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FR-4915-00-P

DEPARTMENT OF TRANSPORTATION

49 CFR Part 1111

[STB Ex Parte No. 527 (Sub-No. 1)]

Expedited Procedures for Processing Simplified Rail Rate Reasonableness Proceedings

AGENCY: Surface Transportation Board.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: On February 12, 1997, the Surface Transportation Board issued an Advance Notice of Proposed Rulemaking soliciting comments on how the complaint and investigation procedures at 49 CFR part 1111 should be modified to reflect the Board's adoption of Simplified Rate Guidelines.<sup>1</sup> Based on the comments received, the Board proposes to amend part 1111 to facilitate the processing of cases using Simplified Rate Guidelines. Comments are invited.

DATES: Comments are due November 10, 1997.

ADDRESSES: Send comments referring to STB Ex Parte No. 527 (Sub-No. 1) to: Surface Transportation Board, Office of the Secretary, Case Control Branch, 1925 K Street, N.W., Washington, DC 20423-0001.

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<sup>1</sup> Rate Guidelines — Non-Coal Proceedings, Ex Parte No. 347 (Sub-No. 2) (STB served Dec. 31, 1996), pet. for rehearing and reconsideration denied (STB served Sept. 24, 1996), pet. for judicial review pending sub nom., Association of Am. Railroad v. Surface Transp. Bd., No. 97-1020 (D.C. Cir. filed Jan. 10, 1997)

FOR FURTHER INFORMATION CONTACT: Thomas J. Stilling, (202) 565-1567.

[TDD for the hearing impaired: (202) 565-1695.]

SUPPLEMENTARY INFORMATION: The Board is charged with expediting the processing of rate complaint proceedings. Under 49 U.S.C. 10704(c), we are required to make a determination as to the reasonableness of a challenged rate within 9 months after the record closes if the determination is based on stand-alone cost (SAC) evidence, and within 6 months if it is based upon a simplified methodology adopted pursuant to 49 U.S.C. 10701(d)(3). On October 1, 1996,<sup>2</sup> we adopted rules to expedite the handling of complaints challenging the reasonableness of railroad rates using SAC,<sup>3</sup> including the generally applicable procedural schedule of 49 CFR 1111.8 that requires completion of the evidentiary phase of a SAC case in 7 months. We declined to adopt a procedural schedule to govern the filing of evidence in cases using the then unadopted Simplified Rate Guidelines procedures. Rather, we decided to consider the adoption of regulations covering such cases following completion of the Simplified Rate Guidelines rulemaking.

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<sup>2</sup> Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings, STB Ex Parte No. 527, published in the Federal Register on October 8, 1996, (61 FR 52710), modified by decision served November 15, 1996.

<sup>3</sup> SAC is one of four constraints on railroad pricing adopted in Coal Rate Guidelines--Nationwide, 1 I.C.C.2d 520 (1985). Notwithstanding its title, Coal Rate Guidelines procedures are not limited to coal cases. Rather, the guidelines are the preferred method of evaluating the reasonableness of any rate.

On December 31, 1996, we adopted simplified evidentiary guidelines in Simplified Rate Guidelines to determine the reasonableness of rail rates on captive traffic where the Coal Rate Guidelines could not be practicably applied. Subsequently, by Advance Notice of Proposed Rulemaking, served February 12, 1997 (62 FR 6508), we solicited comments on whether a general procedural schedule applicable to cases processed under the Simplified Rate Guidelines could be promulgated (and, if so, what that schedule should be), or whether we should delay the adoption of a general procedural schedule and proceed on a case-by-case basis until all concerned acquire some experience utilizing the new guidelines.<sup>4</sup>

Comments were filed by the Association of American Railroads (AAR), the National Industrial Transportation League (NITL), Barbara R. Kueppers, and the United Transportation Union-Illinois Legislative Board (UTU-ILB).

