

STB EX PARTE NO. 528

DISCLOSURE, PUBLICATION, AND NOTICE
OF CHANGE OF RATES AND OTHER SERVICE
TERMS FOR RAIL COMMON CARRIAGE

49 CFR Part 1330

Decided June 27, 1996

AGENCY: Surface Transportation Board.
ACTION: Final Rules.
SUMMARY: The ICC Termination Act of 1995 (ICCTA) eliminated the tariff requirements formerly applicable to rail carriers, but imposed instead certain obligations to disclose common carriage rates and service terms as well as a requirement for advance notice of increases in such rates or changes in service terms. The ICCTA requires the Board to adopt regulations to administer these new obligations by June 29, 1996. The Board adds a new part 1300 to its regulations for that purpose.

EFFECTIVE DATE: These rules are effective August 4, 1996.

FOR FURTHER INFORMATION CONTACT: Beryl Gordon, (202) 927-5660. [TDD for the hearing impaired: (202) 927-5721.]

SUPPLEMENTARY INFORMATION: The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (ICCTA), abolished the Interstate Commerce Commission (ICC) and transferred responsibility for regulating rail transportation to the Surface Transportation Board (Board), effective January 1, 1996.

As pertinent here, the ICCTA eliminated the requirement that rail carriers file with the government tariffs containing the specific rates and charges (or the basis for calculating them) for their common carriage transportation services. *See* former 49 U.S.C. 10761 and 10762. Accordingly, no new rail carrier tariffs are filed with the Board, and the rail carrier tariffs that were previously filed with the ICC were no longer effective

tariffs as of January 1, 1996.¹ The ICC's regulations at 49 CFR part 1314, governing rail carrier tariffs, likewise became ineffective as of that date and have thus been repealed. *Removal of Obsolete Rail Tariff Regulations*, 1 S.T.B. 4 (1996), published at 61 Fed. Reg. 7428 (1996).

Nevertheless, new 49 U.S.C. 11101(b) and (d) require disclosure of rail common carriage rates and service terms. New 49 U.S.C. 11101(c) further requires that rail carriers, when providing common carriage, not increase their rates or change their service terms without advance notice. Finally, new 49 U.S.C. 11101(e) requires rail carriers to adhere to the rate and service terms published or otherwise made available under new 49 U.S.C. 11101(b)-(d).

New 49 U.S.C. 11101(f) directs the Board to establish rules to implement the requirements of new 49 U.S.C. 11101. Accordingly, on March 8, 1996, we served an Advance Notice of Proposed Rulemaking (ANPR) in this proceeding, published at 61 Fed. Reg. 9413 (1996), seeking public comment on appropriate regulations for that purpose. Sixteen comments were received.²

After considering the comments, we served a notice of proposed rulemaking (NPR) on May 3, 1996, published at 61 Fed. Reg. 21,153 (1996), proposing regulations to implement the requirements of new 49 U.S.C. 11101(b)-(d) and (f). Our NPR proposed to create five sections to a new part 1300 of Title 49 of the *Code of Federal Regulations*. Section 1300.1 discusses which transportation or services provided by rail carriers are subject to these rules. Sections 1300.2 and 1300.3 deal with requests for disclosure of *existing* rates and service terms and the establishment of *new* rates or service terms, respectively. Section 1300.4 implements the requirement of new 49 U.S.C. 11101(c) that a rail carrier provide 20-days'

¹ However, carriers can, and indeed must, continue to apply the rates and service terms contained in those tariffs unless and until changed in accordance with the terms of new 49 U.S.C. 11101.

² Comments were received from the Association of American Railroads (AAR); the American Short Line Railroad Association; the Anderson, Inc.; C.F. Industries, Inc.; the Fertilizer Institute; K-III Directory Corporation; Kansas City Board of Trade; Montana Wheat and Barley Committee; National Grain and Feed Association; The National Industrial Transportation League; North Dakota Public Service Commission; The Society of the Plastics Industry, Inc.; United Transportation Union - Illinois Legislative Board; Western Coal Traffic League; and Wisconsin Central Ltd. In addition, AAR's pleading includes additional separate verified statements from representatives of CSX Transportation, Inc.; Union Pacific Railroad Company; and Consolidated Rail Corporation.

advance notice, to certain persons, of an increase in a common carriage rate or a change in a common carriage service term. Finally, § 1300.5 implements the requirement of new 49 U.S.C. 11101(d) that a carrier publish a schedule of its rates, charges, and service terms for the transportation of agricultural products and fertilizer.

