behalf of an applicant supporting the application shall be verified, as provided in 49 CFR 1182.8(e). Pleadings consisting strictly of legal argument, however, need not be verified.

(d) If an application or supplemental pleading contains false or misleading information, the granted application is void ab initio.

§ 1182.3 Filing the application.

(a) Each application shall be filed with the Board, complying with the requirements set forth at 49 CFR 1182.8.

(1) One copy of the application shall be delivered, by first-class mail, to the appropriate regulatory body in each State in which intrastate operations are affected by the transaction.

(2) If the application involves the merger or purchase of motor passenger carriers (contemplating transfer of operating authorities or registrations from one or more parties to others), one copy of the application shall be delivered, by first-class mail, to:

Chief, Lic. & Ins. Div., U.S.D.O.T. Office of Motor Carriers-HIA 30, 400 Virginia Ave., SW., Ste. 600, Washington, DC 20004

(b) In their application, the parties shall certify that they have delivered copies of the application as provided in paragraph (a) of this section.

§ 1182.4 Board review of the application.

(a) All applications will be reviewed for completeness. Applicants will be given an opportunity to correct minor errors or omissions. Incomplete applications may be rejected, or, if omissions are corrected, the filing date of the application, for purposes of calculating the procedural schedule and statutory deadlines, will be deemed to be the date on which the complete information is filed with the Board.

(b) If the application is accepted, a summary of the application will be published in the FEDERAL REGISTER (within 30 days, as provided by 49 U.S.C. 14303(c)), to give notice to the public, in the form of a tentative grant of authority.

(c) If the published notice does not properly describe the transaction for which approval is sought, applicants shall inform the Board within 10 days after the publication date.

(d) A copy of the application will be available for inspection at the Board's offices in Washington, DC. Interested persons may obtain a copy of the application from the applicants' representative, as specified in the published notice.

§ 1182.5 Comments.

(a) Comments concerning an application must be received by the Board within 45 days after notice of the application is published, as provided by 49 U.S.C. 14303(d). Failure to file a timely comment waives further participation in the proceeding. If no comments are filed opposing the application, the published tentative grant of authority will automatically become effective at the close of the comment period. A tentative grant of authority does not entitle the applicant to consummate the transaction before the end of the comment period.

(b) A comment shall be verified, as provided in 49 CFR 1182.8(e), and shall contain all information upon which the commenter intends to rely, including the grounds for any opposition to the transaction and the commenter's interest in the proceeding.

(c) The docket number of the application must be conspicuously placed at the top of the first page of the comment.

(d) A copy of the comment shall be delivered concurrently to applicants' representative(s).

§ 1182.6 Processing an opposed application.

(a) If timely comments are submitted in opposition to an application, the tentative grant of authority is void.

(b) Applicants may file a reply to opposing comments, within 60 days after the date the application was published.

(1) The reply may include a request for an expedited decision on the issues raised by the comments. Otherwise, the reply may not contain any new evidence, but shall only rebut or further explain matters previously raised.

(2) The reply shall be verified, as provided in 49 CFR 1182.8(e), unless it consists strictly of legal argument.

(3) Applicants' reply must be served on each commenter in such manner that it is received no later than the date it is due to be filed with the Board.

(4) Opposing commenters may reply to a request for an expedited decision, within 70 days after notice of the application was published.

(c) The Board may:

(1) Dispense with further proceedings and make a final determination based on the record as developed; or

(2) Issue a procedural schedule specifying the dates by which: applicants may submit additional evidence in support of the application, in response to the comment(s) in opposition; and the opposing commenter(s) may reply.

(d) Further processing of an opposed application will be handled on a case-by-case basis, as appropriate to the particular issues raised in the comments filed in opposition to the application. Evidentiary proceedings must be concluded within 240 days after publication of the notice of the application.

§ 1182.7 Interim approval.

(a) A party may request interim approval of the operation of the properties sought to be acquired through the proposed transaction, for a period of not more than 180 days pending determination of the application. This request may be included in the application or may be submitted separately after the application is filed (e.g., once a comment opposing the application has been filed). An additional filing fee is required, whether the request for interim approval is included in the application or is submitted separately at a later time. *See* 49 CFR 1002.2(f)(5) for the additional filing fee.

(b) A request for interim approval of the operation of the properties sought to be acquired in the application must show that failure to grant interim approval may result in destruction of or injury to those properties or substantially interfere with their future usefulness in providing adequate and continuous service to the public.

(c) If a request for interim approval is submitted after the application is filed, it must be served on each person who files or has filed a comment in response to the published notice of the application. Service must be simultaneous upon those commenters who are known when the request for interim approval is submitted; otherwise, service must be within 5 days after the comment is received by applicants or their representative.

