

STB EX PARTE NO. 527

EXPEDITED PROCEDURES FOR PROCESSING RAIL RATE
REASONABLENESS, EXEMPTION AND REVOCATION
PROCEEDINGS49 CFR Part 1011
and
49 CFR Parts 1100 through 1149

Decided September 27, 1996

AGENCY: Surface Transportation Board.

ACTION: Final Rules.

SUMMARY: Under 49 U.S.C. 10704(d), enacted as part of section 102(a) of the ICC Termination Act of 1995 (ICCTA), the Surface Transportation Board (Board) is required to establish procedures to expedite the handling of challenges to the reasonableness of railroad rates and of railroad exemption and revocation proceedings. To implement procedures for that purpose, the Board amends its *Rules of Practice* at 49 CFR 1100-1149.

EFFECTIVE DATE: November 7, 1996.

FOR FURTHER INFORMATION CONTACT: Thomas J. Stilling, (202) 927-7312. [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 certain core rail regulatory functions to the Surface Transportation Board (Board). As pertinent here, the ICCTA [section 102(a), now codified at 49 U.S.C. 10704(d)] required the Board to review its existing regulations and procedures to promote the "expeditious handling and resolution of all [rail rate and exemption] proceedings."

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Accordingly, on March 22, 1996, we served an advance notice of proposed rulemaking (ANPR) in this proceeding and published at 61 Fed. Reg. 11,799 (1996), seeking public comment on how our regulations and procedures could be improved to expedite the processing of rate reasonableness cases and exemption and revocation proceedings. After considering the comments filed in response to the ANPR,¹ we issued a notice of proposed rulemaking (NPR) on July 22, 1996, published at 61 Fed. Reg. 39,110 (1996), containing a variety of proposed changes to our *Rules of Practice*.

Comments on the NPR ranged from universal agreement with certain proposals to general opposition to others.² Because of the variety of subjects covered by this rulemaking, this decision discusses, as did the NPR, the regulations in the order in which they are currently set out in the *Code of Federal Regulations* (CFR).

¹ Comments on the ANPR were filed by McCarty Farms, Inc., *et al.* and the Montana Department of Transportation (McCarty); the Western Coal Traffic League and Edison Electric Institute (WCTL/EEI); Pennsylvania Power & Light Co. (PPL); the National Industrial Transportation League (NITL); the National Grain and Feed Association (NGFA); the Society of the Plastics Industry, Inc. (SPI); the United Transportation Union-Illinois Legislative Board (UTU); and the Association of American Railroads (AAR).

In addition to the comments filed by the aforementioned parties, we incorporated the comments previously filed in Ex Parte No. 400 (Sub-No. 4), *New Procedures in Rail Exemption Revocation Proceedings*, into the record in this proceeding. Comments in Ex Parte No. 400 (Sub-No. 4) were filed by the American Short Line Railroad Association and numerous individual shortline railroads (Missouri & Northern Arkansas Railroad, New England Central Railroad, Carolina Piedmont Railroad, Austin & Northwestern Railroad, Dallas, Garland & NorthEastern Railroad, Northeast Kansas and Missouri Railroad; Virginia Southern Railroad, New Orleans Lower Coast Railroad, Chesapeake & Albermarle, North Carolina & Virginia Railroad, Central Oregon & Pacific Railroad, Indiana Southern Railroad, South Carolina Central Railroad, San Diego & Imperial Valley Railroad, Texas Northeastern Railroad, Mid-Michigan Railroad, Georgia Southwestern Railroad, Texas-New Mexico Railroad, and Salt Lake City Southern Railroad); the Georgia Public Service Commission; the Transportation Communications Union, United Transportation Union and International Association of Machinists; Regional Railroads of America; Patrick Simmons; and the AAR.

² Comments on the NPR were filed by WCTL/EEI and PPL jointly, NITL, NGFA, SPI, UTU, AAR, and Covington & Burling (Covington).

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A. 49 CFR PART 1104 - FILING WITH THE BOARD - COPIES - VERIFICATIONS - SERVICE - PLEADINGS, GENERALLY.

1. *Filing pleadings in electronic format.*

In the NPR, we proposed to codify, at the end of 49 CFR 1104.3(a), a requirement that pleadings of 20 pages or more be submitted to the Board on computer diskette or tape. We also proposed that all electronic spreadsheets submitted as evidence, or as workpapers underlying evidentiary filings, be furnished on computer diskette or tape.

Most commenters endorse these proposals; only UTU objects to the requirement to file pleadings electronically. UTU contends that other Federal agencies do not have a similar requirement, that many UTU members do not prepare pleadings on personal computers, that filings often contain "excerpts attached from other documents which cannot be formatted," and that the electronic version of pleadings will not be available to the public.³

UTU's comments are unpersuasive. As we explained in the NPR, the availability of pleadings on computer diskettes simplifies the task of reviewing and analyzing voluminous records. Furthermore, the vast majority of parties appearing in Board proceedings use wordprocessing equipment to prepare pleadings, and virtually all lengthy pleadings are composed electronically. We do not believe that the proposal to require diskette submission of lengthy pleadings will generally impose a hardship on any party. If it does, then -- as with our rules generally -- a party may seek a waiver in a particular case.

UTU does raise one point that needs clarification. We acknowledge that attachments to pleadings, which have not been prepared by, or under the direction of, the filing party, may not be readily available to the party in electronic format. However, the intent of the proposed regulation was to have

³ UTU also complains that transcripts of voting conferences and oral arguments, and court decisions involving agency orders are not available to the public. Furthermore, UTU complains that pleadings filed in Board proceedings are not made available on a timely basis to the public.

UTU's complaints are baseless. First, as provided by our regulations, transcripts are always available for inspection, although they cannot be copied, but rather must be purchased from the court reporter. See, 49 CFR 1001.1, 1002.1(h), and 1113.17(d). Second, the agency is not responsible for providing decisions to the public; rather, copies can be obtained through one of the many commercial providers of such decisions. Finally, after being filed, pleadings are always available for inspection, either in paper form or on microfiche, from the Secretary's office. See 49 CFR 1001.1.

verified statements and counsel's arguments, not material merely referenced or cited by the party, filed on computer diskette. Excerpts from trade publications or academic texts that are appended to a pleading, for example, need not be filed on diskette.