Comments in response to the NPR were received from the AAR,³ CF Industries, Inc.; the Fertilizer Institute; Kansas City Board of Trade; National Grain and Feed Association; The National Industrial Transportation League; the Transportation Intermediaries Association; United Transportation Union - Illinois Legislative Board; Western Coal Traffic League and Edison Electric Institute; and Wisconsin Central Ltd.

While the commenters basically embrace the proposed rules, they seek clarification on some issues and suggest modification or additions concerning other issues. Before addressing those specific issues, it is helpful to put them into context by reviewing what we believe Congress envisioned in adopting the requirements of new 49 U.S.C. 11101. These new requirements were meant to serve as a replacement for the prior system of rail tariff filings, which Congress regarded as outdated, unnecessary, and too regulatory. Congress sought to substitute a more modern, flexible, efficient, and simplified system for readily disseminating common carriage pricing information without unnecessary regulatory involvement.

Accordingly, in implementing the new requirements of section 11101, our objective is to design a simple, practical system that provides for full, fair, and open dissemination of common carriage rate information without placing a significantly greater burden on rail carriers than the tariff system that it replaces. Also, consistent with the Congressional objectives in repealing the tariff system, we wish to avoid an unduly prescriptive approach to these regulations.

Many of the commenters seek to have the regulations prescribe in advance a far greater level of detail than we consider necessary or appropriate for maintaining and disseminating pricing information in a modern-day business environment. To some extent, this may reflect lingering suspicion and distrust between the carrier and shipper communities. To a greater extent, however, we believe that it reflects long-developed reliance

³ AAR's pleading includes additional separate verified statements from representatives of CSX Transportation, Inc.; Union Pacific Railroad Company; and Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company.

on a federal regulatory involvement that dictated in advance every detail of railroad tariffs, and unfounded apprehensions about moving into an era when regulation is no longer an overriding presence in the process of rate dissemination.

We do not share the commenters' doubts about this new system, and we believe that it is neither necessary nor desirable for us to attempt to micro-manage this new system. The basic mandates of new section 11101(b)-(e) are clear and straightforward, and compliance with them should be a matter of common sense and should not be difficult or unfair, unduly burdensome for carriers, or constraining for shippers. We are confident that, as the parties become accustomed to this new system, they will find it easier and much more useful than the old tariff system and will appreciate the flexibility that comes with private-sector exchanges that are not "over-regulated." If for some reason the process should not work as intended, we can address any problems as they arise in a more focused way, armed with the benefit of the parties' actual working experience with this new process.

With these guiding principles in mind, we turn to the specific issues raised by the commenting parties.

1. *Formal Requests for Rate Information.*

As we explained in the NPR, the commenting parties described two quite different types of rate inquiries and corresponding systems for disseminating rate information. Some inquirers contact carriers informally (often orally and sometimes anonymously) for specific rate or service information, without necessarily wanting or expecting to receive notification of any and all changes made by the carrier within the next year. To accommodate these informal inquiries, some carriers provide telephone "hot lines," "electronic billboards" or other means of disseminating rate information quickly, efficiently, and informally.

We do not believe that section 11101(b), which directs carriers to respond formally to formal requests for rate information, requires disruption of this type of informal inquiry and response. Indeed, interjecting rigid, formal and time-consuming procedures where they are not needed would impede this current informal (and often instantaneous) flow of information that clearly aids the inquirers. Because section 11101(c)(1) imposes upon the carrier an affirmative duty to notify any person who makes a rate information request under section 11101(b) of future rate increases and

changes in service terms for the next 12 months, an expansive reading of the statute could mean that even for such informal exchanges, the carrier could not release rate information under section 11101(b) without first obtaining information from the requester as to where and how to notify the requester of future changes. Moreover, if the carrier had to notify every casual inquirer of future rate changes, regardless of whether or not the inquirer wants or expects such future notices, such a system would be far more burdensome and expensive for the carriers than the old tariff filing system. We do not believe that Congress, in relieving carriers of tariff filings, meant to increase the regulatory burden on carriers in this manner.