(d) Because the basis for requesting interim approval is to prevent destruction of or injury to motor passenger carrier properties sought to be acquired under 49 U.S.C. 14303, the processing of such requests is intended to promote expeditious decisions regarding interim approval. The Board has no obligation to give public notice of requests for interim approval, and such requests are decided without hearing or other formal proceeding.

(1) If a request for interim approval is included in the application, the Board's decision with regard to interim approval will be served in conjunction with the notice accepting the application.

(2) If an application is rejected, the request for interim approval will be denied.

(3) If an application is denied, after comments in opposition are submitted, any interim approval will terminate 30 days after service of the decision denying the application.

(e) A petition to reconsider a grant of interim approval may be filed only by a person who has filed a comment in opposition to the application.

(1) A petition to reconsider a grant of interim approval must be in writing and shall state the specific grounds upon which the commenter relies in opposing interim approval. The petition shall certify that a copy has been served on applicants' representative.

(2) The original and 10 copies of the petition to reconsider a grant of interim approval shall be filed with the Board, and one copy of the petition shall be served on applicants' representative(s).

(f) The Board may act on a petition to reconsider a grant of interim approval either separately or in connection with the final decision on the application.

§ 1182.8 Miscellaneous requirements.

(a) If applicants wish to withdraw an application, they shall jointly request dismissal in writing.

(b) An original and 10 copies of all applications, pleadings, and other material filed under this part must be filed with the Board.

(c) All pleadings (including motions and replies) submitted under this part shall be served on all other parties, concurrently and by the same (or more

expeditious) means with which they are filed with the Board.

(d) Each pleading shall contain a certificate of service stating that the pleading has been served in accordance with paragraph (c) of this section.

(e) All applications and pleadings containing statements of fact (i.e., except motions to strike, replies thereto, and other pleadings that consist only of legal argument) must be verified by the person offering the statement, in the following manner:

I, [*Name and Title of Witness*], verify under penalty of perjury, under the laws of the United States of America, that all information supplied in connection with this application is true and correct. Further, I certify that I am qualified and authorized to file this application or pleading. I know that willful misstatements or omissions of material facts constitute Federal criminal violations punishable under 18 U.S.C. 1001 by imprisonment up to five years and fines up to $10,000 for each offense. Additionally, these misstatements are punishable as perjury under 18 U.S.C. 1621, which provides for fines up to $2,000 or imprisonment up to five years for each offense.

[*Signature and Date*]

(f) If completion of a transaction requires the transfer of operating authorities or registrations from one or more parties to others, the parties shall comply with relevant procedures of the Office of Motor Carriers of the U.S. Department of Transportation, and comply with ministerial requirements of relevant State procedures.

§ 1182.9 Notices of exemption.

(a) A transaction within a motor passenger corporate family is exempt from 49 U.S.C. 14303 if it does not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with motor passenger carriers outside the corporate family. The Board has found that its prior review and approval of these transactions is not necessary to carry out the transportation policy of 49 U.S.C. 13101; regulation is not necessary to protect shippers from abuse of market power; and an exemption is in the public interest. See 49 U.S.C. 13541(a).

(b) To qualify for a class exemption, a party must file a verified notice of the exempt transaction with the Board. The notice shall contain a brief summary of the proposed transaction, the name of the applicants, their business address and telephone number, and the name of counsel to whom questions would be addressed. The notice shall describe the purpose of the transaction and give the proposed consummation date for the transaction, which must be at least 7 days after the filing of the notice. The notice shall describe any contracts or agreements that have been entered into, or will be entered into, concerning the transaction, and shall indicate the impact, if any, that the transaction would have on employees.

(c) The Board shall publish notice of the exemption in the FEDERAL REGISTER within 30 days from the filing of the verified notice of exemption. If the notice contains false or misleading information, the Board shall summarily revoke the exemption and require divestiture. Petitions to revoke the exemption under 49 U.S.C. 13541(d) may be filed at any time and will be granted upon a finding that the application of 49 U.S.C. 14303 to the person, class, or transportation is necessary to carry out the transportation policy of 49 U.S.C. 13101.

[65 FR 8281, Feb. 17, 2000]

PART 1184—MOTOR CARRIER POOLING OPERATIONS

Sec.
1184.1 Scope and purpose.
1184.2 Contents of a pooling application.
1184.3 Processing pooling applications.

AUTHORITY: 49 U.S.C. 721, 14302.