AAR requests that, in addition to requiring that pleadings be filed on diskette with the Board, the regulations require that diskettes also be served on each party of record. This request seems reasonable; parties also should benefit from having voluminous pleading on diskettes. In fact, in rail rate proceedings, the parties already routinely exchange spreadsheets on computer diskettes and tapes. AAR's request will be incorporated into the regulations at 49 CFR 1104.3. This requirement also addresses UTU's suggestion that diskettes should be made available to other parties.

2. Multi-volume submissions.

Following the issuance of the NPR, our Secretary's office suggested that the regulations include a requirement that all multi-volume submissions be clearly labeled on the cover 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). The Secretary determined that such a requirement will assist the office in keeping track of multi-volume filings. At the request of the Secretary, we are including such a requirement in our regulations at 49 CFR 1104.⁴

3. Service of pleadings and papers.

While we did not propose to change the regulations relating to how pleadings should be served on other parties, SPI suggests that service should be either by hand-delivery, facsimile, or overnight delivery. Currently, the regulations (49 CFR 1104.12) require that service of parties "should be by the same method and class of service used in serving the [Board]."

We will not adopt SPI's proposal. In order to be timely filed, a document must be received by the Board on the date due, or be sent the day before it is due

⁴ This purely procedural regulation can be adopted without notice and comment pursuant to 5 U.S.C. 553(b)(3)(A).

by a next-day delivery service. Because service on parties is required by the same expeditious means, it is unnecessary to adopt SPI's suggestion.

B. 49 CFR PART 1111 - COMPLAINT AND INVESTIGATION PROCEDURES.

1. *Content of complaint and answer.*

a. *Market dominance evidence.* In the NPR, we proposed regulations that would require a complainant challenging the reasonableness of a rail rate to file evidence on the absence of effective intramodal and intermodal competition with the complaint. A defendant would have 45 days to respond to the complainant's evidence, and to offer evidence on the existence of effective product and geographic competition. The complainant would then have 20 days to reply to the defendant's evidence on product and geographic competition. The filing of rebuttal evidence was not anticipated. Under the proposal, the evidentiary record on market dominance would be completed in 65 days.

Both the rail industry and the majority of shipper interests have voiced displeasure with this proposal on several grounds. First, AAR complains that, under the proposal, the party with the burden of proof would only be allowed to file opening evidence and would not be given the normal opportunity to rebut an opponent's evidence. Further, both the railroads and shippers contend that the time frames proposed are too stringent.

More specifically, AAR contends that requiring the submission of all market dominance evidence within a 65-day period would deny the railroads the opportunity to present an effective case. AAR suggests that, at a minimum, 120 days is needed to close the record on market dominance issues.

AAR contends that the proposal effectively precludes the carrier from filing discovery requests needed to prepare evidence on the existence of effective product or geographic competition. Under our market dominance guidelines, a carrier has the burden to identify the existence of product or geographic competition and to prove that it is an effective constraint on the level of the rate. The market dominance guidelines require that detailed information about such competition be submitted. While the railroads acknowledge that they often have generalized information about a shipper's product and geographic options, the specific information required by the market dominance guidelines is not always readily available and must be gathered through discovery.

The shippers argue that the proposal to complete the market dominance phase of a rate case in 65 days will slow down cases, rather than expedite them. Shippers generally do not want to have rate cases bifurcated, preferring instead a procedural schedule that requires the simultaneous submission of market dominance and rate reasonableness evidence. In addition, shippers generally assert that the 20 days allowed by the proposed regulations to reply to the product and geographic evidence filed by a railroad is insufficient.

As an alternative to compiling an expedited market dominance record, the shippers suggest that the regulations establish a procedural schedule governing the submission of all evidence in stand-alone cost cases that would result in a final decision on the reasonableness of a challenged rate within 1 year after the complaint is filed (the evidentiary record would be completed within 7 months, after which the Board would then have 5 months to issue a final decision).⁵

As we observed in the ANPR, the railroad and shipper interests commenting here were responsible, in part, for the ICCTA provision that precipitated this proceeding. Thus, given that both the railroad and shipper industries oppose the market dominance proposal, we will not adopt it. However, in order to move cases to completion as quickly as possible, we have decided to adopt a modified version of the shippers' proposed procedural schedule to govern rate complaint cases using the stand-alone cost procedures.⁶

We are adopting the basic proposal to complete the evidentiary phase of a stand-alone cost case in 7 months. However, we are not adopting that part of the shippers' proposal requiring the Board to issue a final decision 5 months after the record closes. While providing only limited resources to the agency, Congress recognized the complexity of rate cases, and as a result the statute allows up to 9 months after the record closes for the agency to issue a final decision.

Our decision not to commit in regulations to deciding cases sooner than required by statute does not mean that a rate case will never be decided within

⁵ The procedural schedule was proposed in the comments of WCTL/EEI. However, by letter filed on August 21, 1996, all of the shipper groups commenting on the NPR endorsed the WCTL/EEI proposal.

⁶ We are not adopting a procedural schedule to govern the filing of evidence in case using the simplified rate evaluation procedures that will be promulgated pursuant to 49 U.S.C. 10701(d)(3). We will consider the adoption of regulations covering such cases following completion of our rulemaking proceeding that is developing simplified rate procedures.

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1 year after a complaint is filed. But the speed at which we can process cases depends on a variety of factors, including the number of pending rate cases,⁷ the complexity of the issues presented in the individual rate cases,⁸ the overall workload of the agency, and whether the parties take the full 7 months to complete the evidentiary record. We are well aware of the need to move disputes to resolution promptly, and we will decide cases as quickly as possible. The staff devoted to rate cases, however, must manage a large number of cases. When there are few pending rate cases, we hope to be able to issue decisions in advance of the 9-month statutory deadline.⁹ When faced with an extensive docket, processing may take the full 9-month period.¹⁰

To ensure that stand-alone cost cases will be decided expeditiously, we are adopting the following general procedural schedule:

Day 0	Complaint filed, discovery can be propounded.
Day 7	Conference of the parties. Parties meet to discuss discovery matters, to develop protective order, if needed, and to discuss other procedural matters. Parties are to report whether Board intervention is needed to resolve disputes.
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.