#### POSITIONS OF THE PARTIES

AAR acknowledges that the choice of guidelines (Coal Rate Guidelines or Simplified Rate Guidelines) must be made at the outset of a case. However, AAR sees no need to adopt a set timeframe, such as the 45-day schedule suggested in Simplified Rate Guidelines (at 38) for deciding whether a case should proceed under the Coal Rate Guidelines or the simplified procedures. AAR claims that a 45-day schedule would be unfair because it would give a shipper unlimited time to prepare its initial case while giving

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<sup>4</sup> Simplified Rate Guidelines suggested that procedural schedules should initially be set on a case-by-case basis. Id. at 38 n.145.

the defendant only two weeks to analyze complainant's case and prepare opposing evidence.<sup>5</sup> AAR also notes that the 45-day schedule appears to conflict with the requirement for a conference of the parties required by 49 CFR 1111.9.<sup>6</sup> AAR prefers convening a conference of the parties shortly after a complaint is filed to allow the parties to develop a schedule, subject to Board approval, for determining whether the Simplified Rate Guidelines can be used. In addition, because no case has yet been processed using Simplified Rate Guidelines, AAR suggests that we set procedural schedules for the filing of evidence on a case-by-case basis until sufficient experience is gained and the need for a general schedule becomes apparent.

NITL argues that, with minor modifications, complaints seeking to invoke Simplified Rate Guidelines can be handled under the procedures established at 49 CFR part 1111.<sup>7</sup> NITL supports deciding within 45 days a request for invocation of the simplified procedures. It proposes that the factors that must be included in a complaint seeking to invoke the Simplified Rate Guidelines be specifically listed in 49 CFR 1111.1(a) so that

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<sup>5</sup> Under the 45-day schedule, the defendants would have 15 days after the complaint is filed to oppose use of the simplified procedures. Complainant would have 10 days to respond to the railroad position, and the Board would have 20 days to make its determination.

<sup>6</sup> Under 49 CFR 1111.9(b), in stand-alone cost complaints, the parties are to discuss procedural matters within 7 days after a complaint is filed. Under 49 CFR 1111.9(a), in all other complaint proceedings, the parties shall discuss procedural issues within 7 days after an answer is filed.

<sup>7</sup> NITL suggests that a conference of the parties could be held within 7 days of the filing of the answer as specified in 49 CFR 1111.9(a).

potential complainants are given appropriate notice of both the availability of, and requirements for, the use of the simplified procedures.<sup>8</sup>

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<sup>8</sup> Simplified Rate Guidelines (at 37-38) requires that a complaint seeking to invoke the simplified procedures should contain:

- (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 O-D [origin-destination] 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 SAC 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.

(continued...)

Finally, NITL recommends that the Rules of Practice should include a reference to the procedures established in 49 CFR 1244.8 regarding access to the Waybill Sample data. It suggests that complainants request access to the Waybill Sample simultaneously with the filing of the complaint so that complainant can complete discovery and prepare its opening statement within 120 days of the filing of the complaint as specified at 49 CFR 1111.8.

Ms. Kueppers argues that the Board should provide for a cost-efficient means of accessing data through discovery.<sup>9</sup> In particular, she proposes that discovery be completed in 6 months where rate reasonableness is the sole issue in a proceeding. When rate reasonableness is combined with other issues, she proposes that the procedural schedule be determined on a case-by-case basis, allowing for discovery related to other issues. Ms. Kueppers also argues that, because individuals in small shipping organizations have a variety of duties, it is difficult to determine a universally appropriate schedule (such as 120

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<sup>8</sup>(...continued)

(9) The present value of the relief sought.

AAR notes that factor 7 includes costs associated with “preparing necessary jurisdictional threshold and market dominance evidence.” It asserts that these costs are common to both simplified procedure and CMP cases and are therefore not relevant to determining which procedure to follow. We note that while the costs are common to both types of cases, the purpose of including them is to determine and weigh the costs of presenting a rate case under either CMP or the simplified procedures.