Accordingly, we interpret the formalized response requirements of section 11101(b)--and the concomitant duty in section 11101(c)(1) to notify the requester of future rate increases and changes in service terms--as applying only to formally structured requests for ongoing rate information. Several commenters seek clarification of what constitutes a "formal request" for rate information. By the use of that term, we mean a request that clearly notifies the railroad that the requester seeks not only immediate information but also notification of any future increase in the rate(s) involved or changes in pertinent service terms. This request need not be a separate request, merely a clearly stated request.

Our proposed rules indicated that a formal request could be oral, written or in electronic form. In its comments, the AAR suggests that the rules limit formal requests to written or electronic form so that carriers can maintain adequate records of all formal requests. We recognize the carriers' concerns, but do not wish to preclude oral requests if a carrier is willing to accept them. Accordingly, we are modifying the proposed rules so as to allow carriers to require that formal requests invoking the future notice requirements of 49 CFR 1305.4 be submitted in written or electronic form, if they so desire, but so as not to limit them to such a policy.

2. Carrier Responses to Requests for Rate Information.

As we explained in the NPR, a carrier is expected to respond to a request for information regarding existing rates and terms "immediately" and to

respond to a request for a new rate (where there is no existing applicable rate)⁴ "promptly." Shippers and carriers still disagree on whether and how to define the terms "immediately" and "promptly" in this context.

Our proposed regulations did not attempt to specify what constitutes "immediately." However, we explained in the NPR that carriers must handle requests for existing rates and terms *as quickly as possible* and that we would expect that a response could and should be sent within hours, or at the latest by the next business day, in most situations. At the request of some of the commenters, we will state this expectation in the regulations themselves.

Our proposed rules did contain specific time frames in which a carrier should respond to a request for a new rate where there is no existing applicable rate. Under § 1300.3, we would require carriers to respond to requests for new rates or service terms as soon as possible, but no later than 10-business days from receipt of the request. However, if a carrier determines that additional information is required before a new rate or term can be established, it must so notify the requester as soon as possible, but no later than 10-business days after receipt of the request. Once the additional information is received, a response must be within 10-business days.

Contrary to the carriers' arguments, we believe that imposition of some time frame is necessary to assure that the "promptly" directive is effective. We will specifically state in the rules, however, that if both carrier and requester agree, a different time frame may be used.

Some commenters argue for shorter time periods for the carrier's response, but we are concerned that a shorter time frame might not be sufficient in all cases to enable the carrier adequately to analyze the relevant traffic information and underlying market conditions.⁵ In order to provide assurance to shippers that they will not be subject to extensive delays, we will

⁴ In the proposed rules, we used the term "appropriate" applicable rate. We will remove the word "appropriate" from the regulation as it could be confusing. The requirement that a carrier respond promptly to a request for new rates is intended to apply in connection with shipments or services not already contemplated in the carrier's rate structure. As the case precedent reflects, this can include such situations as where only single-car class rates are available, but are clearly inappropriate for unit-train traffic.

Also, to be more precise, in addition to shippers or prospective shippers requesting a rate, we will add that anyone acting on behalf of a shipper or a prospective shipper may so request.

⁵ The rules encourage prompt responses, and we expect carriers to respond to requests for new rates in less than 10 days where feasible.

also instruct carriers that seek additional information from a requester to respond as soon as possible after receipt of the additional information, but no later than 10 business days after its receipt.

3. *Forms of Communication as to Requests for Information or Rate Notification.*

The commenters still disagree regarding the form that a railroad must use (and who can choose that form) to respond to a formal request or to notify requesters of rate increases or changes in service terms. Consistent with Congress' evident intent in the ICCTA, we encourage the use of electronic responses and notices when both parties have the requisite capabilities. Otherwise, the response should be written.