⁷ Presently, there are over 10 rate cases pending before the agency.

⁸ We have recently sought public comment and set oral argument on issues that are central to the processing of several maximum rate cases. *Central Power & Light Co. v. Southern Pacific, et al.*, No. 41242 (STB August 27, 1996 and September 18, 1996).

⁹ The shippers contrast the experience in rate cases with the ICC and Board actions in moving recent merger proceedings to conclusion promptly. In recent merger cases, however, the agency staff with expertise in rail consolidations has been able to limit its focus to a single merger case at a time.

¹⁰ As discussed *infra*, in the section on motions to dismiss, our procedural schedule will not be altered absent a specific Board order. This should eliminate a significant cause of delay in rate cases.

Day 210 Complainant and defendant file rebuttal evidence to opponent's reply evidence.

As required by statute, following the close of the evidentiary record a final decision will be issued within 9 months. This schedule will ensure that SAC cases will be completed within a 16-month period.¹¹

b. *Contents of complaint.* In the NPR, we proposed to require a complainant challenging the reasonableness of a rail rate to state in the complaint whether it intends to contest the level of the rates based on a constrained market pricing presentation,¹² or whether it intends to contest the rate levels based on simplified rate reasonableness procedures to be adopted pursuant to 49 U.S.C. 10701(d)(3). This proposal was generally endorsed by the commenters. We will require complainants to specify in their complaint whether, in their view, 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). See 49 CFR 1111.1(a).

c. *Oral hearings.* NGFA suggests that the provision in 49 CFR 1111.1(b) permitting a request in the complaint for oral hearings should be deleted in light of the provision at 49 CFR 1112.10(b) that "[u]nless material facts are in dispute, oral hearings will not be held." NGFA points out that, when a complaint is filed, it cannot be known whether there will be a dispute over material facts. We agree and will remove paragraph (b) from section 1111.1. This action is consistent with new 49 CFR 1112.10 which no longer require a request for oral hearings to be made in a reply or rebuttal statement.

d. *Content of answer.* The NPR proposed requiring the filing of an answer to all complaints, and requiring a railroad to state in its answer to a rate complaint whether it alleges an absence of market dominance. These proposals were not opposed and will be adopted and codified at 49 CFR 1111.4(a).

¹¹ In the NPR, we indicated that we would decide whether briefing at the close of the evidentiary record was necessary. We will continue that policy, but if briefing is needed in stand-alone rate cases, we will have briefs submitted after the 7-month evidentiary period, while we are preparing the final decision.

¹² Constrained market pricing is the procedure used to evaluate the reasonableness of rates charged on captive, high-volume, repetitive rail traffic (such as movements of unit-trains of coal to electric utilities). See, *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520 (1985), *aff'd sub nom.*, *Consolidated Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir. 1987).

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e. *Failure to answer complaint.* Several parties noted that, while the proposed regulations require answers to all complaints, there are no consequences associated with a failure to file an answer. NGFA suggests that the regulations include a provision stating that failure to answer will be construed as an admission as to the truth and accuracy of the averments in a complaint. We agree that there should be consequences associated with the failure to answer a complaint. Therefore, a defendant's failure to answer a complaint will be construed as an admission of the accuracy and truth of the statements in the complaint. *Cf.* Fed. R. Civ. P. 8(d).

f. *Conference of the parties.* To help develop realistic procedural schedules in all complaint cases, the NPR proposed that, within 7 days after an answer to a complaint is filed, the parties should meet and discuss discovery and procedural matters. Within 14 days after the defendant answers the complaint, the parties would file a report with the Board setting forth procedural matters on which the parties can agree and explaining each party's suggestions on matters on which they could not agree.

After reviewing the comments, we have concluded parties should meet shortly after a complaint is filed. In stand-alone cost cases, this conference will take place 7 days after the complaint is filed or at some other mutually agreed upon time. *See*, 49 CFR 1111.8 and 1111.9(b). For all other complaint cases, we will adopt the requirement to convene a conference of the parties 7 days after an answer to a complaint is filed. We will consider a specific schedule for cases using the simplified rate evaluation procedures once those procedures are promulgated.

2. *Service of the complaint.*

The NPR proposed to require complainants to serve the complaint on the defendants. UTU expresses concern that, because a railroad may have multiple offices, a complainant may be unsure upon whom the complaint should be served. AAR has similar concerns and suggests that complaints be served on the chief legal officer of a defendant. It further suggests that service be by either (1) confirmed facsimile and first-class mail or (2) overnight express courier.

We agree that our proposed regulations regarding service need to be more specific. To address the concerns raised by UTU and AAR, we are adopting the more comprehensive proposal suggested by AAR. *See*, 49 CFR 1111.3.

3. *Amended and supplemental complaints.*

In the NPR, we did not propose to change the regulation at 49 CFR 1111.2 pertaining to the filing of amended or supplemental complaints. NGFA suggests that we amend this regulation to allow for the inclusion of additional defendants not named in the original complaint. Further, NGFA argues that we should delete the requirement that the amended or supplemental complaint must state "a cause of action alleged to have accrued within the statutory period immediately preceding the date [the amended or supplemental complaint is filed]." NGFA notes that no similar requirement is imposed on the filing of the initial complaint.

Without having received comments from other parties, we do not believe that it would be appropriate to adopt this proposed change at this time, particularly as it would apply in all complaint cases. We note that, in the event that the requirements of 49 CFR 1111.2 impose an unfair or undue hardship in a particular case, a party can petition for waiver.

