

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

49 CFR Parts 1002, 1111, 1114, and 1115

[STB Ex Parte No. 646 (Sub-No. 1)]

Simplified Standards for Rail Rate Cases

AGENCY: Surface Transportation Board, DOT.

ACTION: Final rulemaking.

SUMMARY: On September 5, 2007, the Board served a decision that modifies its simplified rail rate guidelines, creating a simplified stand-alone cost approach for medium-size rail rate disputes and revising its three-benchmark approach for smaller rail rate disputes. The Board also places limits on the total relief available over a 5-year period under these two simplified approaches. Several rules in the Code of Federal Regulations (CFR) have been updated to reflect the changes in the simplified rail rate dispute approaches.

DATES: This action is effective October 7, 2007.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION: On September 5, 2007, the Board served a decision that modifies its simplified rail rate guidelines, creating a simplified stand-alone approach for medium-size rail rate disputes and revising its three-benchmark approach for smaller rail rate disputes. The Board also places limits on the total relief available over a 5-year period under these two simplified approaches. Under the new rail rate guidelines, rather than the Board declaring eligibility thresholds, the shipper will be required to determine which rate relief method will be applied to its case, with the understanding that there will be limits on the amount of relief available over a 5-year period based on the approach selected. The following limits will apply: Three-benchmark, \$1 million over 5 years; and Simplified stand-alone cost, \$5 million over 5 years. To reflect the changes in this decision, the following sections of the CFR have been amended: 1111.1, 1111.2, 1111.4, 1111.9, 1111.10, 1114.21, 1114.22, 1114.26, 1114.30, 1114.31, and 1115.9.

The Board's full decision is posted on the Board's Web site, <http://www.stb.dot.gov>. To purchase a copy of

the full decision, write to, e-mail, or call: ASAP Document Solutions, 9332 Annapolis Rd., Suite 103, Lanham, MD 20706; e-mail: asapdc@verizon.net; telephone: (202) 306-4004. [Assistance for the hearing impaired is available through FIRS at 1-800-877-8339.]

Pursuant to 5 U.S.C. 605(b), we conclude that our action in this proceeding will not have a significant economic impact on a substantial number of small entities.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

Authority: 49 U.S.C. 721, 49 U.S.C. 10701(d)(1) and (3).

Decided: September 4, 2007.

By the Board, Chairman Nottingham, Vice-Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams,
Secretary.

List of Subjects**49 CFR Part 1002**

Administrative practice and procedure, Common carriers, Freedom of Information.

49 CFR Part 1111

Administrative practice and procedure, Investigations,

49 CFR Parts 1114 and 1115

Administrative practice and procedure.

■ For the reasons set forth in the preamble, the Surface Transportation Board amends parts 1002, 1111, 1114, and 1115 of title 49, chapter X of the Code of Federal Regulations as follows:

PART 1002—FEES

■ 1. The authority citation for part 1002 continues to read as follows:

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.

■ 2. Amend § 1002.2 by revising paragraphs (f)(56)(ii) through (v) and adding paragraph (f)(56)(vi) to read as follows:

§ 1002.2 Filing fees.

* * * * *

(f) * * *

(56) * * *

(ii) A formal complaint involving rail maximum rates filed under the Simplified-SAC methodology—10,600.

(iii) A formal complaint involving rail maximum rates filed under the Three Benchmark methodology—150.

(iv) All other formal complaints (except competitive access complaints)—17,600.

(v) Competitive access complaints—150.

(vi) A request for an order compelling a rail carrier to establish a common carrier rate—200.

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PART 1111—COMPLAINT AND INVESTIGATION PROCEDURES

■ 3. The authority citation for part 1111 continues to read as follows:

Authority: 49 U.S.C. 721, 10704, and 11701.

■ 4. Amend § 1111.1 by revising paragraphs (a)(1) through (10), redesignate paragraphs (b) through (d) as paragraphs (c) through (e) respectively, and add a new paragraph (b) to read as follows:

§ 1111.1 Content of formal complaints; joinder.

(a) * * *

(1) The carrier or region identifier.

(2) The type of shipment (local, received-terminated, etc.).

(3) The one-way distance of the shipment.

(4) The type of car (by URCS code).

(5) The number of cars.

(6) The car ownership (private or railroad).

(7) The commodity type (STCC code).

(8) The weight of the shipment (in tons per car).

(9) The type of movement (individual, multi-car, or unit train).

(10) A narrative addressing whether there is any feasible transportation alternative for the challenged movements.

(b) *Disclosure with simplified standards complaint.* The complainant must provide to the defendant all documents relied upon in formulating its assessment of a feasible transportation alternative and all documents relied upon to determine the inputs to the URCS Phase III program.

* * * * *

■ 5. Revise § 1111.2 to read as follows:

§ 1111.2 Amended and supplemental complaints.

(a) *Generally.* 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.

(b) *Simplified standards.* A complaint filed under the simplified standards may be amended once before the filing of opening evidence to opt for a different rate reasonableness methodology, among Three-Benchmark, Simplified-SAC or Full-SAC. If so amended, the procedural schedule begins again under the new methodology as set forth at §§ 1111.8 and 1111.9. However, only one mediation period per complaint shall be required.

■ 6. Revise § 1111.4 to read as follows:

§ 1111.4 Answers and cross complaints.

(a) *Generally.* An answer shall be filed within the time provided in paragraph (c) 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. In response to a complaint filed under the simplified standards, the answer must include the defendant's preliminary estimate of the variable cost of each challenged movement calculated using the unadjusted figures produced by the URCS Phase III program.