<sup>9</sup> She requests that parties enter into a confidentiality agreement within 7 days after a complaint is filed. If they are unable to concur on an agreement, they can request that the Board impose a confidentiality agreement. Within 10 days of a confidentiality agreement being in place, the parties are to disclose the information required in Rule 26 of the Federal Rules of Civil Procedure, and the carrier shall provide to complainant its waybill tapes.

days in stand-alone cases) for small shippers to prepare and present a case. She contends that small shippers should be afforded flexibility in scheduling.

The UTU-ILB offers no comments on procedural matters but states that it continues to support traditional rate comparisons as the best test of rate reasonableness for the small shipper, port, or community. It adds that it will await the issuance of a notice of proposed rulemaking before making any other recommendations.

#### DISCUSSION

We appreciate the comments of the parties and have attempted to incorporate as many of their suggestions as practical in our proposal. We propose to include in our regulations the information that a complainant should supply when seeking to test the reasonableness of a rate using the Simplified Rate Guidelines. We also propose to establish a schedule for determining whether the Simplified Rate Guidelines can be used in a particular case. Additional, minor changes are being proposed. We are not proposing to adopt at this time a general procedural schedule for processing rate complaints under the Simplified Rate Guidelines, but rather intend to proceed on a case-by-case basis until we gain more experience using the new guidelines.

Simplified Rate Guidelines (at 37) recognized that a determination as to which guidelines should be used in a particular case must be decided at the outset of the case.<sup>10</sup> If

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<sup>10</sup> No special showing is needed to use Coal Rate Guidelines because, where available, those guidelines must be used.

the simplified procedures are sought, the complainant “must present sufficient information to show that [use of the Coal Rate Guidelines] is not available. . . . [T]his information should be included in the initial complaint, so as not to delay the case.” Id. Simplified Rate Guidelines enumerated 9 evidentiary factors (listed in note 8, supra), which should be included in a complaint. We propose to modify section 1111.1(a), as suggested by NITL, to specifically list the 9 evidentiary factors that a complaint seeking to use the Simplified Rate Guidelines should address.<sup>11</sup> This will ensure that anyone contemplating filing a complaint is fully aware of the factors that must be addressed in its initial pleading. We also propose to make certain technical changes to that section.

As noted, AAR and NITL differ on whether we should prescribe a 45-day period for deciding whether the simplified procedure should be used in deciding rate reasonableness. To comply with the Congressional directive to expedite rate cases, the determination of whether to apply the simplified procedures must be made quickly at the outset of a case. Based on the comments of the parties, however, we propose to modify slightly the 45-day schedule suggested in Simplified Rate Guidelines. Instead of 15 days, the railroad would

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<sup>11</sup> Currently, 49 CFR 1111.1(a) states in relevant part:

In a complaint challenging the reasonableness of a rail rate, the complainant should indicate whether . . . the reasonableness of the rate should be examined using constrained market pricing or simplified standards to be adopted pursuant to 49 U.S.C. 10701(d)(3). The complainant should specify the basis for this assertion.

have 20 days to file opposition to the use of the simplified procedures, the same due date for filing an answer to a complaint. 49 CFR 1111.4(a) and (b). This proposal gives a railroad more time to respond and necessitates only one filing, rather than two, in response to a complaint. The complainant would have 10 days to respond, and the Board would have 20 days in which to determine whether the Simplified Rate

Guidelines should be used. See proposed new section 1111.9 (providing for a 50-day schedule).<sup>12</sup>

We believe that such an approach balances the needs of the parties. While the time frame is relatively short, we note that we are not deciding the case on the merits but simply determining whether to use the Simplified Rate Guidelines. This short schedule is necessary if we are to proceed with the expeditious handling of the complaint.

Both the AAR and the NITL see a scheduling conflict between holding the procedural conference (49 CFR 1111.9) and determining whether to apply the simplified procedures. AAR, while not wanting a schedule for determining whether to apply the Simplified Rate Guidelines, wants a conference of the parties to be held “shortly after the complaint is filed.” NITL also favors a conference and supports proceeding under 49 CFR 1111.9(a), under which the parties are required to meet, or discuss by telephone, discovery and procedural matters within 7 days after an answer to a complaint is filed.<sup>13</sup> To avoid convening a conference during the time that parties are preparing pleadings addressing the appropriateness of using the Simplified Rate Guidelines, we propose to modify 49 CFR 1111.9(a) so that the conference will be held 12 (instead of 7) days after the answer is filed (day 32) and the report to the Board will be due 19 (instead of 14) days after the answer is

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<sup>12</sup> We propose to renumber current section 1111.9 as section 1111.10.