4. *Motions to dismiss.*

In the NPR, we recited shippers' concerns that motions to dismiss have been used as a tool to delay the progress of a proceeding. In an attempt to encourage motions to be filed and resolved early, we proposed to amend section 1111.5 to require that motions to dismiss be filed with the answer or within 20 days after the time when the grounds for such a motion arise.

AAR points out that, under the Federal Rules of Civil Procedure, motions to dismiss based on a lack of jurisdiction can be filed at any time. Furthermore, AAR asserts that a time limit on the filing of motions to dismiss, whether based on jurisdiction or otherwise, is unnecessary because it is to the moving party's benefit to have a case dismissed at the earliest possible time.

In their comments, shippers do not seem particularly concerned about when a motion to dismiss is filed; rather, their primary concern is that the filing of a motion not delay the progress of a case. As SPI notes, "the problem is not with the filing of the motion, but with a party relying upon such a motion to terminate its compliance with the procedural provisions governing the proceeding, and in any failure of the Board to expeditiously rule on such motions."

Because jurisdictional issues can be raised at any time, the proposed rule would not ensure that all motions would be filed early in a case. Furthermore,

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the proposal does not satisfy shipper concerns that the filing of a motion can delay the completion of a proceeding. Based on the comments, we will not adopt the proposal that a motion to dismiss be filed with an answer or within 20 days after grounds for the motion arise. Rather, we will retain the existing rule that motions to dismiss can be filed at any time. However, to ensure that there is no misunderstanding as to the effect of the filing of any motion (whether a motion to dismiss, to compel discovery, or otherwise), we will follow a policy that, unless we issue an order altering the procedural schedule, parties to a proceeding will be expected to adhere to the established schedule pending a decision on the motion.

C. 49 CFR PART 1112 - MODIFIED PROCEDURES.

1. *Petitions to intervene.*

The existing regulation at 49 CFR 1112.4(c) does not require an interested party to file a petition to intervene in order to participate in an investigation "under the modified procedure involving rate-related matters." We proposed to eliminate paragraph (c) because the Board has very limited investigative powers, and because we saw no need to distinguish between complaint and investigation proceedings so far as intervention is concerned.

Only UTU opposed the elimination of paragraph (c). However, it offers no explanation why the proposal should not be adopted other than that it "would be unwise and create unnecessary paperwork." UTU has not provided a persuasive reason to reject the proposal. Paragraph (c) will be eliminated.

2. *Request for Oral Hearings.*

Under our rules, oral hearings are held only when material facts are in dispute. Because such a dispute may not be evident until completion of the evidentiary record, the NPR proposed to eliminate the requirement that a party seeking oral hearings and cross examination must make such a request in its reply or rebuttal statement. No commenter objected and, thus, this proposal will be adopted.

3. *Briefs.*

In the NPR, we did not propose a general rule regarding the filing of briefs. Rather, we expressed our intent to address whether briefs are needed on a case-by-case basis. No unfavorable comments on this matter were received, and we will continue to decide if briefs are needed in particular proceedings on a case-by-case basis.

D. 49 CFR PART 1113 - ORAL HEARINGS.

As we observed in the NPR, the ICCTA did not reenact 49 U.S.C. 10341-44, which authorized the establishment and operation of joint boards. Thus, we proposed to eliminate those sections of the regulations [current sections 1113.1(c)(3) and 1113.31, and a portion of 1113.3(b)(2)] that concern the operation of joint boards. No opposition to this proposal was voiced, and we will eliminate those sections from the regulations.

E. 49 CFR PART 1114 - EVIDENCE; DISCOVERY.

1. *Subpart A - General Rules of Evidence.*

Because our rules of practice are patterned after the Federal Rules of Evidence and the Federal Rules of Civil Procedure, we proposed to eliminate sections 1114.1 through 1114.7, and to replace them with a rule at new section 1114.1 providing that, as a general matter, the Board will follow the rules that apply to non-jury trials in United States district courts. This proposal met with strenuous opposition.

Covington and WCTL/EEI argue that incorporating the Federal rules into the Board's rule is unnecessary and will produce ambiguities and disputes. They point out that many of the Federal rules requirements do not comport with the general procedures historically followed in litigation before the agency.¹³

¹³ Covington notes that the Federal rules provide that a party may serve no more than 25 interrogatories on another party absent court approval or the other party's agreement. Further, Covington points out that Fed. R. Civ. P. 26(a) requires litigants to provide certain information to the opposing party prior to receiving discovery requests. Because the Board's rules are silent on

(continued...)

Furthermore, WCTL/EEI states that it is unaware of any delays caused by our existing rules that reliance on the Federal rules would have avoided. NGFA is concerned that use of the Federal rules will lead to more complex and time-consuming litigation before the Board. Only SPI notes in passing that it is not opposed to the proposal.

Like WCTL/EEI, we are not aware of any case in which our existing rules have caused delays that the Federal rules would have avoided. The intent of the proposal was to eliminate specific regulations that we thought were needlessly cluttering the CFR, not to generate additional controversy in our proceedings. The existing regulations already allow for the admission of any evidence that would be admissible "under the rules of evidence governing proceedings in matters not involving trial by jury in the courts of the United States." 49 CFR 1114.1. Nonetheless, given the opposition by a significant group of parties that regularly participate in agency proceedings, we will not adopt the proposal. Rather, we will retain the current regulations in sections 1114.1 through 1114.7, with the exception of section 1114.7(b) (pertaining to tariff publications which generally need not be filed with the Board).

2. *Subpart B - Discovery.*

a. *Board approval for use of discovery.* The NPR proposed to eliminate the requirement that petitions be filed with the Board requesting discovery of any type. We noted that, whenever the parties cannot agree on a particular discovery matter, a petition requesting a Board order can effectively bring the matter before us for resolution. Furthermore, we proposed to eliminate the requirement to file the products of discovery with the Board.

With the exception of the situation in which a party wishes to take a deposition, no commenter objected to these proposals. With regard to depositions, some commenters expressed the concern that depositions could be used as a harassing tool in litigation, and they request that a Board order be required before a deposition can be taken. We do not share their view that Board authorization is necessary. We recognize that any type of discovery can be abused, and, for that reason, we stand ready to intervene when necessary.