AAR has suggested that electronic billboards or other "passive" forms of electronic notification be deemed satisfactory to meet the carriers' response and notification requirements. We disagree. The burden upon requesters would be too great to expect them to make a daily search of electronic means to obtain the information the statute deems that they have a right to have sent to them. Accordingly, only an active, or positive, response or notification to the requester will satisfy these requirements.

4. *Notice of Rate Increases and Changes in Service Terms.*

In the proposed regulations, we explained that, just as Congress excluded rate reductions from the advance notice requirement, the advance notice requirement does not apply to changes in service terms that are equivalent to a rate reduction. Some commenters ask that the regulations define what is meant by the term "equivalent to a rate reduction." As we explained in the NPR, this phrase means only those changes in service terms that have the effect of reducing the overall charges paid by affected shippers. We believe this term is clear on its face and that no further explanation is needed.

The proposed rule would have required that carriers provide notice to all persons who had made shipments during the prior 12 months that used the rates that are to be increased or the service terms that will be changed. As the AAR points out, however, such notice to past shippers is not required by the statute, and would impose an unwarranted burden on carriers in those situations where future shipments are not expected. Moreover, compliance with such a requirement would be difficult, because carriers currently do not

have the data that would allow them to identify the particular rate under which a shipment moved. Nor would their records necessarily reflect the proper person to notify of future changes, as between the consignor, consignee, billing agent, etc. Accordingly, we will limit the notice requirement to (1) those persons who have specifically asked to be notified of such changes, by making a formal request under §§ 1300.2 or 1300.3 and (2) persons who have already made arrangements for future shipments that will be affected by a rate increase or service term change that is scheduled to take effect before the transportation occurs. Shippers that wish to receive notice of rate increases or changes in service terms need only request such notice each year pursuant to § 1300.2. This process will ensure that such notice is available to everyone who desires it, without imposing the added costs of providing notices to past shippers who have no interest in receiving it. We do not believe that the process will place an undue burden on shippers desiring such notice to request it.

5. *Publication of Rates for Agricultural Products and Fertilizer.*

In addition to the rate maintenance and dissemination requirements applicable to all commodities, 49 U.S.C. 11101(d) imposes special publication requirements for rates applicable to (non-exempted) agricultural products and fertilizer. AAR continues to urge that our regulations list all of the products to which this requirement applies, using the applicable Standard Transportation Commodity Code (STCC) numbers.

As we explained in the NPR, the completeness of a STCC code list could not be guaranteed and would require updating to reflect any relevant changes in the STCC codes or in the types of agricultural products or fertilizer that may be shipped by rail in the future. Thus, inclusion of a STCC code list in the regulations would not provide the necessary certainty as to when the publication requirement would or would not apply. The comments that we received confirmed that new products are developed that require revisions to the STCC code. The comments also showed that even our attempt in the NPR to provide general guidance was incomplete. Thus, we adhere to our view that carriers and shippers are best able to identify the commodities to which this publication requirement applies.

In the proposed regulations, we provided that carriers must also make their rates on agricultural products and fertilizer available at their offices. Some commenters ask that we be more specific as to the offices at which this

information must be kept available. We will do so by providing that a carrier must make this information available at those offices where it normally keeps rate information. If these locations are not convenient to requesters, they can have the material sent to them at a reasonable cost.

Finally, a commenter suggests that in § 1300.5(b), the effective dates of rates should be included in the information that we require to be published. We agree and will so specify.

6. *Other Matters.*

It has been suggested that specific penalty provisions for failure to comply with these regulations be adopted or, in lieu thereof, that we specifically state that the provisions of 49 U.S.C. 11701-11702 and 11901-11908 apply. Because the penalties provided for in the statute are available as a matter of law, we see no need to reiterate them in each of our regulations.

Small Entities

The Board certifies that these rules will not have a significant economic impact on a substantial number of small entities. Although many railroads and shippers are small entities, we believe that the costs of compliance and other impacts would be minimal. We note that the rules should result in easier access to rail rate and service information, and to that extent, our action should benefit small entities.

