AGENCY: Surface Transportation Board, Transportation.
ACTION: Final Rules.
SUMMARY: The Surface Transportation Board (Board) is removing regulations concerning the cancellation of through routes and joint rates, because those rules have been made obsolete by statutory changes.

EFFECTIVE DATE: These rules are effective on September 30, 2002.

FOR FURTHER INFORMATION CONTACT: John Sado, (202) 565-1661. [Federal Information Relay Service (FIRS) for the hearing impaired: 1-800-877-8339.]

SUPPLEMENTARY INFORMATION: The Board is revising its regulations at 49 CFR 1144 to delete obsolete provisions and reflect other changes made by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (ICCTA). The rules at section 1144 were issued by the Interstate Commerce Commission (ICC or Commission) in Intramodal Rail Competition, 1 I.C.C.2d 822 (1985), and pertain to three situations: cancellations of through routes and/or joint rates; prescription of a through rate or joint route; and prescription of reciprocal switching. The Board retains jurisdiction to prescribe through routes and joint rates (49 U.S.C. 10705), and to prescribe reciprocal switching (49 U.S.C. 11102, replacing former 49 U.S.C. 11103).

The ICCTA, however, eliminated the joint rate and through route cancellation provisions of former 49 U.S.C. 10705(e) and 10705a. Former section 10705(e) was previously found at former section 15(3) of the Interstate Commerce Act and provided that a joint rate cancellation could be investigated or suspended by the ICC, and if it was suspended and an investigation was instituted, the cancelling carrier had to show that the proposed cancellation was
Consequently, the reference in new section 1144.3(c) will be to section 1144.2, instead of current section 1144.6(d)’s reference to sections 1144.4 and 1144.5.

6 S.T.B.
date for revisions to the next edition of the applicable volume of the *Code of Federal Regulations*.

Copies of the decision may be purchased from Da-2-Da Legal Copy Service by calling 202-293-7776 (assistance for the hearing impaired is available through FIRS at 1-800-877-8339) or visiting Suite 405, 1925 K Street, NW, Washington, DC 20006.

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

List of Subjects

49 CFR 1144
Railroads.

*It is ordered:*
1. The final rules set forth in this decision are adopted. Notice of the rules adopted here will be published in the *Federal Register*.
2. This decision is effective on September 30, 2002.

By the Board, Chairman Morgan and Vice Chairman Burkes.
APPENDIX

For the reasons set forth in the preamble, part 1144, of title 49, chapter X, of the Code of Federal Regulations is revised to read as follows:

PART 1144 — INTRAMODAL RAIL COMPETITION

Sec.

1144.1 Negotiation.

1144.2 Prescription.

1144.3 General.


1144.1 Negotiation.

(a) Timing. At least 5 days prior to seeking the prescription of a through route, joint rate, or reciprocal switching, the party intending to initiate such action must first seek to engage in negotiations to resolve its dispute with the prospective defendants.

(b) Participation. Participation or failure to participate in negotiations does not waive a party’s right to file a timely request for prescription.

(c) Arbitration. The parties may use arbitration as part of the negotiation process, or in lieu of litigation before the Board.

§1144.2 Prescription.

(a) General. A through route or a through rate shall be prescribed under 49 U.S.C. 10705, or a switching arrangement shall be established under 49 U.S.C. 11102, if the Board determines:

(1) That the prescription or establishment is necessary to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. 10101 or is otherwise anticompetitive, and otherwise satisfies the criteria of 49 U.S.C. 10705 and 11102, as appropriate. In making its determination, the Board shall take into account all relevant factors, including:
(i) The revenues of the involved railroads on the affected traffic via the rail routes in question.

(ii) The efficiency of the rail routes in question, including the costs of operating via those routes.

(iii) The rates or compensation charged or sought to be charged by the railroad or railroads from which prescription or establishment is sought.

(iv) The revenues, following the prescription, of the involved railroads for the traffic in question via the affected route; the costs of the involved railroads for that traffic via that route; the ratios of those revenues to those costs; and all circumstances relevant to any difference in those ratios; provided that the mere loss of revenue to an affected carrier shall not be a basis for finding that a prescription or establishment is necessary to remedy or prevent an act contrary to the competitive standards of this section; and

(2) That either: (i) The complaining shipper has used or would use the through route, through rate, or reciprocal switching to meet a significant portion of its current or future railroad transportation needs between the origin and destination; or

(ii) The complaining carrier has used or would use the affected through route, through rate, or reciprocal switching for a significant amount of traffic.

(b) Other considerations.  (1) The Board will not consider product competition.

(2) If a railroad wishes to rely in any way on geographic competition, it will have the burden of proving the existence of effective geographic competition by clear and convincing evidence.

(3) When prescription of a through route, a through rate, or reciprocal switching is necessary to remedy or prevent an act contrary to the competitive standards of this section, the overall revenue inadequacy of the defendant railroad(s) will not be a basis for denying the prescription.

(4) Any proceeding under the terms of this section will be conducted and concluded by the Board on an expedited basis.

§1144.3 General.

(a) These rules will govern the Board’s adjudication of individual cases pending on or after the effective date of these rules (October 31, 1985).

(b) Discovery under these rules is governed by the Board’s general rules of discovery at 49 CFR part 1114.

(c) Any Board determinations or findings under this part with respect to compliance or non-compliance with the standards of §§1144.2 shall not be given
any *res judicata* or collateral estoppel effect in any litigation involving the same facts or controversy arising under the antitrust laws of the United States.