¹³(...continued)

these matters, the Board may have to become involved in discovery in many cases, a process the Board is attempting to avoid.

The comments, however, generally indicate that depositions are seldom used in preparation for litigation before the Board. We see no reason to believe that depositions will be used more frequently in the future, or that such discovery will be used for harassment. Thus, we will not make an exception for depositions and require prior Board approval. We see no need to become involved in discovery until a problem arises.

b. *Protective orders.* In the NPR, we declined to include a standard protective order in the regulations. SPI urges that we reconsider, especially if we adopt the proposal to require the filing of market dominance evidence and workpapers with a complaint against the level of a rail rate. It points out that workpapers can contain confidential information that will be disclosed only after a protective order is in place.

As we discussed in the NPR, we see no need to adopt a standard protective order. Parties to a proceeding are free to agree to use protective orders that have been used in other cases. Because we have not adopted the proposal to require the filing of market dominance evidence with a complaint, a protective order need not be in place at the time a complaint is filed. Rather, the scope and content of a protective order can be discussed by the parties at the conference that will be convened shortly after a complaint is filed.

c. *Failure to respond to discovery.* The existing regulations require that a motion to compel discovery be filed within 10 days of a failure to respond to discovery. In response to the ANPR, AAR suggested that this rule discouraged negotiated solutions to discovery disputes.¹⁴ Thus, in the NPR we proposed to eliminate the 10-day rule from the regulations.¹⁵

NITL argues that the 10-day rule should be retained unless the parties agree to modify it or the Board changes the requirement in a specific case. SPI and WCTL also urge the Board not to eliminate the 10-day rule. They assert that some reasonable deadline is needed to discipline the parties. They note that parties can always agree to extend the deadline or to negotiate after a motion to compel is filed.

Our concern in proposing to eliminate the 10-day rule was that it is difficult to review all of the voluminous discovery materials often produced in major

¹⁴ For example, AAR pointed out that discovery in rate reasonableness cases is often quite extensive, and that the time needed for review of the materials obtained through discovery to determine if a motion to compel needs to be filed can exceed 10 days.

¹⁵ The proposed regulations appended to the NPR and published in the *Federal Register* inadvertently failed to delete the 10-day requirement.

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cases (to determine if they are fully responsive), to negotiate over contested matters, and to prepare a motion to compel within a 10-day period. However, we agree with the shipper interests that procedural deadlines do serve to focus the parties on the issues and to move cases forward more quickly. Thus, we are faced with the choice of eliminating the rule to ensure that there is time for review of the materials and negotiations, or of imposing a general time limit and requiring parties in those cases generating large amounts of discovery materials to decide whether the 10-day rule should be altered for the particular case. On balance, we agree that it is better to have a general rule with a set deadline in place, and to provide for modification of that rule in individual cases. Thus, we will retain the 10-day rule in 49 CFR 1114.31(a).

d. *Staff participation in discovery.* SPI raised a concern in response to our preliminary conclusion in the NPR that Board staff would be available to assist ALJs handling discovery matters. Specifically, SPI argues that the staff assisting the ALJ should not be permitted to participate in the disposition of interlocutory appeals to the Board, or of the case itself.

We disagree with SPI. First, under basic principles of administrative law, an ALJ who handles discovery disputes is not foreclosed from issuing an initial decision in the proceeding. We do not see why a non-ALJ employee participating in the resolution of discovery should be disqualified from participating in the merits of a case. Indeed, if anything, participation in the discovery process should enhance an employee's understanding of the issues, and facilitate informed decisionmaking. Furthermore, excluding a staff member, or members, with specific technical expertise from further participation in a case will adversely impact on agency resources, given the very limited size of the Board's staff.

e. *Sanctions.* The NPR proposed sanctions that would allow a party to collect the costs, including attorney fees, associated with compelling a party to comply with a Board discovery order. There was no opposition to this proposal, and it is adopted.

F. 49 CFR PART 1115 - APPELLATE PROCEDURES.

In order to reduce the number of appellate levels for appeals from decisions of employees acting under authority delegated to them by the Chairman, we proposed to amend section 1115.1 to provide for only a single appeal to the

entire Board from employee decisions.¹⁶ Only UTU objects to this proposal, arguing that the change would "abdicate [the Board's] functions to an unelected or unappointed civil service."

This proposal will be adopted. Our experience has been that, in many cases, the Chairman's decision on an appeal from an employee decision subsequently has been appealed to the entire Board. The proposal is designed to direct the appeal, in the first instance, to the body that often is ultimately called upon to resolve the dispute. Contrary to UTU's suggestion, appeals will still be resolved by the Board membership and not the agency staff.

The NPR also proposed to handle interlocutory appeals from decisions of employees, including rulings on discovery, under procedures similar to those currently set forth in 49 CFR 1113.15. Thus, we proposed to add new section 1115.9 to our rules, which would apply a highly deferential standard concerning interlocutory appeals of decisions of Board employees. Further, the new section would require that appeals be filed within 3 days and replies within an additional 3 days.

Most commenters support the proposal. AAR, while agreeing with the proposed deferential standard to be applied to appeals, challenges proposed 49 CFR 1115.9(a)(2). AAR argues that the (a)(2) provision -- which provides that a ruling requiring production of documents cannot be appealed as long as the documents are covered by a protective order -- would inappropriately restrict parties' appellate rights.¹⁷ Notwithstanding the confidentiality afforded by protective orders, AAR asserts that in some cases disclosure of highly confidential information should never be required.

We did not intend that the (a)(2) provision establish a rigid no-appeal rule. Indeed, under the proposed regulation, any ruling that "may result in substantial irreparable harm" can be appealed. 49 CFR 1115.9(a)(4). Nevertheless, to avoid confusion, we will not adopt the proposed (a)(2) language restricting an appeal relating to the production of documents.