(b) *Disclosure with simplified standards answer.* The defendant must provide to the complainant all documents that it relied upon to determine the inputs used in the URCS Phase III program.

(c) *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.

(d) *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.

(e) *Failure to answer complaint.* Averments in a complaint are admitted when not denied in an answer to the complaint.

■ 7. Revise § 1111.9 to read as follows:

§ 1111.9 Procedural schedule in cases using simplified standards.

(a) *Procedural schedule.* Absent a specific order by the Board, the following general procedural schedules will apply in cases using the simplified standards:

(1) In cases relying upon the Simplified-SAC methodology:
Day 0—Complaint filed (including complainant's disclosure).
Day 10—Mediation begins.
Day 20—Defendant's answer to complaint (including defendant's initial disclosure).
Day 30—Mediation ends; discovery begins.
Day 140—Defendant's second disclosure.
Day 150—Discovery closes.
Day 220—Opening evidence.
Day 280—Reply evidence.
Day 310—Rebuttal evidence.
Day 320—Technical conference (market dominance and merits).
Day 330—Final briefs.

(2) In cases relying upon the Three-Benchmark method:

Day 0—Complaint filed (including complainant's disclosure).
Day 10—Mediation begins. (STB production of unmasked Waybill Sample.)
Day 20—Defendant's answer to complaint (including defendant's initial disclosure).
Day 30—Mediation ends; discovery begins.
Day 60—Discovery closes.
Day 90—Complainant's opening (initial tender of comparison group and opening evidence on market dominance). Defendant's opening (initial tender of comparison group).
Day 95—Technical conference on comparison group.
Day 120—Parties' final tenders on comparison group. Defendant's reply on market dominance.
Day 150—Parties' replies to final tenders. Complainant's rebuttal on market dominance.

(b) *Defendant's second disclosure.* In cases using the Simplified-SAC methodology, the defendant must make the following disclosures to the complainant by Day 170 of the procedural schedule.

(1) Identification of all traffic that moved over the routes replicated by the SARR in the Test Year.

(2) Information about those movements, in electronic format,

aggregated by origin-destination pair and shipper, showing the origin, destination, volume, and total revenues from each movement.

(3) Total operating and equipment cost calculations for each of those movements, provided in electronic format.

(4) Revenue allocation for the on-SARR portion of each cross-over movement in the traffic group provided in electronic format.

(5) Total trackage rights payments paid or received during the Test Year associated with the route replicated by the SARR.

(6) All workpapers and documentation necessary to support the calculations.

(c) *Conferences with parties.* The Board may convene a conference of the parties with Board staff to facilitate voluntary resolution of discovery disputes and to address technical issues that may arise.

(d) *Complaint filed with a petition to revoke a class exemption.* If a complaint is filed simultaneously with a petition to revoke a class exemption, the Board will take no action on the complaint and the procedural schedule will be held in abeyance automatically until the petition to revoke is adjudicated.

■ 8. Revise § 1111.10 to read as follows:

§ 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 or the simplified standards, 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 or simplified standards complaints.* In complaints challenging the reasonableness of a rail rate based on stand-alone cost or the simplified standards, the parties shall meet, or discuss by telephone, discovery and procedural matters within 7 days after the mediation period ends. 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.

PART 1114—EVIDENCE; DISCOVERY

■ 9. The authority citation for part 1114 continues to read as follows:

Authority: 5 U.S.C. 559; 49 U.S.C. 721.

- 10. Amend § 1114.21 by adding paragraph (a)(3) to read as follows:

§ 1114.21 Applicability; general provisions.

(a) * * *

(3) In cases using the simplified standards Three-Benchmark method, the number of discovery requests that either party can submit is limited as set forth in §§ 1114.22, 1114.26, and 1114.30, absent advance authorization from the Board.

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- 11. Amend § 1114.22 by adding paragraph (c) to read as follows:

§ 1114.22 Deposition.

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(c) *Limitation under simplified standards.* In a case using the Three-Benchmark methodology, each party is limited to one deposition absent advance authorization from the Board.

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- 12. Amend § 1114.26 by adding paragraph (d) to read as follows:

§ 1114.26 Written interrogatories to parties.

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(d) *Limitation under simplified standards.* In a case using the Three-Benchmark methodology, each party is limited to ten interrogatories (including subparts) absent advance authorization from the Board.

- 13. Amend § 1114.30 by adding paragraph (c) to read as follows:

§ 1114.30 Production of documents and records and entry upon land for inspection and other purposes.

* * * * *

(c) *Limitation under simplified standards.* In a case using the Three-Benchmark methodology, each party is limited to ten document requests (including subparts) absent advance authorization from the Board.

- 14. Amend § 1114.31 by revising paragraphs (a)(1), (a)(2), (a)(3), and (a)(4) to read as follows:

§ 1114.31 Failure to respond to discovery.

(a) * * *

(1) *Reply to motion to compel generally.* Except in rate cases to be considered under the stand-alone cost methodology or simplified standards, 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 and simplified standards 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 or under the simplified standards.

(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 or under the simplified standards, 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 and simplified standards 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. If no conference is convened, the Secretary will issue this summary ruling within 10 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.

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PART 1115—APPELLATE PROCEDURES

- 15. The authority citation for part 1115 continues to read as follows:

Authority: 5 U.S.C. 559; 49 U.S.C. 721.

- 16. Amend § 1115.9 by revising paragraph (b) to read as follows:

§ 1115.9 Interlocutory appeals.

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(b) In stand-alone cost complaints or in cases filed under the simplified standards, 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.

[FR Doc. E7-17689 Filed 9-6-07; 8:45 am]

BILLING CODE 4915-01-P