SOURCE: 46 FR 21181, Apr. 9, 1981, unless otherwise noted. Redesignated at 47 FR 49595, Nov. 1, 1982.

§ 1184.1 Scope and purpose.

This statement of policy on motor carrier pooling applications implements section 20 of the Motor Carrier Act of 1980 [Pub. L. No. 96–296, 94 Stat. 793]. The Act's provisions are now contained at 49 U.S.C. 14302.

[46 FR 21181, Apr. 9, 1981, as amended at 64 FR 53269, Oct. 1, 1999

§ 1184.2 Contents of a pooling application.

A pooling application filed under 49 U.S.C. 14302 should include the following information:

(a) An identification of all the carriers who are parties to the pooling agreement;

(b) A general description of the transaction;

(c) A specific description of the operating authorities sought to be pooled;

(d) The basis to establish that the agreement is a genuine pooling arrangement (as opposed to a lease or interline arrangement);

(e) A description of what applicants consider to be the relevant transportation markets affected by the proposed agreement;

(f) The competitive routing and service alternatives that would remain if the agreement is approved, to the best of applicant's knowledge;

(g) If there is a lessening of such alternatives, an estimate of the public benefits that will accrue from approval, or new competition that will arise, which would offset such lessening;

(h) A narrative assessment of how the pooling arrangement will affect present and future competition in the area, including a description of the projected volume of traffic, the revenues, and the commodities which will be subject to the pooling agreement;

(i) Certification that rates set for traffic moving under the agreement do not violate the restrictions on collective ratemaking contained in 49 U.S.C. Subtitle IV and Board regulations;

(j) A narrative statement as to the relative transportation importance of the pooling agreement as it would affect the public and the national transportation system;

(k) If any known non-pooling carriers authorized to transport the subject traffic are not included in the pooling arrangement explain why, and explain whether inclusion would enhance or restrain competition;

(l) A statement of the energy and environmental effects of the agreement, if any; and

(m) Certification by applicant, or its representatives, that the representations made in the application are, to the best of applicant's knowledge and belief, true and complete.

As appendices, applicants must submit: (1) A copy of the pooling agreement; (2) a copy of the specific operating authority of each carrier which is the subject of the pooling agreement; and (3) a caption summary (for FEDERAL REGISTER publication) of the pooling transaction sought to be approved.

[46 FR 21181, Apr. 9, 1981. Redesignated and amended at 47 FR 49595, Nov. 1, 1982; 64 FR 53269, Oct. 1, 1999]

§ 1184.3 Processing pooling applications.

After the pooling application is received (not less than 50 days before the effective date specified in the pooling agreement), the Board will either reject it or determine initially whether the pooling agreement is of major transportation importance and whether there is a substantial likelihood that the pooling agreement will unduly restrain competition. If neither of these two factors is present, the application will be granted without further hearing. Where either factor is found to exist, the application will be published in the FEDERAL REGISTER using the caption summary filed with the application, and a hearing will be scheduled (normally to receive written verified statements) to consider the issues further. In this second phase of the proceeding, the Board will consider whether the pooling agreement would be in the interest of better service to the public or of economy of operation and whether it will unduly restrain competition.

PART 1185—INTERLOCKING OFFICERS

Sec.
1185.1 Definitions and scope of regulations.
1185.2 Contents of application.
1185.3 Procedures.
1185.4 General authority.
1185.5 Common control.
1185.6 Jointly used terminal properties.

AUTHORITY: 49 U.S.C. 721, 10502, and 11328.

SOURCE: 62 FR 2042, Jan. 15, 1997, unless otherwise noted.

§ 1185.1 Definitions and scope of regulations.

(a) This part addresses the requirement of 49 U.S.C. 11328 authorization of the Surface Transportation Board (STB) needed for a person to hold the position of officer or director of more than one rail carrier, except where only Class III carriers are involved. STB authorization is not needed for individuals seeking to hold the positions of officers or directors only of Class III railroads. 49 U.S.C. 11328(b).

(b) When a person is an officer of a Class I railroad and seeks to become an officer of another Class I railroad, an application under 49 U.S.C. 11328(a) (or petition for individual exemption under 49 U.S.C. 10502) must be filed. All other ''interlocking directorates'' have been exempted as a class from the prior approval requirements of 49 U.S.C. 11328(a), pursuant to 49 U.S.C. 10502 and former 49 U.S.C. 10505. For such interlocking directorates exempted as a class, no filing with the STB is necessary to invoke the exemption.