AAR also requests that the time for filing appeals be extended to 7 days. We will, however, retain the 3-day limit. Under the schedule that will govern stand-alone cost cases, 75 days has been allotted for discovery. If appeals were

¹⁶ As noted in the NPR, this revision requires that section 1011.7(b) be modified to reflect that the entire Board will handle any appeals.

¹⁷ AAR notes that the protective orders used in recent rate cases have contained provisions expressly reserving the parties' right to object to a production request on any grounds.

to be filed 7 days after a ruling and replies 7 days later, it could easily take three weeks (a significant part of the total discovery period) to resolve the matter.

G. 49 CFR Part 1121 - RAIL EXEMPTION PROCEDURES.

Under 49 U.S.C. 10502(b) and (d), we must decide within 90 days after receiving an exemption application or revocation request whether to begin a proceeding; once instituted, a proceeding must be completed within 9 months. Because of these statutory time constraints, we proposed special discovery and evidentiary procedures for exemption/revocation proceedings at 49 CFR 1121.

We proposed to permit discovery in exemption cases only after a petition is filed or a class exemption is invoked. In situations involving potential petitions for revocation, we proposed to permit discovery upon the filing of a notice of intent to file a petition for revocation. We also proposed that a party seeking an exemption, or the revocation of an exemption, would be required to submit all of its supporting evidence in its petition.

In response to the NPR, only NGFA and AAR submitted comments on the exemption/revocation procedures.¹⁸ NGFA suggests that we provide stronger assurances of the opportunity for public participation in exemption proceedings, particularly requests for class exemptions. NGFA states that, under proposed 49 CFR 1121.4, public notice of exemption requests is provided only if the criteria of 49 U.S.C. 10502 are met,¹⁹ the impact of the proposed exemption cannot be determined from the record, or significant adverse impacts might result by granting the exemption. NGFA contends that, while this approach might be appropriate for transaction-specific exemptions, public participation in class exemption petitions is generally desirable.

NGFA argues that the 90-day period for the Board to determine whether to begin a proceeding was intended to allow the Board to evaluate whether the exemption request was "sufficiently meritorious to warrant a more thorough

¹⁸ NITL argues that a petition to revoke an exemption, especially one filed by a shipper seeking relief from an exercise of market power, is similar to a complaint proceeding. It submits that the same procedures used in complaint proceedings should apply to petitions for revocation.

Our exemption/revocation rules adequately provide for both discovery and a full airing of all substantive issues. We will not make a blanket adoption in revocation proceedings of our complaint procedures.

¹⁹ As discussed *infra*, this provision requires that *Federal Register* notice be provided after, not before, an exemption is granted.

analysis, including public participation." NGFA requests that the final rules be revised so that, in a request for a class exemption, the Board will determine in 90 days whether to notice the exemption request for public comment.²⁰

As a practical matter, the proposed rules achieve the objectives advanced by NGFA. They allow for public comment if we cannot determine the impact of the proposed exemption from the petition, or if significant adverse impacts might result from granting the petition.²¹ This language is particularly applicable to class exemption requests; indeed, on the basis of similar considerations, it was the policy of the ICC to request public comments before issuing a class exemption.²² We intend to continue this policy. However, to remove any question on this point, we are modifying our regulations at 49 CFR 1121.4(c) to provide for public comment in all class exemption requests.²³

Finally, we note that NGFA voiced displeasure with proposed 49 CFR 1121.4(f), which requires a party seeking revocation of an exemption to provide all of its supporting information in its petition. NGFA contends that this provision will give all adversarial railroads an opportunity to oppose the requested revocation in its initial stage. Despite NGFA's concern, we will adopt the proposed rule. It gives the Board and the opposing parties full notice of the scope of the petition at the earliest time. Moreover, it is in the best interests of

²⁰ NGFA correctly points out that, during this 90-day period, the Board can also consider any public comments that are filed. See 49 CFR 1121.4(a).

²¹ We want to clarify one matter. NGFA claims that the proposed rules in section 1121.4(b) provide for public participation only after the Board determines that the criteria of section 10502 are met. This is incorrect. This rule simply indicates that when the Board decides to grant an exemption, it will publish the findings in the *Federal Register*. It does not in any way restrict the Board from seeking public comment at an earlier (or later) stage of the exemption process.

²² See e.g., *Rail General Exemption Authority-Miscellaneous Manufactured Commodities*, Ex Parte No. 346 (Sub-No. 24) (ICC served February 9, 1988) and *Rail General Exemption Authority-Exemption of Grease or Inedible Tallow, Etc.* 49 CFR 1039, Ex Parte No. 346 (Sub-No. 31) (ICC served October 21, 1993).

²³ We will also modify proposed 49 CFR 1121.4(a) which erroneously cites to paragraph (d). The correct reference should be to paragraph (c). With this modification, our final rules provide that although public comments are generally not sought in a routine exemption, we will direct that additional information or public comments be filed if we cannot determine the impact of the proposed exemption from the information in the petition, significant adverse impacts might result if the exemption were granted, or a class exemption is sought.

the petitioner to submit all its supporting information in its petition because the Board must decide within 90 days whether to initiate a revocation proceeding.²⁴

The AAR states that the proposed rules governing railroad exemption and revocation proceedings should be adopted with one exception: the ability to obtain discovery from the railroad before a petition to revoke is filed. To obtain this right, under the proposed rules, a party would be required to submit a notice of intent to file a petition for revocation. The AAR argues that the proposed rules would encourage parties to use discovery for fishing expeditions. The party seeking discovery, it alleges, would not be required to make a threshold showing that it has a plausible basis for challenging the exemption, nor would it have to allege a factual basis for the opposition. The AAR contends that because there is no deadline for filing a formal petition to revoke the exemption, there are no limits on the pre-petition discovery process.

