

(f) *Amendments to conform to the evidence.* When issues within the proper scope of a case, but not raised in the pleadings, have been raised without objection or with permission of the Board at a hearing or in record submissions, they shall be treated in all respects as if they had been raised in the pleadings. The Board may order the parties to amend the pleadings to conform to the proof or may order that the record be deemed to contain amended pleadings.

[72 FR 36795, July 5, 2007, as amended at 73 FR 26950, May 12, 2008]

**6101.7 Service of papers other than subpoenas [Rule 7].**

(a) *On whom and when service must be made.* Except for subpoenas (6101.16 [Rule 16]) and documents filed *in camera* (6101.9(c) [Rule 9(c)]), when a party sends a document to the Board it must at the same time send a copy to the other party by an equally or more expeditious means of transmittal. The parties will confer and agree upon the method they will use to serve one another. They may agree to use electronic mail, facsimile, overnight courier, hand delivery, or any other mutually acceptable method for accomplishing service promptly and efficiently.

(b) *Proof of service.* A party sending a document to the Board must represent to the Board that a copy has also been sent to the other party. This may be done by certificate of service, by the notation of a photostatic copy (cc:), or by any other means that can reasonably be expected to show the Board that the other party has been provided a copy.

(c) *Failure to make service.* If a document sent to the Board by a party does not show that a copy has been served on the other party, the Board may return the document to the party that submitted it with such directions as it considers appropriate, or the Board may inquire whether a party has received a copy and note on the record the fact of inquiry and the response, and may also direct the party that submitted the document to serve a copy on the other party. In the absence of proof of service a document may be

treated by the Board as not properly filed.

[72 FR 36795, July 5, 2007, as amended at 73 FR 26950, May 12, 2008]

**6101.8 Motions [Rule 8].**

(a) *How motions are made.* Motions may be oral or written. A written motion shall state the relief sought and, either in the text of the motion or in an accompanying legal memorandum, the grounds therefor. In addition, a motion for summary relief shall comply with the requirements of paragraph (g) of this section. Section 6101.23 (Rule 23) prescribes the form and content of legal memoranda. Oral motions shall be made on the record and in the presence of the other party. Except for joint motions by the parties, all motions must represent that the moving party has attempted to discuss the grounds for the motion with the non-moving party and tried to resolve the matter informally.

(b) *When motions may be made.* A motion filed in lieu of an answer pursuant to 6101.6(c) (Rule 6(c)) shall be filed no later than the date on which the answer is required to be filed or such later date as may be established by the Board. Any other dispositive motion shall be made as soon as practicable after the grounds therefor are known. Any other motion shall be made promptly or as required by the rules of this chapter.

(c) *Dispositive motions.* The following dispositive motions may properly be made before the Board:

(1) Motions to dismiss for lack of jurisdiction or for failure to state a claim upon which relief can be granted;

(2) Motions to dismiss for failure to prosecute;

(3) Motions for summary relief (analogous to summary judgment); and

(4) Any other motion to dismiss.

(d) *Other motions.* Other motions may be made in good faith and in proper form. When filing a motion for an enlargement of time, the moving party shall state that it has contacted the opposing party about the request and shall inform the Board whether the opposing party consents to the request or will file an opposition.

(e) *Jurisdictional questions.* The Board may at any time consider the issue of its jurisdiction to decide a case.

(f) *Procedure.* Unless otherwise directed by the Board, a party may respond to a written motion other than a motion pursuant to 6101.26, 6101.27, 6101.28, or 6101.29 (Rules 26, 27, 28, or 29) at any time within 20 calendar days after the filing of the motion. Responses to motions pursuant to 6101.26, 6101.27, 6101.28, or 6101.29 (Rules 26, 27, 28, or 29) may be made only as permitted or directed by the Board. The Board may permit hearing or oral argument on written motions and may require additional submissions from any of the parties.

(g) *Motions for summary relief.* (1) A motion for summary relief should be filed only when a party believes that, based upon uncontested material facts, it is entitled to relief in whole or in part as a matter of law. A motion for summary relief should be filed as soon as feasible, to allow the Board to rule on the motion in advance of a scheduled hearing date.

(2) With each motion for summary relief, there shall be served and filed a separate document titled Statement of Uncontested Facts, which shall contain in separately numbered paragraphs all of the material facts upon which the moving party bases its motion and as to which it contends there is no genuine issue. This statement shall include references to the supporting affidavits or declarations and documents, if any, and to the 6101.4 (Rule 4) appeal file exhibits relied upon to support such statement.

(3) An opposing party shall file with its opposition (or cross-motion) a separate document titled Statement of Genuine Issues. This document shall identify, by reference to specific paragraph numbers in the moving party's Statement of Uncontested Facts, those facts as to which the opposing party claims there is a genuine issue necessary to be litigated. An opposing party shall state the precise nature of its disagreement and give its version of the facts. This statement shall include references to the supporting affidavits or declarations and documents, if any, and to the 6101.4 (Rule 4) appeal file exhibits that demonstrate the existence

of a genuine dispute. An opposing party may also file a Statement of Uncontested Facts as to any relevant matters not covered by the moving party's statement.

(4) When a motion for summary relief is made and supported as provided in 6101.8 (Rule 8), an opposing party may not rest upon the mere allegations or denials of its pleadings. The opposing party's response, by affidavits or as otherwise provided by 6101.8 (Rule 8), must set forth specific facts showing that there is a genuine issue of material fact. If the opposing party does not so respond, summary relief, if appropriate, shall be entered against that party. For good cause shown, if an opposing party cannot present facts essential to justify its opposition, the Board may defer ruling on the motion to permit affidavits to be obtained or depositions to be taken or other discovery to be conducted, or may make such other order as is just.

(h) *Effect of pending motion.* Except as the rules of this chapter provide or the Board may order, a pending motion shall not excuse the parties from proceeding with the case in accordance with the rules of this chapter and the orders and directions of the Board.

[72 FR 36795, July 5, 2007, as amended at 73 FR 26950, May 12, 2008]

#### **6101.9 Record of Board proceedings; review and copying [Rule 9].**

(a) *Composition of the record for decision.* The record upon which any decision of the Board will be rendered consists of:

(1) The notice of appeal, petition, or application;

(2) Appeal file exhibits other than those as to which an objection has been sustained;

(3) Hearing exhibits other than those as to which an objection has been sustained;

(4) Pleadings;

(5) Motions and responses thereto;

(6) Memoranda, orders, rulings, and directions to the parties issued by the Board;

(7) Documents and other tangible things admitted in evidence by the Board;

(8) Written transcripts or electronic recordings of proceedings;