Environment

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

List of Subjects

49 CFR Part 1300

Agricultural products, Disclosure requirement, Fertilizer, Notice requirement, Publication requirement, Rail carriers.

COMMISSIONER OWEN, *concurring*: "Tariff" is an Arabic word meaning information.

The means by which society exchanges information constantly is changing, yet the hide-bound tariff-filing system long required of railroads by this agency has allowed to be built up a series of incomprehensible publications that has made a public mockery of the process.

I emphasize that the intent of these new rules not only is to substitute a more modern, flexible, efficient and simplified system for disseminating common carriage price and service information, but to encourage shippers and carriers to come together and reason with each other.

Healthy and lasting business relationships are fashioned from mutual trust born of good-faith negotiation. Too often, in my opinion, the readiness with which this regulatory agency adjudicated disputes not only substituted a bureaucracy's opinion for more efficient market forces, but encouraged even more disputes to be brought before the agency.

In fact, the emphasis upon voluntarily negotiated solutions should extend to the use of "electronic billboards" or other "passive" forms of electronic notification. Although I join my colleagues in disagreeing, at present, with the railroads' request that such passive means of electronic dissemination be deemed satisfactory in meeting the carriers' response to notification requirements, I encourage railroads and shippers to explore greater use of passive electronic systems such as the Internet.

Opportunities to reduce costs and increase productivity through greater use of electronic devices constantly must be explored and evaluated and I believe this is a subject of appropriate merit to be researched by the Railroad Shipper Transportation Advisory Council recently appointed by the Chairman in response to a congressional directive.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen. Commissioner Owen concurred with a separate expression.

APPENDIX

For the reasons set forth in the preamble and under the authority of 49 U.S.C. 721(a), title 49, Chapter X of the Code of Federal Regulations is amended as follows:

Subchapter D - CARRIER RATES AND SERVICE TERMS

1. The heading for Subchapter D is revised as set forth above.
2. The undesignated center headings for parts 1300-1319, parts 1320-1329, and parts 1330-1339 are removed.
3. A new part 1300 is added to read as follows:

PART 1300—DISCLOSURE, PUBLICATION, AND NOTICE OF CHANGE OF RATES AND OTHER SERVICE TERMS FOR RAIL COMMON CARRIAGE

Sec.

- 1300.1 Scope; definitions.
- 1300.2 Disclosure requirement for existing rates.
- 1300.3 Response to request for establishment of a new rate.
- 1300.4 Notice requirement.
- 1300.5 Additional publication requirement for agricultural products and fertilizer.

Authority: 49 U.S.C. 721(a) and 11101(f).

§ 1300.1 Scope; definitions.

(a) The provisions of this part address the requirements imposed on rail carriers by 49 U.S.C. 11101(b), 11101(c), 11101(d) and 11101(f).

(b) Except as otherwise provided in this section, the provisions of this part apply to any common carriage transportation or service provided by a rail carrier subject to the jurisdiction of the Surface Transportation Board under 49 U.S.C. 10501.

(c) The provisions of this part do not apply to any transportation or service provided by a rail carrier under a contract authorized under 49 U.S.C. 10709 or former 49 U.S.C. 10713 (repealed effective January 1, 1996).

(d) The provisions of this part do not apply to any transportation or service provided by a rail carrier to the extent that such transportation or service is exempted from rate notice and disclosure requirements pursuant to an exemption issued under 49 U.S.C. 10502 or former 49 U.S.C. 10505 (repealed effective January 1, 1996).

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(e) For the purposes of this part, "service terms" means all classifications, rules, and practices that affect the rates, charges, or level of service for rail transportation.

§ 1300.2 Disclosure requirement for existing rates.

(a) A rail carrier must disclose to any person, upon formal request, the specific rate(s) requested (or the basis for calculating the specific rate(s)), as well as all charges and service terms that may be applicable to transportation covered by the rate(s). For purposes of § 1300.4(a)(1) of this part, a formal request under this part is one that clearly notifies the railroad that the requester seeks not only immediate information but also notification of any future increases in the rate(s) involved or changes in pertinent service terms.