The AAR's concerns have merit. We will not adopt our proposal to provide for notices of intent to seek revocation and to allow pre-petition discovery but will require that the petitioner make its discovery request at the same time it files its petition. We believe this procedure will enable us to determine on a timely basis whether to initiate a proceeding. Once the petition and discovery requests are made on day 0, replies are due on day 20. The discovery process shall be completed no later than day 30. The petitioner will be allowed to supplement its petition based on evidence received in discovery on day 45. The railroad can file a supplemental reply on day 60.²⁵ Any objections to discovery must be filed immediately. Assuming the petition is supplemented on day 45 and a supplemental reply is filed on day 60, the Board will have 30 days to decide whether to institute a proceeding.

The 90-day deadline for deciding whether to initiate a proceeding requires that we impose strict standards for developing a record. Therefore, if petitioner does not file discovery requests when it files its petition to revoke, it will have waived its right to discovery in the pre-initiation stage. If discovery is not sought, the record will close upon the filing of the reply on day 20.

These procedures, we believe, will provide all parties with an incentive to move exemption revocation cases along quickly. A petitioner would have an

²⁴ Information later obtained through discovery can be submitted in the supplemental petition discussed, *infra*.

²⁵ If a petitioner seeks discovery, the opponent may forego filing a reply in 20 days and simply file one reply after the supplemental petition is filed.

obvious interest in moving its case. And the railroad will want the Board to decline to institute a revocation proceeding. However, if the discovery process is delayed by the opponent of discovery (for example by filing objections to discovery that cannot be resolved by day 30 or due to difficulties in obtaining requested information), and as a result the petitioner cannot file a timely supplemental petition, we may not be able to fully analyze the revocation request within the 90-day period. In such a situation, we may have to initiate the proceeding on the 90th day to provide adequate time to determine the merits of the revocation submission.

Small Entities. The Board certifies that these rules will not have a significant economic effect on a substantial number of small entities. They should result in easier and quicker discovery and record-building.

Environmental finding. 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 1011

- Administrative practice and procedure.
- Authority delegation (Government agencies).
- Organization and functions (Government agencies).

49 CFR Part 1104

- Administrative practice and procedure.

49 CFR Part 1111

- Administrative practice and procedure, Investigations.

49 CFR Part 1112

- Administrative practice and procedure.

49 CFR Part 1113

Administrative practice and procedure.

49 CFR Part 1114

Administrative practice and procedure.

49 CFR Part 1115

Administrative practice and procedure.

49 CFR Part 1121

Administrative practice and procedure, Rail exemption procedures, Railroads.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

APPENDIX

For the reasons set forth in the preamble, title 49, chapter X, parts 1011, 1104, 1111, 1112, 1113, 1114, 1115 and 1121 of the Code of Federal Regulations are amended as follows:

PART 1011 - COMMISSION ORGANIZATION; DELEGATIONS OF AUTHORITY

1. The authority citation for part 1011 is revised to read as follows:
Authority: 5 U.S.C. 553; 31 U.S.C. 9701; 49 U.S.C. 701, 721, 13702.

§ 1011.7 [Amended]

2. Section 1011.7 is amended as follows:
 - a. In paragraph (b)(1), remove the words "The Chairman of the Commission" and add in their place the words "The Commission (Board)."
 - b. Paragraph (b)(2) is removed.

PART 1104 - FILING WITH THE BOARD-COPIES-VERIFICATIONS-SERVICE-PLEADINGS, GENERALLY

3. The heading of part 1104 is revised as set forth above.
4. The authority citation for part 1104 is revised to read as follows:
Authority: 5 U.S.C. 559; 21 U.S.C. 853a; 49 U.S.C. 721.
5. Part 1104 is amended as follows:
 - a. Remove the word "Commission" and add the word "Board" in the following sections: §§ 1104.3(a), 1104.3(b), 1104.4(b), 1104.5(b), 1104.6, 1104.7(b), 1104.8, 1104.10(a), 1104.10(b), 1104.12(a), 1104.12(b), 1104.13(a) and 1104.14(b).
 - b. Remove the word "Commission's" and add the word "Board's" in the following sections: §§ 1104.3(b), 1104.6 and 1104.11.
 - c. Remove the words "Interstate Commerce Commission" and add the words "Surface Transportation Board" in § 1104.1(a).
6. Section 1104.1 is amended by adding the following new paragraph (d):

§ 1104.1 *Address and identification.*

* * * * *

(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).

§ 1104.3 [Amended]

7. Section 1104.3 is amended by adding the following sentence to the end of paragraph (a):

1 S.T.B.

- (a) * * * In addition to the paper copies required to be filed with the Board, 3 copies of:
- (1) Textual submissions of 20 or more pages; and
 - (2) All electronic spreadsheets should be submitted on 3.5 inch, IBM compatible formatted diskettes or QIC-80 tapes. Textual materials must be in WordPerfect 5.1 format, and electronic spreadsheets must be in LOTUS 1-2-3 release 5 or earlier format. One copy of each such computer diskette or tape submitted to the Board must also be served on each party in accordance with § 1104.12 of this part.

8. In § 1104.15, paragraph (a) is revised to read as follows:

§ 1104.15 Certification of eligibility for Federal benefits under 21 U.S.C. 853a.

(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.

* * * * *

9. Part 1111 is revised to read as follows:

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 Meeting to discuss procedural matters.

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

§ 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 their view, 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.

(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.

§ 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. 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.

§ 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.

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 Conference of the parties convened pursuant or before to section 1111.9(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.

§ 1111.9 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 7 days after an answer to a complaint is filed. 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.

(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.

PART 1112 - MODIFIED PROCEDURES

10. The authority citation for part 1112 is revised to read as follows:
 Authority: 5 U.S.C. 559; 49 U.S.C. 701.

11. Part 1112 is amended as follows:

- a. Remove the word "Commission" and add the word "Board" in the following sections:
 §§ 1112.1, 1112.4(a), introductory text, 1112.7 section heading and text.
 b. Remove the word "Commission's" and add the word "Board's" in § 1112.1

§ 1112.4 [Amended]

- c. Section 1112.4 is amended by removing paragraph (c).
 d. Section 1112.10 is revised to read as follows:

§ 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.