<sup>13</sup> Within 14 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.

filed.<sup>14</sup>

The parties disagree about whether we should prescribe a general procedural schedule to govern the submission of evidence for cases processed under the Simplified Rate Guidelines. AAR and, to some extent, Ms. Kueppers favor a case-by-case approach. NITL supports the use of the procedural schedule applicable to stand-alone cost cases with certain modifications.<sup>15</sup>

We agree with AAR and Ms. Kueppers that it seems best to proceed initially on a case-by-case basis. Without any experience processing cases using the Simplified Rate Guidelines, it is difficult to develop a generally applicable procedural schedule. Nevertheless, the goal of section 10704 is to expedite the processing of rate cases. As a general matter, we believe that the evidentiary phase of a non-coal case should take less than the 7-month time frame for large coal cases. Therefore, we will generally require that discovery be expedited.

Finally, NITL requests that the Rules of Practice cross reference the regulation at 49 CFR 1244.8 concerning access to the Waybill Sample.<sup>16</sup> We believe, however, that such

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<sup>14</sup> Because we propose to redesignate §1111.9 as §1111.10, these modifications are in proposed section 1111.10(a).

<sup>15</sup> See 49 CFR 1111.8.

<sup>16</sup> Ms. Kueppers requests that the carrier provide its waybill tapes to the complainant. Our rules at section 1244.8, however, provide for a party to request from the Board the Waybill Sample, which is a statistically valid sample. We believe that this process is a more efficient method of obtaining information. We also believe, at least for the  
(continued...)

redundance is unnecessary.<sup>17</sup>

The Board certifies that the rules, if adopted, would not have a significant economic effect on a substantial number of small entities. The proposed rules should result in the quicker processing of rail complaints using the simplified procedures. The Board, however, seeks comments on whether there would be effects on small entities that should be considered.

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

List of Subjects in 49 CFR Part 1111

Administrative practice and procedure, Investigations.

Decided: September 18, 1997

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<sup>16</sup>(...continued)  
present, that Ms. Kueppers' request for discovery and confidentiality rules is unnecessary and can be handled on a case-by-case basis.

<sup>17</sup> In Simplified Rate Guidelines (at 41) we denied access to the Waybill Sample prior to the filing of the complaint. However, parties can request access to such data simultaneously with the filing of a complaint. The Board will act promptly on these requests.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams

Secretary

For the reasons set forth in the preamble, title 49 chapter X, Part 1111 of the Code of Federal Regulations is proposed to be amended as follows:

PART 1111 - COMPLAINT AND INVESTIGATION PROCEDURES

1. The authority citation for part 1111 is revised to read as follows:

Authority: 5 U.S.C. 559; 49 U.S.C. 721, 10704, and 11701.

2. Section 1111.1 is proposed to be amended by revising the last two sentences of paragraph (a) and adding paragraphs (a)(1) through (a)(9) to read as follows:

§1111.1 Content of formal complaints; Joinder

(a) \* \* \* In a complaint challenging the reasonableness of a rail rate, the complainant should indicate whether, in its view, the reasonableness of the rate be examined using constrained market pricing or 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 SAC 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.

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§1111.8 [Amended]

3. In §1111.8 remove the phrase “section 1111.9(b)” and add “§1111.10(b)” in its place.

4. Redesignate §1111.9 as §1111.10 and add new §1111.9 to read as follows:

§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 section 1111.1(a) to use the simplified procedures (the remainder of the procedural schedule will 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.

5. In newly designated §1111.10 paragraph (a) is revised to read as follows:

§1111.10 Meetings 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.

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