(b) The information provided by a rail carrier under this section must be provided immediately. (It is expected that the response will be sent within hours, or at least by the next business day, in most situations.) Such information may be provided either in written or electronic form as agreed to by the parties. If the parties cannot agree, such information is to be provided in electronic (non-passive) form where both parties have the requisite capabilities; otherwise, it is to be provided in writing.

(c) A rail carrier may, at its option, require that all requests submitted under this section be in written or electronic form, although the carrier may permit oral requests.

§ 1300.3 Response to request for establishment of a new rate.

Where a shipper or a prospective shipper or person acting on behalf of a shipper or a prospective shipper requests that the carrier establish a rate in the absence of an existing rate for particular transportation, the carrier must promptly establish and provide to the requester a rate and applicable service terms. The information may be provided either in written or electronic form, as agreed to by the parties. If the parties cannot agree, such information is to be provided in electronic (non-passive) form where both parties have the requisite capabilities; otherwise, it is to be provided in writing. The response should be provided as soon as reasonably possible, but no later than 10 business days from receipt of the request. If a carrier determines that additional information is required from the requester before a rate or term can be established, the carrier must so notify the requester as soon as possible, but no later than 10 business days after receipt of the request. Once the additional information is received, the carrier must set the rate and related service terms, and relay them to the requester, as soon as reasonably possible, but no later than 10 business days from the receipt of the additional information. (However, the parties may agree to a different time period, in which case these time periods would not apply.) A rail carrier may, at its option, require that requests submitted under this section be in written or electronic form, although the carrier may permit oral requests.

§ 1300.4 Notice requirement.

(a) A rail carrier may not increase any rates or charges, or change any service terms (except for changes that are equivalent to rate reductions), unless 20 days have expired after written or electronic notice has been provided to all persons who, within the previous 12 months:

(1) Have formally requested under § 1300.2 or § 1300.3 of this part the affected rates or service terms; or

(2) Have made arrangements with the carrier for a future shipment that would be subject to the increased rates or changed service terms.

(b) The notice required by this section may be in written or electronic form, as agreed to by the parties. If the parties cannot agree, the information is to be provided in electronic (non-passive) form where both parties have the requisite capabilities; otherwise, it is to be provided in writing.

(c) For purposes of this section, a mailed notice is deemed "provided" on the date such notice is postmarked.

(d) The notice required by this section must clearly identify the increases in rates or charges or the changes in service terms.

§ 1300.5 Additional publication requirement for agricultural products and fertilizer.

(a) With respect to transportation of agricultural products (including grain, as defined in 7 U.S.C. 75, and all products thereof) and fertilizer, a rail carrier shall publish, make available, and retain for public inspection its currently effective rates, schedules of rates, charges, and other service terms, and any scheduled changes to such rates, charges, and service terms. This requirement is in addition to the requirements imposed by §§ 1300.2, 1300.3, and 1300.4 of this part.

(b) The information published under this section must include an accurate description of the services offered to the public; must provide the specific applicable rates (or the basis for calculating the specific applicable rates), charges, and service terms; and must be arranged in a way that allows for the determination of the exact rate, charges, and service terms applicable to any given shipment (or to any given group of shipments). Increases, reductions and other changes must be symbolized or highlighted in some way to facilitate ready identification of the changes, the nature of those changes and their effective dates.

(c) A rail carrier must make the information available at offices where it normally keeps rate information. Access to the information at such offices must be provided to any person, without charge, during normal business hours.

(d) A rail carrier must also make the required publications available to all persons (hereinafter referred to as subscribers) who have subscribed to a publication service operated either by the rail carrier itself or by an agent acting at the rail carrier's direction. Such publications may be made available either in printed or in electronic form as agreed to by the

parties. Any scheduled changes must be published in a manner that provides timely notice to subscribers. A rail carrier may impose reasonable charges for such publications. Publications may be limited to the specific information requested by the subscriber, and charges for such limited publications should be set accordingly.

1 S.T.B.