* * * * *

PART 1113-ORAL HEARINGS

12. The authority citation for part 1113 is revised to read as follows:

1 S.T.B.

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

13. Part 1113 is amended as follows:

a. Remove the word "Commission" and add the word "Board" in the following sections: §§ 1113.1(a), 1113.2(a), 1113.2(b)(1), 1113.2(d), 1113.4(a), introductory text, 1113.4(b), 1113.5, 1113.6(b), 1113.7(e), 1113.8, 1113.10, section heading and text, 1113.12(a), 1113.12(b), 1113.13, 1113.16, 1113.17 and 1113.18(c).

§ 1113.1 [Amended]

b. In § 1113.1, paragraph (c)(3) is removed.

§ 1113.3 [Amended]

c. In § 1113.3, paragraph (b)(2), add a period after the word "complaint" and remove the remainder of the paragraph.

§ 1113.11 [Amended]

d. In § 1113.11, first sentence, remove the words "and in evidence" and add the words "in evidence and."

§ 1113.31 [Removed]

e. Section 1113.31 is removed.

PART 1114 - EVIDENCE; DISCOVERY

14. The authority citation for part 1114 is revised to read as follows:
Authority: 5 U.S.C. 559; 49 U.S.C. 721.

15. Subpart A is amended as follows:

a. Remove the word "Commission" and add the word "Board" in the following sections: §§ 1114.1, 1114.4, 1114.5 section heading and text and 1114.6.

b. Remove the word "Commission's" and add the word "Board's" in § 1114.4 section heading.

§ 1114.7 [Amended]

c. Section 1114.7 is amended by removing the words "(a) Generally." from paragraph (a) and removing paragraph (b).

16. Subpart B is amended as follows:

a. Remove the word "Commission" and add the word "Board" in the following sections: §§ 1114.21(c)(3), 1114.21(c)(9) and the concluding text, 1114.21(d), 1114.21(e), introductory text, 1114.23(b), 1114.23(c), 1114.23(d)(1), 1114.23(d)(2), 1114.24(b)(2), 1114.24(b)(3), 1114.24(d),

1114.24(h), 1114.26(a), 1114.27(b), 1114.31(a), 1114.31(b)(1), 1114.31(b)(2), 1114.31(c) and 1114.31(d).

- b. Remove the word "Commission's" and add the word "Board's" in § 1114.31(b)(1).

§ 1114.21 [Amended]

- c. In § 1114.21, paragraph (a)(1), remove the words "(except the review boards)."

§ 1114.26 [Amended]

- d. In § 1114.26, paragraph (a), remove the second sentence.

§ 1114.26 [Amended]

- e. In § 1114.26, paragraph (c), remove the words "In those proceedings not requiring a petition for interrogatories, and unless under special circumstances and for good cause," and capitalize the word "no."

§ 1114.27 [Amended]

- f. In § 1114.27, paragraph (a), remove the third and last sentences.

§ 1114.27 [Amended]

- g. In § 1114.27, paragraph (c), remove the words "In those proceedings not requiring a petition for request for admission, and unless under special circumstances and for good cause shown," and capitalize the word "no".

§ 1114.31 [Amended]

- h. In § 1114.31, paragraph (b)(1) remove the words "49 U.S.C. 10321(c)(3) and (d)(4)" and add in their place the words "49 U.S.C. 721(c) and (d)."

17. The additions and revisions to Subpart B are as follows:

- a. Section 1114.21 is amended by revising paragraph (b) and adding a new paragraph (f) as follows:

§ 1114.21 Applicability; general provisions.

* * * * *

- (b) *How discovery is obtained.* All discovery procedures may be used by parties without filing a petition and obtaining prior Board approval.

* * * * *

- (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.

- b. Section 1114.22 is revised to read as follows:

§ 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.

- c. Section 1114.30 is revised to read as follows:

§ 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.

- d. Section 1114.31 is amended by adding a new paragraph (b)(2)(iv) and adding concluding text to paragraph (d) as follows:

§ 1114.31 Failure to respond to discovery.

* * * * *

(b) * * *

(2) * * *

(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.

* * * * *

(d) * * *. 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.

* * * * *

PART 1115 - APPELLATE PROCEDURES

18. The authority citation for part 1115 is revised to read as follows:
Authority: 5 U.S.C. 559, 49 U.S.C. 721.

19. Part 1115 is amended as follows:

- a. Remove the word "Commission" and add the word "Board" in the following sections: § 1115.1(b), 1115.1(c), 1115.2(b)(2), 1115.2(g), 1115.5(a), 1115.5(b), 1115.6, 1115.7 and 1115.8.
- b. In § 1115.1, paragraph (c), remove the words "Chairman of the Commission." at the end of the first sentence and add in their place the words "entire Board."
- c. In § 1115.7, remove the words "Interstate Commerce Commission" and add in their place the words "Surface Transportation Board."

20. The additions and revisions to part 1115 are as follows:

- a. Section 1115.1, paragraph (a) is revised to read as follows:

§ 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. In § 1115.2, introductory text, remove the words "or joint board." and revise paragraph (e) to read as follows:

§ 1115.2 Initial decisions.

* * * * *

(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.

* * * * *

c. Section 1115.3 is revised to read as follows:

§ 1115.3 Board actions other than initial decisions.

- (a) A discretionary appeal of an entire Board action is permitted.
- (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.

d. Section 1115.4 is revised to read as follows:

§ 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.

e. A new § 1115.9 is added to read as follows:

§ 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) 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.

21. Part 1121 is revised to read as follows:

PART 1121-RAIL EXEMPTION PROCEDURES

Sec.

1121.1 Scope.

1121.2 Discovery.

1121.3 Content.

1121.4 Procedures.

AUTHORITY: 5 U.S.C. 553; 49 U.S.C. 10502 and 10704.

§ 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.

1 S.T.B.

(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 section 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) If the impact of the proposed 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, or a class exemption is sought, the Board will:

(1) Direct that additional information be filed; or

(2) Publish a notice in the *FEDERAL REGISTER* requesting 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 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 section 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.