(c) An *interlocking directorate* exists whenever an individual holds the position of officer or director of one rail carrier and assumes the position of officer or director of another rail carrier. This provision applies to any person who performs duties, or any of the duties, ordinarily performed by a director, president, vice president, secretary, treasurer, general counsel, general solicitor, general attorney, comptroller, general auditor, general manager, freight traffic manager, passenger traffic manager, chief engineer, general superintendent, general land and tax agent or chief purchasing agent.

(d) For purposes of this part, a *rail carrier* means a person providing common carrier railroad transportation for compensation (except a street, suburban, or interurban electric railway not operating as part of the general system of rail transportation), and a corporation organized to provide such transportation.

§ 1185.2 Contents of application.

(a) Each application shall state the following:

(1) The full name, occupation, business address, place of residence, and post office address of the applicant.

(2) A specification of every carrier of which the applicant holds stock, bonds, or notes, individually, as trustee, or otherwise; and the amount of, and accurate description of, such securities of each carrier for which the applicant seeks authority to act. (Whenever it is contemplated that the applicant will represent on the board of directors of any carrier securities other than those owned by the applicant, the application shall describe such securities, state the character of representation, the name of the beneficial owner or owners, and the general nature of the business conducted by such owner or owners.)

(3) Each and every position with any carrier:

(i) Which is held by the applicant at the time of the application; and

(ii) Which the applicant seeks authority to hold, together with the date and manner of his or her election or appointment thereto and, if the applicant has entered upon the performance of his duties in any such position, the nature of the duties so performed and the date when he first entered upon their performance. (A decision authorizing a person to hold the position of director of a carrier will be construed as sufficient to authorize that person to serve also as chairman of its board of directors or as a member or chairman of any committee or committees of such board; and, therefore, when authority is sought to hold the position of director, the applicant need not request authority to serve in any of such other capacities.)

(4) As to each carrier covered by the requested authorization, whether it is an operating carrier, a lessor company, or any other corporation organized for the purpose of engaging in rail transportation. (If any such carrier neither operates nor owns any railroad providing transportation that is subject to 49 U.S.C. 10501, the application shall include a copy of such carrier's charter or certificate or articles of incorporation, with amendments to date or, if already filed with the former Interstate Commerce Commission (ICC) or with the STB, a reference thereto, with any intervening amendments.)

(5) A full statement of pertinent facts relative to any carrier involved which

does not make annual reports to the STB.

(6) Full information as to the relationship—operating, financial, competitive, or otherwise—existing between the carriers covered by the requested authorization.

(7) Every corporation—industrial, financial, or miscellaneous—of which the applicant is an officer or director, and the general character of the business conducted by such corporation.

(8) The reasons, fully, why the granting of the authority sought will not affect adversely either public or private interests.

(9) Whether or not any other application for authority has been made in behalf of the applicant and, if so, the date and docket number thereof, by whom made, and the action thereon, if any.

(b) When application has been made on behalf of any person, a subsequent application by that person need not repeat any statement contained in the previous application but may incorporate the same by appropriate reference.

§ 1185.3 Procedures.

The original application or petition shall be signed by the individual applicant or petitioner and shall be verified under oath. Petitions and applications should comply with the STB's general rules of practice set forth at 49 CFR part 1104. Applications or petitions may be made by persons on their own behalf.

§ 1185.4 General authority.

Any person who holds or seeks specific authority to hold positions with a carrier may also request general authority to act as an interlocking officer for all affiliated or subsidiary companies or properties used or operated by that carrier, either separately or jointly, with other carriers. A carrier may apply for general authority on behalf of an individual who has already received authority to act as an interlocking officer. However, a carrier may not apply for general authority for an individual who holds a position with another railroad which is not an affiliate or subsidiary of the carrier or whose properties are not used or operated by the carrier, either separately or jointly with other carriers.

§ 1185.5 Common control.

It shall not be necessary for any person to secure authorization to hold the position of officer or director of two or more carriers if such carriers are operated under common control or management either:

(a) Pursuant to approval and authority of the ICC granted under former 49 U.S.C. 11343–44 or by the STB granted under 49 U.S.C. 11323–24; or

(b) Pursuant to an exemption authorized by the ICC under former 49 U.S.C. 10505 or by the STB under 49 U.S.C. 10502; or

(c) Pursuant to a controlling, controlled, or common control relationship which has existed between such carriers since before June 16, 1933.

[62 FR 2042, Jan. 15, 1997, as amended at 69 FR 58366, Sept. 30, 2004]

§ 1185.6 Jointly used terminal properties.

Any person holding the position of officer or director of a carrier is relieved from the provisions of this part to the extent that he or she may also hold a directorship and any other position to which that person may be elected or appointed with a terminal railroad the properties of which are operated or used by the carrier jointly with other carriers.

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